SKEPTICISM, UNILATERALISM OR ULTIMATUMISM?: TRUMP ADMINISTRATION'S TRADE POLICY AND THE KOREA–U.S. FTA

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ABSTRACT

The existing framework of the global trading regime is now being shaken with the inauguration of the Trump Administration. Trump Administration's trade policy has evolved from skepticism to unilateralism and now to "ultimatumism". Under the Trump Administration, existing skepticism and unilateralism have been further pushed to the point where a minimum level benefit or a minimum quantum of interest is set by the United States (hereinafter "U.S.") and then presented to a trading partner for a guarantee. As a virtual ultimatum is given with the possibility of termination of the trade agreement at issue unless the U.S. demand is accommodated, this new stance can be called "ultimatumism". Circumstances surrounding the Korea–U.S. Free Trade Agreement (hereinafter "FTA") offer a viable example showing this trend of the Trump Administration's trade policy. Trump Administration trade policy, coupled with the prelude leading to the policy, arguably underscore the importance of maintaining and strengthening multilateralism for the global trading regime.

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I. INTRODUCTION: INAUGURATION OF THE TRUMP ADMINISTRATION AND THE NEW U.S. TRADE POLICY

Trump Administration's inauguration in January 2017 has brought about significant changes in many sectors of global business. More than anything else, the new U.S. administration's trade policy has been drawing a great deal of attention from other countries and experts in this field due to the unconventionally aggressive nature of that policy and an apparent disregard for existing practice and legal norms of trade. Immediately after the inauguration, President Trump announced the U.S.'s intent to withdraw from the Trans-Pacific Partnership (hereinafter "TPP"),[1] and re-negotiate both the North America Free Trade Agreement (hereinafter "NAFTA"),[2] and the Republic of Korea–United States Free Trade Agreement (hereinafter "Korea–U.S. FTA").[3] It has frequently issued statements indicating an intention to put the interests of the United States before its obligations under the WTO Agreements.[4] Introducing trade measures that are not contemplated in other countries or by previous administrations are continuously being announced.[5]

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[1] Office of the Press Secretary, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITE HOUSE (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

[2] *USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE (May 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces; Patrick Gillespie, *Trump Team: NAFTA Talks Can Start August 16*, CNN MONEY (May 31, 2017), http://money.cnn.com/2017/05/31/news/economy/nafta-august-16-wilbur-ross/index.html.

[3] Stephen J. Adler et al., *Exclusive: Trump Vows to Fix or Scrap South Korea Trade Deal, Wants Missile System Payment*, REUTERS (Apr. 28, 2017), http://www.reuters.com/article/us-usa-trump-southkorea-exclusive-idUSKBN17U09M.

[4] *See* William Mauldin, *Trump Threatens to Pull U.S. out of World Trade Organization*, WALL STREET J. (July 24, 2016), https://blogs.wsj.com/washwire/2016/07/24/trump-threatens-to-pull-u-s-out-of-world-trade-organization/; Eric Beech, *Trump Administration Would Ignore WTO Rulings It Sees as Anti-US*, REUTERS (Mar. 1, 2017), http://www.reuters.com/article/us-usa-trump-wto-idUSKBN16832U.

[5] *See* Office of the Press Secretary, *Presidential Memorandum for the Secretary of Commerce*, WHITE HOUSE (Apr. 20, 2017), https://www.whitehouse.gov/the-press-office/2017/04/20/presidential-memorandum-secretary-commerce. SECTION 232 INVESTIGATION ON THE EFFECT OF IMPORTS OF ALUMINUM ON U.S. NATIONAL SECURITY, https://www.commerce.gov/page/section-232-investigation-effect-imports-aluminum-us-national-security (last visited Sept. 7, 2017). President Trump directed the U.S. Department of Commerce to initiate a Section 232 investigation on imported aluminum on Apr. 27, 2017. This is the first time since 2001, and in fact second time since the inception of the WTO regime. U.S. International Trade Commission, Institution and Scheduling of Safeguard Investigation and Determination that the Investigation is Extraordinarily Complicated, see Large Residential Washers, Inv. No. TA-201-76 (June 5, 2017), https://www.usitc.gov/secretary/fed_reg_notices/safeguard_201_204_421/201_76_notice_06072017sgl.pdf. This (global) safeguard investigation is deemed extraordinary as the global market (as well as the U.S. market) is dominated by one U.S. domestic producer and two Korean producers. These three producers occupy the global market share. As such, the safeguard investigation was initiated for the sole U.S. producer against the two Korean producers that have manufacturing facilities in other

In short, Trump Administration's trade policy is arguably startling U.S. trade partners, scholars and practitioners in a way that has not been seen before. The existing framework of the global trading regime is now being shaken and is probably in the process of being re-formulated under the Trump Administration.

This article aims to discuss the Trump Administration's trade policy at this juncture. In particular, this article discusses the issue based on an examination of the controversy over and re-negotiation of the Korea–U.S. FTA. It is believed that the examination of the bilateral FTA provides us with a glimpse, if not a comprehensive or panoramic view, of the prospective trade policy of the new administration of the U.S. This article argues that this trade policy has evolved over the past several years, from skepticism to unilateralism, and now under the Trump Administration into "ultimatumism", to the extent that a minimum level of trade benefits from a trade agreement that is determined by the U.S. and an "ultimatum" for termination is given if that self-proclaimed minimum interest is not guaranteed by the other contracting party.

There are several caveats, though. First of all, it is true that it is still too early to definitively define what Trump's trade policy really is: the Trump Administration is only now entering the sixth month of its forty-eight-month lifecycle, so many things still remain unclear. Critics have become more vocal in the U.S. arguing that the isolationist trade policy may be politically popular and bring short term benefits, but that it will harm the interests of the U.S. in the long run.[6]

Secondly, as protectionism has been spreading globally for some time now since the financial crisis of 2008,[7] and even this protectionist tendency had shown its buds during the previous administration of the U.S.,[8] it would not be fair to blame the Trump Administration for all the protectionist elements that characterize U.S. trade policy at the moment. If

countries. Earlier in 2013, the U.S. domestic producer's petition for antidumping and countervailing duty investigations against the same Korean producers led to the successful imposition of antidumping and countervailing duties. The new safeguard investigation is deemed to complement these existing trade measures. In short, all three trade remedy measures were invoked, in essence, for a single company; Jung Wook et al., *USITC Embarks Safeguard Probe on Samsung and LG Washers*, PULSE BY MAEIL BUS. NEWS KOREA (June 15, 2017, 13:10 PM), http://pulsenews.co.kr/vie w.ph p?year=2017&no=40118 7.

[6] *See The Japan–EU Trade Warning*, WALL STREET J., July 7, 2017, at A14.

[7] *See also* Shawn Donnan, *Protectionism Rising as Growth Slows*, FIN. TIMES (Nov. 13, 2014), https://www.ft.com/content/4ee2d69a-6aa3-11e4-bfb4-00144feabdc0; WTO OMC, REPORT ON G20 TRADE MEASURES (2016), https://www.wto.org/english/news_e/news16_e/g20_wto_report_june16_e.pdf; Chad P. Bown, *Confronting the Protectionism Spawned by the Crisis*, BROOKINGS (2016), https://www.brookings.edu/wp-content/uploads/2016/07/0917_g20_summit_bown.pdf.

[8] *See also Obama a Dangerous Protectionist?*, ECONOMIST (Feb. 26, 2008), https://www.economist.com/blogs/freeexchange/2008/02/obama_a_dangerous_protectionis; Jeffrey J. Schott, *Trade Policy and the Obama Administration*, 44(3) BUS. ECON. (2009); Ryan McMaken, *It's Not Just Trump: Obama's Protectionists Are Attacking Chinese Steel*, MISES INST. (June 7, 2016), https://mises.org/blog/its-not-just-trump-obamas-protectionists-are-attacking-chinese-steel.

anything, the protectionist tendency started to present itself even before the inauguration of President Trump.[9] Legislation adopted in the previous administration demonstrated the U.S.'s desire to grant broader discretion to the agency to apply trade-remedy related laws in the U.S.[10]

Thirdly, the unique situation of the Korea–U.S. bilateral trade may have an inherent limitation in "generalizing" the position or the general policy of the Trump Administration. U.S. arguments may be Korea-specific and do not necessarily stand for the general direction of its new trade policy. This article should thus be read with these three caveats in mind.

In what follows, Chapter II provides a general overview of the trade policy of the Trump Administration at this juncture, Chapter III then explains the chronological background, controversies over the Korea–U.S. FTA, and a recent decision to re-negotiate the agreement. Chapter IV then discusses the transition of U.S. trade policy from "skepticism" to "unilateralism" and then to "ultimatumism" using the Korea–U.S. FTA as an example. Implications of the Trump Administration's trade policy for the global trading regime are discussed in Chapter V. Conclusion then follows in Chapter VI.

II. TRUMP ADMINISTRATION'S TRADE POLICY—AN OVERVIEW

President Trump's trade policy is unique and unprecedented in all material respects. This chapter provides an overview of the trade policy of Trump Administration based on its decisions and measures taken during the seven months of its existence.

