

The United States – Korea Free Trade Agreement: Path to Common Economic Prosperity or False Promise?*

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Abstract:

The U.S.-Korea Free Trade Agreement, currently awaiting ratification in the legislatures of both countries, is known to be the most significant bilateral trade agreement for the United States since

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the conclusion of the North America Free Trade Agreement (NAFTA) in 1993 and for Korea since the initiation of the FTA drive in 2003. Both governments have promoted the U.S.-Korea FTA as the trade agreement that will enhance trade between the two countries and promote economic prosperity. The article critically reviews the inherent features of the U.S.-Korea FTA and examines whether the FTA is expected to promote the promised economic prosperity for both countries. The article also discusses prospects and impacts of the FTA on creating even larger free trade agreements between East Asia and North America and between East Asia and Europe.

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I. INTRODUCTION

The historic U.S.-Korea Free Trade Agreement (FTA),¹ which is the largest FTA since the North American Free Trade Agreement (NAFTA) and the first FTA between major trading nations in North America and Asia, was agreed upon on April 2, 2007 after 14 months of negotiations, and signed on June 30, 2007.² Nonetheless, legislatures of the two countries have not been able to ratify the FTA after well over three years, although they might be a bit closer to ratification due to the renegotiation of the FTA on December 5, 2010.³ Considering the fact that the governments of the two countries were able to sign the controversial FTA after negotiations that continued for only 14 months, this failure to ratify the agreement for such a long time is an ironic aftermath.

The U.S.-Korea FTA faced significant political opposition in the two countries: on December 18, 2008, Korean media reported that violence erupted in the National Assembly of Korea (*i.e.*, the Korean legislature) during a deliberation of the Foreign Affairs Sub-Committee at which the ruling party attempted to table a motion to pass the U.S.-Korea FTA, a prerequisite procedure for the vote of ratification at the plenary session under the Korean constitution. Meanwhile, the opposition party members of the Sub-Committee were blocked from entering the meeting room.⁴

¹ Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S. Kor., June 30, 2007, *modified*, Dec. 5, 2010 [hereinafter KORUS FTA], *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. A full text version is available from the Republic of Korea's Ministry of Foreign Affairs and Trade [hereinafter MOFAT], *at* http://www.fta.go.kr/pds/fta_korea/usa/eng/2E_all.pdf. For additional details regarding the U.S.-Korea FTA, *see Signed, Negotiated and Concluded FTAs*, http://www.fta.go.kr/new/ftakorea/kor_usa.asp?country_idx=19 (last visited Oct. 28, 2010) (in Korean).

² For the chronology of the U.S.-Korea FTA negotiations and signing provided by MOFAT, *see Korea — U.S. FTA*, *at* <http://www.mofat.go.kr/english/econtrade/fta/Concluded/US/index.jsp> (last visited Oct. 28, 2010) [hereinafter MOFAT, *Chronology*]. Particularly, the final completion of the negotiations and the subsequent signing of the agreement between the trade ministers of the two countries are detailed in MOFAT's press releases. Press Release, MOFAT, Han-Mi FTA Choijong Hyupjungmoon Gonggae [Final Text of the Korea-U.S. FTA Made Publicly Available] (No. 07-428, July 2, 2007), *available at* <http://www.mofat.go.kr/press/pressinformation/index.jsp> (enter "FTA" in search box and look for press release item no. 259, posted on July 2, 2007); Press Release, MOFAT, Han-Mi Jayu Muyuk Hyupjung (FTA) Hyupsang Tagyul [Korea-U.S FTA Negotiations Completed] (No. 07-191, Apr. 2, 2007), *available at* <http://www.mofat.go.kr/press/pressinformation/index.jsp> (enter "FTA" in search box and look for press release item no. 239, posted on April 4, 2007) (last visited Oct. 28, 2010).

³ *U.S., Korea Sign Sweeping Free-Trade Agreement*, *TAIPEI TIMES*, Dec. 5, 2010, <http://www.taipetimes.com/news/front/archives/2010/12/05/02003490144>.

⁴ For an account of the resistance of opposition Democratic Party members to tabling the agreement and their attempt to force an entry into the National Assembly after being barred

Representatives of NGOs, together with academics and former high-level government officials in Korea all expressed concerns about the unfairness of the terms of the FTA and possible adverse long-term effects on Korea's economy and society, some of which are elaborated upon in this article.

The prospect did not appear very promising in the United States, either. While the Republican administration welcomed the negotiated FTA at the time of its completion, the then Democratic majority leaders in Congress raised objections to its ratification.⁵ Hillary Clinton, the U.S. Secretary of State of the current administration, indicated that the re-negotiation of some of the terms of the U.S.-Korea FTA would be necessary before Congress could ratify it.⁶ Even though the United States

from attendance by Foreign Affairs Committee Chairman Park Jin, a member of the incumbent Grand National Party, *see* Hyun-Kyung Kang, *Assembly in FTA Conflict*, KOR. TIMES, Dec. 18, 2008, http://www.koreatimes.co.kr/www/news/nation/2008/12/116_36329.html.

⁵ For instance, Sander Levin from the State of Michigan, chair of the House Subcommittee on Trade, stated that the agreement failed to “assure elimination of the barriers against US automotive products and the opening of Korea's iron curtain around their market” and promised to oppose the deal unless changes were made to rectify this during the 90-day Congressional review period. *US and Korea Conclude Free Trade Agreement*, BRIDGES WEEKLY TRADE NEWS DIGEST, Apr. 4, 2007, <http://ictsd.org/i/news/bridgesweekly/7581>. Other prominent Democratic Senators—including then-campaigning presidential candidates Hillary Clinton and Barack Obama—were also known to oppose the U.S.-Korea FTA. *See Hilori ‘Han-Mi FTA Bijun Bandoe’ [Hillary ‘Opposes Ratification of Korea-U.S. FTA’]*, DONG-A NEWS, June 11, 2007, <http://www.donga.com/fbin/output?n=200706110083> (reporting presidential candidate Hillary Clinton's remarks at a meeting with the AFL-CIO that disparaged the Korea-U.S. FTA on grounds that it did not favor US auto exports and was disadvantageous to the US's current trade deficit, and predicted that other democratic candidates would be motivated to take similar positions so as to secure labor union support); *see also* reports of one commentator, noting that the U.S. Congress had not ratified a bill to extend normal trade relations with Vietnam, and that it was expected future trade bills would face greater difficulty in passing through the Democratic Congress. Steven Weisman, *Trade Bills Now Face Tough Odds*, N.Y. TIMES, Nov. 16, 2006, at C1 [hereinafter Weisman, *Trade Bills*].

⁶ *See* Michael Ha, *Clinton Indicates Renegotiation of KORUS FTA*, KOR. TIMES, Jan. 14, 2009, http://www.koreatimes.co.kr/www/news/nation/2009/01/116_37853.html (quoting Hillary Clinton during the Democratic administration's transition period as arguing that the “[FTA] provisions need[] to be renegotiated to ensure fair bilateral trade practices in the future . . . [and adding] that Obama hasn't changed his position on the FTA [negotiated and signed by the outgoing Bush administration] and continues to oppose the deal in its current form.”). Two months after the completion of the FTA negotiations in April 2007, and at the request of the United States, the two countries conducted additional negotiations on labor and environmental issues, signing a final text on June 30, 2007. WILLIAM H. COOPER ET. AL., U.S. CONG. RESEARCH SERV., *THE PROPOSED U.S.-SOUTH KOREA FREE TRADE AGREEMENT (KORUS FTA): PROVISIONS AND IMPLICATIONS* 39 (2010) (describing in note 148 how the two sides held further negotiations and included new language in the final text signed on June 30, 2007, incorporating “internationally-accepted” labor rights and certain environmental principles), available at <http://fpc.state.gov/documents/organization/>

made important achievements in the negotiations, fulfilling key American interests in the areas of agriculture, pharmaceuticals, intellectual property rights (IPRs), and services, some leaders in Congress doubted as to whether American automobiles would gain long-awaited market access in Korea as a result of the FTA and expressed concern that the FTA would further increase Korean exports to America at the expense of U.S. domestic automobile producers.⁷ A report circulated by the U.S. Senate Committee on Finance indicated that four major issues would have to be addressed before the U.S.-Korea FTA could be consented to, namely: the large imbalance in the automobile trade between the United States and Korea; problems involving U.S. beef exports to Korea; the opening up of the Korean rice market; and the treatment of Korea's outer production zone in North Korea, called the "Kaesong Industrial Complex."⁸

127268.pdf [hereinafter COOPER, PROVISIONS AND IMPLICATIONS]. For a brief outline of the "new trade policy" principles articulated by the U.S. Congress, *see infra* note 54. After the June 2007 signing date, the Korean government established its opposition to any proposed re-negotiation of certain provisions, arguing that such re-negotiation would undermine the balance of concessions between the two countries achieved through the original negotiations, although it had implied a possibility of "additional negotiations" that would address remaining concerns of the parties without involving any change of terms in the previously-agreed FTA provisions. In early November 2010, the two sides conducted "additional negotiations" in Seoul mostly with respect to the automobile sector, though it initially appeared as though they would remain mired in contention. *Obama to return home empty-handed: U.S., South Korea Fail to Reach Agreement on Free-Trade Deal*, NYDAILYNEWS.COM, Nov. 11, 2010, http://www.nydailynews.com/news/politics/2010/11/11/2010-11-11_us_south_korea_fail_to_reach_agreement_on_freetrade_deal.html; *see also* He-Suk Choi, *Korea, U.S., to Meet to Settle FTA Disputes*, KOR. HERALD, Nov. 5, 2010, <http://www.koreaherald.com/national/Detail.jsp?newsMLId=20101105000555> (explaining how the two nations were conducting additional meetings to iron out areas of disagreement in the run-up to G20 Seoul Summit); President Obama and President Lee, Joint Press Conference on G-20 (Nov. 11, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2010/11/11/president-conference-with-president-obama-and-president-lee-republic-kor> (quoting President Lee as announcing to the press that he had agreed with President Obama on the need for further talks between the Trade Minister and U.S. Trade Representative, and President Obama emphasizing the priority the U.S. placed on removing barriers, while articulating the ways in which the FTA would "create jobs and prosperity in both our countries" and constitute a "win-win for both countries."). However, on December 5, 2010 the two sides finally reached a final agreement and concluded renegotiation of the FTA. *See U.S., Korea Sign Sweeping Free-Trade Agreement*, *supra* note 3.

⁷ Congressional leaders' attitudes towards such deals were little changed from months earlier, when the Vietnam deal provoked stormy opposition. Weisman, *Trade Bills*, *supra* note 5, at C1, C5.

⁸ STAFF OF S. COMM. ON FIN., 111TH CONG., TRADE ISSUES IN THE 111TH CONGRESS (2009). *See also U.S. Senate Points Out 4 Potential Points of Discussion Regarding FTA*, ARIRANG.CO.KR, Jan. 14, 2009, http://www.arirang.co.kr/News/News_View.asp?nseq=

Despite the continuing controversies in Korea,⁹ and the air of discomfort and hesitation surrounding the ratification of the U.S.-Korea FTA by the U.S. Congress, the legislatures of both countries are expected to eventually ratify the FTA because of the closely interconnected political and economic interests of the two countries.¹⁰ The two countries may consider that if the proposed U.S.-Korea FTA fails to go into effect, the repercussions will be felt not only in the economic sector, but also in the political and diplomatic sectors.¹¹ Such interconnectedness has developed over several decades: the United States and Korea have maintained a strong military alliance and close economic relations for over six decades. In 2008, trade between the United States and Korea amounted to US\$84.74 billion, making the United States Korea's third-largest trading partner and Korea the United States' seventh-largest trading partner.¹² This FTA

86330&code=Ne4 (describing the Senate Finance Committee's position on the four major changes that the FTA would have to include, while forecasting "a rough road ahead for the already signed and sealed free trade agreement . . .").

⁹ See Jaemin Lee, *Korea-U.S. Economic Relationship With or Without an FTA: KORUS FTA as a Better Alternative to Manage the Bilateral Economic Relationship*, 2009 JOINT U.S.-KOREA ACADEMIC STUDIES 159 [hereinafter LEE, BETTER ALTERNATIVE], available at <http://www.keia.org/Publications/JointAcademicStudies/2009/Jaemin.pdf> ("Korea has concluded roughly about 2,500 treaties since its inception in 1948, but probably none of them have caused such a heated controversy and debate as we are observing with respect to [the Korea-U.S. FTA]."). There are currently 227 treaties in force between the two countries, none of which has invited a similar level of ongoing national controversy. For a summary from MOFAT of treaties the Republic of Korea has signed to date, see *Daehan Mingug Yangja Joyag Jeongbo: Balhyo Joyag [Republic of Korea Bilateral Treaty Information: Treaties in Force]*, <http://www.mofat.go.kr/state/treatylaw/treatyinformation/index.jsp> (listing bilateral treaties to which Korea is a signatory in reverse chronological order).

¹⁰ In a recent interview, President Barack Obama pledged to push for ratification of the U.S.-Korea FTA. Mike Dorning & Julianna Goldman, *Obama Says He's 'Fierce' Free-Market Advocate, Rejects Critics*, BLOOMBERG BUSINESSWEEK, Feb. 11, 2010, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDLk0IPYaSa0> ("[President Obama] said he would press for passage this year of free-trade agreements with South Korea, Panama and Columbia, though he cautioned that 'different glitches' must first be negotiated with each country."). Once ratified, the agreement goes into effect 60 days after the exchange of instruments notifying the other side of completion of respective domestic procedures. See KORUS FTA, *supra* note 1, art. 24.5, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file12_12723.pdf. ("This Agreement shall enter into force 60 days after the date the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures or on such other date as the Parties may agree.").

¹¹ See LEE, BETTER ALTERNATIVE, *supra* note 9, at 166 ("If the proposed KORUS FTA fails to go into effect, the impact will not be simply confined to the obvious economic loss. Needless to say, political and diplomatic repercussions will certainly follow. . . .").

¹² See generally MOFAT, KOREA-U.S. TRADE SUMMARY (Dec. 2009), <http://www.mofat.go.kr/english/econtrade/bilateral/issues/index2.jsp?TabMenu=TabMenu2> (listing export, import, trade volume and trade balance values from 2006 to September

between the two countries stands to be the most significant trade agreement for the United States since NAFTA in terms of its economic and trade impact.¹³ Due to the broad political and economic effects it will have on both countries, as well as on the trade and economy in Asia and beyond, the proposed U.S.-Korea FTA has become a subject of much interest and considerable debate. This article provides a discussion of the background of the U.S.-Korea FTA, the key issues involved, and its broader impact on the trade relations in the Asian-Pacific region and beyond.

II. HISTORY AND BACKGROUND OF THE U.S. -KOREA FTA

A. *Economic Background*

The FTA talks between the United States and Korea began in November 2004 when the two countries agreed, at a Trade Ministers' meeting held in Chile, to hold preliminary working-level talks to examine the feasibility of an FTA between the two countries.¹⁴ The driving forces behind the U.S.-Korea FTA can be analyzed from many different angles. First, from the U.S. economic perspective, Korea provides a major export market, and the United States wants to increase access to products and services markets in which it has a competitive advantage, such as in agricultural and pharmaceutical goods, as well as the financial services market. Because Korea, in Washington's view, has a low level of openness in these markets, the United States can expect the FTA to yield large increases in exports.¹⁵ For this reason, the Office of the United States

2010). However, it should be noted that if the "Chinese Diversion" effect—encompassing Korean products made in China but destined for the U.S. market, which are not accounted for in the Korean statistics—is duly accounted for, the United States may still be the largest trading partner of Korea. See, e.g., U.S. CENSUS BUREAU, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES, EXHIBIT 14: EXPORTS, IMPORTS AND BALANCE OF GOODS BY SELECTED COUNTRIES AND GEOGRAPHIC AREAS (Feb. 11, 2009), available at <http://www.census.gov/foreign-trade/Press-Release/2008pr/12/exh14.txt> (reflecting cumulative 2008 U.S. imports from China and Korea, amounting to US\$337.79 billion worth of imports from China, compared to US\$48.08 billion worth of imports from Korea in the same period).

¹³ See *U.S. Senate Points Out 4 Potential Points of Discussion Regarding FTA*, ARIRANG.CO.KR *supra* note 8.

¹⁴ MOFAT, *Chronology*, *supra* note 2.

¹⁵ According to the U.S. International Trade Commission's Report to Congress, Korea's exports to the United States are expected to increase by 21% under the U.S.-Korea FTA, whereas Korea's imports of U.S. agricultural products will increase by more than 200% in four years. U.S. INT'L TRADE COMM'N ("USITC"), USITC PUB. 3452, U.S.-KOREA FTA: THE ECONOMIC IMPACT OF ESTABLISHING A FREE TRADE AGREEMENT ("FTA") BETWEEN THE UNITED STATES AND THE REPUBLIC OF KOREA (Inv. No. 332-425, 2001) [hereinafter USITC, Impact], available at <http://www.usitc.gov/publications/docs/pubs/332/pub3452.pdf>. U.S. exports to Korea of manufactured products including movie films will increase by more than 54%, resulting in significant market expansion for major U.S. exports. *Id.* at 5-1.

