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Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution

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Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution

Lisa Blomgren Bingham, Sun Woo Lee,** and Won Kyung Chang****

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I. INTRODUCTION

The world's nations are reexamining governance in the face of globalization. Former Soviet block nations are trying to become democracies and privatizing

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their economies. International institutions such as the World Bank¹ are exerting pressure on developing nations to lay the necessary foundation for the rule of law through legal infrastructure and innovations in governance.² Non-Governmental Organizations (“NGOs”), such as the American Bar Association’s Central European and Eurasian Law Initiative (“CEELI”)³ and United States Agency for International Development (“USAID”),⁴ have funded projects to provide assistance with this process. Many of these projects recommend new institutions to resolve conflicts over rights, property, and the legacy of ethnic violence. All of these developments suggest the convergence of national governance systems.

While much attention has focused on Eastern Europe and Central Asia,⁵ South Korea, an established industrial economy, has quietly broadened and deepened its democracy,⁶ and is presently building new, innovative governance processes into its institutions.⁷ There is a paradigm shift under way in South Korea that is framed as public participation in governance. South Korea is building new processes for conflict resolution and civic engagement into its administrative law and practice. It is drawing on the experiences of other countries and adapting them to its cultural context. The Korean Peninsula is the next geographic region to face major challenges of democratization and privatization. The lesson that Germany teaches is that re-unification of North and South Korea is inevitable, and therefore, North Korea⁸ will likely inherit the governance systems that South Korea is building today.⁹

1. Douglas Webb, *Legal and Institutional Reform Strategy and Implementation: A World Bank Perspective*, 30 LAW & POL’Y INT’L BUS. 161 (1999). One observer notes that the World Bank’s charter precludes it from interfering with the politics of a member nation, but that administrative law and governance are seen as “neutral and technical” conditions for fostering economic growth. Tom Ginsburg, *Japanese Law Symposium: Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 622 (2001).

2. See Tamara Lothian and Katharina Pistor, *Local Institutions, Foreign Investment, and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT’L L. 101 (2003).

3. The Central European and Eurasian Law Initiative, <http://www.abanet.org/ceeli/> (last visited Feb. 7, 2006).

4. For reports on various USAID projects on democracy and governance, see USAID, About USAID, Publications, http://dec.usaid.gov/demo_gov.cfm (last visited Feb. 7, 2006).

5. Webb, *supra* note 1, at 161.

6. Ginsburg, *supra* note 1, at 585-87 (observing that, in Korea, the political environment changed dramatically in the mid-1990s as the result of democratization and constitutional reforms which created incentives for politicians to open up the policy process and adopt a new administrative procedure regime).

7. Kyu Ho Youm, *Freedom of Expression and the Law: Rights and Responsibilities in South Korea*, 38 STAN. J. INT’L L. 123 (2002) (describing massive statutory changes concerning freedom of the press, political rights, and civil liberties since 1987).

8. The Democratic People’s Republic of Korea [hereinafter North Korea].

9. Curtis J. Milhaupt, *Privatization and Corporate Governance in a Unified Korea*, 26 IOWA J. CORP. L. 199 (2001). But see Joongi Kim, *North Korea: Legal Perspectives and Analyses: Essay: The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong*, 27 FORDHAM INT’L L.J. 1306, 1311 (2004) (describing efforts by North Korea to establish special economic zones to attract international investment in Sinuiju and Gaeseong in which North Korea adopted a comprehensive legal structure similar to the Hong Kong precedent of one country but two systems that may presage a move toward a market-based economic system).

This article examines South Korea's¹⁰ implementation of new governance processes, specifically, its growing use of conflict resolution and civic engagement. First, this article discusses definitions of legal infrastructure. Second, it addresses control over dispute-system design as a lens through which to examine new governance processes. Third, it discusses recent developments in the Korean Judicial and Executive branches. Lastly, it will address the connections between new governance processes and economic development in Korea.

II. GOVERNANCE, LEGAL INFRASTRUCTURE, AND NEW GOVERNANCE PROCESSES SUCH AS DISPUTE RESOLUTION

Governance occurs within the context of legal infrastructure, which includes both substantive and procedural elements.¹¹ Legal infrastructure's substantive elements include property and contract rights, individual economic freedom, and civil rights. Its procedural elements include the resources and institutions for enforcing rights and resolving disputes.¹² These include not only public sector institutions, such as courts and administrative forums within local, regional, or national agencies, but also private and nongovernmental institutions that help address conflict.

Most broadly, conflict resolution can happen in a court, through a government agency, in a quasi-public context, through a NGO, or in a private context. Traditional governance processes—such as rulemaking or adjudication—are ways of resolving conflict in the creation and enforcement of public law. Rulemaking is the quasi-legislative collection of information to create a new rule, regulation, or guideline of general and prospective applicability. Adjudication is the retrospective examination of facts involving specific parties to determine rights in accordance with a legal standard, such as a statute or regulation. Both of these processes reconcile the conflicting interests of citizens and stakeholders with the public policy goals of elected officials as expressed in law.

Conflict resolution can also happen through a variety of new governance processes. These processes are alternative quasi-judicial and quasi-legislative processes with a variety of names, including alternative or appropriate dispute resolution (ADR), consensus-building, dialogue, and deliberative democracy.¹³

10. The Republic of Korea [hereinafter South Korea or Korea].

11. See Paul B. Stephan, *Relationship of the United States to International Institutions: The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

12. Robert Hockett, *From Macro to Micro to "Mission-Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153, 156 (2002) (observing that the International Monetary Fund is concerned with property law, contract rights, judicial reform, and other market-facilitating legal and institutional arrangements partly as a result of the Asian Monetary Crisis of 1997 to 2000).

13. Lisa Blomgren Bingham, Tina Nabatchi & Rosemary O'Leary, *The New Governance: Practices and*

Increasingly, these alternative processes are becoming an essential feature of governance. The terms consensus-building, dialogue, and deliberative democracy tend to refer to quasi-legislative processes. They help government to engage citizens and stakeholders to identify policy preferences and set priorities that in turn are used to formulate rules, guidelines, and regulations. In the United States, new quasi-legislative governance processes include forms of deliberative democracy¹⁴ such as the 21st Century Town Meeting of AmericaSpeaks,¹⁵ e-democracy, Public Conversations,¹⁶ participatory budgeting, citizen juries, Study Circles,¹⁷ and collaborative policymaking, among others.¹⁸ The term ADR most often refers to quasi-judicial processes that engage citizens and stakeholders in implementing and enforcing public law and policy. ADR includes various forms and models of negotiation, mediation, and arbitration. All new governance processes permit citizens and stakeholders to actively participate in the work of government.

Moreover, these processes are used increasingly at all levels and sectors of governance. They are a feature of the emerging international governance structures, as sovereign nations negotiate treaties that provide for conciliation and dispute settlement, followed by arbitration before new international courts. These processes have not been adequately studied in any of the contexts or sectors in which they are in use, and South Korea is no exception. South Korea is building these new governance processes into a variety of its government institutions, and creating both an opportunity and a need for participation by its citizens and civil society in the policy process. This, in turn, is changing both the nature of information available to government in making public policy choices and the likely range of outcomes in conflict resolution.

III. CONTROL OVER DISPUTE SYSTEM DESIGN

For purposes of this article, private conflict resolution is a new governance process conducted by someone other than a judge in the judicial branch of government, an administrative law judge, or a public servant in the executive branch of government. The outcomes of private conflict resolution vary with the context of the system in which the process occurs. Dispute system design is the

Processes for Stakeholder and Citizen Participation in the Work of Government, 65 PUB. ADMIN. REV. 547 (2005).

