



The US-Korea Free Trade Agreement
Annex 22-B: A Missed Opportunity on Workers’ Rights in North Korea

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Introduction

On June 30, 2007, the governments of the United States and Korea signed a free trade accord and pledged to work together to secure legislative approval for the agreement in both countries.¹ Korea is the world's thirteenth largest economy and the United States' seventh largest trading partner, and if ratified by the parties, the accord would create a free trade area for the United States second in dollar value only to that created when the North American Free Trade Agreement (NAFTA) entered into force in January 1994.²

Human Rights Watch generally takes no position on free trade per se, and the US-Korea Free Trade Agreement (FTA) is no exception. Instead, we believe that trade agreements can provide important leverage and opportunities to promote workers' rights, and we advocate for meaningful, enforceable labor rights protections in the fabric of accords. Therefore, we are especially concerned that an important annex to the US-Korea FTA creates the possibility that North Korean goods from specially designated outward processing zones,³ produced by workers whose rights are not protected in law or practice, could enter the United States duty free under the agreement.

Annex 22-B of the US-Korea FTA directly flouts the spirit of the recently amended workers' rights provisions in the accord. These provisions were changed to reflect the strengthened labor rights protections elaborated in the new trade policy template agreed to by the US Trade Representative (USTR) and congressional leadership on May 10.⁴ Human Rights

¹ "South Korea, US sign free trade agreement," Associate Press Newswires, July 1, 2007. "Korea" in this paper refers to South Korea.

² See, e.g., "Remarks by U.S. Trade Representative Susan C. Schwab U.S.-Korea Business Council Luncheon," June 14, 2007; "Top Ten Countries with which the U.S. Trades," April 2007, <http://www.census.gov/foreign-trade/top/dst/current/balance.html> (accessed June 28, 2007); World Bank, "Total GDP 2006," July 1, 2007, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (accessed July 6, 2007).

³ The US-Korea FTA does not define "outward processing zones." Similar terms, such as "export processing zones" and "qualified industrial zones," however, generally refer to specially designated geographic areas of manufacturing where foreign and domestic capital are jointly invested and where normal trade barriers, such as import and export tariffs, bureaucratic requirements, and corporate taxes, may not apply, in whole or in part.

⁴ The new, stronger workers' rights provisions include the requirement that each party "adopt and maintain in its statutes and regulations, and practices thereunder" the fundamental labor rights articulated in the International Labour Organization Declaration on Fundamental Principles and Rights at Work and its Follow-Up. They also establish enforcement parity for labor and commercial provisions, ensuring that the mechanisms to enforce the labor rights obligations are no longer different from and inferior to those available to enforce commercial duties. See, e.g., Human Rights Watch, "The 2007 US Trade Policy Template: Opportunities and Risks for Workers' Rights," June 2007.

Watch applauds these improvements and the potential they hold for greater respect for the rights of workers producing goods for export under the accord. As drafted, however, Annex 22-B not only rejects these stronger workers' rights provisions in the main accord, but adopts as an acceptable reference point for assessing labor conditions one of the worst human rights standards in the world—the situation elsewhere in North Korea.

Annex 22-B could use free trade as an agent for positive change. North Korea is presently one of the most closed countries and has a dismal human rights record. The government often quashes basic human rights and freedoms, sometimes resorting to arbitrary detention and torture against those who resist, and fails to protect some of the most fundamental workers' rights. North Korean outward processing zones provide an important opportunity for engagement with this otherwise hermetically sealed country. If the United States and Korea seized this opportunity by offering possible trade accord benefits to those zones where respect for workers' fundamental rights could be credibly and continuously demonstrated, significant rights improvements could result. Such improvements would impact zone workers immediately and could possibly extend to others beyond the zones in the future, as they learned more about the new culture of rights. As drafted, however, Annex 22-B falls far short and squanders this critical moment. Accordingly, Human Rights Watch strongly urges the United States to negotiate amendments to Annex 22-B based on our recommendations below and calls on the US Congress to reject the US-Korea FTA if Annex 22-B remains in its present form.