A. Breaking Away from the Existing Trade Policy

Prior to taking office, Donald Trump drew global attention because of his unconventional trade policies. During his presidential campaign, Trump promised to declare China a "currency manipulator", to immediately pursue

[9] For instance, in 2015, the United States of America (U.S.) amended its rule on the determination of subsidy rates and anti-dumping margins through the American Trade Enforcement Effectiveness Act of 2015, which constitutes Title V of Trade Preference Extension Act (TPEA). The Section 502 of TPEA amended Section 776 of the Tariff Act of 1930 relating to facts available. The TPEA made changes to U.S. Tariff Act to give a broad discretion to the law enforcement agencies such as the Department of Commerce [hereinafter DOC] and the International Trade Commission. Under the new legislation, the U.S. DOC is given a discretion to apply subsidy rates or anti-dumping margins calculated in any prior proceeding under the same AD or CVD order, including "the highest such rate of margin". According to one observation, U.S. DOC now has discretion to apply a rate calculated from a small set of transactions, for a small set of companies, to the point where it is possible for U.S. DOC to use "the highest calculated rate for a single transaction as the adverse facts available margin". Alexander V. Sverdlov, *Change Is Coming: What to Expect from the Recent Amendments to the Trade Remedy Laws*, 47 GEO. J. INT'L L. 161, 182 (2015).

[10] *See id.*

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re-negotiation of the NAFTA, and to withdraw from the TPP.[11] Along similar lines, Trump declared in his inaugural speech that "for many decades, we've enriched foreign industry at the expense of American industry; subsidized the armies of other countries, while allowing for the very sad depletion of our military. We've defended other nations' borders while refusing to defend our own." He also stated that "From this day forward, it's going to be only America first, America first", and that "protection will lead to great prosperity and strength."[12] As such, Trump Administration's trade policy has been criticized as a protectionist by the media, deviating from the traditional trade policy of the U.S.[13] Addressing such remarks, Trump has argued that he "believe(s) strongly in free trade but it also has to be fair trade."[14] Currently, the White House lists withdrawing from the TPP, renegotiating the NAFTA, renegotiating the Korea–U.S. FTA, starting negotiations with China, and rolling back from an agreement with Cuba as major achievements for "a free and fair trade agenda" that Trump pursues in in international trade relations.[15]

While Trump made some extreme remarks regarding trade policy, his policies seem to be taking a slightly conservative turn since he started his term as president. For instance, "The President's 2017 Trade Policy Agenda" released by United States Trade Representative (hereinafter "USTR") in March 2017 does state that the Trump Administration will "expand trade in a way that is freer and fairer for all Americans", but it does not make grand promises of sweeping change.[16] The media has also pointed out that Trump has become more conservative over the months

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[11] Binyamin Appelbaum, *Trump Is Off to a Slow Start on Trade Promises*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/business/economy/trump-trade-policy.html.

[12] Aaron Blake, *Trump's Full Inauguration Speech Transcript, Annotated*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/20/donald-trumps-full-inauguration-speech-transcript-annotated/?utm_term=.ad1bf3491072.

[13] Katie Allen, *Trump's Economic Policies: Protectionism, Low Taxes and Coal Mines*, GUARDIAN (Nov. 9, 2016), https://www.theguardian.com/us-news/2016/nov/09/trumps-economic-policies-protectionism-low-taxes-and-coal-mines; Steve Liesman, *Trump's Protectionism Biggest Threat to US Economy's Growth, CNBC Fed Survey Respondents Say*, CNBC (Jan. 31, 2017, 7:04 AM), https://www.cnbc.com/2017/01/30/trumps-protectionism-biggest-threat-to-us-economys-growth-cnbc-fed-survey-respondents-say.html; Enda Curran, *Global Trade Rebounds Despite Trump's Protectionist Threats*, BLOOMBERG POL. (July 6, 2017, 12:05 AM), https://www.bloomberg.com/news/articles/2017-07-05/global-trade-rebounds-as-trump-s-protectionist-threat-lingers.

[14] Office of the Press Secretary, *Remarks by President Trump in Joint Address to Congress*, WHITE HOUSE (Feb. 28, 2017, 9:09 PM), https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress.

[15] *Cf.* Office of the Press Secretary, *President Donald J. Trump's Six Months of America First*, WHITE HOUSE (July 20, 2017), https://www.whitehouse.gov/the-press-office/2017/07/20/president-donald-j-trumps-six-months-america-first.

[16] *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program*, OFF. U.S. TRADE REPRESENTATIVE, ch. I, at 1 (2017), https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf; Edward Alden, *Trump's 2017 Trade Agenda: Signs of a Sensible Direction*, COUNCIL ON FOREIGN RELATIONS (Mar. 1, 2017), https://www.cfr.org/blog/trumps-2017-trade-agenda-signs-sensible-direction.

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regarding his trade policy, especially regarding Chinese relations and NAFTA.[17]

Still, Trump has continued to be adamant about decreasing trade deficits. In addition to renegotiating NAFTA and the Korea–U.S. FTA, Trump is currently focusing on creating trade barriers to steel and aluminum imports to decrease trade deficits. Notably, Trump is evoking *national security concerns* as the grounds for erecting trade barriers.[18] For instance, on Apr. 20, 2017, the Secretary of Commerce announced that the United States Department of Commerce (hereinafter "USDOC") initiated an investigation regarding the effect of steel imports on national security under Section 232 of the Trade Expansion Act of 1962.[19] Similarly, on Apr. 27, 2017, Trump signed a memorandum on "aluminum imports and threats to national security".[20]

B. U.S. Opinion on Trump Administration's Trade Policy

Overall, the media's portrayal of Trump's unconventional trade policy seems to be negative, ranging from cautionary to outright critical. *The Chicago Tribune* pointed out that "For Americans, Trump's tariffs on imports can be costly",[21] while *The Boston Globe* warned that stronger dollar may create obstacles for Trump's policies.[22] Others are more critical; *The New York Times* reported that "On trade, a politically feisty Trump risks economic damage".[23]

Meanwhile, the media seems to be divided on Trump's use of trade

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[17] *Donald Trump's Trade Policy Is in Disarray*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/opinion/donald-trumps-trade-policy-is-in-disarray.html; Andrew Griffin, *Donald Trump Admits He Backed down on NAFTA After Calls from Canada and Mexico's Leaders*, INDEP. (Apr. 27, 2017, 11:13), http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-nafta-canada-mexico-justin-trudeau-leaders-enrique-pe-a-nieto-a7705311.html.

[18] Patrick W. Watson, *Trump Has Found a Loophole to Rewrite Trade Agreements Without Anyone's Permission*, FORBES (July 19, 2017, 09:33 AM), https://www.forbes.com/sites/partickwwatson/2017/07/19/trump-has-found-a-loophole-to-rewrite-trade-agreements-without-anyones-permission/#4084a12e2dd0.

[19] Office of the Press Secretary, *Press Briefing by Secretary of Commerce Wilbur Ross on the Memorandum Regarding the Investigation Pursuant to Section 232(B) of the Trade Expansion Act*, WHITE HOUSE (Apr. 20, 2017, 11:10 AM), https://www.whitehouse.gov/the-press-office/2017/04/20/press-briefing-secretary-commerce-wilbur-ross-memorandum-regarding.

[20] *President Trump Signs a Memorandum on Aluminum Imports and Threats to National Security*, WHITE HOUSE (Apr. 27, 2017), https://www.whitehouse.gov/featured-videos/video/2017/04/27/president-trump-signs-memorandum-aluminum-imports-and-threats.

[21] Paul Wiseman & Joe McDonald, *For Americans, Trump's Tariffs on Imports Could Be Costly*, CHI. TRIB. (Dec. 1, 2016, 12:16 PM), http://www.chicagotribune.com/news/nationworld/ct-donald-trump-tariffs-20161201-story.html.

[22] Evan Horowitz, *Tariffs + Stronger Dollar = Trouble for Trump Trade Policy*, BOS. GLOBE (Jan. 10, 2017), https://www.bostonglobe.com/business/2017/01/10/tariffs-stronger-dollar-trouble-for-trump-trade-policy/51oTq57ON2FJG5GVCYWrVP/story.html.

[23] Peter S. Goldman, *On Trade, a Politically Feisty Trump Risks Economic Damage*, N.Y. TIMES (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/business/trump-nafta-trade-economy.html.

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deficits as an indicator of unfair trade. For instance, the *Los Angeles Times* pointed out how "changes in the trade balance and the number of manufacturing jobs have often moved in opposite directions" and how focusing on trade deficits overlooks more important problems such as the low saving rate of Americans.[24] Similarly, *The Washington Post* stated that the current trade deficit the U.S. is experiencing is due to changes in capital flow—not cost of production—and that tariffs will not be able to mitigate this situation.[25] On the other hand, *The Atlantic* reported that trade deficits do have a negative impact on the U.S. labor market and that Trump is correct to target trade deficits with tariffs.[26]

U.S. industries also present diverse views on President Trump's trade policy, depending on specific business interests at stake. By way of example, regarding policy on steel imports, the Steel Manufacturers Association (hereinafter "SMA") strongly supports Trump's protectionist policy on steel imports. However, oil and gas industries beg to differ, along with U.S. Chamber of Commerce that also warns the negative effect of imposing broad tariffs on steel imports.[27]

C. Trump Administration's Trade Policy Toward FTAs

One of the ways the Trump administration attempts to mitigate the current trade deficit is renegotiating free trade agreements (hereinafter "FTAs") so that the U.S. can engage in "fair trade". On Apr. 29, 2017, Trump issued Presidential Executive Order to review all trade agreements for violations and abuses. According to Section 1 of the Executive Order, it states:

> [E]very trade agreement and investment agreement entered into by the United States, and all trade relations and trade preference programs of the United States, should enhance our economic

[24] Don Lee, *Why Trump's Obsession with Trade Deficits Is Misguided*, L.A. TIMES (May 2, 2017, 9:25 AM), http://www.latimes.com/business/la-fi-trade-deficit-trump-obsession-20170502-htmlstory.html.