Trade Representative (USTR) has emphasized the economic importance of the FTA with Korea, in contrast to other post-NAFTA U.S. FTAs, which had been more politically motivated.¹⁶ In addition, the United States can seek to benefit U.S. businesses by adopting a comprehensive FTA that requires Korean laws and practices to conform to U.S. standards in areas where U.S. trade interests are affected.¹⁷ Furthermore, the successful conclusion of the U.S.-Korea FTA may also prompt Japan, which provides an even larger market for U.S. exports, to consider its own FTA with the United States more seriously in order to avoid being excluded from the U.S. driven free trade area in Asia.¹⁸

In turn, the Korean government expects the FTA with the United States to provide its “middle-aged” economy with new growth momentum by expanding trade with the United States and improving its less productive service industries.¹⁹ The FTA is also expected to induce competition in their respective markets between Korean service industries and their competitive U.S. counterparts operating on a global scale. Proponents of

¹⁶ In light of the economic importance of the FTA, the former head of the USTR Rob Portman stated that the U.S.-Korea FTA “is the most commercially significant free trade negotiation [since NAFTA].” Press Release, Off. of the U.S. Trade Rep. (USTR), United States, Korea Announce Intention to Negotiate Free Trade Agreement (Feb. 2, 2006) [hereinafter Portman Press Release], http://ustraderep.gov/Document_Library/Press_Releases/2006/February/United_States_South_Korea_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html.

¹⁷ Further discussion on this point, as well as a treatment of the characteristics and problems of a comprehensive FTA, are provided in the next section.

¹⁸ The possibility of an FTA between the United States and Japan has long been discussed, but Japan’s unwillingness to open its agricultural market has always been an obstacle to the promotion of an FTA between the two countries. In an annual U.S.-Japan business meeting held in Tokyo, the U.S. ambassador to Japan, Thomas Schieffer, said that agriculture must be included in any talks if the United States and Japan are to discuss a free trade agreement, and that Washington would not be prepared to talk about one so long as Japan treats its agriculture sector “in a different way.” See Ambassador Thomas Schieffer, Address Before U.S.-Japan Business Council at the Imperial Hotel (Nov. 13, 2006) (“The second tenet that is important to remember is that agriculture has to be a part of any negotiation, whether you call that a free trade agreement or an economic partnership agreement. . . . Comprehensive in the American context means agriculture has to be included.”), available at <http://tokyo.usembassy.gov/e/p/tp-20061113-74.html>; see also EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL 33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS, at 14 (2011), available at <http://www.fas.org/sgp/crs/row/RL33436.pdf> [hereinafter CHANLETT-AVERY, ISSUES].

¹⁹ The Korean economy had been one of the most rapidly growing economies since the 1960s until the 1997 financial crisis. It recovered from the crisis, but its economic performance became sluggish, showing only 0.7 percent real growth in gross national income in 2005, with some improvement of 2.6 and 3.9 percent in 2006 and 2007, respectively. See generally BANK OF KOR., ECONOMIC STATISTICS SYSTEM (ECOS), http://ecos.bok.or.kr/jsp/use/economyinfo_e/EconomyInfoCtl.jsp?actionType=&searchGubun=4&lm=5&nowNo=1.

the U.S.-Korea FTA argue that by inducing this competition, the agreement will enhance the quality and competitiveness of Korean service industries, thereby simultaneously improving consumer welfare and creating more service-related jobs.²⁰ This supposedly positive effect of the U.S.-Korea FTA on the Korean economy has been subjected to intense debate. The following section provides a discussion on this point.

B. Political Background

Although the economic aspects of the U.S.-Korea FTA have been emphasized by the governments of both countries, there is also a subtle, but significant political dimension to the agreement. China, Korea's largest export market,²¹ had approached Korea with an interest in beginning government-level talks for a free trade agreement,²² which would further strengthen the rapidly growing economic ties between China and Korea. Amid the growing Sino-American tension,²³ the U.S.-Korea FTA is in line with the strategic needs of the United States to hold China in check and to strengthen its political and economic alliance with the other East Asian countries.²⁴ From the Korean government's point of view, establishing closer economic relations with the United States through an FTA will also help solidify Korea's security cooperation relationship with its most

²⁰ Hyun-Chong Kim, Significance of the Korea-U.S. FTA from Korea's Perspective (Mar. 8, 2006), available at http://www.fta.go.kr/user/intro/Media_view.asp?idx=953¤tPage=20¤tBlock=2&search=title&keyword=.

²¹ See *supra* note 12.

²² Soh-Jung Yoo, *China Expresses Interest in FTA with Korea*, KOR. HERALD, Aug. 4, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=0000052410> [hereinafter Yoo, *China*]. During a meeting with Korean Prime Minister Lee Hae-Chan in Beijing, Chinese Premier Wen Jiabao expressed strong hopes for the early launch of FTA negotiations with Korea; see also Jin-Woo Lee, 'Tonghwa Suwap Gomapiji? FTA Haja.' *Joong-Il Jungsang Ittara Yogu* ['Aren't You Thankful for the Monetary Swap? Let's Sign an FTA.' *China and Japan Are Calling for FTAs*], E-DAILY, Dec. 13, 2008, <http://www.edaily.co.kr/news/NewsRead.edy?SCD=DA31&newsid=01207046586638192&DCD=A01502&OutLnkChk=Y> (reporting announcements by Japanese Prime Minister Taro Aso and Chinese Premier Wen Jiabao, during the December 2008 Korea-Japan and Korea-China summit meetings, declaring their interest in initiating FTA negotiations with Korea) [hereinafter Lee, *China and Japan*].

²³ See Jaemin Lee, *Torn between the Two Trade Giants: U.S.-China Trade Disputes and Korea*, 5 KEI ACADEMIC PAPER SERIES 5 (June 2010), available at <http://www.keia.org/Publications/AcademicPaperSeries/2010/APS-JaeminLee.pdf> (discussing Sino-American tensions and their effects on Korea).

²⁴ It has been reported that the United States was suspected of exerting influence over Korea's decision to pursue an FTA with the U.S. before China. See Yong-Ma Lee, *FTA, Joongug Daeshin Migug* [FTA: United States instead of China], MBC NEWS, Aug. 10, 2006, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=115&oid=214&aid=0000013951>.

important ally.²⁵ In the years preceding the FTA negotiations, some key security issues, including policies on North Korea, were the subject of disagreement between Washington and Seoul. This discord raised significant concerns and it was hoped that the new FTA with the United States would help patch up the differences and mollify anxiety over the perceived gaps in U.S.-Korea relations.²⁶

C. FTA Negotiations

Once the negotiations were initiated, both governments strived for a speedy conclusion of the negotiations. At the commencement declaration, the then head of the USTR, Rob Portman, optimistically stated that the negotiations would be completed by the end of 2006, and the Korean Trade Minister Hyun-Jong Kim also stated that the U.S.-Bahrain FTA — signed after only two rounds of negotiations — provided an ideal model for the U.S.-Korea FTA negotiations.²⁷ Reflecting on this declaration, the U.S.-Korea FTA negotiations were initially scheduled to take place only through to the end of the year, but were then extended until March of the following year.²⁸ Even though an agreement was finally reached between the two countries after rounds of treacherous negotiations, controversies still remain.²⁹ Concern about various provisions of the FTA, particularly in

²⁵ Jae-Joon Heo, *Han-Mi FTA, Nodong Shijang, Nosa Gwangae* [U.S.-Korea FTA, Labor Market, Labor-Management Relationship] (Kor. Lab. Inst., Seoul, S. Kor.), Apr. 23, 2006, cited in Cho Sang-Gi, *Iljari Jungga Tumuniupko, Dwaerae 'Gujojojong'* Wooryu [What Does Korea-U.S. FTA Mean to Laborers: Increase in Jobs is Ridiculous, In Fact Concerns About Restructuring], LABOR TODAY, Mar. 28, 2007, <http://www.labortoday.co.kr/photo/view.asp?arId=70273&pNo=46&mId1=09&mId2=04&sDate=&isView=l>.

²⁶ Won-Hyuk Lim, Visiting Researcher at the Brookings Institute, Washington D.C., held the view that the proposed U.S.-Korea FTA was not the proper way to solve this problem in the U.S.-Korea relations. See Won-Hyuk Lim, *Roh Moo-Hyun Daetongryungee Nixon Daetongryung Dalmattago?* [Does the Korean President Roh Moo-Hyun Resemble Nixon?], PRESSIAN NEWS, Aug. 30, 2006, www.pressian.com/scripts/section/article.asp?article_num=40060830164422&s_menu=%BC%BC%B0%E8.

²⁷ Portman Press Release, *supra* note 16.

²⁸ See *supra* note 2.

²⁹ The FTA negotiations between the United States and Korea proceeded expeditiously. When compared to the Korea-Japan FTA, which is in a state of deadlock after many years of discussions, extensive research work, and six rounds of negotiations, the U.S.-Korea FTA was not prepared nearly as well. One of this article's authors warned in a previous article that if the U.S.-Korea FTA negotiations were to continue at the proposed fast pace without domestic consensus, many problems could arise. See Yong-Shik Lee, *Korea – USA Free Trade Agreement: Issues and Outlook*, 15 KOR. FORUM ON INT'L TRADE & BUS. LAW 215 (2006) [hereinafter Lee, *Issues and Outlook*]. These problems have indeed occurred, including a widespread civil alliance against the U.S.-Korea FTA and strong opposition manifested in nationwide rallies in Korea.

Korea, still remains.³⁰ Intense demonstrations in opposition to the FTA swept through a number of cities in Korea during the negotiations.³¹ The situation in the United States did not appear so promising either, in view of the consistent demand by the Senate's Democratic majority for more concessions from Korea before it would consent to the FTA.³²

III. RECENT TRENDS IN FREE TRADE AGREEMENTS AND THE U.S.-KOREA FTA

A. General Development

As of December 2008, over 200 regional trade agreements (RTAs) were in effect,³³ and more than 60% of world trade volume was attributed to trades under RTAs.³⁴ This indicates that along with the WTO's multilateral trading system, the regional trading system based on numerous bilateral and multilateral FTAs³⁵ constitutes an integral part of the world trading system today. The number of RTAs has been rapidly increasing since the establishment of the WTO.³⁶ The reason for this increase can be traced into the growing difficulties for countries to reach agreements in the multilateral trading system of the WTO, which is comprised of as many as 153 countries.³⁷ The WTO member countries have shown significant differences in their interests and views, resulting in a deadlock in negotiation talks. Effective resolutions of these different interests through the WTO remain very difficult, if not entirely impossible. The stalled

³⁰ By November 2006, as many as 300 NGOs and labor unions in Korea had formed a civil alliance against the U.S.-Korea FTA. *Korea Sees Worst Labor Protests in Years*, CHOSUN ILBO, Nov. 23, 2006 [hereinafter *Labor Protests*], http://english.chosun.com/site/data/html_dir/2006/11/23/2006112361009.html.

³¹ On November 22, 2006, over 72,000 demonstrators in 13 cities rallied against the FTA. *See id.*

³² *See supra* note 5.

³³ *See* WORLD TRADE ORG., REGIONAL TRADE AGREEMENTS NOTIFIED TO THE GATT/WTO AND IN FORCE (Dec. 15, 2008), http://www.wto.org/english/tratop_e/region_e/cif_e.xls [hereinafter WTO RTAs] (listing all GATT/WTO treaties currently in force as of the stated date). To access more comprehensive information about every aspect of RTAs, *see generally* http://www.wto.org/english/tratop_e/region_e/region_e.htm.

³⁴ Mitsuo Matsushita, *Legal Aspects of Free Trade Agreements: in the Context of Article XXIV of the GATT 1994*, in WTO AND EAST ASIA: NEW PERSPECTIVES 497 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004).

³⁵ The number of RTAs was only 27 during the 1970s and the 1980s but increased to 64 in the 1990s and over 100 after 2000, rapidly increasing since the establishment of the WTO. *See generally* WTO RTAs, *supra* note 33.

³⁶ *Id.*

³⁷ *See* WORLD TRADE ORG., *Members and Observers* (July 23, 2008), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

negotiations of the Doha Development Agenda evidence this difficulty.³⁸ Accordingly, the current trend of entering into an FTA with other countries in the same region or with countries that share similar interests and views is expected to intensify.³⁹

Following this trend, both the United States and Korea, which had not been actively engaged in bilateral or multilateral regional trading arrangements until the 1990s,⁴⁰ began to increase efforts to conclude FTAs. Korea started with an FTA with Chile in 2004⁴¹ and then entered into FTAs with Singapore,⁴² the European Free Trade Association (EFTA),⁴³ the Association of Southeast Asian Nations (ASEAN)⁴⁴ and India,⁴⁵ all of which are currently in effect. Korea then completed negotiations FTAs with the United States and the European Union.⁴⁶ Korea is currently

³⁸ The DDA negotiations have just passed their ninth anniversary. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). The negotiations are currently bogged down in the swamp of competing national interests of 153 members of the WTO in the absence of a long-awaited breakthrough.

³⁹ See Yong-Shik Lee, *Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development?*, 39 J. WORLD TRADE 701, 702 (2005) [hereinafter Lee, *FDI*]; see also YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 141 (2006) [hereinafter LEE, RECLAIMING] (observing that RTAs “have significant effects on international trade because about 90 percent of WTO members, including a number of developing country Members, have signed at least one or more RTAs.”).

⁴⁰ The United States made only two FTAs until the 1990s: the NAFTA agreement and a bilateral FTA with Israel, the latter primarily for political purposes.

⁴¹ Free Trade Agreement between the Republic of Korea and the Republic of Chile, Chile-S. Kor., Feb. 15, 2003 (entered into force Apr. 1, 2004), available at http://www.fta.go.kr/pds/fta_korea/chile/eng/Text_of_Agreement.pdf.

⁴² Free Trade Agreement between the Republic of Korea and the Republic of Singapore, Sing.-S. Kor., Aug. 4, 2005 (entered into force Mar. 2, 2006), available at http://www.fta.go.kr/pds/fta_korea/singapore/kor/KSFTA.pdf.

⁴³ Free Trade Agreement between the Republic of Korea and the European Union, Eur. Free Trade Ass’n-S. Kor., Dec. 15, 2005 (entered into force Sept. 1, 2006), available at http://www.fta.go.kr/new/pds/fta_korea/eu/pdf_eng/Full_Text.pdf.

⁴⁴ Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations, June 2, 2009 (entered into force Sept. 1, 2009).

⁴⁵ Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India, India-S. Kor., Aug. 7, 2009 (entered into force Jan. 1, 2010), available at http://www.fta.go.kr/pds/fta_korea/india/eng/ALL_OF_CEPA_E.pdf.

⁴⁶ Korea and the E.U. signed the Free Trade Agreement Between the Government of the Republic of Korea and the European Union (Korea-E.U. FTA) on Oct. 6, 2010, and agreed to bring the agreement into effect beginning July 1, 2011. See Press Release, MOFAT, Korea-EU Free Trade Agreement to Enter into Force on July 1, 2011 (Sept. 20, 2010), available at http://www.mofat.go.kr/webmodule/htsboard/template/read/engboardread.jsp?typeID=12&boardid=302&seqno=309370&c=TITLE&t=&pagenum=14&tableName=TYP E_ENGLISH&pc=undefined&dc=&wc=&lu=&vu=&iu=&du=.

engaged in FTA negotiations with Canada, Mexico, Australia, New Zealand, Peru, Colombia and Japan.⁴⁷ Korea has already completed preliminary studies for the FTA together with China and is also expected to enter into FTA negotiations with China in the near future.⁴⁸

On the other hand, since NAFTA with Mexico and Canada, the United States has entered into bilateral FTAs with Singapore, Jordan, Bahrain, Israel, Chile, CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua), Australia, Morocco, Oman, and Peru.⁴⁹ The U.S. government has also signed FTAs with Korea, Panama, and Colombia. Currently, FTA negotiations are under way with Malaysia, Thailand, and the United Arab Emirates.⁵⁰ The United States is also a party to the FTAA negotiations and the Trans-Pacific Partnership.⁵¹ While it has shown interest in making an FTA with Japan, the third largest economy in the world, commencement of negotiations has been impeded by disputes over agricultural issues.⁵²

B. Social Impacts of FTA

The goals of recent FTAs — particularly those promoted by the United States — go well beyond removal of trade barriers to promote trade in goods and services: they include provisions that are designed to affect a broader range of domestic policies, including enforcement of intellectual property rights, protection of investment activities, establishment of environmental and labor standards, transparency in applications of domestic laws and regulations, and establishment of investment dispute settlement processes outside national court systems. This type of FTA is designed to bring a range of relevant laws and practices of the signatory

⁴⁷ The progress of Korea's various FTA negotiations is chronicled by MOFAT. See MOFAT, *FTA Status of Korea*, <http://www.mofat.go.kr/english/econtrade/fta/issues/index2.jsp>. The negotiations with Japan have been suspended over agricultural issues since November 2004, though "working level consultations" were reestablished from 2008 onwards. Yon-Se Kim, *Korea, Japan Struggling to Resume FTA Talks*, KOR. TIMES, June 25, 2008, available at http://www.koreatimes.co.kr/www/news/nation/2010/11/242_26529.html; see also MOFAT, *FTA Status of Korea: Korea-Japan FTA*, <http://www.mofat.go.kr/english/econtrade/fta/consideration/Japan/index.jsp>.