Annex 22-B

Annex 22-B requires the United States and Korea to create a Committee on Outward Processing Zones on the Korean Peninsula (Committee), comprised of Korean and US officials. The Committee is charged with identifying areas in North Korea that may be designated as “outward processing zones” and establishing criteria that the zones must meet before being recommended for coverage under the accord. If the Committee unanimously agrees that a zone has met the established criteria, it will notify US and Korean authorities, which are responsible for seeking legislative approval for “*any* amendments” needed to bring the zone

under the agreement. Annex 22-B fails to establish clearly, however, that legislatively-approved amendments are necessary to extend the accord.⁵

The Problem

Annex 22-B raises several important workers' rights concerns, including inadequate labor rights criteria, a flawed process for assessing their fulfillment, and a potential "free rider" problem for North Korea.

Weak Workers' Rights Criteria

The workers' rights criteria that Annex 22-B instructs the Committee to consider in determining whether to recommend free trade accord extension to North Korean outward processing zones are not sufficient to ensure respect for labor rights in those zones. The criteria are vague, weak, and fall far short of the new workers' rights requirements in the main text of the US-Korea FTA. As a result, they will allow the parties to permit the violation of zone workers' basic rights under the agreement.

The US-Korea FTA labor rights provisions, based on the trade policy template, establish that "[e]ach Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO [International Labour Organization] Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration)" and that "[n]either Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties."⁶ The accord also requires that the parties shall not fail to effectively enforce their labor laws "through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties."⁷

⁵ Free Trade Agreement between the United States of America and the Republic of Korea (US-Korea FTA), Annex 22-B (emphasis added).

⁶ *Ibid.*, art. 19:2. The accord explains that the five fundamental workers' rights listed in the ILO Declaration are freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the effective abolition of child labor and, for purposes of the agreement, a prohibition on the worst forms of child labor; and the elimination of discrimination in respect of employment and occupation. *Ibid.*

⁷ *Ibid.*, art. 19:3.

However, Annex 22-B holds North Korean outward processing zones to a significantly lower standard. The Committee evaluating a North Korean outward processing zone for potential inclusion under the trade accord must only consider “labor standards and practices, wage practices and business and management practices prevailing in the outward processing zone, with due reference to the situation prevailing elsewhere in the local economy and the relevant international norms.”⁸

Annex 22-B does not require that North Korean outward processing zones uphold the “relevant international norms” in their statutes, regulations, and practice. It also fails to require effective enforcement of the labor laws governing those “norms” or ban derogation of those laws in a manner affecting trade. Annex 22-B does not even define “relevant international norms” to which the ambiguous “due reference” must be given; they could include all, some, or none of the fundamental workers’ rights articulated in the ILO Declaration.

Furthermore, by directing the Committee to give “due reference to the situation prevailing elsewhere in the local economy,” Annex 22-B adds a criterion for assessing labor conditions that is not contemplated by the trade policy template nor its implementing language in the US-Korea FTA: conditions throughout the country. Human Rights Watch rejects this criterion because it introduces a standard for evaluating working conditions other than internationally recognized labor rights and embraces as a valid standard the egregious workers’ rights violations “prevailing elsewhere” in North Korea.

For example, Human Rights Watch wrote in October 2006:

It is generally accepted that North Korea prohibits organized political opposition or independent civil society. The country has an abysmal human rights record, including arbitrary arrests, pervasive use of torture, lack of due process and fair trials, and executions. There is no freedom of information or freedom of religion. There are no independent trade unions or labor activism. Most North Koreans do not enjoy the freedom to choose their own occupation,

⁸ Ibid., Annex 22-B, para. 3.

because job assignments follow the state's central economic plan, rather than individual talents or wishes.⁹

It would be difficult to find a lower rights standard than that prevailing in North Korea. As a result, labor statutes and regulations governing North Korean outward processing zones and the working conditions in those zones could fall far short of upholding fundamental workers' rights yet still be superior to the situation in the rest of the country. Human Rights Watch has found this to be the case, for example, in the Kaesong Industrial Complex (KIC), where working conditions are likely among the best in the country but where workers' rights are still not adequately protected, as discussed below. The KIC is the only current potential candidate for North Korean outward-processing-zone designation.

Flawed Review Process

Free and independent labor organizations, civil society, and press are nonexistent in North Korea. International rights groups and organizations, like Human Rights Watch, are banned from the country. Therefore, it is highly unlikely that the Committee on Outward Processing Zones on the Korean Peninsula will have reliable, first-hand, independent information about labor conditions in the zones when it applies the weak workers' rights criteria of Annex 22-B.

