COMMENT

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THE KOREA-U.S. FREE TRADE AGREEMENT: MOTIVATIONS FOR INVESTOR-STATE DISPUTE SETTLEMENT PROVISIONS

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ABSTRACT

The Korea-U.S. Free Trade Agreement (KORUS FTA) is the United States' first trade agreement with a major Asian economy. This Comment explores the reasons underlying the inclusion of the investor-state dispute settlement provisions in the KORUS FTA from three perspectives: (1) the theoretical differences between legal institutions in the United States and South Korea, (2) the soundness of legal institutions in South Korea, and (3) the current state of the U.S.-South Korea diplomatic relationship. I argue that the KORUS FTA included investor-state provisions primarily because investor-state dispute settlement provisions pose less of a diplomatic risk than state-to-state dispute settlement provisions. Maintaining a strong and stable relationship is a priority for the United States and South Korea due to their mutual national security interests. Investor-state dispute settlement provisions enable investors to act directly against the government of a host state without government espousal by its home state. In allowing investors to seek arbitration before an international tribunal, the United States and South Korea can avoid a potential investor conflict which may exacerbate underlying diplomatic tensions between the two nations.

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I. INTRODUCTION

Heralded as "the world's largest bilateral free-trade agreement,"[1] the Korea-United States Free Trade Agreement (KORUS FTA) united the world's largest and fifteenth largest economies, respectively.[2] The United States' first free trade agreement with a major Asian economy is expected to increase annual American exports to South Korea by $10 billion annually, an exciting prospect for U.S. business interests.[3] However, the trade pact that was to solidify commercial relations between the United States and its seventh largest trading partner passed only after five years of negotiations, two presidencies, and a canister of tear gas.[4]

As business transactions between the United States and South Korea have increased in numbers and complexity, U.S. investors have expressed strong concerns over the investment environment in South Korea.[5] In the KORUS FTA, the U.S. government sought to strengthen protections for U.S. investors by establishing rules on expropriation, performance requirements, transparency, and non-discriminatory national treatment standards while safeguarding investment revenues against potential political disruptions.[6] To resolve investor disputes, the United States and South Korea agreed to provide for investor-state dispute settlement.[7] This mechanism enables private investors from the United States or South Korea to seek arbitration against the government of a host state before an international tribunal if an

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[1] Sang-Hun Choe, *U.S. and South Korea Sign Free Trade Agreement*, N.Y. TIMES, Apr. 2, 2007, *available at* http://www.nytimes.com/2007/04/02/world/asia/02iht-fta.1.5110252.html; *reprinted and also available at* http://tech.mit.edu/V127/N15/long4.html (last visited Aug. 28, 2012).

[2] All Countries, GDP, Current Prices, and U.S. Dollars, International Monetary Fund Report for Selected Countries and Subjects, http://www.imf.org/external/pubs/ft/weo/2010/02/weodata/weorept.aspx (last visited Aug. 28, 2012).

[3] *See* U.S. - Korea Free Trade Agreement, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (last visited Aug. 28, 2012).

[4] Joohe Cho, *South Korea Tearfully Ratifies Free-Trade Pact With U.S.*, ABC NEWS ONLINE, http://abcnews.go.com/blogs/headlines/2011/11/south-korea-tearfully-ratifies-free-trade-pact-with-the-u-s/ (last visited Feb. 27, 2012).

[5] *See* U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects, Inv. No. TA-2104-24 (2007), USITC Pub. 3949 (Sept. 20, 2007) (Corrected New Printing), at 6-5 *available at* http://www.usitc.gov/publications/332/pub3949.pdf [hereinafter Potential Economy-wide and Selected Sectoral Effects].

[6] *Id.*

[7] U.S.-KOREA FREE TRADE AGREEMENT FINAL TEXT: CHAPTER TWENTY-TWO INSTITUTIONAL PROVISIONS AND DISPUTE SETTLEMENT (2007), http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file973_12721.pdf.

amicable settlement does not yield sufficient results.[8] In doing so, private investors can avoid national jurisdictions and act directly against the host state without seeking espousal from its government or exhausting the host state's domestic avenues.[9]

The KORUS FTA is unique in that it is one of the few free trade agreements that the United States has negotiated with a non-developing nation.[10] Thus, its investment provisions serve as an important precedent for the direction of investment provisions in future FTAs. Initially, it seemed logical that a trade agreement between the United States and South Korea, a nation with a developed economy and legal system, would follow the investment terms of the Australia-U.S. Free Trade Agreement (AUSFTA). While the majority of trade agreements involving the United States provide for investor-state dispute settlement, these pacts historically included developing nations as signatories.[11]

In the past, U.S. investors in developing countries valued the investor-state dispute mechanism because they questioned the impartiality of the local tribunals and courts in settling disputes involving a foreign party.[12] With investor-state dispute settlement available at their fingertips, investors avoided domestic courts in less developed countries and pressed their claims on the international level without involving their home states.[13] In contrast, the United States' most recent bilateral FTA with a developed economy, the AUSFTA, contained only state-to-state dispute settlement provisions.[14] Because the United States and Australia agreed that their respective legal systems were "robust and sophisticated," the dispute settlement terms their governments negotiated did not allow parties to circumvent domestic court systems for a panel of international arbitrators.[15] Despite this precedent, the

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[8] *See* William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 1-37 (2006).

[9] August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691, 692 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer, eds., 2008).

[10] *See infra* Appendix A: Investment Provisions in United States Free Trade Agreements.

[11] The free trade agreement between the United States and Canada, a non-developing nation, initially did not contain investor-state dispute settlement provisions. The free trade agreement between the United States and Canada contained investor-state provisions only after the countries entered into a multilateral free trade agreement with Mexico in NAFTA. *See infra* Appendix A: Investment Provisions in United States Free Trade Agreements.

[12] Dodge, *supra* note 8, at 11.

[13] *See id.* at 14.

[14] U.S.-Austl. Free Trade Agreement, U.S.-Austl., Aug. 3, 2004, Pub.L. 108-286, 118 Stat. 919.

[15] *Id.*; *see also* Australia-United States Free Trade Agreement-Investment, http://www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html (last visited Aug. 28, 2012)

United States and South Korea ultimately included investor-state dispute settlement provisions, in line with most of our nation's other FTAs.[16]

The trade agreement between the United States and Australia appeared to draw a line between countries considered "developed" and countries that had yet to attain this economic status. However, the investor-state dispute settlement provisions in the KORUS FTA demonstrated that such clear boundaries had not been set. The type of investment provisions in a bilateral trade agreement did not depend solely on the state of economic development in the foreign nation. This article seeks to understand why the governments of the United States and South Korea chose not to model the investment provisions in the KORUS FTA after the AUSFTA. What factors led the United States and South Korea to ultimately conclude that state-to-state dispute settlement mechanisms were inadequate? This Comment explores the reasons underlying the inclusion of the investor-state settlement provisions in the KORUS FTA from three perspectives: (1) the theoretical differences between legal institutions in the United States and South Korea, (2) the soundness of legal institutions in South Korea, and (3) the current state of the U.S.-South Korea diplomatic relationship.

II. BACKGROUND

The KORUS FTA has the potential to create significant investment opportunities for U.S. businesses. Nonetheless, investors will hesitate to take advantage of these opportunities unless adequate regulatory protections and dispute settlement mechanisms are available. While investor-state dispute settlement serves as a powerful defense for foreign investors against their host government, there are other groups with interests in South Korea that do not have access to similar mechanisms.[17] Consequently, because investor-state dispute settlement is not the only manner by which an investor can bring suit against the government of the host state, there has been significant debate over whether investor-state dispute settlement should be included in the KORUS FTA.[18] The results of investment provisions in FTAs between the United States and other nations with similar economic

(The Government of Australia stated, "Reflecting the fact that both countries have robust, developed legal systems for resolving disputes with foreign investors, the Agreement does not include provisions for investor-state dispute settlement.").

[16] U.S. – Korea Free Trade Agreement, *supra* note 3.

[17] *See* Martha C. White, *Trade Policy 101: What's in Those Free Trade Agreements and Do They Really Boost Exports?*, SLATE, Dec. 2, 2010, http://www.slate.com/articles/business/exports/2010/12/trade_policy_101.html.

[18] *See* Lori Wallach, *The Korea Trade Deal is Lose-Lose*, HUFFINGTON POST, Feb. 15, 2011, http://www.huffingtonpost.com/lori-wallach/the-korea-trade-deal-is-l_b_823137.html.

development, such as Canada and Australia, help to illuminate the effects of these different mechanisms.