⁴⁸ See Yoo, *China*, *supra* note 22, at 1. A joint feasibility study of the China-Korea FTA, composed by academics and representatives of government and industry from both countries, was completed on May 28, 2010 after three and half years of work. They produced a report showing that the FTA will contribute to economic cooperation between the two countries and the economic integration of the Northeast Asian region.

⁴⁹ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *Free Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² CHANLETT-AVERY, ISSUES, *supra* note 18.

trading partners in line with those of the United States in order to create a favorable regulatory environment for U.S. businesses.⁵³ Provisions of the comprehensive FTA also carry certain social and political preferences, such as environmental and labor standards, which go beyond the realm of traditional trade liberalization.⁵⁴

Thus, the comprehensive FTA has potentially significant consequences not only for trade practices of the signatory countries, but also for their overall economic, cultural, and social policies.⁵⁵ For example, the United States demanded that the screen quota in Korea be reduced as a precondition for the initiation of the negotiations of the Korea-U.S. FTA. This quota, in fact, does not restrict the import of foreign movie films but mandates the number of days that Korean movie theaters must show only Korean movies. The reduction in the screen quota would not only make it easier for theatres to show foreign movies, but it would also affect the Korean cultural policy of protecting the minimal commercial viability of

⁵³ By way of example, in the course of lengthy negotiations for the U.S.-Korea FTA, each the two countries was engaged in intensive research into relevant statutes and precedents of the other. This research concerned both legal and factual aspects and was needed to get an accurate glimpse of how the agreement would actually operate in the two countries, mainly because the purpose of the agreement is to adjust respective domestic policies in accordance with the standards set in the U.S.-Korea FTA. Although this adjustment would not be economic integration per se, it still indicates that close policy coordination, one way or another, by the two governments is expected to arise from the agreement. See Jaemin Lee, *Minimizing the Aftershocks of the Korea-U.S. FTA: How to Manage Disputes Arising from the Two Countries' Discrepant Perspectives and Legal Systems* in *On Korea*, 2 KEI ACADEMIC PAPER SERIES 29, 30–33, Feb. 2009, available at <http://www.keia.org/Publications/AcademicPaperSeries/2008/LeeJaemin.pdf>.

⁵⁴ On March 27, 2007, Congress announced a “new trade policy,” which calls for the USTR to:

- Require countries to adopt, maintain and enforce basic international labor standards in their domestic laws and practices – not merely to “enforce their own laws.”
- Promote sustainable development and combat global warming by requiring countries to implement and enforce common Multilateral Environmental Agreements, and address illegal logging of mahogany in Peru.
- Re-establish a fair balance between promoting access to medicines in developing countries and protecting pharmaceutical innovation.
- Promote U.S. national security by protecting operations at U.S. ports.
- Ensure that [any] trade agreement accords “no greater rights” to foreign investors in the U.S. than to U.S. investors.

Press Release, Trade Subcomm. Chairman Sander Levin, Rangel and Levin Unveil New Trade Policy for America: Plan Incorporates Changes to Strengthen Pending FTAs and Regain Bipartisan Consensus (Mar. 27, 2007), available at http://www.house.gov/apps/list/press/mi12_levin/pr032707.shtml.

⁵⁵ LEE, RECLAIMING, *supra* note 39, at 151–152.

Korean movies and arts.⁵⁶ On this issue, opinions about the justification for the screen quota vary among Koreans, and many have argued that the prosperous Korean movie industry no longer requires such protection. At any rate, the Korean government's cultural and social policies, such as the screen quota, which aimed at protecting and preserving cultural activities will be challenged under the call for increased market access for foreign exports whenever these policies clash with foreign trade interests, regardless of whether these policies target foreign trade per se.

Another hypothetical example is the Korean universal health care system, which may prove to be an impediment to the operations of foreign for-profit hospitals and insurance companies. This is because of the monopoly the publicly funded system has over primary health care in Korea. If this health care system were to be abolished or reformed in order to create a better business environment for foreign hospitals, insurance companies and pharmaceutical companies, then the Korean health care policy would fundamentally change, as would the way in which health care is provided to the Korean population.⁵⁷ Suspension of the public health authorities' mandatory drug price review and authorization process — or limitation of the price regulation mechanism during the review process⁵⁸ — may also be expected to drive up public health insurance premiums to cover the higher cost of foreign drugs. It may then cause difficulty in maintaining the currently favorable premium for low-income families, which has been an important social policy in Korea. Although it is still too early to tell how the proposed FTA with the United States would implicate these important policy areas, these examples do indicate that the promotion of a comprehensive or higher level FTA may lead to fundamental changes in an array of domestic, social, economic, and cultural policies of the signatories. In this respect, there is a possibility that the U.S.-Korea FTA

⁵⁶ It is noteworthy that recently the United Nations sponsored a multilateral convention to recognize the authority of countries to adopt policies to preserve their respective cultural identities, which was accepted almost universally. *See* Convention on the Protection and Promotion of Cultural Diversity, art. 1 para. h, United Nations Educ., Scientific, and Cultural Org. ("UNESCO"), Oct. 20, 2005, UNESCO Doc. No. CLT-2005/Convention Diversité-Cult. Rev.2, *available at* <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

⁵⁷ The reduction of the screen quota has already been implemented at the request of the United States, but the abolition or amendment of the universal health care coverage is only a hypothetical example. Although it has been suggested that the current pharmaceutical provisions in the draft FTA can have a significant impact on the Korean health care system, the Korean government has neither announced any possibility of abolishing or amending the current health care system nor has the United States made any official demand to this effect. *See infra* notes 154 to 158 and accompanying text.

⁵⁸ *Id.*

may work as a legal framework that would affect important regulatory and policy mechanisms of Korea in a way that Korea has not envisioned.⁵⁹

C. *Economic Impacts*

FTAs can also have a significant impact on the economic development of the signatory countries. If an FTA is entered into between nations that are in different stages of economic development, and as a result the trade barriers are abolished, the nation in the lower stages of development may lose its ability to adopt trade measures for the protection and development of its own industries. This would entrench the existing industrial structure of that nation at the time when the FTA was entered into, making it harder for the nation to develop industries in which the other trading partner nation had an advantage.⁶⁰ On the other hand, an argument has been made that the opposite effect may be likely, in that the FTA may facilitate structural changes. The latter argument seems to highlight that the signatory country may develop industries in which it has a competitive advantage, but this argument tends to disregard the critical possibility that the FTA may eliminate the potential for nurturing a competitive advantage in industries that are not initially competitive *vis-à-vis* their foreign counterparts by taking away the ability of the domestic government to adopt trade-related industrial policies to protect such industries. If such industries are exposed to full competition by superior foreign industries as a result of acceding to an FTA, future development of these industries would be very difficult. For example, if the Korean automobile market had been open to foreign imports, as it is now, with little or no trade barriers during the 1960s and the 1970s, when the Korean automobile industry was in its incipient stage and, therefore, substantially weaker than those of Japan or the United States, Korean automobiles would have been unable to compete with the superior foreign-made automobiles as they do now. The revenue base of the Korean automobile industry

⁵⁹ See Chol Lee, Policy Statement, FTA, KORUS FTA, and Challenges of the Labor Movement (Aug. 31, 2006) [hereinafter Lee, Challenges], available at http://kctu.org/?module=file&act=procFileDownload&file_srl=3267&sid=d8ca1ababfffd479bbd440605527dd01 (explaining, from Lee Chol's vantage as Deputy Director at the Policy Department of the Federation of Korea Trade Unions [FKTU], the meaning of core provisions of the Korea-U.S. FTA as well as reasons for which "it is so problematic" and its consequences for organized labor).

⁶⁰ See Lee, *FDI*, *supra* note 39, at 704-08 (citing Ha-Joon Chang's study which demonstrates that "virtually all developed countries today adopted industrial promotion policies [at some stage in their past development history] to establish some manufacturing basis with the extensive use of subsidies and trade protections. . . ." and concluding that "trade protection, although discounted by many 'mainstream' economists for creating economic inefficiency, is closely relevant to development.").

would have been eradicated, and it would have been difficult for the industry to grow into the internationally-competitive industry that is today.⁶¹

Negative effects on the economic development of the services trade may result under the U.S.-Korea FTA. This is particularly the case in current trends of services markets liberalization, where market opening is focused on capital-intensive service sectors such as the financial sectors in which developed countries have competitive advantage; and less so in areas in which developing countries have competitive advantage. For instance, while developing countries can provide ample supply of labor through movement of natural persons, this has been, in fact, tightly controlled and little market access negotiations have been undertaken in this area because of domestic employment and security issues.⁶² In the aftermath of the 2008 economic downturn, some countries adopted immigration regulation that further restricted the opportunities for foreign service providers to provide services in their domestic service markets.⁶³ Even if reasonable labor market opening was to be agreed on, the unique difficulties associated with the movement of labor, such as language barriers, cultural differences, and the hardships of family separation, would make it rather difficult for developing countries to enjoy their competitive advantage of having a large

⁶¹ There is substantial debate around the validity of infant industry promotion policy. See LEE, RECLAIMING, *supra* note 39, ch. 3.1 (explaining that in order to understand the true relationship between economic development and government promotion of homegrown industries, “[i]t is essential to consider historic and empirical evidence. . .”). Nonetheless, recent historical studies have shown that today’s developed countries developed their economies in the past through various government industrial facilitation policies and trade protection. See HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE ch. 2 (2003); see also *supra* note 60.

⁶² Some bilateral FTA negotiations have expanded the number of “working visas” to be granted to parties’ professional service workers. This indicates the close relationship between opening of service markets and immigration regulation. Tight immigration regulation would carry the potential of virtually vitiating or reducing the actual benefit of service market opening.

⁶³ See, e.g., American Recovery and Reinvestment Act of 2009, Div. A, Title XVI, § 1611 (2009). Section 1611 is called the “Employ American Workers Act.” This Act regards recipients of funding from the Troubled Asset Relief Program (TARP) as “H-1B Dependent Employers” under the relevant U.S. immigration regulation (*i.e.*, 20 C.F.R. § 655.736 (2001)) and imposes tight restrictions on these companies’ recruitment of foreign professional service providers. As a consequence, all things being equal, these companies and other companies who may envision future application for TARP funding refrain from employing foreign professional service providers who are willing to provide their services in the U.S. market. This may negatively affect the penetration of foreign service providers in the U.S. service market, even if the market is open in a technical or legal sense; see also Joint Press Statement, E.U.-ROK 2010 Brussels Summit (Oct. 7, 2010), *available at* http://www.mofat.go.kr/english/press/MinistryNews/20101007/1_13155.jsp (reporting the content of E.U. and Korean leaders’ announcements after signing the Korea-E.U. FTA at the 2010 E.U.-ROK summit).

amount of low cost labor in the services trade. For this reason, the liberalization of the service trade will arguably offer more export benefits to developed countries than developing ones.

As will be discussed later, the U.S.-Korea FTA service negotiations seem to have reflected this trend, and the focus of the agreement was on the liberalization of capital-intensive service markets such as financial services and broadcasting services. The U.S. service industries are expected to benefit more from the liberalization of services trade under the FTA, while the export benefits to the Korean service industries are expected to be limited by the significant gap in the productivity between the two countries' service industries.⁶⁴ Many U.S. service industries are among the most competitive in the world even though the recent financial crisis revealed problems with their operations. If Korean service industries, which are smaller in size and have lower productivity, face open competition with the larger and more efficient U.S. service industries, they may well lose their domestic sales base, and their growth potential will probably be negatively affected.⁶⁵ This could potentially lead to a long-term domestic economic loss outweighing the short-term increases in consumer welfare and gross domestic product (GDP) gains⁶⁶ from the higher economic efficiency resulting from free trade in this area.

Liberalization of the services trade under the FTA will potentially have a much more significant economic impact than liberalization of the goods market, where trade barriers have consistently been lowered since the GATT era.⁶⁷ Trade liberalization in the service area only began after

⁶⁴ See Organization for Economic Co-Operation and Development [OECD], *OECD in Figures 2005: Statistics on the Member Countries*, (Oct. 27, 2005) [hereinafter OECD, *Figures*] http://www.oecd.org/document/62/0,3746,en_2825_500246_2345918_1_1_1_1_00.html (showing that the average labor productivity of Korean service industries is reported at around 40% of that of the United States). According to the Korea Institute for International Economic Policy (KIEP), if 20% of the trade barriers were lifted the Korean trade balance in the service industries would worsen by US\$1.8 billion.

⁶⁵ Some have argued that this type of protectionism is a form of Mercantilism. However, this position is distinct from traditional Mercantilism in the sense that the focus of the protection is on growth potential rather than on the current state of an industry and its profits against foreign competitors.

⁶⁶ According to KIEP, consumer welfare and real GDP in Korea after the U.S.-Korea FTA will increase by 1.73% and 1.99%, respectively. See *Han-Mi FTA Chaegyul Ttae Shiljil GDP 1.99% Jungga* [After Conclusion of the Korea-U.S. FTA Real GDP Will Increase by 1.99%], CHOSUN ILBO (Jan. 19, 2006), <http://www.chosun.com/economy/news/200601/200601190356.html>. But see USITC estimate that the impact of the U.S.-Korea FTA on economic growth will be much smaller, with GDP "increas[ing only] by 0.2% [for the United States and 0.7% for Korea] as a result of the FTA." USITC, Impact, *supra* note 15, at 5-2.

⁶⁷ Since the establishment of the GATT, eight rounds of multilateral trade negotiations were completed. In each round, tariffs were successfully lowered by an average rate of 35%. As

the establishment of the WTO in 1995. The degree of liberalization remains low because WTO members have been somewhat reluctant to commit to opening their services market while the economic impact of market opening remains uncertain. Arguments have been raised that opening up the services market under the FTA will not only benefit the U.S. service industries but also those of Korea, the competitiveness of which could further improve through competition with the U.S. industries.⁶⁸ However, more research would be necessary to determine whether the current competitiveness of the Korean service industries will allow any meaningful competition with the U.S. counterparts.⁶⁹ From the perspective of industrial development, it is pertinent to question whether the Korean service markets should be opened up incrementally, as opposed to undergoing an immediate and radical liberalization.⁷⁰ The incremental approach could be modeled after the gradual trade liberalization of the automobile market, which resulted in the successful industrial development of Korea's automobile industry.⁷¹

There is concern that the proposed U.S.-Korea FTA, particularly the liberalization of the services trade, may also worsen the economic polarization in Korea that has been accelerating since the financial crisis in 1997.⁷² If the large scale, capital-intensive U.S. service industries were to

a result, after the Uruguay Round negotiations in 1994 the average import tariff rate applied to manufactured products by developed nations was a mere 3.9%. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 74 (2nd ed. 1997).

⁶⁸ Kyung-Chul Sun, Briefing to the Korean Government on the U.S.-Korea FTA: To Become a First Class Nation (Mar. 22, 2006), *available at* www.fta.go.kr/fta_korea/interview_view.php?page=1&board_id=989&country_id=19.

⁶⁹ According to preliminary research conducted by USITC, Korea's service exports are expected to decrease by over 5% under the U.S.-Korea FTA, which seems to indicate deterioration rather than improvement in competitiveness of Korean service industries. USITC, *Impact*, *supra* note 15, at 5-12.

⁷⁰ The opening of the Korean service market may also be prompted by the result of the WTO's currently on-going DDA negotiations, if they are successfully completed in the near future. As of this writing, it is difficult to predict the extent and terms of the DDA-imposed market opening of the Korean service market. If Korea, as a result of the DDA negotiations, assumes an obligation to open up its service market to a similar level as that envisioned in the U.S.-Korea FTA, discussion of the prospective impact on the Korean services market from the U.S.-Korea FTA would become moot. As the outcome of the DDA is hard to predict at the moment, the discussion in this paper on this issue is premised on the notion that the current services trade regime of Korea under the WTO remains the same for the time being.

⁷¹ Hang-Koo Lee, *Carmakers Succeeded in Localizing Foreign Models*, *KOR. TIMES* (July 9, 2010), http://www.koreatimes.co.kr/www/news/biz/2010/12/291_69133.html.

⁷² According to a recent report of the Korean Ministry of Finance and Economy, the Gini Coefficient worsened from 0.283 in 1997 to 0.310 in 2004 (the value of the Gini Coefficient ranges from 0 to 1, where 1 represents the highest income inequality). Jong-Hak Weon & Myung-Jae Sung, *Sodeugbunbae Gyeongcha Hwagdaewi Woningwa Jeongchaegdaeeung Banghyang* [*Causes of Increasing Income Inequality in Korea and Policy Suggestions*],

actively enter the Korean services market, those Korean individuals and companies that have the ability and the capital to cooperate with them will share in some portion of the profits. Meanwhile, the domestic service suppliers operating with relatively smaller capital will probably be excluded, and could experience significant difficulties in attempting to stay in business.⁷³ Although consumer welfare can increase through the advancement of these efficient foreign service industries,⁷⁴ and perhaps more jobs may also be created,⁷⁵ especially in temporary employment, if the domestic service industries collapse because they are unable to compete, then the resulting loss of individual businesses, combined with the unemployment problem expected in the agricultural sector after the FTA,⁷⁶ may actually have the effect of further polarizing the Korean society rather than bridging it.⁷⁷ To many observers of this agreement, this perceived worsening of the economic polarization in Korea has been a cause for concern.⁷⁸

KOR. INST. OF PUB. FIN. RESEARCH REPORTS (2007), available at http://www.google.com/url?sa=t&source=web&cd=2&ved=0CBsQFjAB&url=http%3A%2F%2F210.218.195.13%2Fbook_pdf%2F%25EC%2597%25B0%25EB%25B3%25B407-10_50.pdf&ei=JNiBTdzbn9DdgQfbn7S9CA&usg=AFQjCNG0ObBHXH1DVA1ifKsfe0RO7Jcvhw&sig2=cDqISS1L6bNnhrwJjzMD9A (in Korean, with English-language abstract at the end).