When foreigners, including US government officials, have been granted the requisite permission by North Korean authorities to tour the only operational potential outward processing zone, the KIC, they have been closely guarded and escorted by North Korean officials and, to our knowledge, not permitted to interview workers about working conditions. As a result, the only available information about workers' fundamental rights at the KIC is generated by agencies of the North Korean government, which presently demands and receives KIC workers' salaries, from which it deducts roughly 30 percent, violating the KIC labor law requirement that workers be paid their wages directly and in full.¹⁰ With such restrictions and under such circumstances, it is virtually impossible to gain a complete and

⁹ Human Rights Watch, "North Korea: Workers' Rights at the Kaesong Industrial Complex," October 2006, citing Korea Institute for National Unification, "White Paper on Human Rights in North Korea," March 2006, pp. 177-184.

¹⁰ Human Rights Watch, "North Korea: Workers' Rights at the Kaesong Industrial Complex," citing Human Rights Watch telephone interview with a Ministry of Unification official, Seoul, August 23, 2006. Although the South Korean Occupational Safety and Health Agency conducts workplace health and safety inspections at the KIC, it does not monitor respect for the fundamental workers' rights articulated in the ILO Declaration.

objective picture of working conditions at the KIC or any other future potential outward processing zone based on this model.

North Korea’s “Free Ride”

The failure of Annex 22-B to establish meaningful workers’ rights requirements for including outward processing zones under the trade accord and a credible process for assessing whether those requirements are met is especially problematic because North Korea is not a party to the US-Korea FTA. As a third party, North Korea is not obligated to uphold *any* of the accord’s provisions, including those governing workers’ rights.

Therefore, the process for assessing whether to extend the accord to North Korean outward processing zones is likely the only opportunity for the United States and Korea to evaluate labor conditions in those zones in the context of the agreement. Once the North Korean outward processing zones clear the low labor rights hurdle established in Annex 22-B and the trade agreement is amended accordingly, they enjoy a “free ride”—all the rewards of the accord and no continuing workers’ rights-related obligations. Poor workers’ rights conditions in the zones could continue or even dramatically deteriorate and labor statutes and regulations could be significantly weakened without violating the accord or risking any negative trade-related consequences for the zones.

Permitting any country to enjoy the benefits of a free trade accord with the United States without assuming its corresponding duties is problematic. When that country has a rights record as dismal as North Korea’s, it is especially troubling, blatantly violating the trade policy template’s underlying principle that the rights of workers producing goods for export under US free trade accords shall be protected.

The KIC’s Failure to Uphold International Workers’ Rights

Human Rights Watch issued a briefing paper in October 2006 that examined workers’ rights at a potential North Korean outward processing zone, the KIC.¹¹ Because Human Rights Watch has not been permitted to visit the KIC, the paper was based on information provided

¹¹ Human Rights Watch, “North Korea: Workers’ Rights at the Kaesong Industrial Complex.”

by Korean authorities, Seoul-based experts on North Korean labor laws, others who have visited the KIC, our analysis of relevant academic writings, and our assessment of the labor law drafted specifically for the KIC. We found that although working conditions at the KIC likely compare favorably with most North Korean manufacturing facilities, the KIC lacks appropriate mechanisms to ensure effective labor law enforcement and falls far short of “adopt[ing] and maintain[ing] in its statutes and regulations, and practices thereunder, the . . . rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)*.”

Labor Law Enforcement

The vague administrative enforcement procedures established under the special labor law adopted for the KIC and the possibility of judicial enforcement through the North Korean justice system are insufficient to ensure labor law compliance at the KIC. The KIC Management Committee, a North Korean agency supervised by the North Korean Central Special District General Bureau for the Kaesong Industrial Complex (General Bureau), is charged with administrative enforcement of KIC labor law, and according to South Korean officials, makes regular monitoring visits to KIC worksites.¹² The committee “can,” but is not required to, impose a fine of between \$100 and \$2000 on a violating employer or suspend that employer’s operations only if the employer has failed to heed prior committee warnings to remedy labor law infractions and the unlawful activity has resulted in “serious consequence.” The law does not define “serious consequence,” however, nor does it set forth guidelines for the committee’s exercise of its enforcement discretion, stating only that if workers or employers have “opinions” regarding penalties imposed, they can raise them with the KIC Management Committee or the General Bureau.¹³ As a result, KIC labor law is inadequate to prevent inconsistent and subjective enforcement decisions or impunity for labor law violations, especially in less egregious cases. Furthermore, the North Korean justice system, which in theory could provide a judicial alternative to the KIC Management Committee’s labor law enforcement and a forum for appealing committee decisions, is in practice, neither independent nor impartial and, in many cases, lacking even minimal due

¹² Ibid.