[25] Ana Swanson, *The Trade Deficit with China Is a Problem—But Not for the Reason Trump Thinks*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/07/the-trade-deficit-with-china-is-a-problem-but-not-for-the-reason-trump-thinks/?utm_term=.150ad0252499.

[26] Jared Bernstein & Dean Baker, *Why Trade Deficits Matter: Economists and Politicians Frequently Overlook Their Role in Whether Americans Are Working, and Where*, ATLANTIC (Dec. 8, 2016), https://www.theatlantic.com/business/archive/2016/12/trump-trade-deficit/509912/.

[27] *Cf.* Tsvetana Paraskova, *Trump's US-Steel Pipeline Plan Could Backfire on Energy Projects*, BUS. INSIDER (July 27, 2017, 10:16 PM), http://uk.businessinsider.com/trumps-us-steel-pipeline-plan-could-backfire-on-energy-projects-2017-7; also see report by the oil/gas association on the negative effect of restricting steel imports: ICF, FEASIBILITY AND IMPACTS OF DOMESTIC CONTENT REQUIREMENTS FOR U.S. OIL AND GAS PIPELINES (2017), http://www.api.org/~/media/Files/News/Letters-Comments/2017/5-16-17-ICF-Domestic-Steel-Report.pdf.

> growth, contribute favorably to our balance of trade, and strengthen the American manufacturing base. Many United States *free trade agreements*, investment agreements, and trade relations have failed, in whole or in part, to meet these criteria.

This Executive Order warrants a general investigation of unfair trade agreements.[28]

In particular, NAFTA and Korea–U.S. FTA have become targets of re-negotiation. As for NAFTA, Trump initially called the agreement the "worst trade deal" during the presidential debates with Hillary Clinton, indicating his desire to withdraw from NAFTA.[29] Again, the problem seems to lie in increasing trade deficits—according to Secretary of Commerce Wilber Ross, while the United States regularly had trade surplus with Mexico pre-NAFTA, it is now regularly suffering from trade deficits post-NAFTA.[30]

However on Apr. 26, 2017, President Trump announced that instead of withdrawing from NAFTA, he will seek to revise it.[31] President Trump later explained in an interview with *The Washington Post* that he had reconsidered withdrawing from after receiving phone calls from the leaders of Canada and Mexico, as well as advice from his advisers.[32] On May 18, 2017, the Trump administration announced its intent to renegotiate NAFTA so that outdated chapters may reflect modern standards,[33] while continuing to focus on decreasing trade deficits.[34] A summary of key objectives for renegotiating NAFTA includes "elimination of unfair subsidies, market-distorting practices by state owned enterprises, and burdensome restrictions of intellectual property".[35]

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[28] Office of the Press Secretary, *Presidential Executive Order Addressing Trade Agreement Violations and Abuses*, WHITE HOUSE (Apr. 29, 2017), https://www.whitehouse.gov/the-press-office/2017/05/01/presidential-executive-order-addressing-trade-agreement-violations-and.

[29] Meggie Severns, *Trump Pins NAFTA, "Worst Trade Deal Ever", on Clinton*, POLITICO (Sept. 26, 2016, 9:34 PM), http://www.politico.com/story/2016/09/trump-clinton-come-out-swinging-over-nafta-228712.

[30] *Wilbur Ross Says NAFTA Talks Likely Later This Year*, BLOOMBERG (Mar. 9, 2017, 1:20 AM), https://www.bloomberg.com/news/videos/2017-03-08/nafta-talks-likely-to-begin-later-this-year-says-ross.

[31] Kim Hjelmgaard, *Trump Backtracks: U.S. Will Not Withdraw from NAFTA*, USA TODAY (Apr. 26, 2017, 11:06 PM), https://www.usatoday.com/story/news/politics/2017/04/26/president-trump-nafta-mexico-canada/100961526/.

[32] Ashley Parker et al., *"I Was All Set to Terminate": Inside Trump's Sudden Shift on NAFTA*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/politics/i-was-all-set-to-terminate-inside-trumps-sudden-shift-on-nafta/2017/04/27/0452a3fa-2b65-11e7-b605-33413c691853_story.html?tid=a_inl&utm_term=.b210e3228143.

[33] Abigail Williams, *Trump Administration Wants to Start Process of Renegotiating NAFTA*, NBC NEWS (May 18, 2017, 5:15 PM), http://www.nbcnews.com/news/us-news/trump-administration-tells-congress-it-plans-starts-process-renegotiating-nafta-n761866.

[34] Shawn Donnan, *Trump to Prioritize Cutting US's NAFTA Trade Deficits*, FIN. TIMES (July 18, 2017), https://www.ft.com/content/6623c78c-6b41-11e7-bfeb-33fe0c5b7eaa.

[35] SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION, OFF. U.S. TRADE REPRESENTATIVE

While NAFTA and the Korea–U.S. FTA have surfaced as major t argets of discussion under the Trump Administration at this stage, it is believed that the same approach of the administration, as analyzed in this article, would equally apply to other FTAs and trade agreeme nts to which the United States is a party or for which the United St ates is participating in the negotiations for conclusion. Apparently, the two FTAs have turned out to be early targets because they were the focal points of the presidential election's trade debates in the fall of 2016.

III. KOREA–U.S. FTA: U.S. COMPLAINTS AND RE-NEGOTIATION

Korea and the U.S. concluded an FTA on Mar. 15, 2012[36], amid robust domestic attention in both countries. The original negotiation was completed on Apr. 30, 2007, but the changed political circumstances of the United States demanded additional negotiation starting from June 2010, to be completed in December 2010, followed by signature of the documents summarizing the additional negotiation in February 2011.[37] Korea's acceptance of the additional request from the U.S. cleared the way for ratification in the U.S. Senate and adoption of the *Act to Implement the Free Trade Agreement between the United States of America and the Republic of Korea* on Oct. 21, 2011, paving the way for entry into force in March 2012.[38] The agreement celebrated its fifth anniversary last March.

A. Trump Administration's Criticism of the Korea–U.S. FTA

The Trump Administration has made no secret of the fact that it does not subscribe to the idea of free trade. Before Mr. Trump became the president of U.S., he had been calling for the termination of the "notorious" Korea–U.S. FTA which has been adding to the U.S. trade deficit.[39] Since

(2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.

[36] For the chronological history of Korea–U.S. FTA, entered into force on Mar. 15, 2012, see FTA STATUS OF ROK: KOREA–U.S. FTA, http://www.mofat.go.kr/ENG/policy/fta/status/effect/us/index.jsp?menu=m_20_80_10&tabmenu=t_2&submenu=s_8 (last visited Aug. 19, 2017).

[37] Gi-Hong Kim, *The Analysis of Negotiation Power in FTA Negotiations Among Nations: Focused on the Re-Negotiation of Korea–US FTA*, 12(2) J. KOREA RES. ASS'N INT'L COM. 23, 35-38 (2012).

[38] *See* United States–Korea Free Trade Agreement Implementation Act, Oct. 21, 2011, 125 Stat. 428; *Korea–US FTA: It's Time for Fast Ratification*, KOREA INT'L TRADE ASS'N (June 27, 2011), http://www.kita.org/about/newsView.do?id=&no=834&searchWrd=&result_url=.

[39] Everett Rosenfeld, *Trump Tough on South Korea: Threatens to Terminate Free Trade Deal, Wants Payment for THAAD Missile Defense System*, CNBC (Apr. 28, 2017, 9:52 PM), https://www.cnbc.com/2017/04/27/trump-threatens-to-terminate-free-trade-deal-with-south-korea-says-he-wants-seoul-to-pay-for-thaad.html. The article reports that President Trump described the Korea–U.S. FTA as "horrible", and that such a statement caused stock prices of Korean corporations to fluctuate.

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the inauguration of the Trump Administration, Korea has been holding its breath, as the fate of the five-year-old bilateral trade deal has suddenly become uncertain. The dreaded term "termination" finally surfaced during President Trump's interview on Apr. 28, 2017, where he described the trade pact as "a horrible deal that should've never been made", vowing re-negotiation and possible termination.[40] This development put Korea in a scramble mode in preparation for the first summit meeting between President Trump and President Moon on July 28, 2017 in Washington, D.C.[41] In the summit meeting, President Trump raised the issue of "re-negotiation" of the Korea–U.S. FTA.[42]

After the summit meeting, President Trump tempered his position and began calling for a "re-negotiation" of the terms rather than the termination of the Korea–U.S. FTA.[43] Apparently, the main force to the modification of his attitude seems to be several expert reports that emphasize a positive influence of the agreement on the U.S. economy.[44]

On July 12, 2017, roughly two weeks after the summit meeting, the Trump Administration officially notified the Korean government of the initiation of discussions to "amend" the Korea–U.S. FTA.[45] On July 24,

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[40] Philip Rucker, *Trump: "We May Terminate" U.S.–South Korea Trade Agreement*, WASH. POST (Apr. 28, 2017), https://www.washingtonpost.com/politics/trump-we-may-terminate-us-south-korea-trade-agreement/2017/04/27/75ad1218-2bad-11e7-a616-d7c8a68c1a66_story.html?utm_term=.affcc4aa7327.

[41] Darcie Draudt, *The Economic Side of the Trump-Moon Summit*, DIPLOMAT (June 27, 2017), http://thediplomat.com/2017/06/the-economic-side-of-the-trump-moon-summit/; Brain Padden, *US-South Korea Summit Could Expose Strains in Alliance*, VOA NEWS (June 21, 2017, 11:29 AM), https://www.voanews.com/a/us-south-korea-summit-could-expose-strains-in-alliance/3909528.html; Elise Hu, *In Trump Meeting with South Korean Leader, a Chance to Reaffirm "Ironclad" Ties*, NPR (June 29, 2017, 4:39 AM), http://www.npr.org/sectionns/parallel s/2017/06/29/534655023/in-trump-meeting-with-south-korean-leader-a-chance-to-reaffirm-ironclad-ties.