⁷³ This situation will be analogous to the dominance of big chain stores, such as Wal-Mart in the U.S. retail market, and the consequent elimination of small, independent retail stores in past decades.

⁷⁴ USITC, Impact, *supra* note 15, at 5-2.

⁷⁵ KIEP has estimated that around 100,000 jobs will be created. *After Conclusion of the Korea-U.S. FTA Real GDP Will Increase by 1.99%*, CHOSUN ILBO, *supra* note 66. But see USITC, Impact, *supra* note 15, at 5-15 (indicating that the expected change in demand for labor in the Korean service sector will be minimal, or less than 0.5%, which indicates that the job increase, if any, will be insignificant).

⁷⁶ See JIN-KYO SUH & JI-HYUN PARK, *Issues in the Agricultural Negotiation of a Korean-U.S. FTA Negotiation and Korea's Strategies* (2007) [hereinafter SUH & PARK, ISSUES] (estimating that 130,000 to 140,000 jobs will be lost in the agricultural sector), <http://www.kiep.go.kr/include/filedown.jsp?fname=PAIK200619.pdf&fpath=Pub0201&NO=180389&FNO=864> (in Korean, with English-language abstract at the end). See *infra* notes 90 to 95 and accompanying text for a more detailed discussion of agricultural issues and the FTA.

⁷⁷ See JIN-KYO SUH & JI-HYUN PARK, *Issues in the Agricultural Negotiation of a Korean-U.S. FTA Negotiation and Korea's Strategies* (2007) [hereinafter SUH & PARK, ISSUES] (estimating that 130,000 to 140,000 jobs will be lost in the agricultural sector), available at <http://www.kiep.go.kr/include/filedown.jsp?fname=PAIK200619.pdf&fpath=Pub0201&NO=180389&FNO=864> (in Korean, with English-language abstract at the end). See *infra* notes 90 to 95 and accompanying text for a more detailed discussion of agricultural issues and the FTA.

⁷⁸ Korean Minister of Finance and Economy Duk-Soo Han asserted at a workshop held by Korea's ruling party (Apr. 2, 2006) that reinforcing the social safety network to help socially-disadvantaged classes is in line with the U.S.-Korea FTA.

Moreover, the liberalization of the services market under the FTA may have to be extended beyond the trade between the United States and Korea by operation of relevant WTO rules. According to relevant provisions of the General Agreement on Trade in Services (GATS), if service industries are opened up through the U.S.-Korea FTA, the door may also have to be opened to the other WTO member nations that provide such services in either of these countries through local investment. The exclusive preferential treatment under an FTA is allowed as an exception to the requirement of the most favored nation (MFN) principle that prevents arbitrary discriminations among trading partners. Article 2 of GATS requires MFN treatment for services trade,⁷⁹ and GATS Article 5 authorizes FTAs as an exception to the MFN principle, allowing preferential treatment under an FTA to be applied exclusively to the trade between the signatories of that FTA.⁸⁰ However, even with the GATS Article 5 exception, if a service supplier is incorporated under the laws of the FTA signatory country it is regarded as qualified to receive the full FTA privileges of service suppliers from that country, even though in some sense this supplier is not originally from the particular FTA signatory country.⁸¹

Therefore, some consideration should be given to this (perhaps) unintended result. If the services markets were to be opened under the U.S.-Korea FTA, it may in effect become opened to service providers from other WTO members that are incorporated in either the United States or Korea. It should also be noted that the reciprocity between the signatories of the FTA does not apply to these other WTO members: they do not have to open their own services market beyond the concessions which they have already made in the WTO multilateral trade negotiations. Nevertheless, these member countries will enjoy, albeit indirectly, the benefit of the service market liberalization under the FTA if their service suppliers provide services through corporations set up in one of the signatory countries. Consequently, by operation of GATS Article 5.6, the signatories of the FTA may also lose their negotiation leverage in WTO service trade negotiations to the extent that they have or will have opened their services market to service providers from non-FTA signatory WTO members and which are incorporated in the signatory countries. As such, the total benefit

⁷⁹ See General Agreement on Trade in Services [GATS] art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1B, 1869 U.N.T.S. 183, *in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 287 (1999) [hereinafter WTO, THE LEGAL TEXTS] (providing in article 2(1) that “each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. . . .”); *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁸⁰ GATS art. 5.

⁸¹ *Id.* para. 5.

from the services market opening through an FTA would require careful consideration of all these multi-dimensional issues beyond enhancement of competition and consumer welfare.

IV. KEY ISSUES IN THE U.S.-KOREA FREE TRADE AGREEMENT

A. Overall Observations

The U.S.-Korea FTA proposes to achieve massive trade liberalization, by removing over 90% tariffs for manufactured products in three years, and eventually eliminating all of them; all market restrictions are to be lifted for agricultural products except rice.⁸² Yet, the overall prospect of the U.S.-Korea FTA would only become ascertainable if one would scrutinize how the bilateral trade actually plays out under the agreement. For instance, regardless of reciprocal elimination or reduction of tariffs, the application of the rule to the actual situation may lead to imbalance in trade benefits expected to result from the agreement. Korea's major export industries such as automobiles, shipbuilding, electronics and semiconductors, are not expected to benefit much under the FTA because U.S. import tariffs on these products are already low, ranging from 0% to 2.5%.⁸³ In addition, the recent experience of Korea is that the actual impediments to Korean exports to the United States are U.S. antidumping measures, countervailing duties, and extraterritorial applications of antitrust laws, rather than tariffs.⁸⁴ All major Korean exporters in these areas have had vivid experience in coping with these measures of the United States.⁸⁵

⁸² See Press Release, MOFAT, Han-Mi Jayu Muyeog Hyeobjeong (FTA) Bunyabyeol Choejong Hyeobsang Gyeolgwa [Final Korea-U.S. FTA Negotiation Results for Each Sector] (Apr. 4, 2007) [hereinafter MOFAT, Final Negotiation Results], http://www.fta.go.kr/new/ftakorea/broadpsd.asp?country_idx=19 (use arrows to look for press release no. 112, dated Feb. 4, 2007). See generally USITC, USITC PUB. 3949, U.S.-KOREA FREE TRADE AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS (Inv. No. TA-2104-24, 2007), available at <http://www.usitc.gov/publications/332/pub3949.pdf>.

⁸³ It has also been pointed out that the rapidly increasing overseas production of Korean export industries will diminish the benefits from the FTA. See Lee Hae-Yeong Kyosu 'Han-Mi FTA, Choidae Gukjae Sagigug [Professor Hae-Yeong Lee: 'Korea-U.S. FTA Is Worst International Fraud], CHOSUN ILBO, June 16, 2007, http://news.chosun.com/site/data/html_dir/2007/06/16/2007061600073.html.

⁸⁴ Seventy-five antidumping and countervailing duty investigations were initiated by the United States against Korean exports from 1965 to 2005, and a total of US\$37.3 billion worth of Korean exports were subjected to U.S. trade measures from 1985 to 2005. KOREA TRADE COMMISSION, MUYEOGGUJE GWANLYEON TONG-GYE [FOREIGN TRADE REMEDY INVESTIGATION STATISTICS] (2010), available at <http://www.ktc.go.kr/kboard/view.jsp?bm=15&pg=1&bd=999999925> [hereinafter KTC, STATISTICS].

⁸⁵ If trade disputes provide any reliable barometer for the extent of the trade measures that Korean exporters face, during the 2007-2008 period when the U.S.-Korea FTA was agreed

Particularly, antidumping investigations by the United States against Korean exporters have been a perennial source of concern for both industry and the government.⁸⁶ Unfortunately, it is apparent that the United States is not prepared to remove these barriers for the benefit of Korean exports. Former USTR Rob Portman declared that the United States would not change its laws and systems because of the U.S.-Korea FTA, which would govern those trade measures.⁸⁷ Thus, an argument can be made that Korean exporters will continue to deal with their major hurdles even in the post-U.S.-Korea FTA era, while their U.S. counterparts, particularly in the areas of agriculture, pharmaceuticals, and services, stand to gain significantly.⁸⁸ The result from these imbalanced FTA gains has the potential of shifting the overall trade balance more in favor of the United States. According to

upon and legislative ratifications were pursued, there were eight disputes at the WTO dispute settlement procedure that involved various trade frictions between the two countries, either as direct parties or indirect parties (*i.e.*, third parties). See Panel Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (June 30, 2010); Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (Feb. 4, 2009); Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/AB/R (July 16, 2008); Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R (Nov. 28, 2007); Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (Jan. 30, 2007); Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007); Request for Consultations by the United States, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, WT/DS347/1 (Jan. 31, 2006); Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (Apr. 18, 2006); Request for Consultations by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, WT/DS353/1 (June 27, 2005); Request for Consultations by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1 (Oct. 6, 2004). These cases are compiled and made available at WORLD TRADE ORG., *Chronological List of Disputes Cases*, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. In these disputes, Korea and the United States have shown sharply divided opinions on key trade issues. In the same time period, there were five separate investigations by the U.S. government into a wide range of governmental policies of Korea for various subsidy allegations, while there were none initiated by Korea against the United States.

⁸⁶ During the period of 1995–2008, the United States initiated twenty-nine antidumping investigations against Korea. Among the antidumping duty orders that followed from these investigations, eleven orders from the United States Department of Commerce are still in place. KOREA TRADE COMMISSION, FOREIGN TRADE REMEDY INVESTIGATIONS STATISTICS, *supra* note 83.

⁸⁷ Letter from Rob Portman, U.S. Trade Rep., to Ted Stevens, President Pro Tempore of the Senate, and Dennis Hastert, Speaker of the House (Feb. 2, 2006) [hereinafter Portman, Letter], available at <http://www.gpo.gov/fdsys/pkg/CREC-2006-02-02/html/CREC-2006-02-02-pt1-PgS503.htm>.

⁸⁸ See *supra* notes 15 and 64.

the Korea Institute for International Economic Policy (KIEP), Korea's current trade surplus with the United States will shrink by US\$5.1 billion. The United States International Trade Commission (USITC) estimates that reduction at US\$9 billion.

With this overall picture of imbalance in the background, a series of key issues emerged in the negotiations for the U.S.-Korea FTA. Significant disagreements arose in certain areas, including agriculture, textiles, pharmaceuticals, services, intellectual property rights, investment, government procurement, sanitary and phytosanitary measures, environment and labor, regulatory issues, trade measures, and rules of origin. As discussed above, some of these issues go beyond removal of trade barriers per se and have far-reaching effects on an array of domestic policies. In most areas, the two countries attempted to strike a balance of interests between the two and in the process U.S. demands were largely accommodated by the Korean government. However, it is not entirely clear whether Korea could garner tangible benefits in some of its key interest areas, including trade remedy measures, working visa issues, coastal shipping services, and rules of origin issues with respect to textiles.⁸⁹ The remainder of this section provides a discussion of the negotiated results of the U.S.-Korea FTA in selected areas and their implications.

B. Agriculture and Textiles

One of the most critical issues in the U.S.-Korea FTA negotiations was agriculture. The United States has been demanding removal of tariffs and non-tariff barriers in agricultural trade in various bilateral and multilateral trade negotiations, and this negotiation stance was also expected in the U.S.-Korea FTA negotiations. The agriculture issue, which had been the main deterrent keeping Japan and Switzerland from entering into an FTA with the United States, was no less critical for Korea, where opening the agricultural market was expected to cause critical injury to its agricultural sector. The success of the U.S.-Korea FTA had depended largely on the outcome of the negotiations in this area.

⁸⁹ Other commentators also pointed out that to have an FTA with Korea, the United States would have to set aside long-standing trade barriers to Korean exports and resolve visa issues in return for the gains from the areas of U.S. interest, such as agriculture. See, e.g., Jeffrey J. Schott *et al.*, *Negotiating the Korea – United States Free Trade Agreement* 14 (Peterson Inst. for Int'l Econ., Policy Brief No. PB06-4, 2006) [hereinafter Schott, *Negotiating*], <http://www.piie.com/publications/interstitial.cfm?ResearchID=639> ("If the United States wants an FTA with Korea, it will have to put long-standing US barriers to Korean exports on the negotiating table and resolve vexing problems regarding access to the US visa waiver program."). However, Korea agreed to the FTA without attaining most of these key interests.

The Korean agriculture sector in most product groups is significantly less competitive than its U.S. counterpart. The 2001 USITC report estimated that the export of U.S. agricultural goods to Korea would increase by 200% once the FTA comes into effect.⁹⁰ Research by the Korea Rural Economic Institute (KREI) also estimated that Korean production would decrease by US\$20-23 billion, and that 130,000 to 140,000 jobs would be lost in the agricultural sector.⁹¹ Opening up the agriculture sector goes directly to the question of the very survival of Korean agriculture. The expected job losses, mounting to the hundreds of thousands, could not only further aggravate the economic polarization problem discussed in the preceding section, but also cause massive desertion of agricultural areas. In turn, this would lead to serious social, environmental, and economic problems for Korea, which maintained the position that effective relief for the affected farmers and plans to improve agricultural competitiveness should precede the liberalization of the agriculture sector.

There has been also another fundamental issue with respect to the opening of the agriculture market. Agricultural trade has been already distorted by large government subsidies that are allowed in the WTO Agreement on Agriculture, and a question is raised whether it could be justified to call for the opening of the agricultural market where exported agricultural products have been subsidized by the government. In 2006, U.S. agriculture subsidies amounted to US\$24.4 billion, which was 10.2% of the total agricultural production, whereas Korean subsidies were only US\$2.4 billion, or 6.4% of the total production.⁹² While consumer welfare in the agriculture importing countries could increase thanks to the cheaper imported agricultural products, it would be done at the expense of domestic agricultural producers, and competition between domestic and imported agricultural products would not be fair to domestic producers when the exporting country subsidizes production of its agricultural products. The call for liberalization of agricultural trade seems to be misplaced unless government subsidies were ultimately removed; and real comparative advantages could only be reflected in agricultural trade free of the current trade distortions caused by agricultural subsidies.

In the final state of the negotiation, Korea agreed to provide market access to all agricultural products except rice, notwithstanding the issues raised above. According to the USTR, almost two-thirds of U.S.

⁹⁰ USITC, Impact, *supra* note 15, at 5-1.

⁹¹ SUH & PARK, ISSUES, *supra* note 76.

⁹² OECD Database, PRODUCER AND CONSUMER SUPPORT ESTIMATES DATABASE, available at http://www.oecd.org/document/59/0,3746,en_2649_33797_39551355_1_1_1_1,00&&en-USS_01DBC.html, cited in YOUN-JOONG KIM ET AL., KOR. RURAL ECON. INST., INTERNATIONAL COMPARATIVE STUDY OF KOREAN AGRICULTURE BY STATISTICAL DATA (2009).

agricultural exports will be immediately duty-free (US\$1.91 billion duty free out of US\$2.96 billion 2004-2006 averages). Current tariffs for the remaining products, including beef and pork, will be eliminated after a transitional period ranging from two to twenty years, with an exception of a small number of specified items.⁹³ The parties have also agreed on new tariff rate quotas (TRQ) for specific items, to be applied up until those tariffs are completely eliminated.⁹⁴ Any tariffs on goods that are not specified in the TRQ schedule will be progressively eliminated.⁹⁵

Textiles were another key area for the FTA negotiations. Textile and clothing products were finally incorporated into the open trading regime under the WTO after the expiration of the *Agreement on Textile and Clothing* in January 2005. Korea is a net exporter of textile products and pressed the United States in the FTA negotiations to increase market access and relax its rules of origin, so-called “yarn-forwarding,” to promote exports of Korean textile products into the U.S. market. In turn, the United States demanded the adoption of a special safeguard against rapid increases in textile imports to protect its domestic textile producers. Both parties have agreed to eliminate tariffs for all textile and clothing products in ten years, with an immediate tariff elimination for 87% of the product items imported into the United States and 97% of those imported into Korea, respectively.⁹⁶ Both countries have also agreed on a special safeguard mechanism allowing imposition of tariffs on the occurrence of injury following unexpected import surges.⁹⁷

The United States and Korea also showed considerable differences on the standards to determine the rule of origin in the textile area. The principal issue was the “yarn-forward” rule adopted by the United States, which requires the yarn and fabric used in apparel to come from either the United States or the trading partner in question for textile products to be recognized as made in that trading partner country. Korea imports most of its yarn from third countries to make textile products, and consequently these products will not qualify for non-tariff treatment under this rule of origin.⁹⁸ Nevertheless, the controversial “yarn-forward” rule has still been agreed on, with certain product exceptions in Korea’s interest.⁹⁹

⁹³ See, e.g., *Trade Facts: Free Trade with Korea – Detailed Summary of the KORUS FTA*, USTR FTA Fact Sheet (Office of the US Trade Representative, Apr. 2007) [hereinafter USTR, Fact Sheet], available at www.amchamkorea.org/publications/Download.php?id=128.