¹³ KIC Labor Law, arts. 46, 49.

process guarantees.¹⁴ Therefore, North Korean courts cannot be relied on to provide workers a meaningful mechanism for fully enforcing their basic rights.

Freedom of Association and Collective Bargaining

The KIC labor law is silent on workers' rights to freedom of association and collective bargaining. The North Korean Foreign Enterprise Law, which provides a legal framework for foreign companies to operate in free economic and trade zones in the country and also governs working conditions at the KIC, does little better. The Foreign Enterprise Law states that workers in foreign enterprises can form unions, but it fails to establish even a minimal legal framework to guarantee that right, failing to ban anti-union discrimination or retaliation, prohibit employer interference in union activity, or require employers to bargain in good faith with workers' representatives. The law also substantially limits the right to organize with the broad prohibition of any trade union that "seriously endangers" security or "healthy public order," as determined by the North Korean state.¹⁵

Equally troubling are reports from Korean officials that the North Korean government, not the KIC workers, selects workers' representatives, who are then subject to the approval of the Korean companies operating at the KIC. Such a system of government-selected, employer-approved worker representatives violates both workers' internationally recognized right to elect representatives of their own choosing and the ban on state and employer interference in workers' organizations.¹⁶

There are no unions or collective agreements at the KIC, in part due to the weak labor laws governing at the KIC, the state-imposed workers' representatives, and the possibility of brutal retaliation for activities displeasing to North Korean authorities, such as independent

¹⁴ Korea Institute for National Unification, "White Paper on Human Rights in North Korea," pp. 90-113.

¹⁵ Human Rights Watch, "North Korea: Workers' Rights at the Kaesong Industrial Complex," citing Second Periodic Report of the Democratic People's Republic of Korea on its implementation of the International Covenant on Civil and Political Rights, CCPR/C/PRK/2000/2, May 4, 2000.

¹⁶ ILO Convention 98 concerning the Right to Organise and Collective Bargaining states that workers' and employers' organizations "shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration." Similarly, ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organise provides, "Workers' and employers' organisations shall have the right to . . . elect their representatives in full freedom" and "public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof." ILO Convention No. 98 concerning the Right to Organise and Collective Bargaining, adopted July 1, 1949, 96 U.N.T.S. 257, entered into force July 18, 1951, art. 2; ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, adopted July 9, 1948, 68 U.N.T.S. 17, entered into force July 4, 1950, art. 3.

labor organizing. According to an American businessman of Korean descent with investments in North Korea, who spoke with Human Rights Watch on condition of anonymity, there were also neither unions nor collective agreements at any of the factories he visited in North Korea as late as 2004. In August 2006, he told Human Rights Watch:

It was obvious to me that it didn't even occur to the workers that they could elect their own representatives or form a trade union. If you asked them what a strike is, they probably won't be able to answer the question. Even if they knew what it was, they were not able to act on it. The Workers' Party decided everything for them.¹⁷

There is no known history of any independent worker organizing anywhere in North Korea. As a result, even if the right to freedom of association were adequately protected at the KIC, workers would likely be largely incapable of fully exercising it without extensive rights information and training, which they do not presently receive.¹⁸

Other Fundamental Workers' Rights: Child Labor and Non-Discrimination

KIC and other North Korean labor laws also fall short of adequately safeguarding against harmful child labor and employment and workplace discrimination. Neither the KIC labor law nor North Korea's general labor law, also in force at the KIC, ban hazardous child labor. And although the North Korean constitution establishes the right to "equal rights in all spheres of state and public activity," neither the KIC labor law nor other labor laws in force at the KIC explicitly ban workplace and employment discrimination, including sexual harassment, or establish remedies for its victims. Without such a ban, North Korean women suffering these violations and attempting to seek justice through the inadequate labor law enforcement mechanisms available to them must clear the additional hurdle of demonstrating that the conduct runs afoul of the general constitutional anti-discrimination provision, a much more difficult legal case to make.¹⁹

¹⁷ Human Rights Watch, "North Korea: Workers' Rights at the Kaesong Industrial Complex," citing Human Rights Watch interview, identity withheld, Seoul, August 29, 2006.

¹⁸ See Human Rights Watch, "North Korea: Workers' Rights at the Kaesong Industrial Complex."