[42] John Brinkley, *Pence Tells Koreans U.S. Wants to Reform Korea–U.S. Free Trade Agreement. But There's Nothing to Reform*, FORBES (Apr. 18, 2017, 5:11 PM), https://www.forbes.com/sites/johnbrinkley/2017/04/18/pence-tells-koreans-us-wants-to-reform-korea-us-free-trade-agreement-but-theres-nothing-to-reform/#295f2d87d11e. According to the article, the U.S. vice president claimed that the President Trump is planning to renegotiate Korea–U.S. FTA.

[43] Matthew Pennington, *Trump Ups Trade Tensions with South Korea in Welcoming New Leader*, CHI. TRIB. (June 30, 2017), http://www.chicagotribune.com/news/nationworld/ct-trump-south-korea-trade-20170630-story.html.

[44] Brinkley, *supra* note 17; Noah Bierman, *President Trump Delivers Tough Trade Talk During Visit by South Korea's New Leader*, L.A. TIMES (June 30, 2017, 7:26 PM), http://www.latimes.com/politics/la-na-pol-trump-korea-trade-20170630-story.html.

[45] Letter from Robert E. Lighthizer, Ambassador, U.S. Trade Representative, to Joo Hyunghwan, Minister of Trade, Industry & Energy, Republic of Korea (July 12, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/USTR%20KORUS.pdf:

> A key focus of the Trump Administration is on reducing our trade deficits with trading partners around the world, and we have real concerns about our significant trade imbalance with Korea. As provided under Article 22.2 of the U.S.–Korea (KOREA–U.S.) Free Trade Agreement, I request the convening of a special session of the Joint Committee soon in Washington, D.C., to consider matters affecting the operation of the

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2017, in response to this letter, Korea acknowledged receipt of the letter and asked for the postponement of the actual negotiations, citing that the new administration of Korea had not yet appointed its own Minister for Trade.[46]

As a matter of fact, requesting an amendment to a treaty is a right accorded a contracting party.[47] The Korea–U.S. FTA is no exception.[48] Under the relevant provision of the Korea–U.S. FTA, the Joint Committee comprising the representatives of the two governments is in charge of the

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> Agreement, including possible amendments and modifications. The Agreement requires a special session of the Joint Committee to be held within 30 days.

see also Gillespie, *supra* note 2; Lesley Wroughton, *U.S. Informs South Korea Plans to Start Talks to Amend Trade Pact*, REUTERS (July 13, 2017, 4:27 AM), http://www.reuters.com/article/us-usa-trade-southkorea-idUSKBN19X2SZ.

[46] In a letter of the Minister of Trade Industry and Energy to the USTR, Minister Un-gyu Paik stated:

> Regarding your request to convene a special session of the Joint Committee under the KOREA–U.S. FTA, Korea agrees to hold the requested Joint Committee in accordance with the due procedures set forth in the Agreement.
>
> In this connection, I would like to seek your consideration of the fact that Korea is in the process of a government restructuring, which is to include the establishment of a Trade Office in my Ministry and the appointment of a new Minister for Trade, who will be co-chair of the Joint Committee on the Korean side.
>
> Under these circumstances, I suggest that the special session of the Joint Committee be convened at an appropriate date in the near future after the restructuring process is finalized.

Julie Jackson, *Seoul Counteroffers on Washington's FTA Amendment Call*, KOREA HERALD (July 25, 2017, 16:09 PM), http://www.koreaherald.com/view.php?ud=20170725000861.

[47] Article 40 of the Vienna Convention on the Law of Treaties stipulates as follows:

> Article 40 (Amendment of multilateral treaties)
> 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
> 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
> (a) the decision as to the action to be taken in regard to such proposal; (b) the negotiation and conclusion of any agreement for the amendment of the treaty . . . .

Vienna Convention on the Law of Treaties art. 40, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[48] Art. 24.2 of the Korea–U.S. FTA also provides that:

> Article 24.2 (Amendments)
> The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures, on such date as the Parties may agree.

Free Trade Agreement Between the Republic of Korea and the United States of America, S. Kor.–U.S., art. 24.2, June 30, 2007 [hereinafter Korea–U.S. FTA].

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discussion of any amendment of the FTA.[49] As a matter of fact, one party may also terminate the treaty if it decides to do so.[50]

As such, as of writing, Korea and the U.S. are now gearing up for a re-negotiation of the Korea–U.S. FTA that came into effect on Mar. 15, 2012 in order to agree a possible amendment. Specific schedules of the re-negotiation and contents to be tabled are not known yet. It is expected that the basic contour of the re-negotiation will take shape sometime during the fall of 2017.

B. Initiation of Re-Negotiation

As noted above, as of July 12, 2017, Korea and the U.S. officially initiated a process to re-negotiate and amend the Korea–U.S. FTA. The outcome of this negotiation would then constitute an "amendment" within the terms of Article 40 of the *Vienna Convention on the Law of Treaties*. While amending a treaty is always a possibility, this recent development of the Korea–U.S. FTA is rather unconventional as most treaties (trade agreements in particular) are not re-opened for amendment once concluded.

Under normal circumstances it is neither reasonable nor practical that

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[49] Art. 22.2 of the Korea–U.S. FTA establishes and empowers the Joint Committee as follows:

> Article 22.2: Joint Committee
> 1. The Parties hereby establish a Joint Committee comprising officials of each Party, which shall be co-chaired by the United States Trade Representative and the Minister for Trade of Korea, or their respective designees.
> 2. The Joint Committee shall: (a) supervise the implementation of this Agreement; (b) supervise the work of all committees, working groups, and other bodies established under this Agreement; (c) consider ways to further enhance trade relations between the Parties; . . . .
> 3. The Joint Committee may: (a) establish and delegate responsibilities to ad hoc and standing committees, working groups, or other bodies; (b) seek the advice of non-governmental persons or groups; (c) consider amendments to this Agreement or make modifications to the commitments therein; . . . .
> 6. Recognizing the importance of transparency and openness, the Parties affirm their respective practices of considering the views of members of the public in order to draw on a broad range of perspectives in the implementation of this Agreement.

Id. art 22.1.

[50] Termination is set forth in Art. 24.5 of the Korea–U.S. FTA as follows:

> Article 24.5: Entry Into Force And Termination
> 2. This Agreement shall terminate 180 days after the date either Party notifies the other Party in writing that it wishes to terminate the Agreement.
> 3. Within 30 days after a Party provides notice under paragraph 2, either Party may request the other Party in writing to enter into consultations regarding whether any provision of this Agreement should terminate on a date later than that provided under paragraph 2. The consultations shall begin no later than 30 days after the Party delivers its request.

Id. art. 24.5.

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contracting parties to a treaty contemplate an amendment in abstract or in advance, in the absence of a compelling reason. Although specific numbers are not readily available, few, if any, FTAs of over 400 concluded so far in the global community have been amended in the middle of their lifespan.[51] It is true that an FTA can and should be subject to a continuous review by the contracting parties. But the notion that such a review should lead to re-negotiation of the terms and conditions of the treaty does not seem to reflect current treaty practice.

Even if amending a treaty is contemplated from time to time, it is usually suggested after the treaty at issue has been in place for a sufficient period of time, so that reliable data is accumulated to justify adjustment of the terms of the treaty one way or another. An amendment proposal after only five years of application of a highly complex and controversial trade agreement is indeed unusual, if not entirely unprecedented. Amendment or adjustment of an FTA at the discretion or desire of one party in the initial stage of the agreement at issue arguably deviates from the general practice of states. What is currently transpiring is an unexpected consequence of the surge in the global anti-globalization sentiment and the unconventional trade policy of the Trump Administration. Arguably, the underpinnings of the re-negotiation proposal are mainly structured to address domestic concerns, rather than be reflective of state practice relating to treaty negotiation, conclusion and implementation.

IV. FROM SKEPTICISM TO UNILATERALISM AND TO "ULTIMATUMISM": THE CASE OF THE KOREA–U.S. FTA

The case of the Korea–U.S. FTA arguably offers a good example of a glimpse of the Trump Administration's trade policy. It is true that the position of a government with respect to a particular trade agreement is not necessarily capable of showing the entire picture of the trade policy of that government. Judging the trade policy of an administration only six months in power may also be too early to produce an accurate picture. Nonetheless, the position of the Trump Administration (as well as that of the previous administration to the extent it is relevant to the current administration) with respect to the Korea–U.S. FTA arguably offers a showcase example of its trade policy.

Trump Administration's trade policy is apparently anchored on skepticism and unilateralism. A notion that the U.S. is being shortchanged from the Korea–U.S. FTA has sowed skeptical views of the trade deal with Korea, even before the arrival of President Trump. The skeptical view gained further traction with the inauguration of the Trump Administration.

[51] REGIONAL TRADE AGREEMENTS INFO. SYS. (RTA-IS), http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited Aug. 19, 2017).

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The view then has been escalated to the introduction of unilateralism under the new administration, in a sense that the new trade policy purports to put America's trade interest at the forefront of any trade negotiation and ensures that interest through direct negotiation with its trading partner. The position of unilateralism has further evolved under Trump Administration into what can be called "ultimatumism" in a sense that the U.S. fixes a minimum level of benefits that it expects from a trade deal immediately, only to send an ultimatum to terminate a trade agreement (or amend it) if the minimum is not firmly guaranteed. The situation with the Korea–U.S. FTA offers a silhouette of the changing contour of trade policy under the Trump Administration.