⁹⁴ KORUS FTA, *supra* note 1, art. 3.2, para. 1.

⁹⁵ *Id.* art. 2.3, para. 2.

⁹⁶ MOFAT, Final Negotiation Results, *supra* note 82.

⁹⁷ See KORUS FTA, *supra* note 1.

⁹⁸ Chan-Hee Kim, *Double Standard on Rules of Origin*, KOOKMIN ILBO, Nov. 1, 2006 (in Korean).

⁹⁹ MOFAT, Final Negotiation Results, *supra* note 82.

Interestingly, the United States took an apparently opposite approach with respect to bovine meat. The United States demanded the “country of slaughter” rule to be used instead of “born, raised and slaughtered (BRS)” rule of origin.¹⁰⁰ Under the “country of slaughter” rule, cattle raised in Canada and slaughtered in the United States will be conferred a U.S. country of origin. This was a cause for concern on the part of Korea because of the occurrence of “mad cow disease” in Canadian cattle,¹⁰¹ but the parties ultimately agreed on this rule.

C. Access to Services Market

The services sector is the area in which the United States has competitive advantage,¹⁰² and, therefore, the United States would make significant efforts to expand entry into the Korean services market. To this end, the United States raised a number of regulatory issues related to the entry into the Korean market, in an effort to remove regulatory barriers to U.S. service export. The United States adopted a comprehensive approach: *i.e.* opening up various service sectors at the same time, including finances, telecommunications, professional services markets, and other service-related industries. As discussed in the preceding section, the economic and social effects of liberalizing the services trade can be more far-reaching than in goods trade; nevertheless, the two countries seemed to have proceeded with negotiations with regard to the liberalization of services trade without sufficient research on its impact on relevant service sectors and on the economy and society at large.¹⁰³

The negotiators on both sides identified areas of services for which market access request was made. These areas included financial services,

¹⁰⁰ *Id.*

¹⁰¹ Since May 2003, there have been 17 instances of Bovine Spongiform Encephalopathy (BSE) in Canada. On the other hand, the United States has had only three instances of BSE in this same period. See *Overview of BSE in North America*, CDC.GOV, <http://www.cdc.gov/ncidod/dvrd/bse> (last visited Mar. 17, 2011) (using a visual diagram to report incidence of BSE cases in the U.S. and Canada from 1993 to 2011).

¹⁰² OECD, *Figures*, *supra* note 64, at 30-33. There is a significant gap in the productivity of services industries between the United States and Korea.

¹⁰³ From the Korean point of view, perhaps this impact is now more limited than expected because the USTR clarified that it was neither seeking to change the non-profit requirement of the Korean health care and education systems, nor to have these markets opened to relevant U.S. service providers. See Press Release, MOFAT, Han-mi FTA Je 1 Cha Gongsig Hyeobsang Gyeolgwa [Results of the First Round of Official Korea-U.S. FTA Negotiations] (June 9, 2006) [hereinafter MOFAT, First Round], http://www.fta.go.kr/new/ftakorea/broadpsd.asp?country_idx=19 (use arrows to look for press release no. 34, dated June 9, 2006). Nonetheless, the opening of the services market without due consideration of its various potential impacts may lead to unanticipated economic and social problems in the future.

professional services, telecommunications, electronic commerce, and broadcasting. Both countries have agreed to adopt a Mutual Recognition Arrangement (MRA) for veterinarians, architects, and engineers.¹⁰⁴ However, the United States has not conceded on the issue of temporary visas for corporate executives and the visa quota for professionals.¹⁰⁵ Korea also requested the U.S. coastal shipping market be opened to Korean shippers, but it was not accepted by the United States.¹⁰⁶ There were discussions as to whether the FTA should be applied to the Korea Development Bank and Industrial Bank of Korea which mainly operate as commercial banks but which sometimes take the role of conduit of governmental policy loan programs. They have been included in the reservation list along with Korea Housing Finance Corporation, the National Agricultural Cooperative Federation, and the National Federation of Fisheries Cooperatives.¹⁰⁷ The United States also exerted pressure on Korea to open its broadcasting market. According to the proposed U.S.-Korea FTA, both countries are to afford the MFN treatment to other country's broadcasting companies.¹⁰⁸ Each country may place competitive safeguards in order to prevent anti-competitive practices such as cross-subsidization.¹⁰⁹

As for financial services, in which a number of issues were raised, the operation of insurance business is limited to subsidiary services such as damages adjustment under the proposed FTA. The parties have also agreed not to recognize the capital of the foreign headquarters as part of the required capital for foreign bank branches.¹¹⁰ The United States has also agreed on a cap on the foreign-owned shares in the ownership of the Korean Stock Exchange when it is to be publicly traded.¹¹¹ As for telecommunications services, the United States demanded abolition of the 49% cap of share ownership by foreigners in the core telecommunications businesses to which Korea agreed to do so within two years.¹¹² The United

¹⁰⁴ KORUS FTA, *supra* note 1, at annex 12-A, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file315_12711.pdf (providing that "[w]here the Parties agree, each Party shall . . . develop procedures for the temporary licensing arrangements of professional service suppliers of the other Party with respect to professional services sectors or subsectors mutually agreed by the Parties).

¹⁰⁵ *Id.* art. 12.1, para. 7.

¹⁰⁶ *Id.* U.S. annex II.

¹⁰⁷ *Id.* Korea annex III-22.

¹⁰⁸ *Id.* art. 18.1, para. 6.

¹⁰⁹ *Id.* art. 14.5.

¹¹⁰ *Id.* art. 11.14, para. 1.

¹¹¹ Press Briefing, MOFAT, Han-Mi FTA Je 7 Cha Gongsig Hyeobsang Gyeolgwa, [Results of the Seventh Round of Official Korea-U.S. FTA Negotiations] [hereinafter MOFAT, Seventh Round Results] (Feb. 20, 2007), http://www.fta.go.kr/new/ftakorea/broadpsd.asp?country_idx=19 (use arrows to look for press release no. 86, dated Feb. 20, 2007).

¹¹² USTR, Fact Sheet, *supra* note 93.

States also demanded that private businesses be allowed to choose technical standards.¹¹³ In accordance with this demand, safeguard rules were to be laid down concerning government measures to mandate the use of specific technologies.¹¹⁴ An agreement has also been made to provide foreign operators with conditional access to existing telecommunication networks and facilities.¹¹⁵

D. Intellectual Property Rights

IPR issues go beyond trade, because it has significant impact on technological development, national economy, and society at large. Trade-related intellectual property rights are controlled by relevant WTO regimes, namely the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement), but criticism has been raised as to whether the IPR issues should be internationally regulated through the rules of international trade.¹¹⁶ The United States produces the largest number of patents in the world and has extensive research and development capabilities. The United States has thus strategically recognized IPR as an area where it can be competitive in the 21st century, and succeeded in getting extensive IPR provisions included as part of the WTO Agreements in the Uruguay Round. Since then, the United States has included provisions for a high level of IPR protection in its bilateral and multilateral trade agreements. As expected, the United States demanded strong IPR protection during the U.S.-Korea FTA negotiations.

While protection of IPR is justified to encourage innovations that often require costly research and development efforts, it should also be balanced against the need for dissemination of information.¹¹⁷ Excessive IPR protection in extent and duration may retard free flow of information and ultimately impede development of industries, science, and even culture and arts. This disadvantage would be more substantial for developing countries in need of advanced technologies for their development

¹¹³ MOFAT, Seventh Round Results, *supra* note 111.

¹¹⁴ See KORUS FTA, *supra* note 1, annex 14.21, para. 5 (providing that in ‘adopt[ing] a measure that mandates the use of a specific technology or standard, or otherwise limits a supplier’s ability to choose the technology it uses, to supply a telecommunications or value-added service’, either party to the FTA shall use a rulemaking process that affords notice and comment opportunities to such suppliers, and permits them to request additional rulemakings concerning “alternative technolog[ies] or standard[s]”).

¹¹⁵ *Id.* art. 14.2, paras. 5–6.

¹¹⁶ LEE, RECLAIMING, *supra* note 39, 123–32.

¹¹⁷ See Preamble to the Agreement on Trade-Related Aspects of Intellectual Property Rights, annex 1C, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement], in WTO, THE LEGAL TEXTS, *supra* note 78, at 321; available at http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm.

purposes.¹¹⁸ There is a tendency for developed countries to push for more IPR protection, while developing countries demand fair and affordable chances to obtain advanced technologies and knowledge for their development needs.¹¹⁹ The TRIPS Agreement already offers substantial IPR protection under the multilateral framework. Under these circumstances, there should be clear justification as to why it is necessary to require an even higher level of protection in the FTA context exceeding the IPR protection that the TRIPS Agreement already offers. The level of IPR protection demanded under the U.S.-Korea FTA exceeds that of the TRIPS Agreement as discussed below, but it is not clear whether the U.S.-Korea FTA offers such justification.

IPR provisions in the U.S.-Korea FTA exceed TRIPS Agreement provisions in terms of the duration, extent, and enforcement of IPRs. For instance, both countries have agreed to extend the duration of copyright to a period of 70 years after the death of the writer,¹²⁰ which exceeds the TRIPS Agreement requirement of 50 years.¹²¹ For another example, USTR describes the trademark protection under the FTA as a “state of the art” because, among other things, trademark protection extends not only to certification of conventional marks for trade but also to sound and scent marks. Online registration of trademarks is also to be protected. In addition, both countries have agreed to facilitate a searchable database and to not impose any registration requirement for license to establish the validity of the license.¹²² It is true that uncharted territories were covered by the agreement to strengthen the scope of the IPR protection, but clear justification in departing from the TRIPS Agreement has yet to come.

Controversy has also risen over the Confirmation Letter on Online Piracy Prevention under Article 18 of the FTA.¹²³ In the Letter, the Korean government stated its commitment to shut down internet sites that allow unauthorized reproduction, distribution, or transmission of copyrighted works.¹²⁴ Internet site operators have opposed this provision as an overly excessive measure because it imposes a unilateral obligation on Korea, not

¹¹⁸ See *id.* (recognizing the “special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base[.]”).

¹¹⁹ *Id.*

¹²⁰ KORUS FTA, *supra* note 1, art. 18.4, para. 4. MOFAT, Final Negotiation Results, *supra* note 82.

¹²¹ TRIPS Agreement, *supra* note 116, art. 12.

¹²² USTR, Fact Sheet, *supra* note 93.

¹²³ Confirmation Letter on Online Piracy Prevention under Article 18 of the FTA, from Hyun-Chong Kim, Minister for Trade of the Republic of Kor., to Susan C. Schwab, USTR Ambassador (June 30, 2007), *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file939_12739.pdf.

¹²⁴ *Id.*

the United States, and authorizes the Korean government to shut down internet sites even for a single occurrence of copyright infringement.¹²⁵ Another Letter on Limitations of Liability of Internet Service Providers also is a cause for concern as it requires disclosure of the identity and contact information of the subscribers who posted unauthorized materials online, without issuance of proper court warrant.¹²⁶ These Letters, produced under the pressure of the U.S. government to make commitments for stronger IPR protections, seem to be in line with the history of changes in the IPR regime of Korea as demanded by the United States.

Korea already experienced sweeping changes in its intellectual property regime as early as in mid-1980s under the pressure of the United States, which was equipped with Section 301 sanctions. In 1986, the Korean government was compelled to introduce a comprehensive copyright regime by accession to the Universal Copyright Convention and Geneva Phonograms Convention. Korea made important amendments including extension of copyright term for the author's lifetime plus 50 years, and introduction of protection for computer software, semiconductor chips, and sound recordings.¹²⁷ Korea was also required to amend its Patent Act by introduction of product patent, extension of patent term for 15 years, and protection of microorganisms.¹²⁸

Such a radical change in intellectual property law could have caused negative impacts on the Korean industries and economy, which were still in their developing stages during the 1980s.¹²⁹ However, the performance of Korean economy did not seem to be adversely affected by the change in the IPR regime, and Korea industries succeeded in strengthening international competitiveness, which suggests a possibility that some developing countries, if not all, can not only survive with the strengthened IPR regime but also use it to improve its industrial competitiveness. Encouraged by this success record, some believe that Korea can use the additional changes in the IPR regime required under the

¹²⁵ Press Release, Korea Internet Business Association (May 28, 2007).

¹²⁶ Letter on Limitations of Liability of Internet Service Providers, from Hyun-Chong Kim, Minister for Trade of the Republic of Kor, to Susan C. Schwab, USTR Ambassador (June 30, 2007), http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file948_12737.pdf.

¹²⁷ Record of Understanding on Intellectual Property Rights between the Republic of Korea and the United States of America, U.S.-S.Kor., Aug. 28, 1986, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005680.asp.

¹²⁸ *Id.* sec. B. The Korean Trademark Act was also required to be amended to allow U.S. trademark owners to freely license their trademarks. *See id.* sec. C.

¹²⁹ Korea did not join the OECD until 1996. *See* William Witherell, Address at the Second Korea-OECD Conference: Korea in the OECD: Realising the Promise (Dec. 13-14, 2001), *available at* <http://www.oecd.org/dataoecd/36/0/2698284.pdf>.

FTA for further technological innovation and progress which is yet to be seen.

E. Investment Protection

The United States began negotiations on investment issues with a high level of ambition. This is reflected in its earlier statement that U.S. investors investing in Korea should be guaranteed the same rights granted by U.S. laws and practices, while Korean investors should not be granted superior rights to those accorded to domestic investors in the United States.¹³⁰ The U.S. objectives revealed in this statement are problematic, as they go against the principle of reciprocity. As to the former part of the statement, it would be inappropriate for one nation to impose its own standards and practices, even if more advanced, on the other with different legal, social, and economic environments and priorities, unless the other country's laws and practices present clear obstacles to foreign investment and its own standards and practices somehow offer a workable alternative solution for that other country. Recent bilateral disputes between the two countries have exposed the difference in perspectives and practices between the two countries when it comes to the propriety of governmental policies and laws, which apparently boils down to cultural differences.¹³¹

¹³⁰ Portman, Letter, *supra* note 87.

¹³¹ In recent high-profile bilateral trade disputes, the United States and Korea registered sharp differences concerning the role of the government, and the relationship between the governmental sector and the private sector. It turned out that these differences are largely based on differing cultural and societal characteristics. See, e.g., World Trade Organization, United States — Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea, WT/DS296/R (Feb. 21, 2005), at 7.6-7.8, 7.49-7.50, 7.59, available at http://www.wto.org/english/tratop_e/dispu_e/296r_a_e.pdf (reflecting different views in the two countries regarding the role of the government in times of national economic emergency). Indeed, one commentator opined that “law is a form of cultural expression and is not readily transplantable from one culture to another without going through some process of indigenization. French law is as much a reflection of the French culture as Russian law is a reflection of Russian culture.” MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 10 (West 1982). Yet another commentator, Luke Nottage, noted that such cultural difference still plays a role in the administration of law in Japan, pointing out that continuing tension between the new legal regime and the traditional legal regime in Japan should be taken into account, where the former has been affected by the influx of Anglo-American jurisprudence, while the latter is based on the notion of social values distinct from profit maximization. See Luke Nottage, *Nothing New in the (North) East? Interpreting the Rhetoric and Reality of Japanese Corporate Governance*, PAC. ECON. PAPER 359, Austl.-Japan Research Center (2006), available at <http://www.crawford.anu.edu.au/pdf/pep/pep-359.pdf>; see also Leon Wolff, *Corporate Governance and Law Reform in Japan: From the Lost Decade to the End of History?*, in JAPANESE MANAGEMENT: THE SEARCH FOR A NEW BALANCE BETWEEN CONTINUITY AND CHANGE 133-166 (Rene Haak & Markus Pudelko eds., 2005). Apparently, this trait still persists and

Under these circumstances, the wisdom of adopting perspectives and practices favored by or familiar to one party can be easily challenged. The latter part of the statement seems to ignore the need for countries seeking foreign investment to provide incentives to induce foreign investment to an area where domestic investment is hard to attract.¹³² Those incentives are not unfair in nature and to regulate this would not be consistent with the goals of the FTA to promote trade and investment. Nonetheless, the FTA stipulates that there should be no favorable treatment of foreign investors.¹³³

In the U.S.-Korea FTA, the United States and Korea have agreed to accord national treatment and MFN treatment to foreign investors.¹³⁴ Negotiations continued on the dispute settlement procedure for investor-state disputes (ISDs) as well as the adoption of temporary safeguards against cross-border capital transactions and remittances in national financial emergencies.¹³⁵ In relation to the former, concern was raised that the dispute settlement procedure, which allows foreign investors to file complaints against the government of the other party outside the domestic court system of the latter, may undermine the state's ability to establish and undertake legitimate public policies that may have a bearing on foreign investment.¹³⁶ The two countries agreed on the dispute settlement

affects economic regulation in countries affected by this culture. These differing notions regarding the role of government in the context of different cultures were also discussed in one of the WTO disputes between the United States and Japan. See Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Apr. 22, 1998), at 10.43–10.46 [hereinafter *Japan Film*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm. Under these circumstances, one could argue that an attempt to apply laws and regulations of one country to another always requires careful scrutiny and forethought.