14. For descriptions of all these processes, see National Coalition for Dialogue and Deliberation, www.thataway.org (last visited Nov. 12, 2006); see also Collaborative Governance Initiative of the Institute for Local Government, www.ilsg.org (last visited Nov. 12, 2006).

15. See America Speaks, www.americaspeaks.org (last visited Nov. 12, 2006).

16. See Public Conversations Project, <http://www.publicconversations.org/pcp/index.asp> (last visited Nov. 12, 2006).

17. See Study Circles Resource Center, <http://www.studycircles.org/en/index.aspx> (last visited Feb. 7, 2006).

18. See generally JOHN GASTIL, *THE DELIBERATIVE DEMOCRACY HANDBOOK* (John Gastil ed., Jossey-Bass 2005).

concept that dispute resolution occurs through a system of steps and rules for the process, where this system is the product of a conscious series of choices and subject to a wide variation of resulting designs.¹⁹ Originally conceived as describing innovations in a collectively bargained grievance procedure (such as grievance mediation), the concept has broader applicability as a useful way to think about the design of new governance processes.

There are three basic categories of parties with control over dispute system design: (1) private parties who jointly design the system for themselves; (2) one party who designs it unilaterally and uses superior economic power to impose it on the other party; and (3) third parties who design a system for the benefit of others who are the disputants.²⁰

An example of the first category of joint private ordering is when two parties design a system together, as is the case in private commercial international arbitrations. Similarly, in labor relations and collective bargaining authorized by law, there are repeat players—both unions and management. Together, they create an organic, self-regulating balanced system for labor mediation and grievance arbitration. These systems are generally seen as fair, useful, functional, and economically efficient.

A second category of private ordering is where one party designs the system unilaterally. This is commonly used and is a growing practice in the United States. The unilateral design of a system is achieved through adhesive mandatory arbitration, in which one party designs an arbitration plan and imposes it through superior economic power on the other party. Under the Federal Arbitration Act and federal preemption, these are enforceable arbitration agreements with a limited scope of review. However, there are some unresolved problems with this form of private ordering, such as power asymmetries. Power asymmetries include to repeat players using their structural advantage in the process to achieve superior outcomes over one-shot players; for example, the individual employee who may only use arbitration once is a one-shot player.²¹ Alternatively, some one-party designs use voluntary mediation, and these designs pose less concern.²²

Finally, there is public institution-building, in which third parties design arbitration or mediation programs for use by disputants. These third parties are not parties to the actual arbitration or mediation, but they create additional means for dispute resolution. These processes are generally seen as fair and balanced. Often, third parties ensure that there is stakeholder and disputant participation or democratic forms of voice in the design process.

19. WILLIAM URY, JEANNE BRETT, & STEVEN GOLDBERG, *GETTING DISPUTES RESOLVED* (Jossey-Bass 1989).

20. See Lisa Blomgren Bingham, *Control Over Dispute Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221 (2004).

21. *Symposium, Self-determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 874 n.5 (2002).

22. LISA BLOMGREN BINGHAM, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE* (IBM Center for the Business of Government 2003).

As discussed below, Korea is in the midst of a dramatic growth in third-party dispute system design through initiatives by government. However, it has limited formal private ordering through joint or one-party dispute system designs.

IV. RECENT MOVEMENTS TOWARD NEW GOVERNANCE PROCESSES IN KOREA

This section will describe the backdrop for dispute resolution in Korea. It will also review innovations in progress in the judicial branch of government and then address innovations in the executive branch. This section will briefly examine the administrative law context for these innovations, discuss developments at the National Labor Relations Commission, examine proposals for a national model for public policy conflict resolution, and describe Korea's first major environmental mediation case.

A. *The Backdrop for Dispute Resolution in Korea*

Toward the end of the twentieth century, Korea moved from a dictatorship to a vibrant and developing democracy, one that has flourished in the past decade. There was dramatic economic growth during this period, something that became known as the "Asian Tiger" phenomenon. However, vertically-integrated corporate conglomerates, called chaebol, dominated the economy.²³ These organizations were very closely held in point of fact, if not de jure. They were founded by families, and control of a chaebol either remained in the hands of the founder or passed to the second- and third-generation of the family.²⁴

An economic crisis in 1997-1998²⁵ was partly a function of dramatic leverage that the chaebol were able to obtain with a centralized and government-supported banking system.²⁶ For example, these companies obtained a borrowing-to-assets ratio of 500% in 1997.²⁷ The top thirty chaebol have overlapping boards of directors and stock ownership; total family ownership interests are 43% as a

23. Milhaupt, *supra* note 9, at 205-09.

24. *Id.* at 206.

25. Financial and Corporate Restructuring Assistance Project, *Final Report and Legal Reform Recommendations to the Ministry of Justice of the Republic of Korea*, 26 IOWA J. CORP. L. 546 (2001).

26. Craig P. Ehrlich & Doe Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 3 (2002) (arguing that a 2001 anticorruption law making it a crime for a public official to accept a gift in excess of 50,000 won had insufficient enforcement tools, and that the economic crisis of 1997 was partly a function of corruption as part of the relationship among the chaebol, the government, and the banks during decades of development from the 1960s to the 1990s).

27. Milhaupt, *supra* note 9, at 207 n.39. See also Hockett, *supra* note 9, at 175 (observing that the Asian Financial Crisis began when investors noted weaknesses in the financial system of South Korea and other Asian Nations consisting of weak regulatory oversight, huge, unhedged private short-term debt in foreign currencies, inadequately transparent corporate balance sheet data, corruption, and interlocking governments, banks, and firms); see also Ehrlich & Kang, *supra* note 26, at 28-29 (observing that banks continue to extend credit to manufacturers not capable of servicing their debt, and do so at the direction of the government).

function of cross-shareholding in the top thirty chaebol.²⁸ In addition, these chaebol control 41% of the domestic economy, according to a 1995 study.²⁹

There is a cultural tradition of deference to authority from the Confucian era. This deference has an impact on how Korea will use dispute resolution. For example, it can inhibit party empowerment in mediation. Specifically, the Confucian tradition established a governmental meritocracy in which bureaucrats made decisions intending to build a better society and community. This is more consistent with quasi-judicial or arbitral decisionmaking. It is an autocratic, not a democratic, legacy for Korea.

Moreover, the vertical concentration of power in the chaebol tends to suppress disputes. However, as a result of the financial crisis in the late 1990s, substantive laws gave more rights to shareholders, created more transparency, and ensured more accountability for the boards of directors of the chaebol.³⁰ They also directly addressed cultural traditions of gift-giving that may appear as corruption and bribery under international norms.³¹ These reforms tend to introduce more disputes as shareholders and members of the public obtain more information about chaebol board decisionmaking. The prospect of future reunification with North Korea gives added meaning to all law reform in South Korea. Some commentators nevertheless advocate continued reform of corporate governance.³²

There are also cultural forces that support the use of dispute resolution. Korea has a rich tradition of informal conciliation in communities and at the workplace that stems from its Confucian heritage.³³ In this tradition, elders, superiors, and family clan members may informally intervene, without authority, to effect reconciliation because conflict disrupts the harmony of the community. This informal conciliation stresses both evaluative³⁴ and directive mediation styles, as those terms are used in more recent U.S. literature.³⁵ These de facto, informal mediators will not hesitate to tell both parties that the other is at fault, then chide, criticize, suggest solutions, educate, threaten, urge reconciliation,

28. Milhaupt, *supra* note 9, at 205.

29. *Id.* at 205 n.27. The top 30 chaebols controlled 47.3% in 1995, 47.1% in 1996, 46.6% in 1997, 47.1% in 1998, and 40.6% in 1999. See In-Hahk Hwang et al., *Chaebol Structure and Policy*, in *INDUSTRY POLICY* (KERI 2000). The top five chaebols controlled 26.3% in 1999.