A. Skepticism: Feeling Short-changed in a Trade Deal

The U.S.'s FTAs with Korea,[52] Peru,[53] Colombia[54] and Panama[55] were negotiated and concluded roughly around the same time in the late 2000s and early 2010s. Diverse reasons spanning economic rationale and geopolitical considerations prompted the U.S. government to push ahead with these preferential trade agreements with four countries. Since the four FTAs were negotiated and concluded largely contemporaneously, key traits and characteristics of the agreements are similarly formulated. It is noteworthy, however, that the Trump Administration has singled out the Korea FTA for re-negotiation, which has only been in operation for five years.

Since the FTA's entry into force in March 2012, the two countries have encountered various issues and disputes covering a wide range of areas of the agreement. Korea has raised concerns over the trade remedy measures by the U.S. Department of Commerce, arguably targeting key export items of Korea. The United States has taken issue with the U.S. products' low penetration into the Korean market. In the two-way discussion, the U.S. concerns and complaints have outnumbered and outweighed those of Korea. Washington's concerns and complaints have covered a broad

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[52] The Korea–U.S. FTA was agreed upon on Apr. 30, 2007 and went into effect on Mar. 15, 2012. For the chronological history of the Korea–U.S. FTA negotiations and conclusion, see FTA STATUS OF ROK: KOREA–U.S. FTA, *supra* note 36.

[53] The U.S.–Peru Trade Promotion Agreement was agreed upon on Apr. 12, 2006 and went into effect on Feb. 1, 2009. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2010, at 219 (2010).

[54] The U.S.–Colombia Trade Promotion Agreement was agreed upon on Nov. 22, 2006, and went into effect on May 15, 2012. *See* U.S.–COLOM. TRADE PROMOTION AGREEMENT, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa (last visited July 30, 2017).

[55] The U.S.–Panama Trade Promotion Agreement was agreed upon on June 28, 2007, and went into effect on Oct. 31, 2012. *See* U.S.–PAN. TRADE PROMOTION AGREEMENT, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa (last visited Aug. 8, 2017).

spectrum of the FTA. Below are some of the examples of U.S. complaints:

1. Competition Chapter: In response to the Korea Fair Trade Commission's (hereinafter "KFTC") decision in December 2016 to impose a 1.03 trillion KRW (854 million USD) fine for anti-competitive business practices, Qualcomm, U.S. corporation, and the U.S. government argued that the imposition was in contravention of the relevant provisions of the Korea–U.S. FTA.[56] According to the press release of the San Diego-based company: its fundamental procedural safeguards, such as access to case files and right to cross-examine, guaranteed under the Korea–U.S. FTA were breached.[57] The Qualcomm issue is one of the similar incidents where the KFTC's investigations have been criticized by U.S. industries as targeting foreign companies with more aggressive enforcement efforts.[58]
2. Services Chapter: In accordance with the stipulation of the Korea–U.S. FTA's legal services market opening schedule, Korea amended its Foreign Legal Consultant Act, an amendment to implement Korea's commitment under the Korea–U.S. FTA. The amended act included new requirements such as restriction of a U.S. law firm's ownership of a joint venture as 49% and participating U.S. attorney's submission of "good standing" practice record of more than three years in respective jurisdictions.[59] It has been pointed out that these restrictions tend to create a favorable business environment for Korean law firms while putting their foreign counterparts in a disadvantageous position.[60] Similar concerns over disguised regulation and slow implementation

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[56] *Qualcomm Responds to Announcement by Korea Fair Trade Commission*, QUALCOMM (Dec. 28, 2016), https://www.qualcomm.com/news/releases/2016/12/27/qualcomm-responds-announcement-korea-fair-trade-commission.

[57] *See* Mike Freeman, *Qualcomm Slapped with $865 Million Fine from South Korea's Trade Regulator*, SAN DIEGO UNION-TRIBUNE (Dec. 28, 2016, 7:35 AM), http://www.sandiegouniontribune.com/business/technology/sd-fi-qualcomm-fine-20161227-story.html; The company has been subject to similar probes in other jurisdictions for several years—for instance, in China in 2015, it settled a similar investigation by agreeing to pay a $975 million fine. *See also* Noel Randewich & Matthew Miller, *Qualcomm to Pay $975 Million to Resolve China Antitrust Dispute*, REUTERS (Feb. 10, 2015, 11:04 AM), http://www.reuters.com/article/us-china-qualcomm-idUSKBN0LD2EL20150210.

[58] *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 284 (2017).

[59] Oe-guk-beop-ja-mun-sa-beop [Foreign Legal Consultant Act], Act No. 9524, Mar. 25, 2009; *see* Marialuisa Taddia, *South Korean Legal Market: Life and Seoul*, L. SOC'Y: GAZETTE (Feb. 27, 2017), https://www.lawgazette.co.uk/practice/south-korean-legal-market-life-and-seoul/5059972.article.

[60] *See* Hyun-ju Ock, *Foreign Envoys Protest Limits on Foreign Law Firms*, KOREA HERALD (Jan. 18, 2016, 16:19), http://www.koreaherald.com/view.php?ud=20160118000978; Byung-Joo Moon, *Ambassadors Protest Bill on Foreign Law Firms*, KOREA JOONGANG DAILY (Jan. 11, 2016), http://mengnews.joins.com/view.aspx?aId=3013751; Simon Mundy, *Foreign Law Firms Rap South Korea over New Bill*, FIN. TIMES (Jan. 17, 2016), https://www.ft.com/content/25be426c-bc38-11e5-a8c6-deeeb63d6d4b.

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have also been raised in other service sectors.[61] The services sector has been regarded as the area where the U.S. has the comparative advantage in its bilateral trade with Korea.[62] Due to the nature of the services trade, it may have taken a longer time to penetrate the Korean market. But the U.S. has apparently been dissatisfied with the rather slow progress of penetration into the Korean market.[63] Here also, some of the complaints relate to Korea's intentional foot-dragging in implementing the promises made in the agreement.[64]

3. Rules of Origin Chapter: Determination of a country of origin for frozen orange juice from Florida was one of the thorniest issues of the bilateral trade in the early stage of the Korea–U.S. FTA implementation.[65] The U.S. complained that the Korean Customs Service (hereinafter "KCS") was imposing unreasonable "country-of-origin" verification requirements on citrus growers from Florida, based on suspicion that orange juice concentrates from Florida in fact includes those originating from Brazil.[66]
4. Rules of Origin Chapter: Similar concerns have been steadily raised by U.S. exporters of other products,[67] because Korea's KCS "require[s] excessive and unnecessary documentation during the verification process" and the agency rejects documentation for "minor errors".[68] It has become too difficult to satisfy the requirements to be eligible to utilize the FTA's preferential treatment, argues U.S. exporters.[69]
5. Automobile Import: The continuing significant imbalance in the auto sector has been a chronic source of tension between the two countries.[70] The USTR lists "increased access to Korea's automotive

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[61] *See* Public Citizen, *On Unhappy Fifth Anniversary of U.S.–Korea Free Trade Agreement, Deficit with Korea Has Doubled as U.S. Exports Fell, Imports Soared*, COMMON DREAMS (July 31, 2017, 6:00 PM), https://www.commondreams.org/newswire/2017/03/15/unhappy-fifth-anniversary-us-korea-free-trade-agreement-deficit-korea-has.

[62] *See id.*

[63] *US Urges Korea for Active Implementation of KORUS FTA*, KBS NEWS (Mar. 29, 2016, 10:46 AM), http://news.kbs.co.kr/news/view.do?ncd=3255752.

[64] *See id.*

[65] TRACING A PATH OUT OF A COSTLY TRADE DISPUTE, https://www.usda.gov/media/blog/2014/06/27/tracing-path-out-costly-trade-dispute (last visited July 31, 2017).

[66] EXPORT MARKETS OFFER OPPORTUNITIES FOR FLORIDA CITRUS, http://www.freshplaza.com/article/110320/Export-markets-offer-opportunities-for-Florida-citrus (last visited July 31, 2017).

[67] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 58, at 278 ("U.S. exporters and producers have raised concerns that the Korea Customs Service (KCS) has been conducting unduly onerous verifications for claims of preferential tariff treatment under the KORUS FTA.").

[68] *See id.*

[69] For instance, a preferential tariff on a particular product may only be available if the exporter can show that a certain percentage of the content was made in that country. The bureaucratic complications mean that many companies don't even apply to use the benefits offered under the bilateral deals, and it may mean U.S. companies with global customers must move plants out of America to stay competitive. *The Japan–EU Trade Warning*, *supra* note 6.

[70] *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 58, at 286.