¹⁹ See *Ibid.*

A Way Forward

As discussed, Annex 22-B presents an extraordinary opportunity to push for greater openness and respect for fundamental workers rights at the KIC and in other potential North Korean outward processing zones. Unless the annex is amended, however, this important opportunity will have been missed. These outward processing zones are one of the few windows into and out of the closed and repressive country and therefore also one of the few means for exerting such pressure on North Korea. Properly revised, Annex 22-B could represent a small but important step in the fight for rights improvements in North Korea.

Requiring North Korean Outward Processing Zones to Uphold Workers' Rights

North Korean workers producing goods for duty-free export to the United States under the free trade accord should be provided the same rights protection as their Korean counterparts. The double standard permitted by Annex 22-B is unacceptable. Human Rights Watch, therefore, recommends that Annex 22-B be amended to require that:

- 1) North Korean outward processing zones fulfill the labor rights requirements of the main text of the US-Korea FTA, including by adopting and maintaining, in their laws and practices, the workers' rights articulated in the ILO Declaration and promoting worker awareness and understanding of these rights before being eligible for coverage under the agreement;
- 2) North Korean outward processing zones uphold the US-Korea FTA workers' rights requirements as a condition for continued eligibility for coverage under the accord. To prevent backsliding on workers' rights in zones covered by the agreement, the annex should provide for a public petition process for alleging non-compliance with Annex 22-B; annual evaluations of workers' rights conditions by the Committee on Outward Processing Zones on the Korean Peninsula; and clear procedures for mandatory withdrawal of the zones' trade agreement benefits if the public petitions or annual assessments credibly demonstrate that the labor rights requirements are being violated.

Requiring Increased Openness

A thorough, objective, accurate assessment of workers' rights conditions in potential outward processing zones is impossible under the present circumstances in North Korea. So that the Committee on Outward Processing Zones on the Korean Peninsula can conduct meaningful workers' rights evaluations, Human Rights Watch recommends that Annex 22-B be amended to require that:

- 1) Before being considered for inclusion under the US-Korea FTA, each North Korean outward processing zone permit an independent, third-party workers' rights monitoring visit by the International Labour Organization or an international human rights, workers' rights, or trade union organization, agreed upon by US and Korean authorities, during which worksites are toured and observed, randomly selected workers are interviewed anonymously and outside the watch of North Korean supervisors, relevant employer records are collected and reviewed, and after which the results are publicly disclosed;
- 2) Zones submit at least annually to such monitoring visits, whose results will also be publicly disclosed and considered by the Committee on Outward Processing Zones on the Korean Peninsula's annual workers' rights evaluations;
- 3) Retaliation against zone workers, or their families, interviewed during labor rights monitoring visits be considered a violation of Annex 22-B workers' rights requirements and automatically trigger procedures for withdrawing the zone's trade agreement benefits.

Requiring Legislatively-Approved Amendments to Extend the Accord

Approval of the US-Korea FTA by both parties' legislative branches is necessary before the accord can enter into force. US congressional approval is also required before trade benefits are granted to developing countries under unilateral US trade preference programs, such as the Generalized System of Preferences. Similarly, Annex 22-B should be amended to unambiguously require legislative approval to extend the US-Korea FTA to any North Korean outward processing zone. The legislative process serves as a check on the power of US and Korean authorities and as an important opportunity to verify the Committee on Outward Processing Zones on the Korean Peninsula's workers' rights assessment before bringing a zone under the accord.

Conclusion

Human Rights Watch understands that it is unlikely that North Korean outward processing zones could achieve full compliance with our recommended amendments to Annex 22-B at this time or in the near future. Nonetheless, we believe that free trade accords should require all covered countries to effectively protect, in law and practice, the basic labor rights of their workers producing goods under the agreements. No exceptions should be made, especially for a country as repressive as North Korea. Therefore, although we recognize that in the extraordinary case of a country as closed as North Korea, increased trade could lead to greater openness and accompanying opportunities to push for rights improvements, we also believe that the significant benefits of free, duty-free trade should not be granted to the country's outward processing zones absent compliance with equally significant workers' rights obligations. Therefore, we oppose Annex 22-B in its current form and urge the USTR to negotiate amendments to Annex 22-B based on our recommendations, set forth above, and thereby seize this critical opportunity to improve respect for workers' rights in North Korean outward processing zones while opening a bit further the window onto and from North Korea that these zones can provide. The US Congress should demand nothing less as a requirement for approving the US-Korea Free Trade Agreement.