30. Financial and Corporate Restructuring Assistance Project, *supra* note 25, at 546; Ehrlich & Kang, *supra* note 26, at 1.

31. Ehrlich & Kang, *supra* note 26, at 22-24.

32. Milhaupt, *supra* note 9, at 216-17; Ehrlich & Kang, *supra* note 26, at 6 (discussing failure of the 2001 reforms to create the position of independent counsel with tenure or other independent investigative body to address charges of corruption and whistleblowing).

33. Nam Hyeon Kim, James A. Wall, Jr., Dong-Won Sohn & Jay S. Kim, *Community and Industrial Mediation in South Korea*, 37 J. CONFLICT RESOL. 361 (1993); Dong-Won Sohn & James A. Wall, Jr., *Community Mediation in South Korea: A City-Village Comparison*, 37 J. CONFLICT RESOL. 536 (1993).

34. Kim et al., *supra* note 33, at 367-68, 371-73 (about the same for both community and workplace disputes); Sohn & Wall, *supra* note 33, at 541-42 (about the same for both city and village disputes).

35. ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* (2d ed. 2003).

compromise in the interest of community harmony, and cap it off with considerable use of alcohol to enable face-saving communication.³⁶ This cultural tradition is outside any formal dispute-system design. Any formal structures or social institutions for mediation practice that were in place as a result of the Confucian tradition appear to have been suppressed during the Japanese occupation of Korea in the first half of the twentieth century.³⁷

Korea does not have dispute resolution in the form of joint private ordering to the same extent as the United States. There is limited use of commercial arbitration.³⁸ There is the Korean Commercial Arbitration Board (“KCAB”),³⁹ which handles both domestic cases, defined as those involving parties with their principal offices or permanent headquarters in the Republic of Korea, and international cases, which are all others.⁴⁰ Unlike arbitration rules of various U.S. third-party providers, such as the American Arbitration Association,⁴¹ the arbitration rules of the KCAB are reviewed and approved by the Korean Supreme Court.⁴² The KCAB reported receiving and opening a total of 210 cases in 2002—163 cases were domestic and 47 cases were international. From the 210 cases, 167 went to an award, 35 were withdrawn, and 8 were stopped.⁴³ The caseload appears stable. In 2003, the KCAB reported opening a total of 211 cases—173 domestic and 38 international, where a total of 202 cases went to an award, 40 were withdrawn, and 7 were stopped.⁴⁴ Generally, about four-fifths of the cases are domestic, and one-fifth are international.⁴⁵ Among the international cases, the most common claims are non-payment, delayed shipment, contract cancellation, and unacceptable quality of goods.⁴⁶ Korea adopted a version of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (“UNCITRAL Model Law”) in 1999, and named it the Korean Arbitration Act.⁴⁷ Thus, in terms of legal infrastructure for international commercial arbitration, Korea is in the mainstream as a modern industrial economy.

36. Kim et al., *supra* note 33, at 369.

37. *Id.* at 366.

38. Kwang-Rok Kim, *How Do You Settle Business Disputes with Koreans?: The Advent of a New Amendment to the Korean Arbitration Act*, 15 *TRANSNAT'L LAW* 227 (2002).

39. See The Korean Commercial Arbitration Board, www.kcab.or.kr/English (last visited Nov. 15, 2005).

40. Arbitration Rules of Korean Commercial Arbitration Board (KCAB), ch. 1, art. 2 (2004), www.kcab.or.kr/English/M6/M6_S2.asp (last visited Nov. 15, 2005).

41. See American Arbitration Association, www.adr.org (last visited Nov. 12, 2006) (listing the various rules and protocols administered by the American Arbitration Association).

42. *Id.*

43. These are the most recent statistics on the KCAB website, reported at Korean Commercial Arbitration Board, www.kcab.or.kr/English/M5/M5_S4.asp (last visited Jan. 2, 2006).

44. *Id.*

45. *Id.*

46. *Id.*

47. Kwang-Rok Kim, *supra* note 38, at 229-30; Arbitration Act of Korea (Amended by Act No. 6083 as of Dec. 31, 1999), www.kcab.or.kr/English/M6/M6_S1.asp (last visited Nov. 15, 2005).

Korea makes very limited use of one-party dispute-system designs, such as mandatory commercial and employment arbitration, as those processes are used in the United States. While Korean credit card companies may be adopting the same language for arbitration as their U.S. peers, there is no equivalent of the Federal Arbitration Act to limit the scope of judicial supervision over abuses. In contrast, the Korean Arbitration Act allows courts broad discretion to set aside awards that are contrary to Korean law or public policy.⁴⁹

Korea does not have a tradition of independent mediation practice.⁵⁰ The KCAB offers mediation services as well as commercial arbitration services.⁵¹ It mediates using members of its staff as neutrals, provides its services free of charge, and generally conducts mediation by telephone or correspondence,

48. One-party dispute system design is permitted under the Arbitration Act of Korea § 8 (3). One use concerns disputes among credit card companies, stores, and customers regarding a customer's use of a credit card. Personal communications with staff members of LG Card Co., Ltd. (January 31, 2006).

49. The Arbitration Act of Korea provides as follows:

Article 36 (Application for Setting Aside Award to Court)

(1) Recourse against an arbitral award may be made only by an application for setting aside to a court.

(2) An arbitration award may be set aside by the court only if:

1. The party making the application furnishes proof that:

(a) a party to the arbitration agreement was under some incapacity under the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the Republic of Korea; or

(b) a party making the application was not given proper notice of the appointment of the arbitrator or arbitrators or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(d) the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties, unless such agreement was in conflict with any provision of this Act from which the parties cannot derogate or, failing such agreement, were not in accordance with this Act; or

2. The court finds on its own initiative that:

(a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Korea; or

(b) the recognition and enforcement of the award is in conflict with the good morals or other public policy of the Republic of Korea.

(3) An application for setting aside the award shall be made within three months of the date on which the party making that application has received the duly authenticated award or, if a request has been made under Article 34, the duly authenticated copy of a correction or interpretation or an additional award.

50. Kwang-Taek Woo, *A Comparison of Court-Connected Mediation in Florida and Korea*, 22 BROOKLYN J. INT'L L. 605, 608 (stating that "[v]oluntary mediation by parties' agreement without court intervention was available, but very rare. Accordingly, mediation in Korea is generally a court-connected procedure in which the court intervenes and leads.").

51. See Korean Commercial Arbitration Board, www.kcab.or.kr/English/M3/M3_S1.asp (last visited Jan. 2, 2006).

although in-person mediation is available.⁵² Unlike the United States, mediation settlements reached with the assistance of the KCAB are not legally binding, but the KCAB reports that most settlements are implemented voluntarily.⁵³ It reports that in 2002, it opened 470 domestic and international mediation cases, which were divided roughly in half between the two categories.⁵⁴ In 2003, it opened 451 cases.⁵⁵ The KCAB reports that the majority of international mediation cases involve non-payment, delayed shipment, and unacceptable quality of goods, in that order of frequency.⁵⁶

Thus, Korea has both the legal infrastructure and the institutional capacity for private dispute resolution in the form of commercial arbitration and mediation. Nevertheless, in light of Korea's status as the eleventh largest economy in the world,⁵⁷ with a population of 48 million people⁵⁸ and a relatively low reported caseload in mediation and arbitration for commercial disputants, it would appear that private dispute resolution is not yet fully institutionalized in Korea.