¹³² By way of example, in 2002 the state of Alabama provided a US\$252.8 million package to attract Hyundai Automobiles to establish a manufacturing plant in the state as an effort to stimulate its sagging economic vitality. See Michael Tomberlin & Kristi L. Ellis, *Hyundai Incentives: \$252.8 million, State Officials Say Automaker's \$1 Billion Investment Worth It*, BIRMINGHAM NEWS, April 5, 2002, at 1A & 2A. In other words, even the local governments of the United States offer preferential treatment to foreign investors to have them invest in their own regions.

¹³³ KORUS FTA, *supra* note 1, art.11.4, para. 2.

¹³⁴ *Id.* arts. 11.3 & 11.4.

¹³⁵ Press Release, MOFAT, Han-Mi FTA Je 4 Cha Gongsig Hyeobsang Gyeolgwa [Major Results of the Fourth Round of Official Korea-U.S. FTA Negotiations] (Oct. 27, 2006) [hereinafter MOFAT, Fourth Round Results], http://www.fta.go.kr/new/ftakorea/broadpsd.asp?country_idx=19 (use arrows to search archive for press release no. 62, dated Oct. 27, 2006).

¹³⁶ Joo-Hee Roh, *Government Adopts the Settlement Procedure for Investor-State Disputes as Inevitable*, PRESSIAN NEWS, Nov. 22 2006 (in Korean). Some experts opined that foreign investors would not be able to undermine public policies by filing complaints under the proposed dispute settlement procedure. See Press Release, MOFAT, Han-Mi FTA Je 3 Cha Hyeobsang Gwanlyeon Jeonglye Beuliping [Korea-U.S. FTA Negotiations Third Briefing]

procedure with certain exemptions.¹³⁷ Korea – having a vivid memory of the catastrophic 1997 financial crisis – demanded a temporary safeguard be in place which would enable the government to stop the outflow of foreign currency reserves should this type of financial crisis recur.¹³⁸ The United States and Korea have agreed to this safeguard provided that there is a one-year durational limit and that certain guidelines are met.¹³⁹ Both parties have also agreed to prevent retrospective application of law and to allow a provisional remedy to aggrieved investors.¹⁴⁰

F. Regulatory Issues

The United States has long held the opinion that much of the difficulty that U.S. exporters face abroad has been caused by lack of transparency in the application of relevant laws and regulations of the importing countries, and thus has consistently contended that these regulatory problems undermine the interests of U.S. businesses abroad. Moreover, the United States pointed to the existence of collusion between the Korean government and private corporations, and questioned the procedural transparency of trade and investment laws.¹⁴¹ Consequently, the United States raised regulatory and institutional issues during negotiations and applied pressure on Korea to improve the transparency and predictability of its legal procedures. As a result, every chapter of the FTA includes a separate transparency provision requiring publications and notices prior to the implementation of relevant laws. There is also a separate provision dedicated to the manner and timing of the publication of any laws or regulations that will affect the rights of the other country under the FTA.¹⁴²

In addressing regulatory issues, however, reciprocity seems to have been missing. The USTR affirmed that U.S. laws and regulations would

(Sept. 5, 2006), http://www.fta.go.kr/new/ftakorea/broadpsd.asp?country_idx=19 (use arrows to search archive for press release no. 55, dated Sept. 5, 2006).

¹³⁷ KORUS FTA, *supra* note 1, art 11, sec. B.

¹³⁸ For the causes and developments of the Asian financial crisis in 1997, see generally Andrew Berg, *The Asia Crisis: Causes, Policy Responses and Outcomes* (Int'l Monetary Fund, Working Paper No. WP/99/138, 1999), available at <http://www.imf.org/external/pubs/ft/wp/1999/wp99138.pdf> (noting the significant role of sudden capital outflows as a source of fundamental vulnerability during the Asian financial crisis in 1997); see also HAIDER A. KHAN, GLOBAL MARKETS AND FINANCIAL CRISES IN ASIA (2004) (explaining the financial crisis as the result of liberalization, weak domestic institutions for economic governance and a chaotic global market system without global governance institutions).

¹³⁹ KORUS FTA, *supra* note 1, annex 11-G.

¹⁴⁰ *Id.* arts. 11.15–11.22. See also MOFAT, Fourth Round Results, *supra* note 135.

¹⁴¹ Portman, Letter, *supra* note 87.

¹⁴² KORUS FTA, *supra* note 1, art. 21.1

not change as a result of the U.S. - Korea FTA, but that the United States would raise regulatory issues with Korea and seek changes accordingly.¹⁴³ It should also be noted that the significant differences in legal traditions and business practices may cause foreign businesses to conclude, often inaccurately, that they have been subjected to unfair and unjust treatment.¹⁴⁴ For instance, the United States emphasizes and promotes individual competition. By way of contrast, Korean culture places importance on the traditional cooperative relationship between the government and businesses,¹⁴⁵ even though government interventions have been reduced in recent decades.

This difference stems from the dissimilar perspectives on the role of government and the way in which government and private businesses should interact.¹⁴⁶ Thus, it may be inappropriate to measure the perceived government-private cooperation relationship in Korea against U.S. customs and practices, or to discuss ways of dissolving such a relationship under the FTA with a presumption that it is a form of illegal collusion that results in unfair competition and lack of transparency.¹⁴⁷ It will be more efficient to address specific instances of unfair treatment affecting trade and investment through mutually-agreed communication channels, such as consultations, rather than trying to force one country to conform its laws and customs to the standards of the other. A renowned Australian scholar has also commented on this U.S. tendency to have a FTA negotiating partner comply with its own practices and expectations, by stating, with reference to the U.S.-Australia FTA, that “while Australia wanted conventional FTAs with reduction of trade barriers, the United States seems to have wanted its own version of an FTA to be imposed on Australia with new regulatory attachments such as higher IPR standards.”¹⁴⁸

¹⁴³ Portman, Letter, *supra* note 87.

¹⁴⁴ See generally Japan Film, *supra* note 131, for the argument on the part of the United States, in noting that Japan’s new legal regime has been affected by the influx of Anglo-American jurisprudence, and the further point that any attempt to apply laws and regulations of one country to another always requires careful consideration of social and cultural differences.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Professor Ross Buckley of the University of New South Wales referred to the Australian stance as the 19th century free trade agreement and the American attitude as the (American) 21st century free trade one. Research Seminar with Professor Ross Buckley, in The University of New South Wales, Sydney (Feb. 19, 2009); see also CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS (Ross Buckley et al, eds., Kluwer Law Int’l 2008) (noting that WTO multilateral negotiations to liberalize trade have become increasingly difficult, as newer

With respect to the competition issue, specification that the antitrust laws be applied to the Korean conglomerates (chaebol) became a point of debate.¹⁴⁹ The United States questioned whether competition laws are being applied strictly to those chaebol corporations and wanted the FTA to specify the responsibility of the Korean government to apply competition laws to them. The Korean government disagreed and argued that since antitrust laws of Korea are already being applied to chaebol corporations, explicit specification in the FTA would be inappropriate. Here again, the demand by the United States for such specification in the FTA shows its consistent emphasis on the regulatory issues which is arguably beyond the purview of trade agreements. Perhaps both parties could have considered replacing rampant applications of trade remedy measures, such as antidumping measures, with more comprehensive regulations against anticompetitive behavior, but it was not discussed in the course of the FTA negotiations.¹⁵⁰

Lastly, there are a couple of regulatory issues between the United States and Korea that are worth mentioning, namely the Korean taxation scheme on automobiles, and the drug price review system. In relation to automobiles, the United States has been complaining about Korea's taxation scheme, which imposes higher tax rates on automobiles with larger engine displacement. Because U.S.-made automobiles tend to have engines larger in size than those of their competitors, they have been subjected to higher tax rates. In the FTA, Korea has agreed to amend its Special Consumption Tax Law and the Annual Vehicle Tax Law to reduce the tax rates applicable to automobiles with larger engine displacement.¹⁵¹ Within 3 years of the date of coming into force of this Agreement, vehicles with engines larger than 1000 ccs are to be taxed at a single rate of no more than 5%.¹⁵² Korea has also agreed not to amend or otherwise modify the Subway Bond and Regional Development Bond so as to increase the disparity in purchase rates across categories of vehicles at the time the Agreement comes into force.¹⁵³ Higher tax rates applicable to cars with larger engine displacement have been justified in Korea due to its policy of discouraging use of automobiles that consume more gas and overload

members are generally developing countries with interests and attitudes different from those of industrialized countries).

¹⁴⁹ Press Release, MOFAT, What Are Trade Remedies, Intellectual Property Rights, and Positive Lists? (Nov. 8, 2006).

¹⁵⁰ The Canada-Chile FTA abolished antidumping duties after 2003, and competition laws would control dumping disputes between the two countries.

¹⁵¹ KORUS FTA, *supra* note 1, art. 2.12(a) & (b) (providing that vehicles with engines under 1000 ccs will not be taxed; engines larger than 1001–2000 ccs will not be taxed more than 5%; and engines larger than 2000 ccs will not be taxed more than 8%).

¹⁵² *Id.* art. 2.12(a)(ii).

¹⁵³ *Id.* art. 2.12(c).

smaller Korean roads with heavier weights. Hence, the demand by the United States for this regulatory change is another example where one country's regulatory scheme for legitimate public policy objectives had to be abandoned to satisfy the interests of its trade partner.

The United States also opposed Korea's drug price review system, under which the appropriateness of a drug price is reviewed before it can be covered by the publicly-funded Korean health insurance program. The United States has been concerned that U.S. drugs, which tend to be more expensive, may not be covered by the Korean health insurance program. Nonetheless, Korea has maintained that it would not abandon the price review system, which it considers necessary to sustain the publicly-funded health insurance system in sound fiscal condition, but has agreed to establish a committee to consider views of U.S. pharmaceutical companies.

¹⁵⁴ In the final draft, Korea has agreed to ensure that the procedures, rules, and guidelines that apply to reimbursements are fair, reasonable, and non-discriminatory, and that reimbursements would be made at competitive market-derived prices.¹⁵⁵

Concern has been raised that by allowing competitive market-derived prices to be the measure of reimbursements, the price review system will not be able to achieve its objective of keeping reimbursements at an economically feasible level and of maintaining the sound fiscal condition of the publicly funded Korean healthcare system.¹⁵⁶ Furthermore, under the effects of a footnote in Article 5.2 of the FTA – which stipulates that pharmaceutical formulary development and management will be governed by the rules on government procurement – only technical examinations, but not economic review, will be allowed during selection of drugs. Consequently, the government agency will not be able to exclude expensive foreign drugs on the basis of their prices so long as those drugs are approved for safety and effectiveness.¹⁵⁷ An estimate has been made that because of this concession, the financial burden on the Korean healthcare system will increase by over US\$2 billion a year to cover the increased reimbursement costs.¹⁵⁸

¹⁵⁴ MOFAT, Seventh Round Results, *supra* note 111.

¹⁵⁵ KORUS FTA, *supra* note 1, art. 5.2 (a) & (b).

¹⁵⁶ *Gungangbohumeun Jikyutdaduni: Hyupjungmoon Bunsukhalsoorok Gagwan [You Said that You Would Regulate the Price of Medication: the More You Analyze the Agreement, the More Nonsensical It Is]*, PRESSIAN NEWS, May 27, 2007, http://www.pressian.com/article/article.asp?article_num=30070527151529&Section=.

¹⁵⁷ *Id.*

¹⁵⁸ Interview by Si-Yeon Kim and Ho-Joong Kim with Suk-Kyun Woo, Policy Director, Alliance of Korean Healthcare Assn's (Mar. 29, 2007) (in Korean).

G. Restrictions on Trade Remedy Measures

Trade remedy measures, such as antidumping (AD) measures, countervailing duties (CVDs), and exclusionary orders against alleged unfair trade practices, should also be examined in relation to regulatory issues. When abused, these trade measures do not promote free trade, and particularly in the case of AD measures, there is little question that these measures have operated as discriminatory and arbitrary import regulations against inexpensive exports.¹⁵⁹ Abusive trade remedy measures are contrary to the very objective of the FTA of promoting free trade, and an effective mechanism should be in order to deal with them.¹⁶⁰ In relation to trade remedy measures, extraterritorial application of domestic antitrust laws against businesses of trading partner nations, and enforcement of criminal charges on their citizens for business activities taken place outside U.S. territory, run counter to the internationally recognized “Principle of Territoriality” that domestic laws apply within the boundaries of the nation making such laws. This practice is also inconsistent with the aim of the FTA to establish a business and economic environment favorable to free trade.¹⁶¹

¹⁵⁹ Yong-Shik Lee, *Toward a More Open Trading System: Should Safeguards Replace Antidumping Measures?*, 1 21ST CENTURY L. REV. 2, 3-14 (2005). A Yale economist, T. N. Srinivasan “characterized antidumping as the equivalent of a nuclear weapon in the armoury of trade policy and suggested removing [such practices]” altogether. Int’l Inst. for Sustainable Dev., Report on the WTO’s High-Level Symposium on Trade and Development (Mar. 17–18, 1999) (summary record of remarks by delegates at WTO Symposium on Trade and Development), available at http://www.wto.org/english/tratop_e/devel_e/summmhl_e.htm.

¹⁶⁰ In the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), for instance, entered into by China and Hong Kong on June 29, 2003, there is a prohibition against imposition of AD and CVD measures. Mainland and Hong Kong Closer Economic Partnership Agreement, China-H.K., June 29, 2003 (entered into force Jan. 1, 2004), ch.1, art. 7, available at http://www.tid.gov.hk/english/cepa/files/main_e.pdf. AD measures are also not permitted in the Australia-New Zealand FTA. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Feb. 27, 2009 (entered into force Jan. 1, 2010), ch. 1, art. 3, sec. e(ii), available at <http://www.dfat.gov.au/fta/aanzfta/aanzfta.PDF>.

¹⁶¹ Extraterritorial application of U.S. antitrust law has been internationally criticized, and countries including Great Britain and Canada have enacted laws that prohibit their citizens from cooperating with extraterritorial U.S. antitrust investigations. See, e.g., Protection of Trading Interests Act, 1980, c. 11 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1980/11/contents>; see also A. V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT’L L. 257 (1981). However, though the Canadian approach has historically been to oppose extraterritoriality of U.S. antitrust laws after the uranium controversies of the 1970s and 80s the prosecutorial agencies of the two governments signed a series of high-level memorandums, ultimately leading up to the Mutual Legal Assistance Treaty (MLAT) of 1990. Konrad von Finckenstein, Can. Comm’r of Competition, Address at a Joint Meeting in Vancouver of the American Bar Association Section of Antitrust Law and the Canadian Bar Association

Korea, whose exports have been frequently targeted for AD and CVD measures from various countries including the United States,¹⁶² requested Washington to tighten its requirements for the application of these measures in order to prevent abuse. However, the USTR has expressed difficulty in doing so,¹⁶³ reiterating that the U.S. law does not give them the authority to make decisions that will change the existing trade remedy laws, and the decision is one to be made by the U.S. Congress.¹⁶⁴ Instead, both governments have agreed to set up a Committee on Trade Remedies where they would discuss trade remedy measures,¹⁶⁵ but no real change in the application of trade remedy measures is expected as a result of the negotiations since it requires legislative adjustments on the part of the United States which it has consistently refused.

V. IMPLEMENTATION AND PROSPECTS OF THE U.S. -KOREA FTA

A. *Subsequent Legislation in Korea after Conclusion of the US - Korea FTA*

Even before the ratification of the US-Korea FTA by the Korean National Assembly, a series of legislations and bills have been introduced by the Korean government in order to ensure conformity with the agreement: it was expected that as many as 25 statutes, including tax and customs laws, foreign trade laws, intellectual property laws and the laws regulating service industries, would have to be either newly enacted or amended to ensure conformity with the FTA.¹⁶⁶ The following discusses examples of two areas of law, namely the law regarding legal service market and intellectual property law.

In response to the upcoming opening of the Korean legal service market in accordance with the provisions of the FTA,¹⁶⁷ the Foreign Legal

National Competition Law Section: International Antitrust Cooperation: Bilateralism or Multilateralism? (May 31, 2001), *available at* <http://www.apeccp.org.tw/doc/Canada/Policy/1a.htm>.

¹⁶² See KTC, STATISTICS, *supra* note 84.

¹⁶³ MOFAT, First Round, *supra* note 103.

¹⁶⁴ Suk-Hwan Choi, *FTA Hyupsangdan, Muyeogguje Yogu Sahang Daepog Chugso* [Delegation for FTA Negotiations, Significantly Reduces Demands for Trade Remedies], PRESSIAN NEWS, Dec. 6, 2006 http://www.pressian.com/article/article.asp?article_num=30061206131812&Section=.

¹⁶⁵ KORUS FTA, *supra* note 1, sec. C.