A. Effects of the KORUS FTA on the U.S. Economy

The KORUS FTA is expected to provide significant gains for the U.S. economy, U.S. industry, and U.S. workers.[19] According to estimates by the U.S. International Trade Commission (USITC), the KORUS FTA will eliminate tariffs on more than 90 percent of the products traded between the two countries.[20] The reduction of South Korean tariffs and tariff-rate quotas on goods alone will add $10 to $12 billion to the annual U.S. Gross Domestic Product (GDP).[21] Lowered trade barriers and the reduction of tariffs are expected to increase not only imports, but exports in merchandise and services.[22] This effect will help the United States improve its longstanding problem with increasing imports and declining exports,[23] as the U.S. merchandise trade balance with South Korea moved from a $2.9 billion surplus in 1996 to $13.9 billion deficit in 2006.[24] Moreover, foreign investment resulting from free trade will spur U.S. productivity and economic growth, pointing towards higher-paying jobs and a higher standard of living in the United States.[25]

The gradual phase-out of most tariffs currently imposed by South Korea will benefit merchandise exports from the United States because tariffs on U.S. exports to South Korea are substantially larger than those applied to U.S. imports from South Korea.[26] Approximately 82 percent of U.S. tariff lines and approximately 80 percent of Korean tariff lines now have free rates of duty as a result of the KORUS FTA.[27] Approximately 99 percent of U.S. tariff lines and 98 percent of South Korean tariff lines will

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[19] *See Hearing on the U.S.-Korea Free Trade Agreement Negotiations Before the Subcomm. on Trade*, 110th Cong. 2 (2007) (statement of Karan Bhatia, Deputy U.S. Trade Representative), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40312/pdf/CHRG-110hhrg40312.pdf.

[20] U.S. – Korea Free Trade Agreement, *supra* note 3; Background Note: South Korea, U.S. Department of State, http://www.state.gov/r/pa/ei/bgn/2800.htm (last visited Aug. 28, 2012).

[21] U.S. – Korea Free Trade Agreement, *supra* note 3.

[22] Potential Economy-wide and Selected Sectoral Effects, *supra* note 5, at xvii.

[23] *See Hearing on Investment Protections in U.S. Trade and Investment Agreements Before the Subcomm. on Trade*, 111th Cong. 2-3 (2009) (statement of Linda Menghetti, Vice President of the Emergency Committee for American Trade), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40312/pdf/CHRG-110hhrg40312.pdf.

[24] Potential Economy-wide and Selected Sectoral Effects, *supra* note 5, at 1-3.

[25] *See id.*

[26] *Id.*

[27] *Id.* at 1-7.

have free rates of duty by year ten of the agreement.[28] Merchandise exports to South Korea will likely increase by an estimated $9.7 to $10.9 billion dollars,[29] with the greatest increases by value in
machinery and equipment; chemical, rubber, and plastic products; bovine meat products; other meat products (including beef); and food products.[30]

Merchandise imports from South Korea will likely increase by an estimated $6.4 to $6.9 billion dollars,[31] with the greatest increases in textiles, motor vehicles and parts, wearing apparel, machinery and equipment; and chemical, rubber, and plastic products.[32] Although increases in market access will vary by industry, the FTA will expand access to South Korea's services market, providing substantial opportunities for the financial, telecommunications, and professional sectors.[33] U.S. meat exporters will find greater access to the South Korean market particularly beneficial, as South Korea provides a large market for many meat products that are less demanded by U.S. consumers.[34] U.S. exports of passenger vehicles to South Korea also have the potential to increase.[35]

After a longstanding dispute over the terms initially negotiated in the KORUS FTA, the United States and South Korea reached an agreement regarding the automotive sector in 2010.[36] Among other changes, the agreement required South Korea to reduce its tariff on U.S. automobile imports from 8 percent to 4 percent, and to fully eliminate it in the fifth year of the agreement.[37] Meanwhile, the 2.5 percent U.S. tariff on auto imports will remain in place until the fifth year, instead of being immediately eliminated as specified in the 2007 agreement.[38]

The effects of the KORUS FTA on the U.S. economy may initially appear modest regarding imports, exports, and employment. For example, aggregate U.S. output and employment changes would likely be negligible

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[28] *Id.*

[29] *Id.* at xvii.

[30] Potential Economy-wide and Selected Sectoral Effects, *supra* note 5, at 2-12.

[31] *Id.* at xvii.

[32] *Id.* at 2-12.

[33] *Id.* at xviii.

[34] *Id.* at xxi.

[35] *Id.* at 3-74.

[36] *See* Potential Economy-wide and Selected Sectoral Effects, *supra* note 5, at 3-74; *see also* Legal Texts Reflecting December 3, 2010 Agreement, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/legal-texts-reflecting-december-3-2010-agreement (last visited Aug. 28, 2012).

[37] *See* Letter from Ron Kirk, U.S. Trade Representative, to Jong-Hoon Kim, Korean Trade Minister (Feb. 10, 2011), *available at* http://www.ustr.gov/webfm_send/2557.

[38] *See id.*

due to the size of the U.S. economy relative to that of the Korean economy.[39] But there is great potential for those numbers to escalate once normalized trade regulation builds a better platform for U.S. investors to engage the South Korean market.

The USITC determined that changes in trade facilitation, such as reduced transaction costs, increased transparency, national treatment, and a more secure investment environment, will all likely increase trade and investment in a wide array of goods and services over the long run.[40] These expectations render the inquiry into investor-state dispute settlement provisions in the KORUS FTA all the more important. The terms regarding dispute settlement govern the rules by which investors can seek the administration of justice, and thereby serve as a barometer for the degree of protections that investors can expect to receive when operating within the host state's marketplace.

B. Methods of International Dispute Settlement

Investor-state provisions have been common in preceding U.S. free trade agreements and other U.S. bilateral investment treaties (BITs).[41] But it is only one avenue by which a private investor in a foreign country can bring suit against the host government. In the absence of investor-state dispute settlement, an investor can attempt to sue the host state in the domestic courts of the host government.[42] However, the problem with taking this route is that states often have sovereign immunity from suit in local courts as well as foreign sovereign immunity from suit in non-local courts.[43]

If an investor hoped to bring a lawsuit in a country that possessed such immunities, then an investor's other option would be to bring a suit on a state-to-state basis in a permanently established international tribunal, such as the International Court of Justice.[44] Because private parties do not have standing to bring a claim under international law, an investor would need to appeal to its own government and request that its government bring the suit on the investor's behalf by espousing its claim.[45] Dispute settlement in a state-to-state manner can also present issues for investors as well. As state-to-state dispute settlement requires government espousal, political

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[39] Potential Economy-wide and Selected Sectoral Effects, *supra* note 5, at xvii.

[40] *Id.* at xviii.

[41] *See infra* Appendix A: Investment Provisions in United States Free Trade Agreements.

[42] Reinisch & Malintoppi, *supra* note 9, at 694.

[43] Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 820 (2005).

[44] *See* Reinisch & Malintoppi, *supra* note 9, at 715.

[45] Bjorklund, *supra* note 43, at 820-21.

considerations often come into play.[46] Investors may see their interests diminished or sacrificed due to the diplomatic implications that may result from its government bringing such lawsuits.[47]

C. Grounds for Concern Over the Investment Provisions

The absence of investor-state dispute settlement provisions in the AUSFTA broke the trend of investment terms in a long line of U.S. free trade agreements and opened the debate to whether the KORUS FTA should include investor-state dispute settlement provisions. Among those factions in the debate, business groups and non-governmental organizations (NGOs) emerged at the forefront of the conversation. Their concerns brought to light the advantages and disadvantages of allowing investor-state dispute settlement under the KORUS FTA.

The business community in the United States lobbied heavily in favor of the KORUS FTA.[48] Their support, however, was not without preconditions. The same business groups were adamant in demanding investor-state provisions as a form of protection for investors in South Korea from "discriminatory, arbitrary, direct and indirect expropriatory actions by governments."[49] Although critics of the investor-state provision argued that South Korea's mature legal system rendered this form of protection unnecessary, U.S. business groups maintained that the South Korean legal system was not impervious to nationalist influences.[50]

In particular, the South Korean government's involvement in attempts by the U.S. private equity firm Lone Star to purchase and sell Korea Exchange Bank (KEB) led U.S. businesses to believe that there remained a need to circumvent South Korea's domestic court system.[51] South Korea's government prosecutors accused Lone Star of colluding with bureaucrats and undervaluing the bank, and thereby prevented Lone Star

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[46] Reinisch & Malintoppi, *supra* note 9, at 713.

[47] *Id.*

[48] *See generally Hearing on the U.S.-Korea Free Trade Agreement Negotiations Before the Subcomm. on Trade*, 110th Cong. 2 (2007) (statement of Tami Overby, President, American Chamber of Commerce in Korea), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40312/pdf/CHRG-110hhrg40312.pdf.

[49] *Id.* at 5.