In contrast, the United States has experienced dramatic growth in party-initiated private ordering and dispute system design. One case is particularly illustrative: the development of the Center for Public Resources ("CPR") Institute. For a period of time, there was a growing phenomenon of Fortune 500 companies suing each other.⁵⁹ In-house counsel at these companies decided they needed to reduce their litigation budgets for outside counsel. As a result, these companies joined forces to create CPR, which became the CPR Institute, and they created the CPR Pledge in which they agreed to adopt a policy of using ADR before resorting to the courts.⁶¹ Private companies have certain formal dispute resolution systems, such as labor-management committees, collective bargaining, and related grievance procedures that provide due process. However, in Korea, there are cultural understandings and integration of businesses that suppress disputes among the chaebol. Moreover, there appears to be no formal dispute-system design governing disputes within the chaebol group.

At present, there is limited curriculum on negotiation, mediation, arbitration, and dispute resolution in law departments, public administration programs, and

52. *Id.*

53. *Id.*

54. Mediation Statistics of the Korean Commercial Arbitration Board, www.kcab.or.kr/English/M5/M5_S4.asp (last visited Nov. 15, 2005).

55. *Id.* The KCAB does not report settlement rates for its mediated cases.

56. *Id.*

57. Financial and Corporate Restructuring Assistance Project, *supra* note 25, at 550.

58. Hoyoon Nam, *U.S.-Style Law School System in Korea: Mistake or Accomplishment?*, 28 FORDHAM INT'L L.J. 879, 880 (2005).

59. Marc Galanter, *Contracts Symposium: Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577 (2001).

61. See International Institute for Conflict Prevention & Resolution, www.cpradr.org/CMS_disp.asp?page=Abt_Began&M=1.3 (last visited Jan. 2, 2006).

business schools.⁶² As a result, there is no substantial institutional infrastructure for negotiation or dispute-resolution training. There are no established professional associations or obvious sources of trained mediators, although there is a roster of arbitrators maintained by the KCAB. These are challenges for implementing private dispute resolution.

There is limited one-party dispute system design activity in South Korea. It stands to reason because this is a culture with more collectivist than individualist traditions. Until recently, there was a tradition of lifetime commitment to the employment relationship. In personal communications with government officials and law professors, there was a universally negative response to the prospect of mandatory, adhesive arbitration clauses. Interviewees expressed considerable concern about corruption in decisionmakers. Interviewees reported that they have no equivalent to the Federal Arbitration Act, which limits judicial review over arbitration awards,⁶³ nor did they believe it likely that there would be any innovation in legal infrastructure that would permit this kind of adhesive use of arbitration in Korea.⁶⁴ In contrast, a recent study in the United States found that one-third of the market basket of goods and services in greater Los Angeles, California, incorporate adhesive arbitration clauses designed unilaterally by the corporate, institutional party.⁶⁵

In contrast to the limited private ordering in Korea, there is exciting innovation by government in institutional legal infrastructure for dispute resolution. This constitutes third-party dispute-system design because the government is designing systems for the use of the public and disputants. This is part of a larger paradigm shift that the government has framed as democracy-building and public participation.⁶⁶ Executive branch agencies and institutions are already engaging in activities to implement these new governance processes, anticipating an executive order.⁶⁷ The process under discussion essentially builds dispute resolution into governance by allowing the engagement of citizens and stakeholders in governmental decisionmaking processes. However, there are limited institutions and infrastructure to support dispute resolution. For example,

62. Personal communications with faculty members at Yonsei University Department of Public Administration (September 26, 2005); at Yonsei University Department of Law (September 27, 2005); and at Sungkyunkwan University Business School (September 28, 2005). These universities are in the top five nationwide.

63. For a review of interpretations of the Federal Arbitration Act, see David S. Schwartz, *Mandatory Arbitration: Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 55 (2004).

64. For a review of the state of mandatory arbitration in the United States, see Thomas B. Metzloff, *Foreword: Mandatory Arbitration*, 67 LAW & CONTEMP. PROBS. 1 (2004).

65. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004).

66. The current president was a public interest advocate who sympathizes with the labor union movement. He is a one-term president trying to change the culture for citizen involvement and public participation as his political legacy. This creates a unique window for change.

67. Executive Order for Managing Conflicts in Public Administration (pending legislation).

there is no professional body of mediators in dispute resolution practice. A new center for dispute-resolution training in the executive branch is systematically benchmarking the best practices of other countries. South Korea is a knowledge economy. It has bootstrapped its way up the world economic ladder through education and the development of human capital. The government will benchmark ways to build conflict resolution capacity.

B. The Judicial Branch: The Korean Supreme Court and ADR

Disputes in the civil justice system in Korea differ greatly from that in the United States. The legal profession is small and elite. Legal education does not take place in graduate schools, as in the American model; instead, there are undergraduate law departments with a first degree in law, similar to the European model and what was formerly prevalent in Japan.⁶⁸ Professors in these law schools have graduate degrees in law, but most have not practiced law or been admitted to the bar.⁶⁹ Those with undergraduate law degrees or those who read the law, but have no formal training, are eligible to take the *sabubshihum*, the Korean equivalent of the bar exam.⁷⁰ Fewer than 1000 people, about 1% of the test-takers, pass it each year, and as a result, there is one lawyer in Korea for every 4800 people.⁷¹ In contrast, in the United States, there is one lawyer for every 300 people.⁷²

Upon passing the *sabubshihum*, prospective lawyers receive two years of additional training at the Judicial Research and Training Institute (“JRTI”), mostly from professors who are judges or prosecutors.⁷³ Although lawyers in private practice enjoy great prestige and high incomes, there are some lawyers who claim not to have sufficiently lucrative work.⁷⁴ On the other hand, there is concern that the small number of lawyers limits access to justice.⁷⁵ The government will be experimenting with a set of reforms to provide graduate education in law combined with easing the standards for admission to the bar in order to improve access to justice, permit lawyers to specialize, and ensure that lawyers have a broader general education.⁷⁶

68. Nam, *supra* note 58, at 33.

69. *Id.* at 913.

70. *Id.* at 885-86 (describing three phases: (1) a multiple choice exam on civil, constitutional, and criminal law, and on English, as well as one elective from criminal policy, international law, international transactions, intellectual property, economy law, labor law, legal philosophy, and tax; (2) an essay examination on administrative law, civil law, civil procedure, commercial, constitutional, and criminal law, and criminal procedure; and (3) an interview covering ethics, specialized knowledge, communication skills, manner and attitude, and creativity and perseverance).

71. *Id.* at 879-80.

72. *Id.* at 880.

73. *Id.* at 888.

74. *Id.* at 902.

75. *Id.* at 916.

76. *Id.* at 895-96 (describing the Korean Supreme Court Judicial Reform Committee’s Law School Plan,

Korea is beginning to move from a civil code tradition toward a common law system. The Korean Supreme Court will be supervising an experiment with the jury system.⁷⁷ The judicial branch has created and will soon implement a virtual courtroom, in which the courts can conduct full-scale civil trials over the Internet and through the use of video-teleconferencing. This is viewed as a move to make disputing more efficient.

The Korean Supreme Court's Task Force on Civil Justice Reform (the "Task Force") is also undertaking a redesign of the entire national civil justice system to add new forms of ADR—specifically, mediation and arbitration. There will be one new national court-connected dispute system design. In the United States, we have allowed the thousand flowers to bloom; every state and federal court has its own dispute system design and there is wide variation.⁷⁸

At present, Korean judges supervise mediation.⁷⁹ Judges may mediate upon the motion of a party or by court referral. Judges may mediate their own cases using a format similar to a judicial settlement conference, or they may appoint a three-person mediation committee (composed of two neutral non-judge commissioners with special subject matter expertise and a judge who chairs); however, they will supervise the case carefully either way.⁸⁰ The process resembles med-arb,⁸¹ in which a mediation process can turn into an adjudicatory one if the parties fail to reach a mutual settlement. The mediator-judge may issue an arbitration award that

under review by a government committee of officials, legal scholars, practitioners, civic activists under the supervision of the Minister of Education and Human Resources Development).

