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Carmen Suro-Bredie  
Chairman, Trade Policy Staff Committee  
Office of US Trade Representative

**RE: United States-Republic of Korea Free Trade Agreement**

Dear Ms. Suro-Bredie

The Computing Technology Industry Association (“CompTIA”) is pleased to respond to the request for public comments on the proposed Free Trade Agreement (“FTA”) with Republic of Korea (“ROK”) published in the Federal Register on February 9, 2006 (vol. 71, Number 27, page 6820-6821.)

CompTIA is the world’s largest information and communications technology trade (“ICT”) association with over 20,000 member companies in nearly 90 countries. CompTIA’s members consist of software developers, hardware manufacturers, application service providers, Internet service firms, distributors, retailers, resellers, training, service, and telecommunications companies. The Association’s members collectively employ thousands of people and produce billions of dollars worth of goods and services each year. CompTIA operates in both the US and Korea. Our international operations allow us to provide a unique, first-hand perspective on this important topic.

**Background**

Over 30% of trade between the US and South Korea is, in one form or another, currently produced by the ICT sector, and it is widely expected that this sector will be responsible for a major part of the growth in U.S.-Korean trade. As a result, it is extremely important that the future FTA with Korea serve as an example for FTAs to which the United States is a party.

**Trade in ICT Goods**

1. Convergence continues to impact ICT goods and many products are performing functions that are common to more than one World Customs Organization’s Harmonized Code classification, thereby allowing governments to classify certain ICT goods as consumer products not covered by the ITA. In addition, a number of new products have come on the market that are not included within the original ITA. In response to this, the ROK, a signatory to the ITA, has joined discussions to expand the product coverage of the ITA i.e., ITA-2.

2. Given ROK's interest in expanding the product set included within the ITA, CompTIA recommends that the FTA include an immediate zero-tariff commitment for all products that make up WCOHC Chapters 84, 85, and 89, but are currently not covered in the ITA. Both economies have advanced IT and telecommunications sectors, and, in addition to the direct trade and welfare effects of lowering these tariffs, there is likely to be a strong demonstration effect to other regional trading partners engaged in bilateral and multilateral negotiations with either party, e.g. the recently announced US-Malaysia FTA negotiations, or the Doha Round. It is interesting to note that the Korean Electronics Association has already endorsed this goal within the context of Doha Round.

### **Trade in ICT Services**

3. The ROK has already submitted a fairly comprehensive WTO commitment on Computer-related Services (CPC 841-845, 849). Specifically, Korea has committed to full market access and national treatment for all sectors, modes 1-3, with some limitations on mode 4. It would be expected that the ROK would agree to a similar commitment in the FTA. CompTIA would also recommend similarly comprehensive commitments for Management Consulting Services (CPC 865) and Services Related to Management Consulting Services (CPC 866).

### **Non-Tariff Trade Barrier ("NTB"s)**

4. While Korea's commitments to market access and national treatment in the ICT sector have advanced considerably since the Uruguay Round, Korean NTB's affecting the ICT sector have actually increased. As Korea has sought to encourage the development of its own ICT sector, it has adopted product and network standards, product registration requirements, procurement policies and has enforced its competition laws in ways that amount to NTB's by erecting serious impediments to market access for US ICT companies.
5. This trend is quite interesting, given the importance that the ROK itself places on the need to eliminate NTBs in the IT sector as presented in a 2004 WTO submission on the same.<sup>1</sup> In that submission, the ROK states:

"The electronics industry takes up a considerable share in international trade and its share is continuously growing. The need to eliminate NTBs in this industry is greater. ... Even if an ambitious tariff cut is implemented, NTBs will continue to be a formidable obstacle in the trade liberalization of electronics industry. As such, the removal of electronics NTBs will promote free trade and contribute to boost global welfare, thereby enabling many countries to share in the benefits of eliminating NTBs. According to a study<sup>2</sup> of NTBs notifications submitted to the

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<sup>1</sup> NTBs of the Electronics Industry: Korea's Contribution to Vertical Approach to NTBs Negotiation, 5 November 2004, WTO (04-4729).

<sup>2</sup> Analysis of NTBs notifications (May 2004), Korea Trade-Investment Promotion Agency.

WTO secretariat until April 2004, NTBs in the electronics industry accounted for 11.2% of total NTBs reported by 30 countries. This figure is the highest among manufactured products. Among 1,326 cases that cited specific products, 148 cases were related to electronic products.”