¹⁶⁶ *Beobjecheo 'Han-Mi FTA Jeongbipilyo Beoblyeong 70geon'* [Ministry of Legislation: '70 Laws Require Amendment under the KORUS FTA'], CHOSUN ILBO (June 7, 2007), http://issue.chosun.com/site/data/html_dir/2007/06/11/2007061100910.html. In addition, it is expected that 25 Presidential Decrees and 18 Ministerial Ordinances will be amended to conform with the FTA. *Id.*

¹⁶⁷ KORUS FTA, *supra* note 1, ch. 12.

Consultant Act ("FLCA") was enacted on March 2, 2009 and took effect as of September 26, 2009. The FLCA permits a foreign lawyer who is licensed in FTA signatory countries to register with the Korean Bar Association as a "foreign legal consultant ('FLC') for limited law practice in Korea and a foreign law firm to open an office in Korea.

The liberalization of the Korean legal service market under the FLCA takes three steps. At the first stage, the FLC is permitted to offer consultation of law of the country where the FLC is licensed; consultation of treaties to which the country joined or of generally recognized international law; and representation in international arbitration to which the applicable law is foreign law or public international law. At the second stage, which is set to start within two years after the FTA comes into force, a foreign law firm will be allowed to form an affiliate relationship with a Korean law firm and is permitted to take cases with a Korean law firm in which both the U.S. and Korean laws are involved. At the final phase, which is scheduled to start within five years after the FTA becomes effective, a foreign law firm will be permitted to form a partnership with a Korean law firm and hire Korean lawyers under certain conditions.

As to the intellectual property law area, amendments to the Copyright Act were made to reflect the terms of the U.S.-Korea FTA.¹⁶⁸ The following changes were made: (1) neighboring rights are fully protected in accordance with the international treaties; (2) certain online service providers ("OSPs") shall take necessary measures that cut off illegal forwarding of the relevant works if requested by the holder of rights; (3) the Korean government, including local governments, may adopt administrative measures to prevent copyright infringement, such as collection, deletion, or destruction of copies and tools which infringe copyright, and suspension of infringing bulletin board service after three warnings (so called "Three Strike-out System"); (4) copyright infringers may be indicted in the absence of the complaint filed by the copyright owner, if such infringements were committed commercially and habitually. Also, by amendment to the Customs Act, the border measures extends to copyright infringement where a copyright owner can record its works with the customs office and take actions if suspected infringing goods pass through customs.

In addition, the Korean government proposed other IPR-related bills to the National Assembly, to comply with the FTA provisions.¹⁶⁹ The

¹⁶⁸ Jeojakgwon beob [Copyright Act], Act. No. 432 (1957), *amended and substantially revised by* Law No. 3916, Dec. 31, 1986, *and* Law No. 8101, Dec. 28, 2006 (entered into force June 29, 2007), *amended by* Law No. 9529, Mar. 25, 2009 (entered into force Sept. 26, 2009), *amended by* Law No. 9625, Apr. 22, 2009 (entered into force July 23, 2009) (S. Kor.), *available at* http://eng.copyright.or.kr/law_01_01.html.

¹⁶⁹ DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 52 (S. Kor.), *available at* http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.

bills included further amendments to the Copyright Act,¹⁷⁰ the Patent Act¹⁷¹ and the Trademark Act.¹⁷² These developments and efforts on the part of the Korean government demonstrated the strong will of the Korean government to implement the U.S.-Korea FTA immediately after its ratification by the legislature. The Korean government also prepared revisions of administrative regulations for implementation of the FTA. There has been no corresponding effort on the part of the U.S. Congress to enact or amend any of the U.S. legislations.

B. Additional Negotiation of the FTA between the United States and Korea

Beginning from early 2010, the United States and Korea sought to find a breakthrough for the pending U.S.-Korea FTA. The breakthrough came in June 2010 at the G-20 meeting in Toronto, when the presidents of the two countries agreed to make concerted efforts to finalize the agreement by the following G-20 meeting in Seoul in November 2010.¹⁷³ Accordingly, President Obama directed USTR Ron Kirk to work with his Korean counterpart to resolve outstanding issues, namely the automobile and beef issues.¹⁷⁴ President Obama also indicated his willingness to present the FTA for Senate ratification once the “additional negotiation” was complete on November 11, 2010.

Despite the efforts of the two governments since the announcement, including successive rounds of intensive negotiations right before the deadline, the two sides failed to reach agreement.¹⁷⁵ In the joint press conference in Seoul, the two presidents expressed their frustration but promised to direct the officials of the two governments to continue the negotiations to resolve the outstanding issues.¹⁷⁶ This promise bore fruit

pdf (empowering both the Executive branch and the National Assembly to submit bills of legislation).

¹⁷⁰ Submitted on October 10, 2008, as Bill No.1801513, and currently pending before the National Assembly.

¹⁷¹ Proposed on October 25, 2007, as Bill No. 177655, but not reviewed due to expiry of the 2008 parliamentary session.

¹⁷² Submitted on October 13, 2008, as Bill No. 1801518.

¹⁷³ Office of the Press Secretary, the White House, Remarks by President Obama and President Lee Myung-Bak of the Republic of Korea After Bilateral Meeting (June 26, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-president-lee-myung-bak-republic-korea-after-bilateral->.

¹⁷⁴ See COOPER, PROVISIONS AND IMPLICATIONS, *supra* note 6, at 1.

¹⁷⁵ Office of the Press Secretary, the White House, Press Conference by the President After G20 Meetings in Seoul, Korea (Nov. 12, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/11/12/press-conference-president-after-g20-meetings-seoul-korea>.

¹⁷⁶ *Id.*

when the representatives of the two countries finally completed additional negotiation on December 3, 2010, with new agreements after four-days of intensive talks.¹⁷⁷ Those agreements include further concessions by Korea on the automobile issue,¹⁷⁸ which will help overcome the opposition to the FTA by the U.S. automobile industry but have been criticized in Korea as undermining Korea's key trade interest to be gained by the FTA.¹⁷⁹

C. Prospects for Ratification by the U.S. and Korean Legislatures

As cited above, there have been considerable political objections to the U.S.-Korea FTA in both countries. Ultimately, however, the U.S.-Korea FTA is expected to be ratified by both legislatures.¹⁸⁰ Despite the perceived imbalance of gains from the FTA and the social and economic risks it creates, the Korean political leadership seems to be determined to have the FTA with the United States, because of their conviction that this

¹⁷⁷ Office of the Press Secretary, the White House, Statement by the President Announcing the US-Korea Trade Agreement (Dec. 3, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/03/statement-president-announcing-us-korea-trade-agreement>.

¹⁷⁸ Office of the Press Secretary, the White House, Informational Press Release: Increasing U.S. Auto Exports and Growing U.S. Jobs Through the U.S. Korea Agreement (Dec. 3, 2010), http://www.whitehouse.gov/sites/default/files/fact_sheet_increasing_us_auto_exports_us_korea_free_trade_agreement.pdf.

¹⁷⁹ Dae-Hee Lee, *Migukcha Sooip Jangbyuk Munuhjyudta: 'Obamaeyu Sunglee' [Import Barrier for American Cars has Collapsed: 'Obama's Victory']*, PRESSIAN NEWS, Dec. 5, 2010, http://www.pressian.com/article/article.asp?article_num=30101205132112§ion=02. According to the new agreement, the removal of U.S. tariffs against import of automobiles from Korea, which has been hailed by the Korean government as a major achievement, will be suspended for five years for passenger cars and for ten years for trucks. This will be a loss to Korea which exports significantly more automobiles to the U.S. than the U.S. does to Korea. Korea has also agreed to relax application of new environmental and gas mileage requirements in favor of U.S. automobile exports. At the request of the U.S., Korea has further agreed to a safeguard provision whereby a party of the FTA may adopt tariffs against imported automobiles if imports surge after the removal of tariffs. In return for these concessions, Korea reportedly received concessions on agriculture and pharmaceutical imports, but one criticism was that the extent of U.S. concessions was not comparable to that of Korea on the automobile issue. Reflecting on this imbalance, a senior Korean politician commented that additional negotiation was bound to be completed in the U.S.'s favor, since it was held shortly after the Yeon-Pyeong incident, when North Korea shelled the South Korean island causing civilian casualties, and South Korea asked for U.S. diplomatic and military assistance to preserve its security against the North. Kim Jong-Hoon: *'Hyupsang Jalmothaetda' go mulruhnamyun haebyeongdae jiwon* [Kim Jong-Hoon: *'If I Am Fired Because 'the Negotiations Fail,' I Will Join the Marines'*], CHOSUN ILBO, Dec. 5, 2010, http://news.chosun.com/site/data/html_dir/2010/12/05/2010120500573.html?Dep1=news&Dep2=top&Dep3=top.

¹⁸⁰ LEE, BETTER ALTERNATIVE, *supra* note 9, at 1.

FTA will “upgrade” the Korean economy by providing it with a new momentum for further economic growth; and that the FTA will also help strengthen the security alliance with the United States.¹⁸¹

A renowned economist, Professor Jagdish Bhagwati, has commented that Korea will (eventually) sign anything that the United States asks, due to its security concerns.¹⁸² This is likely to be true, at least for the FTA, in the end. With the U.S. army playing an important role in maintaining Korea’s national security, a certain extent of imbalance may not be sufficient to justify backing away from the most important trade deal with the United States. For the United States, some of the objections to the FTA have already lost ground since Korea began to import American beef, *albeit*, with some restrictions, and the political leadership will eventually see how the U.S.-Korea FTA negotiations have met most of its key trade interests with Korea. With China rapidly growing as an economic rival, both U.S. Congress and the Democratic administration will also see the vital importance of this “economic alliance” with Korea through the FTA.

VI. FUTURE IMPACTS OF THE U.S. -KOREA FTA

A. *Economic Integration between the United States and Korea*

The U.S.-Korea FTA negotiations have achieved an extraordinary result with respect to removing traditional trade barrier tariffs – there will be no tariffs for trade of all industrial goods¹⁸³ and complete market access will be granted to all agricultural products except rice. The United States has also attained a triumphant result, the magnitude of which is yet to be realized by some of the political leaders: the FTA met almost all of U.S. key trade objectives vis-à-vis Korea, such as market access for its agricultural products and services industries, as well as securing fundamental regulatory changes in Korea that will pave the way for increasing exports of key U.S. products — such as pharmaceuticals — and enhancing protection of its IPR interests to a level the USTR describes “state of the art.”

¹⁸¹ The resolve of the Korean leadership to ratify the FTA was perhaps well demonstrated when Representative Park Jin, Chairman of the National Assembly Foreign Affairs, Trade and Unification Sub-Committee, having faced strong opposition from the opposing party, excluded opposing Committee members from the meeting room and tabled the ratification of the U.S.-Korea FTA without going through the normal process. Hyun-Kyung Kang, *Assembly in FTA Conflict*, *supra* note 4.

¹⁸² Jagdish Bhagwati, Keynote Address at the American Society of International Law (ASIL) Conference at the University of Minnesota Law School: Developing Countries in the GATT Legal System, (May 24, 2007).

¹⁸³ Press Release, MOFAT, Final Negotiation Results, *supra* note 82.

From the outset of the U.S.-Korea FTA negotiations, the USTR indicated that its objectives were not limited to the removal of trade barriers, but included seeking changes in Korea's regulatory systems and practices as necessary to create an optimal business environment for U.S. export industries.¹⁸⁴ The U.S. stance is in line with the previous comprehensive FTAs that it has pursued with other countries. This intent has also been revealed in the U.S.-Korea FTA negotiations by the U.S.'s demands, *inter alia*, for legal changes in Korea's IPR protection, creation of a investment dispute settlement process that will sometimes replace domestic court proceedings, changes in Korea's domestic tax scheme on automobiles, adjustment of the drug price review system, and specific ways in which notice of pending legislation is to be given and specific laws are to be applied.¹⁸⁵ Many of the U.S. demands go well beyond trade issues and have the effect of setting parameters for a broader range of Korean domestic policies. This raises the question of whether the proposed U.S.-Korea FTA is an attempt to integrate the economies of the United States and of Korea, in the sense that the systems and practices of the latter will be aligned in accordance with those of the former, even if systems of economic governance are maintained separate between the two countries.

This "economic integration" seems to have support not only from U.S. business communities, but also from some of the Korean population, including high-level officials who believe that the "advanced" U.S. standards are the global standards, and should therefore be adopted for the benefit of Korea. They contend that the adoption of these standards through the FTA will improve the competitiveness and efficiency of the Korean economy.¹⁸⁶ Nonetheless, identifying the systems and practices of a nation that has different economic, social, and cultural priorities as simply being more advanced, and attempting to adopt them without due reference to those differences, would lead to problems. For instance, the more "advanced" U.S. economic systems and practices have been criticized for placing too much emphasis on competition and short-term profits, as dramatically shown in the recent debacles of the financial crisis in 2008, and too little on other important values, such as provision of the public good and protection of the economically underprivileged. The neglect of these values has caused extreme wealth gaps among its population and led

¹⁸⁴ Portman, Letter, *supra* note 87.

¹⁸⁵ It has been estimated that as much as 15% of Korean laws will have to be amended after the U.S.-Korea FTA, while the United States is prepared to amend none. See Joo-Hee Roh, *Han-Mi FTA Chaegyul Dwaemyun Bubryul 15% Tuduh Gochuhya*, [After the U.S.-Korea FTA, 15% of Laws Will Have to be Amended], PRESSIAN NEWS, Jan. 16, 2007, http://www.pressian.com/article/article.asp?article_num=30070116164222&Section=.

¹⁸⁶ Hyun-Chong Kim, *Significance of the Korea-U.S. FTA from Korea's Perspective*, *supra* note 20.

to the inadequacy of its social welfare system.¹⁸⁷ An economic culture emphasizing consumption is an important cause of the astronomical budget and trade deficits in the United States.¹⁸⁸ It has been suggested that implanting U.S. economic systems and practices in Korea may pose the danger of dismantling Korean public policy and social stability.¹⁸⁹

A careful analysis should be conducted to see whether the expected gains from the proposed FTA are balanced between the United States and Korea. While the United States is expected to increase its exports significantly in agriculture, pharmaceuticals, and services,¹⁹⁰ the increase in Korean exports may not be comparable because U.S. tariff rates are already low on major Korean exports, including automobiles, semiconductors, and ships. Furthermore, major Korean export industries, such as automobiles, have already been increasing production within the United States.¹⁹¹ Also, Korea has been unsuccessful in getting the United States to agree to tighten its requirements for the application of AD and CVD measures against Korean products, which would have provided tangible benefits to the Korean exports.¹⁹² Korea has also been unable to persuade the United States to agree to change its rules of origin for textile products based on yarn-forwarding,¹⁹³ save a few exceptions. Additionally, Korea has not been able to increase the number of job-based visa issuances for Korean

¹⁸⁷ For example, the United States does not have universal healthcare coverage and due to the high premiums of private insurance companies, more than 50 million Americans are without any health insurance coverage. See CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009 22 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>. These people are unlikely to have other financial sources for adequate medical care — though the Patient Protection and Affordable Care Act (PPACA) of 2010 is expected to reduce the number of uninsured. In contrast, Korea has enjoyed a publicly-funded, universal health care system since the 1970s, under which virtually every citizen is entitled to health care, indicative of a clearly differing social consensus in each country as to the public provision of health care to the economically disadvantaged.

¹⁸⁸ The U.S. budget deficit reached US\$455 billion and trade deficit US\$673 billion in 2008. U.S. Gov't Accountability Office, *The Federal Government's Financial Health: A Citizen's Guide to the 2008 Financial Report of the United States Government* (Feb. 13, 2009), available at <http://www.gao.gov/financial/citizensguide2008.pdf> (referring to U.S. budget deficit in 2008); see also *Mild Increase in U.S. Trade Deficit a Good Thing*, FINANCIAL POST, May 12, 2009, <http://www.financialpost.com/story.html?id=1588142> (referring to U.S. trade deficit in 2008).

¹⁸⁹ Yong-Shik Lee, *Issues and Outlook*, *supra* note 29, at 226.

¹⁹⁰ USITC, *Impact*, *supra* note 15, at 5-19–5-21.

¹⁹¹ Hae-Yeong Lee, *Worst International Fraud*, see *supra* note 83.

¹⁹² KTC, *STATISTICS*, *supra* note 84.

¹⁹³ The 2001 USITC report indicates that the textiles industry is among the product areas in which Korea may expect the largest increases in exports under the FTA. USITC, *Impact*, *supra* note 15, at 5-11 (indicating that the textile industry is among the product areas in which Korea may expect the largest increase in exports under the U.S.-Korea FTA).

service providers, which could have secured a constant flow of Korean exports on the service front.¹⁹⁴ Dubious outcomes in these areas of core interest to Korea, coupled with the granting of major concessions in agriculture and services to the U.S., are expected to cause large job losses and may also sacrifice Korea's growth potential in these areas. This possibility has brewed widespread skepticism as to the nature of the prospective benefit for Korea, though some studies taking a broader view of the FTA suggest it will have mixed costs and benefits for both sides.¹⁹⁵ The social and economic impact of the elaborate IPR provisions and the provisions affecting the operation of the drug price review system will also be significant.¹⁹⁶

In addition to the substantive problems posed by the proposed U.S.-Korea FTA, procedural issues have been raised with respect to the negotiation process. It has been pointed out that the U.S.-Korea FTA negotiations could have started with more preparation, particularly on the part of Korea,¹⁹⁷ and that the Korean government could have exerted efforts to consult interest groups which might be affected by the proposed FTA. Furthermore, the parties proceeded in haste in an attempt to complete all negotiations before the Trade Promotion Authority (TPA) of the U.S. President expired in the summer of 2007.¹⁹⁸ Consequently, fierce

¹⁹⁴ According to the 2001 USITC report, Korea's service exports are expected to decrease by over 5% under the U.S.-Korea FTA. *Id.* at 5-12.