[50] *See id.*

[51] *See* Yoolim Lee, *Lone Star Retreats on Knife Threat in South Korean Bank Sale*, BLOOMBERG, Aug. 1, 2007, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aWmQutBeuUiw ("Even though Asia is very attractive because of the economic growth story, investors have to realize that there is some political risk," says Colin McKay, global leader for both private equity and transaction services at PricewaterhouseCoopers LLP in New York.).

from completing a $4 billion deal with South Korea's Kookmin Bank to sell KEB.[52] An audit by the South Korean government ultimately cleared Lone Star of any wrongdoing.[53] But Lone Star first suffered a difficult legal process that included a conviction by Seoul's lower court and a costly appeal.[54] Following the Lone Star incident, U.S. investors largely viewed the event as evidence of South Korea's lingering protectionist tendencies.[55]

On the opposing end, certain NGOs argued that there were serious risks to incorporating investor-state dispute settlement provisions in the KORUS FTA. For one, just as U.S. investors will have the power to circumvent South Korean courts by submitting claims for arbitration, South Korean corporations operating in the United States also will have the power to directly challenge the U.S. government before an international tribunal to demand compensation.[56] In effect, South Korean investors who are afforded this right may have the ability to bring claims that U.S. investors could not under the confines of U.S. law.

In addition, a number of U.S. labor and environmental groups objected to investor-state dispute settlement because these provisions enable private investors, but no other interest groups, to make claims for lost profits that may be due to U.S. environmental or labor regulations.[57] These objections are exacerbated by the fact that the awards handed down by the arbitration panel are not subject to appeal, leading NGOs to contend that there is no limit to the potential abuse that could occur.[58]

Some NGOs argued that providing South Korean investors a means to make claims against the U.S. government under the KORUS FTA will grant South Korean investors greater rights than those afforded to U.S.

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[52] *Id.*

[53] *Id.*

[54] *See* Yeon-hee Kim, *Court Finds Lone Star S. Korean Head Guilty in KEB Case*, REUTERS, Feb. 1, 2008, http://uk.reuters.com/article/idUKSGE67902T20100810.

[55] *See id.*

[56] *See* PUBLIC CITIZEN, KOREA-U.S. FREE TRADE AGREEMENT (FTA): PROBLEMATIC FOREIGN INVESTOR AND FINANCIAL DEREGULATION PROVISIONS 1 (2010), *available at* http://www.citizen.org/documents/KoreaFTAInvestmentFinancialServices.pdf.

[57] *See* Martha C. White, *Trade Policy 101: What's in Those Free Trade Agreements and Do They Really Boost Exports?*, SLATE, Dec. 2, 2010, http://www.slate.com/id/2276471/pagenum/all/#p2.

[58] LUCY REED, JAN PAULSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 96-97 (2004) (Either party, however, may request that an award be "revised," or changed, under Article 51 of the ICSID Convention, but only "on the ground of discovery of some fact of such a nature as decisively to affect the award."); AFL-CIO, THE U.S.-KOREA FREE TRADE AGREEMENT: REPORT OF THE LABOR ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS AND TRADE POLICY 7, 21 (2007), *available at* http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/korus_fta07.pdf.

investors.[59] In the United States, state and federal governments possess sovereign immunity under the U.S. Constitution and cannot be sued in U.S. courts, apart from some limited exceptions.[60] Under the Eleventh Amendment, foreign and domestic investors in the United States may bring an action against the federal government only if the U.S. government waived its immunity or consented to suit.[61] Similarly, investors operating in the United States may make claims against state governments only if Congress abrogated their immunity or if the state government consented to suit.[62]

Under the investor-state provisions in the KORUS FTA, however, South Korean investors may bring claims against U.S. state and federal governments before an arbitration panel and potentially recover for losses.[63] This effect may be damaging to U.S. businesses, especially as a number of foreign corporations are major competitors with American brands in the U.S. market. But while NGOs may be correct in pointing out this imbalance from the perspective of those U.S. businesses operating domestically, it is also important to note that South Korean businesses operating in their country will also be subject to comparable restrictions.

A U.S. investor operating within South Korea who may be prevented from bringing suit against the South Korean government on the grounds of sovereign immunity can seek to recover losses under investor-state provisions, while a South Korean investor operating domestically will not be privy to a similar alternative course of action.[64] NGOs also heavily criticized the investor-state dispute settlement provisions because no such arrangement existed for the enforcement of other chapters within the KORUS FTA. Labor and environmental groups argued that there are no means for them to bypass the federal government and challenge corporate practices that violate regulations regarding human rights or the environment.[65]

On the other hand, the investor-state dispute settlement mechanism enables corporations that incur losses due to labor and environmental restrictions to make claims against the government of the host state.[66] NGOs

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[59] *See* PUBLIC CITIZEN, *supra* note 56, at 1; White, *supra* note 57.

[60] U.S. CONST. amend. XI.

[61] *See id.*; F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.").

[62] *See* U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1, 10 (1890).

[63] *See* U.S.-KOREA FREE TRADE AGREEMENT FINAL TEXT: CHAPTER TWENTY-TWO INSTITUTIONAL PROVISIONS AND DISPUTE SETTLEMENT, *supra* note 7.

[64] *See id.*

[65] *See* AFL-CIO, *supra* note 58, at 7, 21; Press Release, Sierra Club, Statement by Sierra Club Executive Director Michael Brune on the U.S.-South Korea Trade Agreement (Dec. 12, 2010) (on file with author).

[66] *See* Press Release, Friends of the Earth, President Obama Promotes Bush-Era

argued that these dispute settlement terms also create another imbalance in the KORUS FTA, as well as serious consequences.[67] Effectively, foreign corporations can compel the U.S. government to spend costly amounts of taxpayer dollars in arbitration for essentially requiring foreign corporations to follow U.S. law.[68]

Lastly, representatives of U.S. state and local governments asserted that investor-state settlement provisions infringe upon their powers under the Constitution and laws of the United States. State and local governments argued that legal challenges brought by foreign investors regarding U.S. state and local regulations complicate and confuse the scope of their regulatory authority.[69] They expressed concerns that foreign investors who are well versed in U.S. laws will use these provisions as a means to subvert state and local regulatory efforts, especially with respect to laws concerning the environment.[70] All of these issues can also potentially burden the resources of state and local entities and unnecessarily disrupt their day-to-day operations.[71]

Although previous FTAs also contained investor-state dispute settlement provisions, inclusion of these terms was often preferable for the United States. In those instances, the agreements were drawn with "capital-importing countries," and there was little risk of claims against the U.S. government.[72] Thus, the prospect for challenges of U.S. laws was "somewhat limited by the existence of relatively few foreign investors from such countries operating within the United States."[73] In fact, the inclusion of these provisions arguably benefited the United States to a greater degree because U.S. investors brought most of the challenges while operating in the foreign countries.[74]

D. Results of Investor-State Dispute Settlement with Canada under NAFTA

The United States witnessed the effects of investor-state dispute settlement provisions in a free trade agreement with a developed economy with Chapter Eleven of the North American Free Trade Agreement

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Damaging Trade Deal (Dec. 3, 2010) (on file with author).

67 *See* AFL-CIO, *supra* note 58, at 21; Sierra Club Press Release, *supra* note 65.

68 *See* Sierra Club Press Release, *supra* note 65.

69 *See* Potential Economy-wide and Selected Sectoral Effects, *supra* note 5, at 6-13.

70 *Id.*

71 *Id.*

72 Dodge, *supra* note 8, at 14.

73 *See* PUBLIC CITIZEN, *supra* note 56, at 2.

74 *See* Dodge, *supra* note 8, at 14.

(NAFTA). Under NAFTA, Canadian firms used the investor-state system to challenge the U.S. government on U.S. environmental, health, and other policies in foreign tribunals.[75] From 1994 to 2009, approximately forty-one claims alleging violations of NAFTA Chapter Eleven were submitted.[76]

Of these claims, the International Center for Settlement of Investment Disputes (ICSID) registered fourteen cases under NAFTA, which were ultimately conducted under the ICSID Arbitration (Additional Facility) Rules.[77] While the United States emerged victorious in all the NAFTA investor-state challenges, billions of dollars remain in dispute in outstanding cases.[78] The NGO community has expressed concern over a number of these cases, contending that they would not have been allowed in domestic courts.[79]

Investors and governments have spent a great amount of time and money over the settlement of these claims, with little result. The cost of investor-state arbitration is substantial, often ranging from $5 to $10 million or greater.[80] Additionally, investor-state tribunals often require disputing parties to bear their own costs, and to share the costs of administering the hearing and paying for the tribunal, regardless of the degree of success of each litigant.[81] Yet, the amount awarded to investors under NAFTA Chapter Eleven has totaled less than $200 million.[82] This comparison begs the question whether investor-state dispute settlement is as advantageous to foreign investors as business groups claim.

E. Results of State-to-State Dispute Settlement with Australia under AUSFTA

Currently, there are no claims involving investors seeking espousal for violations under the AUSFTA.[83] One can only speculate as to the

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[75] *See* PUBLIC CITIZEN, *supra* note 56, at 2.