“The Korean Experience tells a similar story. According to a recent survey conducted by a Korean institution<sup>3</sup>, 65% of electronics-related companies pointed out that NTBs had a greater impact as a trade barrier than tariffs. 33.5% of the respondents said that NTBs undermined free trade and 45.3% said that NTBs were a burden on companies. As such results show, about 80% of Korea's electronics-related companies responded that NTBs hindered free trade, and this finding would not be isolated to Korean companies alone.”<sup>4</sup>

6. The ROK’s recommendation was that NTBs be addressed using a vertical approach, with focus on the electronics industry. The ROK goes further in suggesting that: “As is seen in the electronics industry, even if NTBs are to be removed through negotiations, they are very likely to return in modified forms, given that NTBs cannot be uniformly regulated based on a concrete and clear definition by nature. Therefore, institutional mechanisms such as a regular monitoring system should be considered when setting up NTBs modalities (e.g. the establishment of NTBs committee) in order to effectively implement what has been agreed upon in negotiations and prevent modified NTBs”<sup>5</sup>. CompTIA strongly recommends that the US government negotiate the implementation of these recommendations within the FTA.
7. Given the extent of NTBs in Korea today, CompTIA believes that as a practical matter, the US Trade Representative should immediately focus on a few egregious matters. For example, in the area of customs procedures, there is no provision in The Korean Customs Act, Art. 38, that allows for the reconciliation of the reported value of imported goods at the time of import, based on the “best information available” and the subsequent true valuation, as there is in US customs procedures. This leads to overpayment of duties, taxes and fees to the ROK, with no procedure for relief. CompTIA recommends that the ROK adopt a provision in its Art. 38 of its Customs Act that would establish a reconciliation and relief process similar to that employed by the US in its ACS Reconciliation program.
8. The Korean government also appears to be using competition policy increasingly as a tool to limit US companies’ market access. Within the last two years at least three major US IT companies have been investigated by the Korean FTC, on a broad range of concerns. Recently the head of the KFTC intimated that a fourth US ICT (hardware) company would be investigated. Most of the allegations have been based on complaints by Korean competitors, not Korean consumers. In one case, the KFTC imposed remedies against a U.S. company that would have the effect of leaving the

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<sup>3</sup> Research of NTBs of concern to Korean companies (January 2004), Korea International Trade Association.

<sup>4</sup> NTBs of the Electronics Industry: Korea’s Contribution to Vertical Approach to NTBs Negotiation, p. 2.

<sup>5</sup> Ibid., p. 5.

market almost entirely to one Korean competitor—even though this competitor had already settled the underlying competition dispute with the U.S. company. The KFTC's remedies were all the more troubling given that the conduct at issue had already been investigated by U.S. antitrust authorities and indeed had been undertaken in full compliance with a judgment entered by a U.S. court. Given the market access challenges that many US companies experience in competing in Korean markets dominated by chaebols, (against which Korean competition authorities have been historically lax—despite some recent improvements), it is ironic that some of the more recent high-profile KFTC enforcement actions have focused on U.S. companies.

9. CompTIA recommends that the FTA include a robust competition chapter, one that builds upon existing FTA competition chapters by including commitments that will minimize opportunities for Korea to use competition laws and enforcement as protectionist tools to limit US ICT companies' market access. For instance, the Korea FTA competition chapter should reflect the Parties' shared understanding that the proper objective of antitrust law is to prevent consumer harm that is economically demonstrable, and that the burden of proof for establishing such harm is the sole responsibility of the competition authority. Remedies should be least trade restricting, and should not bar market access or limit competition beyond that necessary to remedy the specific offense. Similarly, the FTA more broadly should reinforce limitations set forth in the TRIPS Agreement against IP expropriation and compulsory licensing, except under extraordinary circumstances. The Korean FTA should also build on existing transparency provisions in existing FTA competition chapters by requiring that enforcement proceedings are conducted in a fair and transparent manner. Such transparency should also extend to KFTC's interpretation of Korea's competition laws and its enforcement policies. The appeals process should be clear, easily accessible and characterized by full national treatment. Finally, there should be a workable, effective consultation mechanism to promote cooperation between competition authorities so as to avoid duplicative enforcement actions or divergent competition remedies. The competition chapter should also include a clear commitment that neither party will use competition to limit trade.

### **Procurement**

10. The ROK has signed the WTO Government Procurement Agreement, and the FTA should reinforce those commitments. There are, however, a number of other concerns that need to be addressed regarding the ROK's current procurement practices. For example, many Korean government contracts impose unlimited liability on the seller; others vest the government agency with broad ownership rights of submitted materials that discourage bidders who wish to retain their IP. Confidentiality clauses give government agencies considerable control over information distribution, with little if any left to the seller.
11. In addition, the ROK requires that certain software companies disclose the source code of the software that they intend to sell to the government. The South Korea

Government has released a regulation that would require all ICT security vendors to submit copies of their source code as part of a security evaluation procedure, as a precondition for eligibility to sell their products to all Korean government agencies and some key private sector entities. This requirement applies to procurement by all government agencies in South Korea. In addition, the Korean financial services regulator has also mandated that all financial-services related entities (banking, insurance, etc.) in Korea must follow these regulations in the procurement of ICT security products. This process is in addition to the certificate issued by a certifying agency mutually recognized by the international Common Criteria Recognition Agreement (CCRA).