77. Personal communication with June Young Chung, Judge, Deputy Director General for Litigation Affairs and other members of the Korean Supreme Court Task Force on Civil Justice Reform, in Seoul, South Korea (Sept. 26, 2005); email from Jin-suk Chun, MPA and member of the Ministry of Education, Seoul, South Korea (on file with authors) (describing draft bill entitled "The Law of Public Participation in Criminal Justice," drafted by the Commission of Legal System Reform and submitted May 16, 2005, which would implement a five to nine member criminal jury, the number varying with the seriousness of the charge). *See also* Civil Mediation Act § 7.

78. For recent reviews of the literature evaluating various court-connected ADR designs in the United States, see Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004); and John Lande, *Commentary: Focusing on Program Design Issues in Future Research on Court-Connected Mediation*, 22 CONFLICT RESOL. Q. 89 (2004). Both articles are part of a double issue symposium that collects field and applied research on dispute resolution in seven substantive areas: courts, employment, education, community, victim offender reconciliation, family, and the environment. *See Symposium, Conflict Resolution in the Field: Assessing the Past, Charting the Future*, 22 CONFLICT RESOL. Q. 1-320 (2004).

79. Kwang-Taeck Woo, *A Comparison of Court-Connected Mediation in Florida and Korea*, 22 BROOK. J. INT'L L. 605 (1997) (describing processes in effect under the Civil Mediation Act, Law No. 4202 (Jan. 13, 1990), amended by Law No. 4505 (Nov. 30, 1992), and Law No. 5007 (Dec. 6, 1995)). This law applies to civil mediation, but not family or labor mediation. *Id.* at 609.

80. *Id.* at 613-15.

81. *Id.* at 630. Mediation-arbitration, or med-arb, is a process in which the same neutral third-party first serves as a mediator, but if the parties reach an impasse, the mediator converts to an arbitrator to ensure a final and binding resolution of the dispute. The same neutral conducts two different ADR processes in sequence. For a discussion of the different ways mediation and arbitration can be combined, and of med-arb's strengths and weaknesses, see COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 20-30 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

is essentially advisory, where the parties may reject it within a limited time.⁸² Moreover, the mediator-judge retains the authority to approve the reasonableness of any voluntary settlement or reject it, substituting his or her own judgment for the parties' solution.⁸³ There are concerns about confidentiality in this model, as is true with med-arb in the United States; specifically, the parties may be less forthcoming with a mediator who can use any information they share against them in the subsequent arbitration.⁸⁴ Moreover, in Korea, mediation processes are open to the public.⁸⁵

Korea has seen a tremendous growth in caseload and a new willingness of individuals to file claims. Disputes are increasing in many different forums,⁸⁶ including against administrative agencies⁸⁷ and in cases involving constitutional issues.⁸⁸ During the period of Japan's occupation of Korea, it had tremendous control over and influence on Korean law, to the extent that eventually proceedings had to be conducted in Japanese before Japanese judges. This made Koreans understandably reluctant to resort to the courts for redress of wrongs.⁸⁹ However, since 1987 and the democratization of Korea, disputing patterns have changed; people are more willing to file claims.⁹⁰ During the 1990s, the annual number of civil litigations filed in district courts (the first level of the Korean justice system) increased tremendously. For example, approximately 1.5 million cases were filed in 1991, whereas over 4 million cases were filed in 1998.⁹¹ This dramatic increase in caseload has led to the Korean Supreme Court's consideration of a national private ADR system.⁹²

The Task Force is conducting research to establish its dispute system design. It is examining the training and qualifications of neutrals, whether mediators should be court employees or outsiders, who will pay the neutrals and how much, and how mediation agreements and arbitration awards are enforced. The court is reconsidering fundamental legal infrastructure. The question is: what forms of

82. Woo, *supra* note 79, at 630.

83. *Id.* at 629-30.

84. See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS, *supra* note 80, at 21-22.

85. Woo, *supra* note 79, at 616.

86. *Id.* at 609.

87. Ginsburg, *supra* note 1, at 618-19 (observing that although both Japanese and Korean societies have traditionally been seen as valuing consensus and avoiding courts, in 1995, Korean courts decided 214.9 administrative cases per million persons while Japanese courts decided only 7.6 cases per million persons, and suggesting that this is related to administrative law reform).

88. Woo, *supra* note 78, at 620-21.

89. Ginsburg, *supra* note 1, at 596-97.

90. One study reports dramatic use of a new system for civil complaints and administrative litigation. *Id.* at 610.

91. See Sahng Hyeog Ihm, Lawsuit Avoiding Tradition in East Asia and Reconsideration of it in Korean Society 6-7 (May 30, 2002) (unpublished manuscript, on file with authors).

92. Personal communication with Sangjoon Kim, Judge, Deputy Director General for Planning and Coordination, Supreme Court of Korea, in Seoul, South Korea (July 26, 2004).

dispute resolution and what dispute system design will they build into the courts? This raises questions of the timing of dispute resolution, where to mediate, what rules to establish regarding confidentiality, the role other agencies, such as the National Labor Relations Commission, have in the enforcement of the outcomes of ADR, and whether there are other functions or services the court needs to fund. For example, the court will consider matters such as funding research and evaluation. In the United States, in contrast, such funding has mostly come from philanthropy.

Korea's innovation is a response to cultural changes, specifically, increasing prosperity and deepening democracy. The Task Force is engaged in the comprehensive work of dispute system design, and the result will provide private dispute resolution for all those engaged in civil litigation in South Korea.

C. The Executive Branch: Administrative Law and the Bureaucracy in Korea

As the result of almost half a century of occupation by Japan, Korea inherited a body of administrative law and practice that was built on a German model for a modern state.⁹³ Under this civil code model, bureaucrats operated with substantial administrative discretion, and used informal administrative guidance to induce voluntary compliance by the regulated community under implicit threat of retaliation.⁹⁴ They were insulated from meaningful judicial review by a judicial branch staffed with junior judges who lacked subject matter expertise and were trained in a system that acculturated them not to exercise independent supervision over the policy process.⁹⁵ However, comparative law scholars have noted that Korea diverged in both law and practice from this common base, and now reflects administrative law infrastructure that fosters transparency, public participation, freedom of information, and meaningful judicial review.⁹⁶

As part of this process of both democratization and administrative law reform in the early 1990s, Korea implemented new mechanisms for voice, participation, and dispute settlement in the executive branch.⁹⁷ Specifically, it adopted notice and comment processes not only for rulemaking, but also for legislative proposals, the great majority of which are drafted⁹⁸ by government ministries.⁹⁹ It created an Ombudsman to receive complaints about the administrative

93. Ginsburg, *supra* note 1, at 589-90.

94. *Id.* at 593-94.

95. *Id.* at 595-96.

96. *Id.* at 615-22.

97. *Id.* at 607 (describing the creation of a designated administrative court of the first instance, a provision eliminating the requirement of exhaustion of administrative remedies, and an Administrative Appeals Commission under the Prime Minister).

98. *Id.* at 608.