[76] Sergio Puig & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration, ICSID Review*, 25 FOREIGN INVESTMENT L.J. 225, 231 (2010).

[77] *Id.*

[78] *See* PUBLIC CITIZEN, *supra* note 56, at 2; U.S. Department of State, NAFTA Investor-State Arbitrations, http://www.state.gov/s/l/c3439.htm (last visited Aug. 28, 2012).

[79] *See* sources cited *supra* note 78.

[80] *See* Meg Kinnear, *Damages in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 551, 569-70 (Katia Yannaca-Small ed., 2010).

[81] *See id.*

[82] *See* Puig & Kinnear, *supra* note 76, at 232.

[83] *See generally* U.S. Department of State, International Claims and Investment Disputes (L/CID), http://www.state.gov/s/l/c3433.htm (last visited Aug. 28, 2012) (showing that there

meaning of this result. On one hand, perhaps investors found the domestic remedies of the United States and Australia sufficient in satisfying their claims. Perhaps investors found the requirement to exhaust all domestic remedies before seeking espousal as too high of a bar. If the KORUS FTA possessed state-to-state provisions modeled after the AUSFTA, investors may find similar difficulties in seeking espousal.

III. REASONS BASED IN INSTITUTIONAL DIFFERENCES

Critics of the investor-state provisions in the KORUS FTA argued that South Korea's legal system is mature and equipped to handle a free trade agreement with only state-to-state dispute settlement provisions.[84] The U.S. government and the Australian government both stated that its respective well-developed legal institutions served as the primary grounds as to why the AUSFTA did not include provisions for investor-state dispute settlement.[85] Similar to Australia's legal system, South Korea's legal system is accessible to investors and developmentally mature.[86] On these grounds, a number of interest groups have argued it is reasonable for the KORUS FTA to also possess only state-to-state dispute settlement provisions.[87]

A. Legal Theory

A comparison between the legal institutions in South Korea and the United States, however, yields significantly more differences than similarities. For one, the systems of law in the United States and South Korea are based on fundamentally distinctive legal theories. South Korea's legal system is founded upon civil law, while the legal systems in the United

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are no publicly reported instances in which the United States or Australia has espoused a claim for a citizen against another government).

[84] *See* PUBLIC CITIZEN, *supra* note 56, at 2.

[85] *See* Australia-United States Free Trade Agreement – Investment, *supra* note 15; Office of the United States Trade Representative, U.S.-Australia FTA Long Summary of the Agreement, at 3, *available at* http://www.ustr.gov/webfm_send/2625 (last visited Aug. 28, 2012) ("In recognition of the unique circumstances of this Agreement – including…the longstanding economic ties between the United States and Australia, their shared legal traditions…the two countries agreed to not adopt procedures…that would allow investors to arbitrate disputes with governments.").

[86] *See Hearing on Investment Protections in U.S. Trade and Investment Agreements Before the Subcomm. on Trade*, 111th Cong. 2 (2009) (statement of Robert Stumberg, Professor of Law at Georgetown University Law Center), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40312/pdf/CHRG-110hhrg40312.pdf.

[87] *See* PUBLIC CITIZEN, *supra* note 56.

States and Australia both belong to the common law tradition.[88] As these differences are rooted in the theory of the law, they will not abate with economic development. Although South Korea's rapid economic progress enabled its legal system to advance by leaps and bounds, the inherent challenges from these institutional differences still present great concerns to American investors and the American business community at large.[89]

As the shared legal tradition between Australia and the United States played a pivotal role in setting the investment terms under the AUSFTA, the fundamental differences of the American and the South Korean legal systems were likely equally instrumental in deciding the investment terms for the KORUS FTA.[90] Derived from a Germanic tradition and modeled after the Japanese Constitution, South Korea's civil law system is primarily based on statutes and codes.[91] In contrast, the Constitution of the United States serves as the foundation for the common law system in the United States. Although the court systems in the United States and South Korea bear superficial structural similarities, the procedural differences between the two systems overshadow the commonalities.

B. Court Structure

In a structure similar to courts of the common law tradition in the United States, South Korea's courts are arranged in tiers such that a case begins in a court of first instance and then may be appealed to higher courts.[92] South Korea's judicial system is composed of the Supreme Court of South Korea, six High Courts, thirteen District Courts, and several courts of specialized jurisdiction, such as the Family Court and the Administrative Court.[93] All of these courts review cases on statutory grounds.[94]

South Korea also has a Constitutional Court that reviews the constitutionality of laws under the Constitution of the Republic of Korea, thereby exercising the type of judicial review similar to that of the judiciary

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[88] *See* JAMES G. APPLE & ROBERT P. DEYLING, FED. JUDICIAL CTR., A PRIMER ON THE CIVIL-LAW SYSTEM, 1, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf; NATIONAL COURT ADMINISTRATION, THE SUPREME COURT OF KOREA, 78 (2006).

[89] *See supra* Part II.C.

[90] *See* Australia-United States Free Trade Agreement – Investment, *supra* note 15; Office of the United States Trade Representative, *supra* note 85.

[91] *See* NATIONAL COURT ADMINISTRATION, *supra* note 88, at 78 (noting that the Japanese legal system is derived from modern European civil law countries).

[92] *See id.* at 50, 53.

[93] *See id.* at 10.

[94] *Id.*

in the United States.[95] However, the Constitutional Court of Korea differs in that it is an independent and specialized court, and also performs administrative law functions such as ruling on competence disputes between governmental entities, giving final decisions on impeachments, and making judgments on the dissolution of political parties.[96]

C. Civil Procedure

Arguably, the most pronounced differences between common law and civil law courts are in the procedures of the two systems. That is the case when comparing the American and South Korean legal systems as well. Elements of a lawsuit that vary include filing a claim, evidence, witnesses, experts, and a judge's overall control of a case.[97] In the United States, initiating a lawsuit requires a simple complaint stating a claim, accompanied by notice to the opposing party.[98] By contrast, filing a suit in a country with a civil law system such as South Korea requires a detailed statement of the claim.[99]

Once the court determines that the claim is sound, the judge in South Korea's civil law system exercises significantly more control over the case than that of his common law counterpart in the United States.[100] In South Korea, the judge determines the central issue of the case at hand, while the American adversarial system enables parties to assert as many claims as they want in the initial trial.[101] In the United States, parties conduct discovery of evidence, but in South Korea, the court bears the responsibility of gathering and evaluating the evidence.[102] Although the South Korean court is not allowed to consider any evidence that is not presented by either of the parties, the judge has discretion in assessing the relevance and the materiality of the evidence.[103] While lawyers in the United States question their witnesses, judges in South Korea participate in the questioning of witnesses during the trial.[104]

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[95] *Id.*

[96] *Id.*

[97] *See generally* APPLE & DEYLING, *supra* note 88 (comparing differences between civil law legal systems and common law legal systems).

[98] FED. R. CIV. P. 4, 8.

[99] *See* Hyun Seok Kim, *Why Do We Pursue 'Oral Proceedings' in Our Legal System?*, *in* LITIGATION IN KOREA 31, 45 (Kuk Cho, ed., 2010).

[100] *Id.*; *see also* APPLE & DEYLING, *supra* note 88, at 37.

[101] FED. R. CIV. P. 8; Kim, *supra* note 99, at 45-46.

[102] FED. R. CIV. P. 26; Youngjoon Kwon, *Litigating in Korea: A General Overview of Korean Civil Procedure*, *in* LITIGATION IN KOREA 1, 20-21 (Kuk Cho, ed., 2010).

[103] *Id.* at 20-21.

[104] *Id.* at 22.

If the KORUS FTA followed the state-to-state provisions of the AUSFTA, American and South Korean investors seeking legal redress would not be able to avoid litigating within a legal system with vast theoretical differences. Under the dispute settlement terms of the AUSFTA, an investor would need to first exhaust the domestic law claims of the host state.[105] The aforementioned investor, however, could not raise breaches of the AUSFTA in domestic courts.[106] Instead, investors who bring suit would have to find proxies for their investment claims in the domestic laws of Australia and the United States, "alleging a violation of the U.S. Constitution or the Australian Constitution rather than an expropriation in violation of the AUSFTA."[107] Only after the investor exhausted domestic remedies could the investor's home state government espouse the investor's claim and raise a breach under the treaty.[108]

Furthermore, if the KORUS FTA included the dispute settlement preconditions of the AUSFTA, an understanding of the host state's legal system or hiring legal counsel that possessed such expertise would be a prerequisite for litigating disputes. Under state-to-state dispute settlement terms modeled after the AUSFTA, investors making claims for legal remedies in the host state would need to bring suit within the courts of the host state first and exhaust all domestic remedies before they could request government espousal.[109] Investors operating under these investment terms would need to become familiar with the domestic law of the host state, both procedurally and substantively. But given that most of South Korea's practice in administrative law, bankruptcy, and corporate mergers and acquisitions are based on the law of the United States, parties bringing suit should find a number of parallels in the substance of the law.[110]

Despite the fact that the legal systems of the United States and South Korea possess inherent theoretical differences, the prevalent exchange of academics and legal professionals on an international basis suggest that theoretically distinctive legal systems are probably not the main reason for adopting investor-state dispute settlement in the KORUS FTA. In the last decade, major law firms have moved towards the global model, participating in cross-border mergers or establishing offices outside the United States.[111]

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105 U.S.-Austl. Free Trade Agreement, *supra* note 14.