12. Despite the fact that South Korea will become a party to the CCRA in April 2006, the NIS Security Review process will remain in place, thus increasing the barriers to entry raised by this policy in at least 3 key segments of the South Korean market for IT security products: (1) Public Sector (2) Financial Services and (possibly) (3) Education.

Since the products of U.S. vendors, who operate globally, would likely have been tested/certified under the internationally-accepted Common Criteria standards, U.S. vendors would be forced to bear the burden of additional unproductive costs involved in re-certification and testing, while South Korean vendors would only need to be tested once in South Korea, for their products to qualify in domestic and international markets due to the principle of mutual recognition by other countries who are signatory to the CCRA, including the U.S.. It is therefore apparent that the application of this review process violates national treatment.

13. This requirement leaves the software developer vulnerable to the distribution of that code to competitors or others, resulting in a serious compromise of the developer's intellectual property rights. The disclosure of source code is unnecessary and presents a real and immediate threat of piracy and cloning. Access to source code enables a second comer to the market to develop a competing substitute product without incurring any of the development and testing costs incurred by the original developer. CompTIA recommends that the FTA include a provision that requires the Korean government to drop this additional review and rely upon the CCRA process in its stead, or significantly limit these disclosure requirements to the minimum necessary for a small number of mutually agreed upon purposes and providing tangible safeguards against the subsequent release of the source code to third parties with full indemnification of the injured party, if such occurs.
14. One last point on procurement, in December 2002, the Korean MOIC produced a policy to advance Open Source Software (OSS), under the auspices of the Korean Industry Promotion Agency (KIPA)). Among the elements of this policy was a proposal to introduce legislation giving clear preference to the government purchase of OSS over proprietary software. This law has not been introduced to date. However, MOIC has not indicated that it has abandoned its intent to do so. Such an OSS-preference law would have a significant impact on the export of US software by developers, vendors, value-added resellers, solution providers, etc. because most of

these companies sell proprietary software exclusively or in large part, and would therefore be barred from the government market. Consequently, CompTIA recommends that the FTA include a “technology neutrality” commitment similar to the software procurement policy adopted by the US Government. Such a provision would require the parties not to condition eligibility for any government procurement contract or procurement funding on a software vendor’s specific licensing or development model, including whether the vendor develops or licenses software on a commercial or non-commercial basis. Any such government preference for specific software development or licensing models will invariably have the effect of excluding certain vendors from the market, diminishing competition, and denying government agencies the flexibility to select the best product to suit their needs.

15. There are other broader based NTBs that affect the US ICT industry’s ability to export ICT goods and services to Korea. The Korean government’s propensity to adopt and mandate Korea-only standards is well documented, for example, regarding cell phone and broadband internet technologies. The FTA should point to the desirability of adopting voluntary, industry-led consensus-based standards that respect the IP rights of owners of essential technologies, and should substantially limit the use of government-mandated standards and regulations, or standards that are based on design or descriptive characteristics rather than performance or functional requirements.
16. In addition, the FTA should promote transparency in the regulatory implementation and enforcement processes. The FTA should allow foreign company and trade association comment on upcoming regulations, and should provide adequate time for such comments, a minimum of 30 days. Further, there should be provisions that provide a mechanism for prior consultations between governments on regulations and mandated standards that have a demonstrable effect on trade.

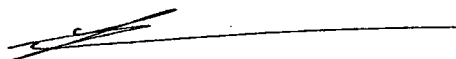
### **Intellectual Property Protections**

17. While the ROK’s enforcement efforts regarding IP have improved significantly, there are, as mentioned above, a number of government policies e.g. competition policy, procurement policies, standards adoption, etc., that could have severe negative effects on US IP rights holders. With this in mind, CompTIA recommends that the FTA reflect a strong commitment to the preservation of all forms of IP protection, including patents, copyrights, trade marks and trade secrets. Efforts should be made to harmonize Korean IP protection levels with those of the United States, to the extent possible. In no way should any provision adopted under the FTA weaken existing IP protections in either country.

## **Conclusion**

CompTIA believes that the proposed Korean FTA is important both because of the growing importance in U.S. Korean trade and because of the precedent it will set for other similar trade agreements. The ICT sector in particular has important interests in the outcome of this agreement. Any successful KFTA needs to address a growing number of concerns that the American ICT industry has with NTBs in Korea. The ICT NTBs need to be fully and successfully addressed in the eventual agreement in order to ensure that U.S.-Korean trade in ICT goods and services is fair, balanced and benefits both the Korean and U.S. consumer.

Respectfully submitted,



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