99. *Id.* at 607-08 (characterizing these processes as more open than notice and comment rulemaking in the United States because they apply to legislation as well as rulemaking).

bureaucracy from members of the public.¹⁰⁰ It also created a National Grievance Settlement Committee under the Prime Minister to settle civil petitions.¹⁰¹ The government's newest wave of innovation focuses on forms of dispute resolution, deliberation, and dialogue for both quasi-judicial and quasi-legislative government functions.

D. The Korean National Labor Relations Commission

An example of mediation for quasi-judicial functions is the Korean National Labor Relations Commission ("NLRC"),¹⁰² which is an independent commission responsible for the administration of national private sector labor law.¹⁰³ There is approximately an 11% rate of private sector unionism in South Korea.¹⁰⁴ Interviewees report that labor relations are increasingly adversarial. In the private sector, there are comprehensive bargaining units capable of shutting down an entire industry.¹⁰⁵

The NLRC is a quasi-judicial governmental body, composed of tripartite representatives of workers, employers, and those supporting public interests. It is affiliated with the Department of Labor. The NLRC conducts adjudications regarding unfair labor practices and unfair dismissal, and through its regional structure, executes special labor relations services like mediation and arbitration. The NLRC is considering improvements in governance to broaden its use of mediation and interest-based negotiation.¹⁰⁶ Recent legislative reforms will permit national government workers to join unions for the first time¹⁰⁷ and also create a right for temporary or contract workers to file complaints of discrimination.¹⁰⁸ These are changes in substantive law. These laws are part of an effort to give the private sector more flexibility in designing its workforce and hiring and firing

100. *Id.* at 608.

101. *Id.*

102. See National Labor Relations Commission, http://www.nlrc.go.kr/en/en_index.html (last visited Feb. 7, 2006).

103. Trade Union and Labor Relations Adjustment Act, Act No. 5310, arts. 53-61 (1997) (S. Korea), amended by Act No. 5511 (1998) & Act No. 6456 (2001), available at http://www.dynamic-korea.com/archives/view_archives.php?uid=200500003145&main=doc.

104. In 2003, private sector unionization was 10.8%, and 22.5% out of full time employees have union membership, while temporary and contract workers had 1.5% and 0.4% respectively as of August 2004. See Korea Labor Institute, <http://www.kli.re.kr/> (last visited Nov. 12, 2006).

105. There are two influential bargaining units in Korea: the Federation of Korean Trade Unions (<http://www.efktu.or.kr/~fktueng/>); and the Korean Confederation of Trade Unions (<http://www.kctu.org/>).

106. Personal communications with representatives from the National Labor Relations Commission, in Seoul, South Korea (Sept. 28, 2005).

107. Public Officials Trade Union Act became effective on Jan. 28, 2006. Korean government employees have legally organized government workers' unions. This act legalized unions for government workers.

108. The Equal Employment Act guarantees employees the right to file complaints of sexual discrimination. However, it has been controversial in Korea whether temporary or contract workers are included under this Act.

workers. The Korea Tripartite Commission is responsible for issues of government employee unionization and temporary or contract workers. Nevertheless, the NLRC is anticipating a dramatic growth in caseload, in part related to these initiatives.

The question is: how does one manage the growing caseload? The NLRC is examining system designs from other countries and considering the use of interest-based negotiation and mediation to address the anticipated increase in disputes. The chair of the NLRC holds rank of cabinet minister. The NLRC institutional structure includes a national office and regional offices in which there are professionals who serve as labor mediators and administrative law judges. The NLRC also mediates, arbitrates, and adjudicates.¹⁰⁹ Interviewees report that the mediation style is very directive.¹¹⁰ As is common with labor mediators in the United States, NLRC mediators report that there is the usual head-knocking, arm-twisting, and reality-testing, in which the mediators give unions and management opinions on the appropriate outcome of a dispute.¹¹¹ Evaluative mediation is in some ways like advisory arbitration; the parties receive an outsider's view of the strength of their best alternative to a negotiated agreement. This reality-testing serves as a means to get them talking again, a form of loop-back to negotiation. However, it sometimes simply reinforces an intransigent party who becomes convinced they can win on the merits. Interviewees report that NLRC mediators achieve high settlement rates. On December 31, 2005, the NLRC reported that its average rate of mediation success was 57.8%.¹¹²

There may be a relationship between increasingly adversarial labor relations and democratization. As Korea opens up new mechanisms for voice through the discrimination statute on contract and temporary workers and through public

109. The Labor Union and Employee Relations Act §§ 47-80.

110. For a discussion of mediation styles, see ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* 76-77 (2d ed. 2003). Evaluative mediators tend to listen to parties' presentations on the merits of the dispute and provide an opinion on the value of the case or its likely outcome in court or before an administrative agency; they evaluate the case substantively. Directive mediators tend to assert control over the structure of the mediation process and to actively guide and direct the parties toward a resolution of the dispute, using various techniques to persuade or pressure the parties to settle. Transformative mediators do not have settlement of the dispute as their goal, but instead focus on providing the parties with opportunities for empowerment and recognition during the course of the process. Empowerment is enhancing the disputant's sense of control and personal efficacy during the process. Recognition is where one disputant understands and acknowledges the perspective, values, or goals of the other disputant. It can take the form of an apology. A final form of mediation is facilitative. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (2d ed. 1996). This form of mediation helps the parties identify issues, their underlying interests and needs, and helps them brainstorm solutions to the dispute, generally using interest-based negotiation techniques. There is some ongoing discussion within the mediation community as to the boundaries between these models of practice.

111. Personal communications with representatives from regional NLRC offices at the National Conference of the NLRC, Ritz Carleton Hotel, in Seoul, South Korea (Sept. 28, 2005).

112. The National Office's rate is 31.5%, and regional offices' rates range from 44.4% to 82.6%, http://www.nlrc.go.kr/st/stmd_receipt.jsp (last visited Nov. 12, 2006).

sector collective bargaining, increasing numbers of employees may become willing to file claims. There may be a rich flowering of debate and controversy; some view conflict as a fundamentally creative force.

The NLRC convened a national conference in September 2005 to benchmark dispute resolution programs in employment in the United States, and particularly, the REDRESS™ Program at the U.S. Postal Service (“USPS”). This program is one in which there is comprehensive data and published empirical results. After the USPS adopted a mediation program for discrimination complaints, there was almost a 30% drop in administrative law judge adjudications of formal complaints of discrimination.¹¹³ Since 1997, the number of formal complaints of discrimination at the USPS has dropped from a high of 14,000 per year to between 8000 and 9000 per year. A multivariate regression indicated that the drop correlated with the introduction of the mediation program over an eighteen-month period in eighty-five different zip code areas.

There are questions as to whether this program provides a useful model for the NLRC. The REDRESS™ Program uses the transformative model of mediation, one that is not evaluative or directive.¹¹⁴ It requires a different type of training for the mediators; training that is not readily available in South Korea. Interviewees were exploring training in both interest-based negotiation and mediation. This again raises the question of what institutional infrastructure is necessary to support expanded use of private dispute resolution in Korea.

E. The Executive Branch and Public Participation

The public participation theme is manifest in yet another initiative: the National Conflict Resolution System.¹¹⁵ This initiative of the Korean presidency will take the form of either an executive order or draft legislation. The proposal is to build a three-stage dispute resolution procedure into all South Korean national government agencies that are responsible for development projects or the management of conflicts over public policy. The three stages are a conflict impact assessment, deliberative polling in selected appropriate cases, and multi-stakeholder mediation. The proposal places an emphasis on civic engagement and public involvement or participation. The conflict impact assessment would determine the adverse consequences of not resolving the conflict. The Korean Environmental Institute is likely to be tasked with performing the conflict impact assessments; it does all the environmental impact statements for major government actions in Korea. It consists of approximately 120 researchers who

113. Lisa Blomgren Bingham & Mikaela Cristina Novak, *Mediation's Impact on Formal Complaint Filing: Before and After the REDRESS™ Program at the United States Postal Service*, 21 REV. PUB. PERSONNEL ADMIN. 308 (2001).