106 Dodge, *supra* note 8, at 26.

107 *Id.*

108 *Id.*

109 *See* U.S.-Austl. Free Trade Agreement, *supra* note 14.

110 Sang-Hyun Song, *The Education and Training of the Legal Profession in Korea: Problems and Prospects for Reform*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 21, 26-27 (William P. Alford, ed., 2006).

111 *See generally*, 2013 Vault Guide to the Top 100 Law Firms, http://www.vault.com/wps/portal/usa/rankings/landing?rankingId=1&regionId=0 (last visited

All of the top 100 firms in the United States have at least one or more offices abroad.[112] Legal scholars from both countries commonly engage in foreign exchange between American law schools and law programs at Korean universities.[113]

Due to the strong American influence on international trade law, an increasing number of Korean legal scholars now study abroad in the United States, whereas they formerly often spent time in Germany because of the country's strong influences on South Korea's civil law system.[114] Furthermore, litigation today generally involves hiring legal representation, whether foreign parties are involved or not. It is more than likely that investors seeking remedies in a host state will hire counsel native to the host state and that person will be able to inform the parties bringing suit of the laws and procedures of the host state's legal system. With the frequent exchange of scholars and professionals, the rapid dissemination of knowledge over the Internet, and the availability of foreign expertise through international law firms, it is unlikely that investors from the United States and South Korea would feel intimidated by their respective legal systems from a purely theoretical standpoint.

IV. REASONS BASED IN INSTITUTIONAL SOUNDNESS

The "robust" nature of the legal system in Australia and the United States also played a pivotal role in providing only state-to-state dispute settlement provisions in the AUSFTA.[115] Today, South Korea is a fully functioning, modern democracy.[116] During the 1990s, South Korea further substantiated its role as a major player in the global economy, joining the World Trade Organization (WTO) in 1995 and the Organization for Economic Cooperation and Development (OECD) in 1996. Critics of the investor-state provisions in the KORUS FTA argued that South Korea's economic progress also speaks to the soundness of the nation's legal institutions. Nevertheless, a nation's development status is often based largely on its economic progress, not the state of its legal institutions. A nation's economic progress does not guarantee that its legal system has

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Aug. 28, 2012) (listing firms with international offices, such as Skadden, Arps, Slate, Meagher, & Flom LLP; Sullivan & Cromwell LLP; and Davis Polk & Wardell LLP).

112 *Id.*

113 Song, *supra* note 104, at 26-27.

114 *Id.*

115 *See* Australia-United States Free Trade Agreement – Investment, *supra* note 15.

116 CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html (last visited Aug. 28, 2012).

advanced in a similar manner. A nation that may be a functioning democracy can still require reform before its judiciary can be declared truly independent from unlawful influences.

Political liberalization and rule of law did not immediately accompany South Korea's rapid economic growth following the Korean War.[117] Although South Korea declared itself a democracy after World War II, the nation officially remained under military rule until the election of President Kim Young-sam in 1993.[118] During this period, the military dictatorships that governed the country also stunted the development of the judiciary as an independent entity.[119] While the Court Organization Act in 1949 created a three-tiered, independent judicial system in South Korea, the statute functioned largely only to create a court system that still operated at the behest of the executive branch.[120] The lack of an independent judiciary was not addressed until the South Korean legislature passed the revised Constitution of 1987.[121] The 1987 Constitution granted the Supreme Court the authority to review lower court decisions and guaranteed that judges would not be removed from office at the whim of the president.[122]

An evaluation of South Korea's legal system demonstrates that although the nation's judiciary is largely independent, certain practices by its legal profession suggest it is not entirely immune from influence. First, the extreme difficulty of South Korea's bar examination has led to the creation of a legal profession that is elite but limited in its numbers and its body of knowledge. Second, both judges and prosecutors are influenced by their superiors and use the power of their position beyond what their office dictates. It is likely that a lack of confidence in the soundness of South Korea's legal institutions is one of the main reasons behind adopting investor-state dispute settlement provisions in the KORUS FTA.

A. Problems with the Legal Education System

Many scholars believe that the root of South Korea's problems with its legal system stems from the structure of the legal education system and its incompatibility with the judicial examination, or South Korea's equivalent of a bar examination. The judicial examination in South Korea

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[117] Song, *supra* note 110, at 22.

[118] CIA World Factbook, *supra* note 116.

[119] DOH C. SHIN, MASS POLITICS AND CULTURE IN DEMOCRATIZING KOREA, at xxii (1999).

[120] DAE-KYU YOON, LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987, 119 (2010) [hereinafter YOON, LAW AND DEMOCRACY].

[121] *Id.* at 120.

[122] *Id.* at 120-21.

allows only the upper echelon of students studying law each year to become practicing attorneys or judges. The result is an insufficient number of practitioners with limited expertise on many modern subjects of law that are essential to investors and businesses operating on an international scale.

The current education system for the legal profession leads to academic training for a large number of individuals, with only a very small number of them passing the judicial examination and moving on as practicing lawyers, judges, and prosecutors.[123] Although the passage rate has grown to approximately 1,000 people annually, yielding a profession of almost 10,000 practicing members, [124] these numbers dwarf in comparison to those for the various state bars in the United States. The South Korean government initially created the judicial examination for the sole purpose of recruiting judges and prosecutors.[125]

Private practice existed as an occupation only for former judges and prosecutors after they retired or stepped down from public office.[126] After all these years, the effect has been a scarcity of lawyers as well as high legal fees charged by those in practice.[127] While this process may have been sufficient in the budding days of Korea's legal system, South Korea's legal market now has greater demands. Foreign investors operating in South Korea cannot feel confident about a legal system where securing representation may be difficult and exorbitant in costs.

The current legal education and bar examination system in South Korea also fosters legal professionals who are familiar with only a limited body of law and prevents the development of expertise in more specialized subjects such as intellectual property law, international transactions, and international trade law.[128] The notoriously challenging nature of the judicial examination causes undergraduate law programs at South Korean universities to emphasize an exam-oriented curriculum and its students to ignore academic subjects outside of the judicial examination.[129]

Both students and universities focus primarily on the traditional subjects of law, namely constitutional, administrative, civil, commercial, and criminal law, as well as civil and criminal procedure.[130] While study abroad programs often offer students the opportunities to gain a broader exposure of

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123 *See* Song, *supra* note 110, at 24.

124 Dae-Kyu Yoon, *The Paralysis of Legal Education*, *in* LEGAL REFORM IN KOREA 36, 40 (Tom Ginsburg, ed., 2004) [hereinafter Yoon, *The Paralysis of Legal Education*].

125 YOON, LAW AND DEMOCRACY, *supra* note 120, at 134.

126 *Id.*

127 *Id.* at 135.

128 *See* Yoon, *The Paralysis of Legal Education*, *supra* note 124, at 42.

129 *See* Song, *supra* note 110, at 25.

130 Yoon, *The Paralysis of Legal Education*, *supra* note 124, at 40.

legal knowledge, only a small number take advantage of this opportunity due to pressures to focus on the judicial examination.[131]

Legal professionals currently have limited opportunities to explore specialized areas of law even after graduating from their undergraduate law programs. Those in the undergraduate law program who do not pass the judicial examination often pursue doctorate degrees in law in order to become academics.[132] However, focusing on specialized subjects at the graduate level is also difficult because the curriculum is limited by the university's resources. University law programs often concentrate their resources on traditional subjects to produce professors who can teach students how to pass the judicial examination.[133]

Those who are fortunate enough to pass the judicial examination are enrolled in the Judicial Research Training Institute (JRTI) at the Supreme Court of Korea to receive practical training from experienced judges, prosecutors, or attorneys.[134] But the education at the JRTI has long been oriented toward the training of judges and prosecutors due to its historical purpose of catering to those entering these two professions.[135] Thus, while more specialized courses are offered, the practical training offered at the JRTI also results in emphasizing subjects that are considered traditional to the study of law in South Korea.[136]

The lack of legal professionals in South Korea, whether in public service or in private practice, who can bridge the gap between U.S. investors and the South Korean legal system is a legitimate cause of concern for foreign investors who have to utilize the court system. Recent developments, however, suggest that South Korea's legal practitioners will make significant strides in expanding the breadth of their legal knowledge. In 2007, the South Korean government adopted a new system of legal education based on the American law school system.[137]

Under the reformed legal education system, former law programs at the undergraduate level will be gradually phased out.[138] In their place, universities will open law schools operating at the graduate education level, and those schools will be primarily responsible for the training of legal professionals in both theory and practicum.[139] Graduates will sit for a new

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131 *See* Song, *supra* note 110, at 25.