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market" as "a key priority" in its monitoring of the Korea–U.S. FTA.[71] The continuing under-performance of the U.S. automobile sales in the Korean market has been offering a tempting catchphrase that the FTA is skewed to the detriment of the U.S.[72] New environmental regulation and safety standards have been criticized as imposing a disproportionate burden on U.S. vehicles.[73]

6. Motorcycles Ban: Korea's ban on driving motorcycles on expressways has continuously been on the bilateral discussion agenda.[74] The U.S. takes issue with the Korean government's safety concerns over motorcycle traffic on national highways and claims the ban is a measure to protect domestic manufacturers.[75]
7. Pharmaceutical and Medical Devices Pricing: The U.S. complains that Korean regulations and policies in pharmaceutical reimbursement and pricing contain "lack of transparency and predictability."[76] It is feared that uncertainties in the regulations and policies will "unfairly disadvantage U.S. exporters."[77]
8. Additional Security Verification of ICT Equipment: U.S. has long criticized Korean government's additional testing of information and communication technology equipment to be used by government agencies for national security purposes, even if it has been tested and certified by relevant international standards (CCRA).[78] Korea also requires this equipment to incorporate encryption developed by its intelligence service agency.[79] It is claimed to be "a market access barrier for SMEs and start-ups" from the U.S.[80]
9. Data Localization Requirement: Digital information treatment has also been another source of constant tension between the two countries. In particular, violation of FTA provisions has been referred to when Google's repeated request for permission to transfer the digital mapping data from Korea to its foreign servers has been rejected. The data on point is 1:5,000 scale map data compiled by the National Geographic Information Institute, information in great demand for digital commercial service. Here again national security concerns have

[71] *See id*.
[72] *See* Neal Asbury, *US Car Brands Take the Off Ramp in Korea*, NEWSMAX FIN. (Nov. 14, 2013, 7:27 AM), http://www.newsmax.com/Finance/NealAsbury/US-Korea-auto-cars/2013/11/14/id/536563/; Robert E. Scott, *U.S.–Korea Trade Deal Resulted in Growing Trade Deficits and More than 95,000 Lost U.S. Jobs*, ECON. POL'Y INST. (May 5, 2016, 10:37 AM), http://www.epi.org/blog/u-s-korea-trade-deal-resulted-in-growing-trade-deficits-and-more-than-95000-lost-u-s-jobs/.
[73] *See* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 58, at 286-87.
[74] *Id.* at 287.
[75] *See id*.
[76] *Id.* at 288.
[77] *See id*.
[78] *Id.* at 280.
[79] *See id.*
[80] *See id*.

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been the basis of Korea's refusal while it is claimed that the underlying reason is to favor domestic service providers.

In short, after the conclusion of the FTA the United States has been expecting more market penetration in Korea, its seventh-largest trading partner.[81] The U.S. recognizes improvement of its goods' and services' performance in certain sectors of the Korean markets as a result of the FTA.[82] But overall it still seems to believe that there is a long way to go for full implementation of the FTA. It attributes U.S. goods' and services' less-than-optimal performance in the Korean market to a web of Korean domestic regulation and non-tariff barriers. In particular, since 2012 the U.S. has been continuously pointing out, in various sectors of its trade with Korea, a lack of transparency, unclear provisions of laws and regulations, a broad discretion accorded to agencies in charge, and a lack of procedural fairness.[83] Compared to Korea's relatively robust penetration into the U.S. market, views have been expressed that this agreement does not ensure a "level playing field."[84]

This observation by the U.S., both in the governmental sector and the industries, has helped spread and build "skepticism" on the part of the U.S. toward the FTA with Korea. Upon careful scrutiny, however, all the alleged Non-Tariff Barriers (hereinafter "NTBs") of Korea do not necessarily constitute a violation of the Korea–U.S. FTA or WTO Agreements: it turns out that some of the alleged NTBs are based upon a misunderstanding of the requirements or a failure to meet the requirements of the FTA, or simply a vigorous application of the provisions of the FTA by Korean agencies in charge. Nonetheless, the accumulation of these incidents have fostered the creation of a perception that the U.S. is not getting fair share of the deal, leading to the spread of "skepticism" among opinion leaders of in U.S.[85]

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[81] *Id.* at 275.

[82] *Id*:

> A number of U.S. farm exports to Korea have recorded double- and triple-digit gains since the FTA came into effect . . . The Agreement has brought improvements in the transparency of Korea's regulatory system, strengthened intellectual property protection, helped dismantle non-tariff barriers to autos and other key U.S. exports, and enhanced market access for U.S. exporters of all sizes, including small and medium-sized exporters.

[83] Throughout its 2017 NTE Report, these are the recurring and common themes in various sectors surveyed and reported.

[84] *See* Youg-bae Shin, *USTR Formally Demands Negotiation to Revise FTA with Korea*, KOREA HERALD (July 13, 2017, 8:41 AM), http://www.koreaherald.com/view.php?ud=20170713000051; Ben Mouncer, *Imports Surge Behind Reconsideration of South Korea Trade Deal*, BUS. REV. USA (July 13, 2017), http://www.businessreviewusa.com/leadership/5905/Imports-surge-behind-reconsideration-of-South-Korea-trade-deal.

[85] Potentially this would be important because, for better or worse, it is reported that the United States is becoming increasingly agitated by the allegedly less than optimal implementation by Korea regarding some of the issues covered by the Korea–U.S. FTA. In particular, the United

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Accumulation of the skepticism provided a viable agenda for the Trump presidential campaign. Consequently, President Trump, during his campaign, repeatedly made references to the bilateral trade with Korea in general and the Korea–U.S. FTA in particular, claiming that U.S. industries are losing from this trade deal with Korea.

B. Unilateralism: Securing National Interest Through Direct Negotiation with a Specific Trading Partner

Under the Trump Administration, accumulated skepticism has quickly morphed into unilateralism. During his first six months in office, Trump has repeatedly shown disregard to multilateralism. Trump withdrew from the TPP, a multilateral free trade agreement between more than twelve countries across the pacific, which was supported by the Obama administration.[86] The Trump administration is also reported to have stated that they will ignore anti-U.S. WTO rulings, as "ever since the United States won its independence, it has been a basic principle of our country that American citizens are subject only to laws and regulations made by the U.S. government—not rulings made by foreign governments or international bodies," according to a leaked report that was scheduled to be sent to the Congress.[87]

Then, what would be the fundamental reasons for the Trump Administration's disregard of multilateralism? According to the Press briefing by Secretary of Commerce Wilbur Ross, the problem with the current WTO system is that it has a "most favored nation clause," which makes reciprocal tariff barriers difficult to erect. In addition, Ross also pointed out that the WTO does not effectively secure intellectual property rights and does not have an effective dispute resolution mechanism.[88] As such, deviating from multilateral agreements or organizations and turning

States has pointed out the "invisible" barriers that its products and service providers face to penetrate the Korean market. *See* John Talton, *Seoul Searching: How KOREA–U.S. Is Working out*, SEATTLE TIMES (July 16, 2014), http://blogs.seattletimes.com/jontalton/2014/07/16/seoul-searching-how-Korea-U.S.-is-working-out/. It is possible that these issues from other sectors may find themselves on the negotiating tables once Korea (or the two sides) opens up the discussion on the investment chapter of the Korea–U.S. FTA.

[86] Trans-Pacific-Partnership Agreement, Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership; Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html.

[87] Reuters Staff, *Trump Administration Would Ignore WTO Rulings It Sees as Anti-U.S.: FT*, REUTERS (Mar. 1, 2017, 9:59 AM), http://www.reuters.com/article/us-usa-trump-wto-idUSKBN16832U.

[88] Office of the Press Secretary, *Press briefing by Secretary of Commerce Wilbur Ross on an Executive Order on Trade Agreement Violations and Abuses*, WHITE HOUSE (Apr. 28, 2017, 3:36 PM), https://www.whitehouse.gov/the-press-office/2017/04/28/press-briefing-secretary-commerce-wilbur-ross-executive-order-trade.

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to bilateral agreements can enable the U.S. to get better deals with individual countries.

Some reporters have criticized that the Trump Administration's apparent disregard of multilateralism stems from the belief that economic treaties are essentially a zero-sum situation rather than a win-win situation and that historically other countries have taken advantage of the U.S., when in reality economic treaties can be a win-win situation.[89] Others have pointed out that such disregard toward multilateralism seems to be a product of both economic populism and political populism.[90]

While withdrawing from multilateralism, the Trump administration has simultaneously pursued enabling the U.S. to exert influence with minimum consultation with other nations—by way of focusing on bilateral agreements. For instance, after withdrawing from the TPP, Trump stated in his interview with the *Wall Street Journal* that "we've also withdrawn from the Trans-Pacific Partnership, paving the way for new one-on-one trade deals that protect and defend the American worker. And believe me, we're going to have a lot of trade deals. But they'll be one-on-one. There won't be a whole big mash pot."[91] Similarly, the President's 2017 Trade Policy Agenda states that "we believe that these goals (of making trade freer and fairer for all Americans) can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations."[92] Currently, the Trump Administration is attempting to engage Japan in bilateral talks, after withdrawing from the TPP.[93] President Trump is also attempting to strike a bilateral trade agreement with the U.K., though the process will be delayed until the U.K. formally leaves the European Union.[94]

In a nutshell, the new administration purports to raise concerns directly with each trading partner and to resolve outstanding issues in an aggressive manner. Putting U.S. interests first has become not only a key priority, but also the only objective of the trade policy of the U.S.[95] Arguably, exploring

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[89] Geoffrey Gertz, *What Will Trump's Embrace of Bilateralism Mean for America's Trade Partners?*, BROOKINGS (Feb. 8, 2017), https://www.brookings.edu/blog/future-development/2017/02/08/what-will-trumps-embrace-of-bilateralism-mean-for-americas-trade-partners/.

[90] Daniel W. Drezner, *Why the Trump Administration Hates Multilateral Trade Agreements the Most*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/posteverything/wp/2017/03/09/why-the-trump-administration-hates-multilateral-trade-agreements-the-most/?utm_term=.82335afddd20.

[91] Paul Gigot, *Building the Wall: A Transcript of the Weekend's Program on FOX News Channel*. WALL STREET J. (Jan. 30, 2017, 12:13 PM), https://www.wsj.com/articles/building-the-wall-1485796043.

[92] *Supra* note 16.

[93] William Mauldin, *Trump's Big Gamble: Luring Countries into One-on-One Trade Deals*, WALL STREET J. (Jan. 27, 2017, 5:39 PM), https://www.wsj.com/articles/trumps-big-gamble-luring-countries-into-one-on-one-trade-deals-1485483628.