¹⁹⁵ *But see* Schott, *Negotiating*, *supra* note 89 (explaining how the U.S.-Korea FTA would result in some shifts in employment in Korea, but also arguing that Korea as a whole would benefit from the FTA and that there would be a change in the allocation rather than degree of employment).

¹⁹⁶ *See supra* notes 154 to 158 and accompanying text. A proponent of the U.S.-Korea FTA described the FTA as "the economic highway" for Korea. Cho Tae-Yul, Deputy Minister for Trade, Statement at the 2007 World Knowledge Forum in Seoul: Regional Integration and the Next Step of KORUS FTA (Oct. 17, 2007), http://young.mofat.go.kr/webmodule/common/download.jsp?boardid=753&tablename=TYPE_SPEECH&seqno=fcbfe3fd8fe0fe3fa106b01e&fileseq=fccfbf06ef9402fff0fb106b. This "highway" seems to be only one-way, since the United States made relatively few concessions in comparison to the large ones made by Korea in areas of key American interest, such as agriculture, pharmaceuticals, IPRs, and services.

¹⁹⁷ USITC conducted research on the economic effects of the U.S.-Korea FTA at the request of the U.S. Senate Committee on Finance, and produced a CRP report in 2001 (*see* USITC, *Impact*, *supra* note 15), but according to a former adviser to the Korean President the Korean government did not engage in extensive research prior to the beginning of the FTA negotiations. By way of contrast, it completed five years of research prior to the beginning of the Korea-Japan FTA negotiations, even though its effects were expected to be more limited than that of the U.S.-Korea FTA. Joo-Myung Lee, *Former Adviser to the President, Tae In Chung, Criticizes the U.S.-Korea FTA*, PRESSIAN NEWS, Mar. 28, 2006.

¹⁹⁸ *See* Lee, *Challenges*, *supra* note 59, for a discussion of the widespread dissatisfaction over the Korean government's handling of the U.S.-Korea FTA negotiations; *see also* Korea Sees Worst Labor Protests in Years, CHOSUN ILBO, *supra* note 30.

objections to the U.S.-Korea FTA negotiations have sharply divided Korean society, causing hundreds of thousands of citizens to rally in the streets of Korea.¹⁹⁹ The problem has been compounded by an assertion that an estimate of the positive effect of the proposed U.S.-Korea FTA on the Korean economy, conducted by KIEP, a government-funded research institute, and cited extensively by the government to support the U.S.-Korea FTA, may have been exaggerated.²⁰⁰ Furthermore, democratic deficiency was clearly a problem during the FTA negotiations on the part of Korea. Although any treaty negotiation inevitably involves a certain level of confidentiality and requires the executive branch to make prompt decisions on its own, proper consultation with various interest groups and the timely provision of sufficient information to domestic constituents could have elicited more support from the public.²⁰¹

The benefits that the FTA would create for the economy as a whole might not be very significant for either the United States or Korea. USITC estimated that the impact of the U.S.-Korea FTA on economic growth would be very small: GDP increases of 0.2% for United States and 0.7% for Korea.²⁰² As discussed above, several industries in the United States —

¹⁹⁹ *Korea Sees Worst Labor Protests in Years*, CHOSUN ILBO, *supra* note 30. The Korean government, government-funded institutes, and big businesses in general are known to support the U.S.-Korea FTA, whereas progressive NGOs, labor unions, farmers, and a near majority of the general public oppose it. The preference of groups like the former in favor of the FTA is reflected in a poll commissioned by the Korea Economic Institute (KEI) in Washington D.C., in which 50 corporate representatives, experts, and government officials expressed a rate of 90% in support of the proposed U.S.-Korea FTA. William Watts, *The Korea-US Free Trade Agreement: KORUS FTA Views of Experts and Concerned Parties: Opinion Survey Report #1* (May 15, 2006) (survey report prepared for KEI President Charles Pritchard), available at <http://www.keia.org/Publications/Other/FTASurvey1.pdf>.

²⁰⁰ Joo-Hee Roh, *KIEP, Han-Mi FTA Gyeongjae Hyogwa Jaegumjeung 'Mothagaetda'* [*KIEP Refuses to Verify Economic Effect of the U.S.-Korea FTA*], PRESSIAN NEWS, Apr. 20, 2006, www.pressian.com/scripts/section/article.asp?article_num=30060420114228.

²⁰¹ On September 7, 2006, twenty-three members of the Korean National Assembly (Korean legislature) filed a complaint with the Constitutional Court of Korea that the Korean administration usurped the powers of the Korean National Assembly in its FTA negotiations. *Lawmakers Launch Lawsuit Against South Korea FTA Talks* (Yonhap News Agency, Seoul, S. Kor.), Sept. 7, 2006, available at <http://www.bilaterals.org/spip.php?article5789>. Eventually, however, the Constitutional Court ruled in favor of the administration and dismissed the complaint. Park Si-Soo, *Constitutional Court Nods Disputed Korea-US Bill*, KOR. TIMES, Dec. 28, 2010, available at <http://www.bilaterals.org/spip.php?article18781>. One of the authors of this article pointed out that the Korean administration should be required to report the progress of the FTA negotiation to the Korean National Assembly, so that the Korean legislature could oversee its progress on behalf of the people. Yong-Shik Lee, *Issues and Outlook*, *supra* note 29, at 228. The U.S. has accomplished more in this regard by setting up a Congressional Oversight Group that receives reports and oversees trade negotiations, and by consulting and working closely with interest groups.

²⁰² USITC, *Impact*, *supra* note 15, at 5-2.

including agriculture, service industries, and pharmaceuticals — stand to gain significantly by substantially increasing their exports to Korea.²⁰³ It is, however, doubtful that Korea will attain reciprocal trade gains after the FTA when it has failed to secure its key trade interests, such as abolition or reduction of trade remedy measures, and when trade barriers, if any, to its major exports to the United States have already been low. While Korea has made commitments to make substantial regulatory changes to create a more favorable business environment for U.S. businesses, the systems and practices of the United States, such as admission of foreign labor, will not likely be changed as a result of the FTA. It remains to be seen what the final tally for Korea will be like in terms of trade benefits after agreeing to regulatory changes that may put considerable strains on its economic and social system.

B. Stimulus for More FTAs and East Asia Free Trade Area

Setting aside the question of the economic benefits, the conclusion of the U.S.-Korea FTA will be marked as a successful achievement for the recent bilateral arrangements that both countries have pursued. Not only will it further encourage these two countries to continue forging ahead with their bilateral efforts with the other countries, but other countries will also respond more favorably to U.S. and Korea's bilateral FTA initiatives due to the economic importance of these two countries. As mentioned earlier, Korea is now negotiating FTAs with other major trading countries: after the completion of the U.S.-Korea FTA negotiations, Korea has concluded FTAs with the European Union and India and good progress is being made with respect to FTA negotiations with Canada, Australia, Peru, Colombia and New Zealand. It may also begin FTA negotiations with China in the near future.²⁰⁴ The United States is also conducting negotiations with several countries, although U.S. counterparts are smaller, and FTAs with them seem to have more political, rather than economic, significance.²⁰⁵ At any rate, the spreading of bilateral arrangements for FTAs may distract major trading countries from the multilateral trade negotiations at the WTO, and make the successful conclusion of the stalled Doha Round negotiations more difficult. This may lead to a more fragmented trading system in the long run in the form of a "spaghetti bowl."

²⁰³ *Id.* at 5-10 (predicting that U.S. agricultural and manufacturing exports to Korea would significantly increase, but predicting fewer gains for the U.S. services industry).

²⁰⁴ See *supra* notes 21-24 and accompanying text (discussing China and Korea's economic relationship and the potential for a Sino-Korean FTA).

²⁰⁵ *Id.*

The U.S.-Korea FTA will have regional implications beyond the United States and Korea,²⁰⁶ and may set a new direction for the first trans-Pacific free trade framework between East Asia and North America. Shortly after the completion of the U.S.-Korea FTA negotiations, both China and Japan expressed a desire to sign an FTA with Korea, fearing for their isolation in the region.

As mentioned earlier, feasibility studies on an FTA between Korea and China have been completed, and FTA negotiations between Korea and Japan have also begun, but have subsequently been suspended due to disagreement over agricultural issues.²⁰⁷ Japanese businesses have urged the Japanese government to resume the suspended FTA negotiations with Korea and start negotiations with the United States.²⁰⁸ With its growing influence, China is seeking a leading role in trade and economy in Asia, and has been looking to form closer trade relations with other major economies in Asia, including Korea, India, and Japan.

C. Path to Trans-Pacific Free Trade Area

The successful conclusion of the U.S.-Korea FTA will not only create the third largest free trade area in the world, after the E.U. and NAFTA, but may also mark the beginning of a new trans-Pacific free trade area, which will be the largest free trade area yet to be formed.

The key to forming a larger free trade area that includes East Asia and North America would likely be determined by the Japanese stance on agriculture. If Japan decides to open its agricultural market to the extent that Korea did in the U.S.-Korea FTA, both the United States and Korea will be willing to negotiate an FTA with Japan.²⁰⁹ The governments of both countries have opined that Japan's protective stance on agriculture is the major obstacle to FTA negotiations with it,²¹⁰ and there appears to be no

²⁰⁶ See Schott, *Negotiating*, *supra* note 89, at 13–14 (anticipating new and revived trade negotiations between Korea and its regional neighbors as a result of the U.S.-Korea FTA); see also Inbom Choi & Jeffrey J. Schott, *Free Trade Between Korea and the United States?* 63–67 (Inst. for Int'l Econ., Policy Analysis of International Economics Ser. No. 62, 2001) (examining the potential trade diversion effects that could be the result of passage of the Korea-U.S. FTA).

²⁰⁷ Lee, *Issues and Outlook*, *supra* note 29, at 10.

²⁰⁸ *Joint Statement*, KYODO NEWS, Apr. 13, 2007; Business Roundtable & Nippon Keidanren, *Joint Statement: U.S.-Japan Economic Partnership Agreement* (Jan. 19, 2007) (stating the imperative for “a comprehensive and high-level” economic partnership agreement between the U.S. and Japan), available at <http://www.keidanren.or.jp/english/policy/2007/007.html>.

²⁰⁹ It is known that Korea demands over 90% market liberalization in agriculture, but Japan wants to keep it down to 50%.

²¹⁰ CHANLETT-AVERY, *ISSUES*, *supra* note 18, at 14; see also *supra* note 47 and accompanying text.

other significant issues that will block an FTA. Thus, if Japan's position on agricultural issues changes, FTAs between Japan and these two countries will become feasible. Separate bilateral FTAs among the three countries can lead to a legal framework for a single free trade agreement among them,²¹¹ similar to how the bilateral FTA between the United States and Canada was later adapted to include Mexico to form NAFTA. Canada will also be a likely candidate of a membership for this new free trade area between East Asia and North America. Canada already has an FTA with the United States and is currently conducting FTA negotiations with Korea. Business communities in both Canada and Japan have favored an FTA between the two countries as well.²¹²

China, however, will be unlikely to participate in this free trade area, at least in the near future, due to its political and economic differences with the United States and Japan. Thus, for the United States, the formation of this trans-Pacific free trade area will be an ideal trade and economic platform on which it can keep China in check and continue to be a leading trade and economic force in both North America and East Asia. For Japan, the participation in this free trade area will strengthen its trade, economic, and even political position in the region against rapidly growing China. For Korea and Canada, this free trade area will help them to access their traditional export markets in Japan and the United States, without creating obstacles to the furtherance of their trade relations with China. It is in fact very likely that Korea will have a bilateral FTA with China and at the same time participate in this free trade area, as demonstrated by China's willingness to sign an FTA with Korea even after Korea's conclusion of FTA negotiations with the United States.²¹³ Conclusion of FTAs with major trading nations such as China, the United States, Japan, and European Union could turn Korea into a "hub" of regional and bilateral free trade relations.

If the trans-Pacific free trade area is feasible, then the next question is the nature and characteristics of a legal framework for this free trade area. The legal framework is expected to be framed largely in accordance with the preferences of the United States as shown in the U.S.-Korea FTA as well as in the other FTAs that the United States has promoted: *i.e.* strong

²¹¹ Three separate FTAs can be developed into a legal framework for a larger trade area because the contents and nature of these bilateral FTAs will not vary greatly, as they are all framed by the United States.

²¹² *Consideration of Canada-Japan Trade Pact Considered a Precursor to Japan-U.S. Deal*, 17 INT'L TRADE REPORTER 21, 834 (May 2000) (discussing the value of negotiating an FTA between Japan and Canada as a precursor to later attaining a U.S.-Japan FTA, "which would be the ultimate goal"), in Posting of Oliver Hoedeman, paxaran@antenna.nl, to cwj@corpwatch.org (Jun. 5, 2001), available at <http://www.jca.apc.org/web-news/corpwatch-jp/30.html>.

²¹³ Yoo, *China*, *supra* note 22; Lee, *China and Japan*, *supra* note 22.

IPR provisions, emphasis of legal transparency and public participation, high-degree of market opening for both agriculture and services, imposition of labor and environmental standards, separate dispute settlement processes and committees to discuss relevant issues under the FTA. This is because the United States will be the key player in forming this regional free trade area and will be unlikely to depart from or substantially concede its strong policy stance that it has shown in the bilateral and other regional contexts. One way or another, Korea had to accommodate the U.S. priorities for most parts of the FTA negotiations, and it is not expected to be any different for Japan or Canada.

As discussed earlier, some of the provisions in the U.S.-driven FTAs were intended to bring regulatory practices and the business environment of the signatory country in conformity with those of the United States in order to create an optimal business environment for U.S. export industries. Thus, these provisions will have far-reaching economic, political, and social impact, and the degree of required market opening and regulatory intervention under the FTA can be characterized as one that leads to an economic integration among the signatory countries. The question is how much of this impact can be tolerated by the society that may have rather different economic, political, and social priorities as previously discussed. Concern has been raised that the adjustment cost for Korea as a result of the U.S.-Korea FTA will be enormous, particularly in the areas of agriculture, IPRs and health care.²¹⁴ Thus, the post-FTA occurrences in Korea will be a barometer of whether an even larger free trade area between East Asia and North America will be successful and beneficial to all of the participating countries.

D. Encouragement for East Asia - Europe Free Trade Area

Economic integration between East Asia and North America through the formation of a free trade area may also encourage formation of another free trade area between East Asia and Europe. As stated, Korea has completed its FTA negotiations with the European Union and the agreement is set to go into effect as of July 1, 2011. Just as the U.S.-Korea FTA can be developed into a larger free trade area as shown above, other countries in the region may be added to the free trade framework initially formed between the European Union and Korea as well. Japan can also be a participant in this agreement, again if it somehow decides to open its

²¹⁴ See *supra* notes 90–101 (agriculture), 116–129 (IPRs), 154–158 (health care and drug price review system), and 190–196 (predictions about future developments) and accompanying text.

agricultural market. Japan's bilateral FTA with the E.U.²¹⁵ and Korea's bilateral FTA with the E.U. can be then merged into a single framework for free trade, creating a free trade area between Europe and East Asia. This means that East Asia can become a hub of free trade areas linked with both Europe and North America. It will no doubt create significant impact and new dynamics in world trade and economy, but the economic analysis to measure this impact must yet await the realization of these pan-continental free trade areas. In all of this, China is likely to be excluded. For Korea, it also remains to be seen whether this "web" of FTAs would revitalize the Korean economy with a new growth momentum as hoped by its leadership.²¹⁶ It indeed remains to be seen whether the FTA is a path to common economic prosperity or simply a false promise.

²¹⁵ Japanese business communities proposed forming an E.U.-Japan FTA. Nippon Keidanren, *Call for the Start of Negotiations on Japan-EU Economic Integration Agreement: Third Proposal for Japan-EU Economic Partnership Agreement* (Nippon Keidanren, Tokyo, Japan), Nov. 17, 2009, available at <http://www.keidanren.or.jp/english/policy/2009/099proposal.pdf>.

²¹⁶ A Cambridge economist, Ha-Joon Chang, opined that the real reason for the sluggish growth of the Korean economy is that companies have substantially reduced investments after the 1997 financial crisis to meet shareholders' demands for higher income dividends. Yeong-Jin Kim, Hanguk Gyeongjae, Yeongwonhee Puhreehmieoh Leegue Mot Olla Gal Soodo [An Interview with Ha-Joon Chang], CHOSUN ILBO, June 12, 2007, available at http://news.chosun.com/site/data/html_dir/2007/06/12/2007061200993.html.