132 *Id.*

133 *Id.*

134 *See* Yoon, *The Paralysis of Legal Education*, *supra* note 124, at 41, 43.

135 Song, *supra* note 110, at 34.

136 *Id.*

137 YOON, LAW AND DEMOCRACY, *supra* note 120, at 134, 139.

138 *Id.* at 141.

139 *Id.* at 139.

bar examination, where the success rate is expected to be about 70 to 80 percent for anyone who has completed a graduate law program.[140] For the private sector, many large law firms in South Korea also offer their associates the opportunity to study for one or two years in the United States, followed by training at an American law firm to compensate for the absence of these opportunities while they were at university.[141]

The combined efforts of the South Korean government, universities, law students, and law firms will modernize and reinvigorate South Korea's legal profession. With the new reforms in education and the bar examination, law students will have more time and freedom to explore specialized areas of law. More importantly, as the small group of judges, public prosecutors, and attorneys increase in numbers, members of the bar will be forced to expand beyond domestic civil and criminal matters and develop practices in subjects of law that foreign investors find essential to their operations in a host state.[142] As more members of the South Korean bar acquire expertise in business-related legal subjects, U.S. investors will also gain more confidence in South Korea's legal system. Until then, these shortcomings in South Korea's legal system explain the presence of investor-state dispute settlement terms in the KORUS FTA.

B. Problems With the Legal Profession

Many legal practitioners in South Korea, specifically those within the public sector, have failed to live up to the democratic standards attained by countries of comparable economic development. Although the legal profession has demonstrated that they are largely free from external influences, the judiciary and the prosecutorial corps lack independence from internal cronyism. Judges and prosecutors engage in practices that undermine the administration of justice and rule of law by the South Korean legal system. Prosecutors in South Korea not only have overly broad authority, but they also overstep their bounds to protect those in political power.[143] The judiciary places tremendous weight on seniority, and judges

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[140] *Id.* at 142.

[141] Song, *supra* note 110, at 27.

[142] *Id.* at 30. *See also* Jae-Won Kim, *Legal Profession and Legal Culture During Korea's Transition to Democracy and a Market Economy*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 47, 50 (William P. Alford, ed., 2006) [hereinafter Kim, *Legal Profession and Legal Culture*].

[143] *See* Heekyoon Kim, *The Role of the Public Prosecutor in Korea: Is He Half-Judge?*, *in* LITIGATION IN KOREA 87, 101 (Kuk Cho, ed., 2010) [hereinafter Kim, *The Role of the Public Prosecutor*]; YOON, *supra* note 120, at 207-08.

often defer to those norms, even at the risk of undermining the credibility of the legal system.[144]

In South Korea, the prosecutor is the dominating force in a criminal investigation and can be the deciding factor in the distribution of criminal justice.[145] Historically, the Prosecutor General enjoyed a relationship close to the President, given that the President usually appointed the Prosecutor General as an instrument to exercise his authority.[146] South Korean prosecutors often do not think of their judicial role as subordinate to that of a judge.[147] The prosecutor governs the entire criminal procedure and entertains broad discretion during the indictment process.[148] With respect to criminal investigations, the prosecutor possesses the sole right to open an investigation and to stop it.[149] In fact, the police are prohibited from releasing any suspects without the prosecutor's permission.[150] A South Korean prosecutor's unchecked authority over a criminal case was most likely alarming to the United States, a nation that has long believed in checks and balances for entities and agents of the state in positions of power.

These concerns may not be altogether unjustified because South Korean prosecutors have fallen repeatedly to political influence. Prosecutorial action against corruption has long been biased by politics.[151] The prosecutorial corps has been lenient towards those politically powerful, and aggressive towards political outsiders.[152] South Korean prosecutors have indicted many political dissenters on charges of violating the National Security Law, despite that the law's original intent was to protect South Korea from the threat of North Korea, not to quash political expression.[153] Because prosecutors in South Korea are virtually unchecked in who they choose to indict, they can often avoid investigating corruption cases involving high-ranking politicians and government officials.[154]

The constant reluctance of prosecutors to enforce laws against wrongdoing by a sitting president and his close aides has led the South Korean public to believe that that those in power possess a "prosecutorial

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144 *See* Kim, *Legal Profession and Legal Culture*, *supra* note 142, at 53-54.

145 YOON, LAW AND DEMOCRACY, *supra* note 120, at 208.

146 *See* Tom Ginsburg, *Introduction*, *in* LEGAL REFORM IN KOREA 1, 11 (Tom Ginsburg, ed., 2004).

147 Kim, *Legal Profession and Legal Culture*, *supra* note 142, at 57.

148 YOON, LAW AND DEMOCRACY, *supra* note 120, at 208.

149 Kim, *The Role of the Public Prosecutor*, *supra* note 143, at 89.

150 *Id.*

151 David T. Johnson, *The Prosecution of Corruption in South Korea*, *in* LEGAL REFORM IN KOREA 47, 56 (Tom Ginsburg, ed., 2004).

152 *Id.*

153 Kim, *The Role of the Public Prosecutor*, *supra* note 143, at 88.

154 Song, *supra* note 110, at 58.

sanctuary," called *sungeuk*.[155] Although the South Korean government granted tenure to the Prosecutor General to ensure that the individual holding the position need not fear removal, the provision has so far served only to secure the office for those demonstrating loyalty to the president and his party.[156] The record of human rights abuse and political bias by the prosecutorial corps likely also served to convince the U.S. government that South Korea's legal system still needed to make significant progress.

Judges in South Korea have also engaged in practices that violate the rule of law. In recent years, controversy surrounding the independence of the judiciary involved judges who choose to enter private practice after they retire from the bench.[157] Unlike in the United States, where a judgeship usually occurs at the pinnacle of a lawyer's legal career, a judge in South Korea is regarded as a civil servant within the governmental system. A judge's career follows distinct promotional steps.[158] Because South Korea's judiciary is rigidly hierarchical, judges who fail to rise to the next promotion level by the time a more junior judge is promoted are expected to respect the tradition of the judicial branch by resigning.[159] Since civil law judges generally enter their service immediately after their legal education and training are finished, South Korean judges are usually reasonably young when they retire and can still afford the time to have a second career in private practice.[160]

Often, the corruption occurs when a former judge moves to private practice. Many judges choose to enter the private bar after their retirement because it is extremely lucrative.[161] While in private practice, these judges frequently take advantage of their former positions. They ignore conflicts of interest in order to gain business or advocate for their clients. As a matter of professional courtesy, it is customary for former colleagues and clerks in the court to refer some cases to retired judges when they open their law offices.[162] Even more problematic, seniority norms and personal connections mean that former judges arguing cases before the same court on which they used to serve will generally find their former colleagues deferring to them during trial.[163] Because the public is well aware of the influence a former judge can exert when arguing before a court, clients seek

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155 *Id.*

156 *Id.* at 59.

157 Ginsburg, *supra* note 146, at 11.

158 Song, *supra* note 110, at 54.

159 *Id.* at 54-55.

160 *Id.* at 54-55, 57.

161 Ginsburg, *supra* note 146, at 10-11.

162 Song, *supra* note 110, at 35.

163 Ginsburg, *supra* note 146, at 11.

out these ex-judges, inducing more judges to leave the court and adopt this illegal and unethical practice.[164]

V. REASONS BASED IN DIPLOMACY

Finally, and perhaps most significantly, there are diplomatic grounds for the United States and South Korea to exclude investor-state dispute settlement provisions from the KORUS FTA. U.S. interests in South Korea involve a wide-range of security, economic, and political concerns.[165] As some of those concerns have served as a source of serious conflict in recent years, it is likely that the U.S. and South Korean governments did not want to subject their diplomatic relationship to controversy that may result from lawsuits arbitrated in a state-to-state manner. Furthermore, the history between the United States and South Korea is marked by colonialism and Western dominance, whereas U.S. relations with Canada and Australia have a less controversial past. Because state-to-state dispute settlement involves the investor state's government pursuing remedies from the host state's government, such suits may carry stronger implications and result in more diplomatic damage than when a private party brings suit on its own accord.