[94] Ruth Sherlock, *Congress Pushes Donald Trump to form Bilateral Trade Deals with the UK*, TELEGRAPH (Jan. 27, 2017, 6:34 PM), http://www.telegraph.co.uk/news/2017/01/27/congress-pushes-donald-trump-form-bilateral-trade-deal-uk/.

[95] *See* Office of the Press Secretary, *supra* note 15; Ian Bremmer, *"America First": Who Really*

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common prosperity or establishing a common economic zone of cooperation has been sidelined in this process. Granted, all states pursue their respective national interest through trade agreements, but few, if any, proclaim officially that securing its own national interest is the only objective of trade deals. Certainly, this has not been the traditional policy of the United States. Its trading partners' interests or common interests barely appear in the new policy. This stance of "U.S. interest first" can be termed "unilateralism".

In addition, setting the issues, selecting negotiation timing, and choosing negotiation parties are determined by the U.S. unilaterally. First, political statements are made, followed by an official decision to take a specific measure, apparently in the absence of close coordination and consultation with trading partners. The Trump Administration has not declared that it is against FTAs. This type of "one-way" communication and decision making process also indicates unilateralism.

C. Ultimatumism: Unilateralism in the Next Level

The skepticism on the part of the U.S. has evolved into unilateralism under the Trump Administration. The unilateralism has been further pushed to the point where a minimum level of benefit or a minimum quantum of interest is set by the U.S. and then presented to the trading partners for a guarantee. To the extent that a preordained outcome is set and presented as a goal for a negotiation, this is arguably a stance and/or policy that can be distinguished from mere unilateralism.

1. Ultimatum: Guarantee for a Minimum Level of Benefit or Face Termination — At least officially, governments rarely declare or make it publicly known that they will accept trade deals that only provides a certain minimum level of benefit and try to secure a guarantee from their counterparts. Under the Trump Administration, it appears that minimum gains that should be enjoyed by U.S. industries and workers are calculated or contemplated. In the alternative maximum gains that the U.S. trading partner should enjoy are figured. The quantum is then conveyed to the other trading partner so as to prompt a remedial action. Termination of the agreement is touted as an option on the table if a remedial action is refused. In a sense, this is a soft version of "take-it-or-leave it" ultimatum. Thus, a new term ("ultimatumism") may be coined to describe this new stance, distinct from unilateralism. It aims to ensure a certain level of U.S. interest immediately and on a constant basis, using the possibility of an immediate demand for amendment or even termination if the level is not maintained. This is a unique and unconventional, if not totally unprecedented, approach

Wins?, POLITICO (July 21, 2017), http://www.politico.com/magazine/story/2017/07/21/america-first-donald-trump-foreign-policy-215398.

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in international trade.

A variety of benefit and interest are mixed into this equation. For instance, since the election of President Trump, pressure has been exerted on foreign governments and companies for more investment in the U.S.[96] In response, foreign corporations hope that they stay outside the possible U.S. target list. It is also suggested that foreign governments and corporations voluntarily reduce their exports to the U.S. market. Purchasing more U.S. products is another way of achieving the same objective.[97]

It is against this backdrop that re-negotiation of the Korea–U.S. FTA is taking place. In spite of the assessment of the apparent balance in the agreement and long-term benefit for the U.S.,[98] the Trump Administration presents a certain target range to reduce a short-term trade deficit in the goods sector.[99] It suggests that the Korea–U.S. FTA should be amended to meet the set target.[100] Korean corporations are expected and encouraged to increase their investment in the U.S. market, and some of them have actually decided to do so.[101] Korea is requested to reduce its trade surplus,

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[96] For examples, see David Pierson, *iPhone Builder Foxconn Will Open Factory in Wisconsin*, L.A. TIMES (July 26, 2017, 9:15 AM), http://www.latimes.com/business/technology/la-fi-tn-foxconn-factory-20170726-story.html; Kim Slowey, *Austrian Wood-Products Maker Egger to Build $700M NC Factory*, CONSTR. DIVE (July 28, 2017), http://www.constructiondive.com/news/austrian-wood-products-maker-egger-to-build-700m-nc-factory/448116/; Mathew Rocco, *Trump Congratulates Toyota on Opening of Texas Headquarters*, FOX BUS. (July 6, 2017), http://www.foxbusiness.com/markets/2017/07/06/trump-congratulates-toyota-on-opening-texas-headquarters.html; Suk-yee Jung, *Korean Enterprises to Invest US$12.8 Billion in the U.S. Until 2021*, BUS. KOREA (July 3, 2017, 11:15 AM), http://www.businesskorea.co.kr/english/news/national/185 11-investment-us-korean-enterprises-invest-us128-billion-us-until-2021.

[97] For examples, see TCA Sharad Raghavan, *India's First Ever U.S. Crude Purchase to Arrive in Sept.*, HINDU (July 30, 2017, 3:36 AM), http://www.thehindu.com/todays-paper/tp-miscellaneous/tp-others/indias-first-ever-us-crude-purchase-to-arrive-in-sept/article19388767.ece; Joanna Smith, *"Buy American" Policy Looms Large over NAFTA Talks*, CTV NEWS (July 30, 2017, 2:26 PM), http://www.ctvnews.ca/canada/buy-american-policy-looms-large-over-nafta-talks-1.3525388; Zheng Xin, *China Escalated Imports of Crude from United States*, CHINA DAILY (July 20, 2017, 8:07 AM), http://www.chinadaily.com.cn/business/2017-07/20/content_30179723.htm; Charles Lee, *S Korea to Look for More US Oil, Gas Imports Under Trump Administration*, S&P GLOB. PLATTS (Jan. 13, 2017, 1:07 AM), https://www.platts.com/latest-news/oil/seoul/s-korea-to-look-for-more-us-oil-gas-imports-under-27750022.

[98] *See* UNITED STATES INTERNATIONAL TRADE COMMISSION, ECONOMIC IMPACT TRADE AGREEMENTS IMPLEMENTED UNDER TRADE AUTHORITIES PROCEDURES, 2016 REPORT (June 2016), https://www.usitc.gov/publications/332/pub4614.pdf.

[99] *See Donald Trump, Economic Theory and Trade Deficits*, CTR. FOR ECON. & POL'Y RESEARCH (Oct. 6, 2016), http://cepr.net/blogs/beat-the-press/economic-theory-and-trade-deficits; Peter Morici, *Trump's Promise to Fix Our Trade Deficit Is Still Falling Woefully Short*, FOX NEWS (July 18, 2017), http://www.foxnews.com/opinion/2017/07/18/trumps-promise-to-fix-our-trade-deficit-is-still-falling-woefully-short.html.

[100] Byungmoon Son, *Re-Negotiation of KORUS FTA, Major Issues and Prospective Schedules*, EBN (July 13, 2017, 10:30), http://www.ebn.co.kr/news/view/900633.

[101] Jung, *supra* note 96; Seung Kwan Lee, *Samsung Electronics Will Invest USD 380 Million to Build Factories in the US*, YONHAP NEWS (June 28, 2017, 22:30), http://www.yonhapnews.co.kr/bulletin/2017/06/28/0200000000AKR20170628161000003.HTML?input=1195m; Heejong Kang & Hayoung Ki, *Samsung and LG Establishing Factories in the US—Hyundai Also Follows to Invest*, ASIA ECON. (June 23, 2017, 7:45 AM), http://view.asiae.co.kr/news/view.htm?idxno=

either reducing its exports to the U.S. or increasing imports from the U.S.[102] It appears that the Trump Administration's trade policy does not look at the long term benefit that materializes over time. It is indeed rare, if not entirely without precedent, that a trading partner requests an amendment of a trade agreement that has only been in existence for five years.

Official statements describe the U.S. position. In his letter to his Korean counterpart dated on July 12, 2017, Robert Lighthizer, the USTR, stated: "When the KOREA–U.S. Agreement was negotiated, expectations were high that both of our economies would realize significant gains. However, our overall deficit with Korea has increased, and our goods deficit has doubled since the Agreement entered into force."[103]

In raising the issue of the Korea–U.S. FTA, the Trump Administration has underscored the trade deficit between the two countries. Regarding Korea–U.S. FTA, Trump stated in an interview with Reuters that the agreement is "unacceptable" and "a horrible deal made by Hillary (Clinton)." Trump also stated that "It's a horrible deal, and we are going to renegotiate that or terminate it."[104] Similar to NAFTA, the Trump administration focuses on the fact that U.S. trade deficits have increased post-Korea–U.S. FTA. Originated under the George W. Bush administration and renegotiated under the Obama administration, the Korea–U.S. FTA decreased tariffs on 95% of the goods that are imported and exported between South Korea and the U.S.[105] According to *The Economist*, the USTR originally predicted the Korea–U.S. FTA to increase U.S. exports by $10 billion, but in reality, the exports dropped by $3 billion from 2011 to 2016.[106] According to USTR Robert Lighthizer, "trade deficit in goods with Korea has doubled from $13.2 billion to $27.6 billion, while U.S. goods exports has actually gone down." As such, Lighthizer requested an initiation of discussion through the Joint-Committee as part of a process of renegotiating the Korea–U.S. FTA on July 12, 2017.[107] Similar views were also expressed by other U.S. officials.[108]

2017062307402687302.

[102] Moonsuk Bae, *Export Dependent South Korea Falter from Protectionist War Signaled by Trump Administration*, HERALD ECON. (July 18, 2017).

[103] Lighthizer, *supra* note 45.

[104] Adler, *supra* note 3.

