

implementing the agreement.<sup>20</sup> The Obama administration and the Korean government both recognized that if formally amended, the KORUS would no longer be eligible for the fast-track expedited procedures for approval of free-trade agreements, since these procedures are available only for agreements signed before July 1, 2007. To get around that roadblock, the two governments agreed to keep intact the Agreement as signed in 2007, but then to supplement it with the February 2011 exchange of letters that, in effect, revise the obligations in the KORUS.

Substantively, the December 2010 supplemental agreement reflected in those letters slows down the pace of liberalization in some areas and expands market access in others. For example, the United States is allowed to keep its 25 percent tariff on Korean trucks for eight years longer than under the original agreement, and Korea was permitted to delay for two years a reduction in tariffs on some cuts of pork. On the other hand, both countries agreed to eliminate electric car tariffs by the fifth year of implementation. In addition, the exchange of letters makes clear that the parties shall apply the relevant KORUS dispute settlement procedures to this new “understanding.”<sup>21</sup> The letters further state that these exchanged letters “constitute an agreement between our two Governments, which shall enter into force on the date that the KORUS enters into force and terminate on the date that that KORUS terminates.”<sup>22</sup>

The U.S.-Korea Free Trade Implementation Act approves the free-trade agreement (as originally written) and contains provisions to “secure the benefits of the agreement entered into pursuant to an exchange of letters between the United States and the Government of Korea on February 10, 2011.”<sup>23</sup> These benefits are secured by writing the lessened U.S. obligations into the new U.S. legislation.<sup>24</sup> The House Committee report accompanying the Act notes that the KORUS as approved in 2007 was “modified by a later agreement on December 3, 2010,” but the report does not otherwise discuss the innovative procedure used by the Congress to approve a trade agreement revised after the negotiating deadline had passed.<sup>25</sup>

The KORUS has been controversial in Korea. It was approved by the Korean parliament in November 2011 in an acrimonious session during which a member of parliament discharged a tear-gas grenade.<sup>26</sup>

## USE OF FORCE AND ARMS CONTROL

### *United States Ceases Performance of CFE Treaty Obligations in Response to Russia's Nonperformance*

In November 2011, the U.S. Department of State announced that the United States would cease to perform certain obligations under the Conventional Armed Forces in Europe (CFE) Treaty with regard to Russia because of Russia's nonperformance of its CFE obligations. While

<sup>20</sup> United States–Korea Free Trade Implementation Act, Pub. L. 112-41, 125 Stat. 428 (2011).

<sup>21</sup> Office of the United States Trade Representative Press Release, *supra* note 19, at 1, 5.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> Pub. L. 112-41, §2.

<sup>24</sup> *See, e.g., id.*, §§201, 321.

<sup>25</sup> H.R. REP. NO. 112-239, at 24, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt239/pdf/CRPT-112hrpt239.pdf>.

<sup>26</sup> Chico Harlan, *S. Korea Aims to Ratify Trade Deal Soon After U.S. Does*, WASH. POST, Oct. 8, 2011, at A9; *South Korea Ratifies Long-delayed US Trade Deal*, BBC NEWS, Nov. 22, 2011, at <http://www.bbc.co.uk/news/world-asia-15832451>.

the Department's announcement does not state the basis for the U.S. action under the law of treaties, it follows the approach indicated by Article 60 of the Vienna Convention on the Law of Treaties.<sup>1</sup> This provision notes in part that

(2) A material breach of a multilateral treaty by one of the parties entitles:

....

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

(3) A material breach of a treaty, for purposes of this article, consists in:

(a) A repudiation of the treaty not sanctioned by the present Convention; or

(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.<sup>2</sup>

The Department's announcement follows:

Today the United States announced in Vienna, Austria, that it would cease carrying out certain obligations under the Conventional Armed Forces in Europe (CFE) Treaty with regard to Russia. This announcement in the CFE Treaty's implementation group comes after the United States and NATO Allies have tried over the past 4 years to find a diplomatic solution following Russia's decision in 2007 to cease implementation with respect to all other 29 CFE States. Since then, Russia has refused to accept inspections and ceased to provide information to other CFE Treaty parties on its military forces as required by the Treaty.

The United States will continue to implement the Treaty and carry out all obligations with all States Parties other than Russia, including not exceeding the numerical limits on conventional armaments and equipment established by the Treaty. We will resume full Treaty implementation regarding Russia if Russia resumes implementation of its Treaty obligations.

The United States remains firmly committed to revitalizing conventional arms control in Europe. In order to increase transparency and consistent with our longstanding effort to promote stability and build confidence in Europe, the United States will voluntarily inform Russia of any significant change in our force posture in Europe.<sup>3</sup>

<sup>1</sup> Vienna Convention on the Law of Treaties, Art. 60, *opened for signature* May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969). The United States is not party to the Vienna Convention but regards many of its provisions as reflecting customary international law.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Dep't of State Press Release No. 2011/1992, *Implementation of the Treaty on Conventional Armed Forces in Europe* (Nov. 22, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/11/177630.htm>.