A. South Korea as a Geopolitical Ally

The United States and South Korea have a decades-long history of positive diplomatic exchange.[166] The two nations have maintained strong ties since the Korean War of 1950-53 when the United States defended South Korea from external aggression.[167] In addition to being a key trading partner to the United States, South Korea is a crucial geopolitical ally, offering the United States instrumental backing in East Asia against China and North Korea. But while the two nations have consistently made public statements of mutual support, actions by more recent administrations and domestic protests in South Korea suggest that the relationship between the two countries remains delicate.

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164 *Id.*

165 *See* LARRY A. NIKSCH, CONGRESSIONAL RESEARCH SERVICE, KOREA-U.S. RELATIONS: ISSUES FOR CONGRESS 1 (July 25, 2008), *available at* http://www.fas.org/sgp/crs/row/RL33567.pdf.

166 *See* Lee Myung-bak, President, Republic of Korea, Address to a Joint Session of Congress (Oct. 14, 2011) (stating that the military, political, and economic alliance between the United States and South Korea was one "forged in blood.").

167 *See* NIKSCH, *supra* note 165.

South Korea's close proximity to China and North Korea renders the country vital to the United States' foreign policy strategy within the region. Although the United States and China have an active trading relationship and maintain a continuous dialogue, U.S. relations with China continue to be tenuous.[168] The United States is China's second-largest trading partner, and U.S. presidents have paid state visits to China since the establishment of formal diplomatic relations in 1979.[169] But the U.S. government disagrees with the Chinese government on topics such as human rights violations, Taiwan independence, intellectual property protection, currency, and restrictive trade practices.[170] As South Korea is a leading nation in Asia, its support to the United States is essential as the United States shapes its relationship with China in the coming years.

The United States and South Korea also have a longstanding partnership in their foreign policies with regard to North Korea.[171] The United States and other nations in the international community have attempted to engage in diplomatic conversation with North Korea over the years, most recently through the Six-Party Talks.[172] However, U.S. relations with North Korea remain contentious and largely unfruitful, especially as North Korea refuses to denuclearize and continues to engage in antagonistic behavior with its neighbors.[173]

North Korea-South Korea relations over the years were conciliatory during previous South Korean administrations,[174] but the current Lee administration asserted that it will link South Korean policy towards North Korea more closely to North Korea's progress in nuclear dismantlement.[175] North Korea subsequently responded by essentially shutting down North-South Korea relations, as Pyongyang expelled South Korean government officials and rejected President Lee's offer to hold annual springtime talks over the provision of food and fertilizer.[176] The United States and South

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168 *See* U.S. Department of State, U.S. Relations With China, http://www.state.gov/r/pa/ei/bgn/18902.htm (last visited Aug. 28, 2012).

169 *See id.*

170 *Id.*

171 *See* Interview by Warren Strobel with Hillary Clinton, U.S. Sec'y of State, in Washington, D.C. (Oct. 11, 2011) (regarding the Obama Administration's policy with North Korea, Secretary Clinton stated, "[W]e have been closely consulting with and coordinating with the South Koreans to an unprecedented degree."), *available at* http://iipdigital.usembassy.gov/st/english/texttrans/2011/10/20111013134557su0.2901837.html#axzz1pyaCcAsl.

172 *See* China, U.S. Department of State, *supra* note 168.

173 *Id.*

174 *See* NIKSCH, *supra* note 165, at 10-12.

175 *Id.* at 12.

176 *See id.*

Korea found further reason to maintain a unified front with the death of former North Korean leader Kim Jong-il in 2011. His son Kim Jong-un's ascension to leadership in North Korea has added another element of uncertainty to foreign relations with North Korea.[177] Consequently, the United States continues to maintain about 28,000 troops in South Korea to supplement the 650,000 South Korean armed forces in a joint effort to deter North Korea's 1.2 million-man army.[178]

B. Protests in South Korea Over U.S.-Korea Relations

The political and economic relationship between the United States and South Korea has appeared strong and mutually beneficial over the years, but a number of mass public demonstrations over issues such as U.S. military occupation and Korean beef suggest that South Koreans are increasingly eager to assert their nationalism and independence from the United States in their affairs. The South Korean government responded to recent protests over U.S. military presence with efforts to reduce American troops stationed in South Korea, although these reductions have now ceased.[179] Mass public disapproval over the South Korean government's lift on the ban of U.S. beef imports indicated that South Koreans felt strongly about protecting a chief staple of their national economy from outside competition.[180]

While the U.S. military has been stationed in South Korea since the Korean War, the United States began moving towards a supporting role in South Korean national security in 2003.[181] The accidental killing of two South Korean schoolgirls by a U.S. military vehicle and the subsequent acquittal of the soldiers in military court sparked a string of anti-American protests in Seoul.[182] Shortly thereafter, President Roh Moo-hyun, who had won the election after promising South Korean independence from the

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[177] *See* David Chance & Jack Kim, *North Korea Mourns Dead Leader, Son is "Great Successor"*, REUTERS, Dec. 19, 2011, http://www.reuters.com/article/2011/12/19/us-korea-north-idUSTRE7BI05B20111219.

[178] *Id.*; NIKSCH, *supra* note 165, at 1.

[179] *See* South Korea, U.S. Department of State, http://www.state.gov/r/pa/ei/bgn/2800.htm (last visited Aug. 28, 2012).

[180] *See* Stella Kim & Blaine Harden, *Fury at South Korean President Grows*, WASH. POST, Jun. 11, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/10/AR2008061001463.html.

[181] *See* NIKSCH, *supra* note 165, at 14.

[182] *See* Barbara Demick, *50,000 in South Korea Protest U.S. Policies*, L.A. TIMES, Jun. 14, 2003, http://articles.latimes.com/2003/jun/14/world/fg-korea14; NIKSCH, *supra* note 165, at 14.

United States, proposed policies that reduced U.S. military involvement in Korea.[183]

In 2004, the U.S. and South Korean governments reached an agreement that returned the Yongsan military base in Seoul and a number of other military bases in South Korea to the South Korean government.[184] The agreement also decided to eventually relocate all U.S. forces to south of the Han River by 2016.[185] Furthermore, the United States and South Korea agreed to reduce the number of U.S. troops in Korea to 25,000 by 2008, but a recent agreement between President George H.W. Bush and President Lee in 2008 stopped the number of U.S. troop reductions, capping the number at 28,500.[186] The United States will officially transfer wartime operational control to the South Korean military on December 1, 2015.[187]

Controversy arose again when the South Korean government removed a ban on U.S. beef.[188] South Korea suspended imports of U.S. beef in 2003 due to fears over mad cow disease when a cow in Washington State tested positive for the infection.[189] In 2008, public anger erupted and took form in the streets of Seoul when the Bush and Lee administrations reached an agreement that allowed for the import of all U.S. boneless and bone-in beef irrespective of age.[190] In the months prior to the lifting of the ban, 10,000 protestors gathered in a candlelight rally in Seoul, denouncing the planned imports.[191] When the Lee administration went forward with the scheduled imports, more than 18,000 people again rallied in Seoul's streets in protest of U.S. beef.[192] In response, the United States and South Korea revised the agreement to limit imports to U.S. beef of less than 30 months old.[193]

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183 *See* NIKSCH, *supra* note 165, at 14.

184 *See* South Korea, U.S. Department of State, *supra* note 179.

185 *See id.*

186 *See id.*

187 *Id.*

188 *See generally* Sang-Hun Choe, *South Korea Lifts Ban on U.S. Beef*, N.Y. TIMES, Jun. 26, 2008, *available at* http://www.nytimes.com/2008/06/26/world/asia/26korea.html.

189 *See Countries Move to Ban U.S. Beef*, CNN, Dec. 23, 2003, http://www.cnn.com/2003/BUSINESS/12/23/japan.madcow.reax/; NIKSCH, *supra* note 165, at 14.

190 *See* Si-soo Park, *Students Protest Imports of U.S. Beef in Candlelight Rally*, KOREA TIMES, May 2, 2008, http://www.koreatimes.co.kr/www/news/nation/2008/05/117_23569.html; NIKSCH, *supra* note 165, at 14.

191 *See* sources cited *supra* note 190.

192 *See* Choe, *supra* note 188.

193 *See* NIKSCH, *supra* note 165, at 14.

C. Investor-State Dispute Settlement Reduces Diplomatic Implications

Maintaining a robust diplomatic relationship is critical to both the United States and South Korea. The passage of the KORUS FTA has the potential to not only solidify a business relationship between the two countries, but also to strengthen its partnership over matters of national security. The KORUS FTA gives both the United States and South Korea a much-needed boost in the current recession and also reinforces a mutual bond to combat the nuclear threats made by North Korea. Some sources even go as far as to argue that the U.S.-South Korea alliance over trade and security are inextricably tied, and that a trade pact between the United States and South Korea is essential to the stability of the U.S.-South Korea relationship as a whole.[194] However, closer diplomatic ties between the two nations also mean the risk of greater repercussions. A free trade agreement between the United States and South Korea will result in a boom of investment exchange, but this growth almost certainly will give rise to more investment-related disputes. If such disputes gain enough media attention, nationalist interests in South Korea will have more fuel to ignite anti-American sentiments. In deciding what type of dispute settlement terms to include in the KORUS FTA, the United States and South Korea clearly wanted to minimize any risks of harming the diplomatic relationship between the two countries.