114. BUSH & FOLGER, *supra* note 109.

115. Sun Woo Lee et al., National Conflict Resolution System, Presidential Commission for Sustainable Development (2004).

are trained in economics and the natural and environmental sciences. One role this agency could and should undertake is collecting data on all environmental and public policy cases in which conflict resolution processes are used. There is precedent for this as the U.S. Institute of Environmental Conflict Resolution collects this data nationwide.¹¹⁶

The notion of a conflict impact assessment contrasts with a conflict assessment, which is the practice in multi-stakeholder consensus-building and dispute resolution processes in the United States. A conflict assessment serves more of a convening function to determine who the parties are, who should be at the table, how are they are going to structure the process, and whether it is reasonable to mediate the dispute or conflict.¹¹⁷

The second step, deliberative polling, is viewed as a means of conflict prevention or avoidance. In deliberative polling, the government convenes a representative sample of the electorate to deliberate on the public policy problem giving rise to the dispute.¹¹⁸ Impartial policy experts are available to answer questions and provide information. Citizens then deliberate and discuss the policy issues before they vote on their policy preferences. In the United States, voting is done by using information technology, including hand-held digital voting devices keyed with the citizen's demographic information. The voting results are tabulated and incorporated into a statistical report including demographics. The report then becomes critical information for policymakers to use for informed decisionmaking. In the Korean legislation, the third step is conflict resolution through a mediation process.

Executive branch agencies are moving to implement dispute resolution processes. Government agencies have started to develop their own conflict resolution systems. The executive branch has established a training initiative for government officials.

The executive branch is learning how to build a dispute resolution practice infrastructure. The government commissioned the Korean Development Institute School of Public Policy and Management and the Massachusetts Institute of Technology to conduct a comparative conflict resolution studies conference to help South Korea examine how to build a mediation profession by looking at how the profession emerged in the United States, Europe, and Japan. The conference also examined the role of legal infrastructure in the form of enabling statutes, the emergence of professional organizations, the contributions of the

116. See U.S. Institute for Conflict Resolution, www.ecr.gov (last visited Nov. 12, 2006). For information on the national evaluation study, see http://www.ecr.gov/multiagency/program_eval.htm (last visited Feb. 7, 2006).

117. See MOORE, *supra* note 110, at 81-160. See also E. FRANKLIN DUKES, MARINA A. PISCOLISH & JOHN B. STEPHENS, *REACHING FOR HIGHER GROUND IN CONFLICT RESOLUTION: TOOLS FOR POWERFUL GROUPS AND COMMUNITIES* (Jossey-Bass 2000).

118. See generally The Center for Deliberative Democracy, *Deliberative Polling: Toward a Better Informed Democracy*, <http://cdd.stanford.edu/polls/docs/summary> (last visited Feb. 2, 2006) (describing deliberative polling).

academic community, and the necessary support for researchers. Much work lies ahead for Korea to successfully implement and institutionalize these new governance processes.

F. Environmental and Public Policy Disputes

There has been one significant environmental and public policy mediation case in South Korea: the Han Tan River Dam Project. The two mediators, Dr. Chin-Seung Chung and Dr. Sun Woo Lee, were leaders in the public administration academy. The new governance process was applied to the Hantan River Dam Conflict as an exemplar.

In 1996, 1998, and 1999, there were serious floods in the lower Imjin River areas. The Korean government decided a dam construction was necessary to prevent future flooding.¹¹⁹ Two-thirds of the Imjin River and its watershed are under the occupation and control of North Korea. Thus, the government had to find an alternative that would enable flood prevention because it could not control the Imjin River. The Hantan River is the biggest of the Imjin River tributaries, so the government thought the Hantan River might be the second best option to control the Imjin River flood. However, the proposal to construct the Hantan River dam created a great deal of conflict involving several parties.

There were five parties: (1) the Ministry of Construction and Transportation ("Ministry"); (2) the Korea Water Resource Corporation ("KWRC") which together with the Ministry was in charge of dam construction; (3) people living in the Dam site and downstream ("PD"); (4) people living in the upper stream area of the Hantan River Dam site ("PU"); and (5) NGOs for environmental movements. The parties had different interests in the dam. Seemingly, the Ministry, KWRC, and PD were in favor of dam construction, while the PU and NGOs were opposed. However, the construction of the dam was very important to the Ministry and the KWRC for their organizational survival because their orientation toward developing national land was criticized. In response to this criticism, the government cancelled its plan to construct a dam a couple of years before the Hantan River Dam conflict occurred. The PD wanted an early decision, regardless of dam construction, because they suffered from restrictions on their property rights during the period of uncertainty. The PU opposed the dam due to the side effects after dam construction¹²⁰ as well as for political reasons.¹²¹ The

119. Sun Woo Lee, Chin-Seung Chung & Soo Sun Park, *Study on the Mediation Process of the Hantan River Dam Conflict*, Presidential Commission for Sustainable Development (2005).

120. In fact, they did not have to worry about the side effects because the dam was designed to contain water for less than fifteen days a year, only when there was a warning of possible flooding. In another sense, the Hantan River Dam was designed as a so-called flood-controlling dam, in order to avoid the negative effects brought about by a multi-purpose dam. THE KOREAN ENVIRONMENT INSTITUTE, *ENVIRONMENTAL IMPACT ASSESSMENT ON HANTAN RIVER DAM* (2001).

NGOs were against any dam, as this would oppose their mission statement and philosophy.

There were four serious obstacles to mediation. First, there was not enough data on the amount of flooding in the Imjin River, and no way to measure it, because the great majority of the river was in North Korea. Second, local elections of the PU made mediation difficult because political candidates locked themselves into positions opposing the dam. Third, there were communication problems and intransigence. For example, a common communication problem involved a first party raising an issue and a second party providing a solution, but the first party refused to accept the solution due to stubbornness. In effect, the first party lacked confidence and trust in the second party, and maintained an unmoving stance on all issues. Fourth, PU representatives had different interests in participating in the mediation process. Some wanted to build their political reputation, while others made efforts to get more benefits for their communities.

The mediation began five years after the conflict began. The mediation team consisted of two professional mediators—one interpersonal conflict resolution skills trainer and one representative from the NGOs. The mediation process started in February 2004. There were thirteen pre-mediation sessions between February and May 2004, and sixteen mediation sessions between June and August 2004.¹²² During the premediation sessions, mediators tried to uncover the causes and interests of the parties regarding the conflict and to explain the mediation process to the parties. In doing so, the mediators helped convince the parties to implement the process, so that members of each party understood and participated in the mediation process. The mediation process consisted of four steps: (1) creating a set of ground rules; (2) finding causes; (3) developing alternatives; and (4) building consensus and agreement. The creation of ground rules contributed to building mutual trust among conflicting parties.

Mediators worked with the parties until they agreed that the mediation goal was to determine how to prevent flooding in the lower Imjin River area. Out of seven issues,¹²³ the most important and controversial issue was to assess the amount of floodwater that would be controlled by the Hantan River Dam. Neither party had superior scientific and technological methods to calculate this amount and its effects on the Imjin River flood. The failure to assess the amount of flooding that the Hantan River Dam would control made it difficult to develop alternatives.

121. There were two local elections at the end of April and October. Political candidates tried to take advantage of the community opinion against the dam construction, encouraging people's psychological opposition. It made the mediation very difficult. Lee et al., *supra* note 119.