Investor-state dispute settlement provisions are less of a diplomatic risk than state-to-state dispute settlement provisions. In the case of state-to-state dispute settlement, investors who have exhausted all of the host state's domestic remedies will request its home government to espouse its claim as a means to take legal action against the host state. In doing so, a state essentially converts a private claim into a diplomatic dispute. Such action tends to increase international friction and can "inject unnecessary irritants" into foreign relations.[195]

Of course, it is possible for governments to decline espousal or sacrifice an investor's interests in the course of legal action due to political considerations.[196] However, diplomacy by nature is extremely sensitive, and past incidents demonstrate that the South Korean public is easily provoked

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[194] *See Hearing on the U.S.-Korea Free Trade Agreement Negotiations Before the Subcomm. on Trade*, (Statement of Tami Overby, President, American Chamber of Commerce in Korea), *supra* note 48 ("Moreover, the failure to conclude an agreement almost inevitably would affect the strategic partnership between our countries, which is important to ensuring stability and security in Northeast Asia.").

[195] Dodge, *supra* note 8, at 28.

[196] *Id.*

when it comes to matters involving the United States.[197] Including state-to-state dispute settlement provisions in the KORUS FTA would open the door to frequent diplomatic disputes and would thereby potentially exacerbate underlying tensions between the two nations.

In contrast, investor-state dispute settlement reduces the significance of the state as a world actor, rendering the provision a more ideal solution for a trade agreement between the United States and South Korea.[198] Investor-state dispute settlement also involves investors from one state making claims against the government of another state, but direct claims by investors are less politically charged.[199] After all, it is not uncommon for governments to face actions brought against them by their citizens or citizens of a foreign state. Such actions generally do not carry the weight of actions brought on a state-to-state level.

Most importantly, because investors are pressing their claims without the assistance of their home state government, home states can maintain a position of neutrality during disputes.[200] Investor-state dispute settlement allows the United States and South Korea to avoid aggravating the sensitive nature of its diplomatic relationship while granting its citizens a means to make investment claims under the FTA. For both countries, this option is the best of both worlds.

VI. CONCLUSION

After years of dispute over its terms, the U.S. Congress ratified the KORUS FTA on October 12, 2011,[201] and the National Assembly of South Korea ratified the agreement on November 22, 2011.[202] With the pressure of America's ongoing recession and a presidential election year looming ahead, the Obama Administration pushed for and reached a supplemental agreement with South Korea to resolve the outstanding issues in the KORUS FTA.[203] The result was that the South Koreans made significant concessions

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197 *See supra* Part V.B.

198 *See* Dodge, *supra* note 8, at 27.

199 *Id.* at 28.

200 *Id.*

201 *See* Zachary A. Goldfarb & Lori Montgomery, *Obama Gets Win as Congress Passes Free-Trade Agreements*, WASH. POST, Oct. 12, 2011, *available at* http://www.washingtonpost.com/business/economy/obama-gets-win-as-congress-passes-free-trade-agreements/2011/10/12/gIQAGHeFgL_story.html.

202 *See* Cho, *supra* note 4.

203 Amy Tsui, *U.S., Korea Reach Supplemental Deal on Autos for Korea FTA, No Beef Solution*, INT'L TRADE REP., Dec. 3, 2010.

on automotives in exchange for the United States delaying the zero-tariff date on pork.[204] No changes were made to the investment chapter.

South Korea has a developed economy with a legal system that has made significant strides since the nation's early days as a democracy. Nevertheless, South Korea's economic status failed to act as the deciding factor for the dispute settlement provisions in the KORUS FTA. Instead, concerns with South Korea's legal system and the need for the United States and South Korea to minimize diplomatic friction have served as the biggest motivations behind the adoption of investor-state dispute settlement. The reforms to South Korea's legal education system will help develop South Korean lawyers well-versed in the modern aspects of business law, but the number of practicing attorneys is currently insufficient to handle the onslaught of disputes that may occur with the influx of investment after the KORUS FTA. Unfortunately, the South Korean legal system is not yet independent, given the corrupt practices of retired judges who accept favors from their former colleagues and the illegal bias that prosecutors grant members of their political party. The national security interests between the United States and South Korea gave both nations a final push towards a dispute settlement mechanism that reduced the opportunity for frequent clashes on a diplomatic level.

The motivations underlying the investor-state dispute settlement provisions in the KORUS FTA demonstrate that the economic status of a nation is not the strongest indicator for whether investor-state dispute settlement provisions will appear in an FTA. The development of a nation often points to whether a nation is likely to have a robust legal system. Ultimately, however, states will take a holistic look at their diplomatic relationship with another state in deciding the investment terms of a free trade agreement. In the case of the United States and South Korea, diplomatic stability continues to be of paramount importance. With more pressing problems involving North Korea and China on the table, neither the United States nor South Korea do not want individual investment claims to become a political football, used by either side as a distraction from the issues at hand..[205] Due to these diplomatic concerns, even if the United States did not have qualms with South Korea's legal system, it is likely that the U.S. government may have chosen investor-state dispute settlement over state-to-state dispute settlement.

State-to-state provisions are too risky and troublesome to become an increasing trend in U.S. free trade agreements. With investor-state dispute settlement, a state does not need to jeopardize its diplomatic relationship in

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[204] *Id.*

[205] Telephone interview with Jason Kearns, Trade Counsel, U.S. House Committee on Ways and Means (Mar. 5, 2012).

order to protect the investments of its citizens. A state also does not need to dread the possibility of being inundated with claims by foreign investors. If there is a trend to be drawn from the numerous U.S. trade agreements in the past few decades, it is that investor-state dispute settlement is currently the more attractive alternative for nations to safeguard the interests of the state as well as its citizens.

APPENDIX A

Investment Provisions in United States Free Trade Agreements
The United States has free trade agreements in force with 17 countries:

FTAs[206]	**Date of Implementation**[207]	**Date Entered Into Force**[208]	**Developing Country?**[209]	**Investment Provisions**[210]
Australia	Aug. 3, 2004	Jan. 1, 2005	No	State-to-state
Bahrain	Jan. 11, 2006	Aug. 1, 2006	Yes	Investor-state
Canada (NAFTA)	Dec. 8, 1993	Jan. 1, 1994	No	Investor-state
Chile	Sep. 3, 2003	Jan. 1, 2004	Yes	Investor-state
Colombia	Oct. 21, 2011	*Not Yet Entered*	Yes	Investor-state
Costa Rica (CAFTA)	Aug. 2, 2005	Jan. 1, 2009	Yes	Investor-state
Dominican Rep. (CAFTA)	Aug. 2, 2005	Mar. 1, 2007	Yes	Investor-state
El Salvador (CAFTA)	Aug. 2, 2005	Mar. 1, 2006	Yes	Investor-state
Guatemala (CAFTA)	Aug. 2, 2005	Jul. 1, 2006	Yes	Investor-state
Honduras (CAFTA)	Aug. 2, 2005	Apr. 1, 2006	Yes	Investor-state
Israel	Jun. 11, 1985	Sep. 1, 1985	No	None
Jordan	Sep. 28, 2001	Dec. 17, 2001	Yes	Investor-state
Mexico (NAFTA)	Dec. 8, 1993	Jan. 1, 1994	Yes	Investor-state
Morocco	Aug. 17, 2004	Jan. 1, 2006	Yes	Investor-state
Nicaragua (CAFTA)	Aug. 2, 2005	Apr. 1, 2006	Yes	Investor-state
Oman	Sep. 26, 2006	Jan. 1, 2009	Yes	Investor-state
Panama	Oct. 21, 2011	*Not Yet Entered*	Yes	Investor-state
Peru	Dec. 14, 2007	Feb. 1, 2009	Yes	Investor-state
Singapore	Sep. 3, 2003	Jan. 1, 2004	No	Investor-state
South Korea	Oct. 21, 2011	Mar. 15, 2012	No	Investor-state

[206] *See* WILLIAM H. COOPER, CONGRESSIONAL RESEARCH SERVICE, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 7 (Aug. 1, 2006), http://fpc.state.gov/documents/organization/70293.pdf; Executive Office of the President - Office of the U.S. Trade Representative, Free Trade Agreements, http://www.ustr.gov/trade-topics/industry-manufacturing/industrial-tariffs/free-trade-agreements (last visited Aug. 28, 2012).

[207] *See id.*

[208] *See id.*

[209] Who Are the Developing Countries in the WTO?, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Aug. 28, 2012).

[210] *See* Free Trade Agreements, *supra* note 206.