122. PRESIDENTIAL COMMISSION FOR SUSTAINABLE DEVELOPMENT, REPORT ON THE HANTAN RIVER DAM CONFLICT RESOLUTION PROCESS (Feb. 2005).

123. There were seven main issues: legitimacy of decisionmaking on the dam construction; the amount of flooding in Imjin River; the amount of the flood controlled by the Hantan River Dam; environmental effects; cost-benefit analysis; safety; and tourism. Lee et al., *supra* note 119.

In order to advance the mediation process from finding causes to developing alternatives, the mediation team launched into a two-day overnight session. On one hand, mediators emphasized that the parties should raise questions and doubts on the basis of scientific, empirical, and rational arguments. On the other hand, mediators persuaded the parties that they also had to accept answers to these questions and explanations responding to these doubts on the basis of scientific and empirical information. Mediators emphasized that the most important thing was not measuring the flood amount, but finding alternatives to prevent the Imjin River from flooding. Through the two-day overnight session, parties developed five alternatives, one of which was to construct the Hantan River Dam. The parties then worked together to come to a consensus on the best one out of the five alternatives. However, the Ministry, KWRC, and the NGOs each argued for using their own tools to evaluate the alternatives. A three-day overnight session was scheduled to overcome this obstacle to agreement.

Eventually, the parties realized that it was difficult for them to evaluate the alternatives by themselves. The stakeholder groups insisted that they could not reach a mutual, voluntary agreement. They asked the mediators to decide. This is consistent culturally with Korea's authoritarian tradition. In an authority structure, disputants are acculturated not to take responsibility for their own decision to settle. The stakeholders said they all agreed to live with the decision of the mediators. The parties requested that the mediators select one of the five alternatives within a one-month timeframe. The parties committed to each other and to the mediators that they would accept the mediators' decision with no objection. Members of each party approved the agreement on these rules, which essentially turned the mediation into an arbitration process. This concluded the mediation.

The mediators next played the role of arbitrators, issuing a final decision. Three parties accepted the decision, but one of the stakeholder groups, the PU, reneged and appealed the decision to an office within the executive branch that functions similarly to the Inspector General in the United States. That office referred the case to the Prime Minister's office. The Prime Minister's office endorsed the decision of the mediators-turned-arbitrators.

This was Korea's first experience with a large-scale environmental mediation. This illustrates the challenges that lay ahead for institutionalizing these new governance processes in Korea. Not only is there a need to build the infrastructure for practitioners, but also users must learn how to participate effectively in these new processes.

V. IMPLICATIONS OF THE NEW GOVERNANCE PROCESSES IN KOREA

These developments have broad implications. They are viewed as legal infrastructure to support continuing economic development. However, the longer term implications concern possible reunification with North Korea. New governance processes can play an important role in Korea's continuing evolution.

A. Dispute Resolution and Economic Development

Why is the South Korean government embarking on this ambitious program of dispute system design? One motivation has to do with the economy and economic development. One commentator has made a convincing argument that the previous wave of administrative law reform in the 1990s was a function of Korea as a “developmental state”; that is, a state that “directed economic growth using a variety of activist mechanisms, rather than simply providing an enabling environment for capitalism as required by liberal ideology.”¹²⁴ Using principal-agency theory from political economy, it is argued that Korea’s administrative law reforms were designed to provide avenues for out-of-power political players to influence the policy process because no one party had a lock on re-election or control over the government.¹²⁵ This in turn made it possible for the private sector, NGOs, and citizens to have more voice in the policy process.

While the jury is still out, there is a growing body of empirical evidence relating democratic legal infrastructure and the civil justice system to economic growth.¹²⁶ There appears to be an underlying motivation for dispute resolution reforms in Korea. For example, in the court system, although the legislative mandate for juries is framed as public participation in governance, what seems to be motivating the dispute system design includes a concern about transaction costs, the economic efficiency of disputes, economic competitiveness, and caseload growth. The Task Force is interested in the research of Marc Galanter on what he has termed the “vanishing trial.” His work finds that there is a decrease over the past two decades both in the absolute number of jury trials and the trial rate (from 12% to 2%) in U.S. federal district courts.¹²⁷ He suggests that one of the explanations for these results may be the institutionalization of dispute resolution.

Similarly, the work of the Korean National Labor Relations Commission appears to have an underlying economic rationale. Interviewees indicated that they face changes in substantive legal infrastructure concerning individual worker job security. Korea is moving toward more flexible hiring and firing. There were major layoffs in the last fiscal crisis. The political quid pro quo for increased labor-market flexibility is the new statute prohibiting discrimination against temporary and contract workers; the new legal infrastructure also authorizes the opportunity to file more claims, which could increase the administrative case docket of the NLRC. There is a need to make government and public law work efficiently to avoid transaction costs. This motivates the

124. Ginsburg, *supra* note 1, at 585.

125. *Id.* at 618-19.

126. Frank B. Cross, *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002).

127. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004).

need to build new institutions, specifically, forms of private dispute resolution, in order to keep the economy growing.

For the environment, the salient case examples interviewees gave boiled down to "We just can't get it done." One example concerned a project to construct a highway through the mountains. The project was halted when a Buddhist nun went on a hunger strike. Similarly, the problems with achieving a settlement in the Han River Dam dispute present significant economic concerns. There is a need for flood control on the Han River. The water in the river originates in North Korea. The watershed provides 20% of the nation's drinking water; its watershed includes Seoul, the capital city that is home to almost a quarter of the population. There is flooding, and there are concerns about water quality because of the increase in the construction of hotels and restaurants on the river's banks upstream. The government needs to build this dam and cannot get it done without some process for addressing conflict.

In other words, there are significant problems in terms of transportation, land use, flood control, water quality, and sustainable development. Korea needs the institutional infrastructure for dispute resolution to facilitate building the hard infrastructure to solve these problems. Although proposals for either legislation or executive orders are framed as public participation and democracy-building, there is also an economic justification for private dispute resolution.

B. Reunification with North Korea

There are implications for the future reunification of Korea. There is a working group that involves representation from the World Bank, the scholarly community, South Korea, the United States, and other countries planning for reunification.¹²⁸ Scholars are considering the experience of reunification in Germany. They are examining privatization experiences in Poland, Russia, and the Czech Republic. Some observe that North Korea will likely inherit South Korea's legal infrastructure, and that corporate law reforms underway in South Korea will aid in the transition of nationalized industry in North Korea to private hands. This could generate a new wave of disputes. In Germany, there were many claims for natural restitution of nationalized property that were brought by heirs of the property owners in both East and West Germany. These claims ended up in the courts and required special legislation. There may also be disputes arising out of claims to private ownership of property nationalized in North Korea.

There are also implications in the area of labor relations. There is little information available on the North Korean economy and work force. However, it is foreseeable that reunification accompanied by privatization and the transition

128. Milhaupt, *supra* note 9.

to a market economy could prompt a wave of unionism in North Korea. This could generate work for the NLRC.

There are implications for the environment because of development. A reunified Korea will need to build a transportation infrastructure between the former North and South Korea. There may be anticipation of these potential future sources of conflict in the developments of legal infrastructure, both in terms of substantive law and institution-building for private dispute resolution in South Korea.

VI. CONCLUSION

Korea is instituting innovations in national governance that are laying the groundwork for the next generation of its citizens to participate more meaningfully in all the aspects of government decisionmaking that affect their lives. These innovations may also contribute to continuing the growth in the economy that made the Asian Tigers the envy of the developing world. Private dispute resolution is an essential part of this legal infrastructure.

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