[105] Holodny Elena, *Trump Says He'll Revisit the 'Horrible' US–South Korea Trade Deal—Here's What You Need to Know*, BUS. INSIDER (Apr. 28, 2017, 12:38 PM), http://www.businessinsider.com/what-is-korea-us-trade-deal-korus-2017-4.

[106] *The South Korea–US Trade Agreement Turns Five*, ECONOMIST (Mar. 16, 2017), http://www.economist.com/news/finance-and-economics/21718894-though-not-many-are-celebrating-its-birthday-south-korea-us-trade-agreement.

[107] USTR CALLS A SPECIAL SESSION UNDER THE U.S.–KOREA FREE TRADE AGREEMENT, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-calls-special-session-under-us (last visited Aug. 19, 2017).

[108] Chung-un Cho, *US Wants to Improve, Not Renegotiate FTA*, KOREA HERALD (July 21, 2017,

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These statements make it evident that reducing the trade deficit in the goods sector to a certain level is one of the ultimate goals of the upcoming re-negotiation. It should be noted, however, that trade deficit alone does not offer an accurate picture for evaluating a trade agreement.[109] As a matter of fact, the U.S. has also enjoyed benefits from the FTA in areas where the U.S. has a comparative advantage, such as the services sector, the benefit is considered to be slow in coming.[110] Over time, the benefit thus accumulated is expected to maintain the equilibrium expected at the time of the conclusion of the agreement.

Trade agreements, engineered to guarantee a particular outcome for one party even in the sacrifice of free trade, may not be able to satisfy the requirements of Article XXIV of the General Agreement on Tariffs and Trade (hereinafter "GATT"). The GATT provision stipulates that regional trade agreements liberalize "substantially all the trade between the constituent territories."[111] If new FTAs include restrictive measures, either mandatorily or voluntarily out of fear of practical retaliation, they may lose eligibility to enjoy the exception under this provision of the GATT. The new trade policy of Trump Administration thus raises legal questions as well.

2. Reading the Final Balance Sheet of an FTA: Difficult and Elusive — A trade agreement can only survive if, and as long as, it can ensure a win-win situation for both parties. If one party believes it is being shortchanged, no words of friendship or good will can save it. At the end of the day, in a trade deal money talks. An aggrieved party has the option of triggering the kill switch (called a termination clause) embedded in a trade pact. The Korea–U.S. FTA is no exception. It is thus important and critical to read the balance sheet of the Korea–U.S. FTA carefully and accurately when this issue is put on the table. If the balance sheet does indicate that one side stands to gain more systematically than the other, then the playing field should be leveled at all costs. Otherwise, it would simply be a matter of time or a matter of patience before a "losing" party invokes termination.

As with any other FTA, reading the Korea–U.S. FTA balance sheet,

16:52), http://www.koreaherald.com/view.php?ud=20170721000623 ("Amid growing concerns over US President Donald Trump's repeated comments of "renegotiating" the free trade agreement with Korea, an American envoy to Seoul said Friday the intention is to improve the deal, not bring it back to square one.").

[109] *See, e.g.*, Tim Worstall, *US to Rethink S Korea Free Trade Agreement—Trump and Lighthizer Get Trade Wrong Again*, FORBES (July 13, 2017, 4:53 AM), https://www.forbes.com/sites/timworstall/2017/07/13/us-to-rethink-s-korea-free-trade-agreement-trump-and-lighthizer-get-trade-wrong-again/#6e39e585630a.

[110] Tami Overby, *Four Years in: The Benefits of the U.S.-Korea Free Trade Agreement*, U.S. CHAMBER COM. (Mar. 15, 2016 1:45 PM), https://www.uschamber.com/above-the-fold/four-years-the-benefits-the-us-korea-free-trade-agreement.

[111] General Agreement on Tariffs and Trade art. XXIV:8(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

however, is far from simple. It requires understanding some unique aspects of the trade pact. First is how to account for a time gap between the goods trade and services trade in terms of "market opening" effect. All things being equal, the effect of goods trade liberalization (i.e., tariff cuts) is usually immediate: importers no longer pay extra tax at the border. Meanwhile, services trade commonly demands prior planning and a time-sequential process: in a foreign country a service provider needs to rent an office, hire staff, undergo a registration process, and run advertisements. So, here market penetration takes more time.

Between the two countries, the U.S. has a competitive edge in services trade.[112] The five years duration may not yet be sufficient for full penetration into the Korean market by competitive U.S. service providers. USTR's own assessment in the National Trade Estimate of Mar. 31, 2017 regards Korea–U.S. as "provid[ing] meaningful market access commitments across virtually all major services sectors" of Korea.[113] While Washington has registered concerns over implementation of the services market opening in certain sectors of Korea, this "time lag" in services trade is a factor to be reflected in the Korea–U.S. assessment.

Reading the balance sheet properly also requires recognition that the pact is not just about market liberalization and tariff reduction. It is (at least intended to be) much more than that. The almost 1,000-page long treaty texts cover virtually the entire spectrum of economic activities. For instance, facilitation and protection of foreign investment is a core concept. At least on the part of Korea, the Korea–U.S. FTA has induced more Korean investment in the U.S., totaling 51 billion dollars during the five year period, more than double the U.S. investment in Korea during the same period.[114] Transparency and due process in the regulatory regime are other examples. Again at least on the part of Korea, the FTA has played a pivotal role in attaining these objectives. The USTR's 2017 NTE attributes "improvements in the transparency of Korea's regulatory system" to Korea–U.S. FTA.[115] Granted, there is still a long way to go, but it seems to be working, albeit slowly.

All in all, a final score sheet of Korea–U.S. FTA will only be available when all these multiple facets of the agreement are fully taken into account over time. Under these circumstances, looking at the trade deficit in the goods sector in a given year is just touching the tip of the iceberg. It is certainly premature to discuss it regarding a treaty that is just five years old.

This realization underscores the fallacy of setting a target number or quantum for the benefit and interest to be guaranteed through bilateral

[112] BENEFITS INT'L TRADE, https://www.uschamber.com/international/international-policy/benefits-international-trade-0 (last visited July 30, 2017).
[113] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 58, at 275.
[114] *Id.*
[115] *Id.*

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FTAs. Unless long-term performance in all major sectors are duly accounted for, it is neither accurate nor reasonable to state which side is losing how much. A target number to compensate for the perceived loss, therefore, is not a proper way to initiate discussions on the re-negotiation of a trade agreement.

V. TRUMP TRADE POLICY'S IMPLICATION FOR GLOBAL TRADING REGIME

In the meantime, recent developments on the global trade front after the inauguration of the Trump Administration shed important light on the global trading regime. They provide an important lesson for the global community at this juncture. Other countries, particularly, those in the Asia Pacific region, are advised to be apprised of this lesson in terms of formulating, maintaining and improving the global trading regime.

A. Importance and Contribution of Multilateralism

The multilateralism enshrined in the WTO regime is currently at a crossroads with the impasse over the Doha Development Agenda (hereinafter "DDA"), as the WTO Members are actively pursuing various FTAs as an alternative. The surge of trade blocs and fragmentation of trade regimes are an ominous sign for the continuation and re-invigoration of multilateralism.

More than anything else, what has transpired, and is still transpiring, under the Trump Administration regarding the Korea–U.S. FTA arguably underscores an inherent limitation of the bilateralism or for that matter of regionalism. Unless immediate trade benefit materializes, a contracting party with a stronger economic leverage could demand the re-adjustment of the terms of an FTA. Of course, in most FTAs, an amendment is a right given to a contracting party.[116] In Korea–U.S. FTA, the U.S. was able to demand re-adjustment or re-negotiation largely based on its own judgment, apparently despite the explanations from the other contracting party, Korea. It is doubtful whether a similar demand could be made in a multilateral regime. Even if a demand were to be made, it is also doubtful whether it could be made in the early stage of a trade agreement. The guarding principles apparently seem weaker and looser in the bilateral regime. The situation would be somewhat better in the context of a regionalist approach but not that much different, given similar unilateral decisions to demand re-negotiation of the NAFTA and withdrawal from the signed agreement in the TPP. It follows therefore that a trade benefit flowing from a bilateral trade regime is more vulnerable to unilateral adjustment by one party than

[116] *See* Korea–U.S. FTA, *supra* note 48, art. 24.2; VCLT, *supra* note 47, art. 39.

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the benefit anchored in multilateralism. If one party is the stronger of the two, then the demand could be made with relative ease. A contracting party in a weaker position of the two would be more vulnerable in a bilateral setting.

Similar unilateral demands or sending an ultimatum could hardly occur in a multilateral setting. Thus, this would apparently support the usefulness and merit of multilateralism in a global trading regime. In terms of establishing the rule of law and predictability based upon it, a multilateral regime is arguably more resilient and reliable.

This again underscores the role of the WTO. The WTO and its commitment to multilateralism are the source of the masterful choreography of the global performance. The deeper FTAs penetrate the global trading regime, the more evident the benefit of multilateralism becomes. The advent of a trade policy of administrations such as that of President Trump's further proves the importance of multilateralism.

B. Long-Term Danger of the Global Protectionism

Secondly, recent developments in U.S. trade policy under the new administration also alert us to the dangers of protectionism. When protectionism becomes a global phenomenon, states become bolder in terms of trade policy. Some states with more leverage due to the size of the market can become more aggressive in pursuing its own protectionism. But for the protectionist trend, the Trump Administration would not be able to pursue trade policies that it adopts now, or at least not in a way or at a level seen at the moment.

Ever since the global financial crisis in September 2008, protectionism has been apparent in many countries as an immediate alternative for reviving the sagging national economies. In the 2017 Davos Forum, China's President Xi Jinping eloquently warned of the danger of global protectionism by stating: "Pursuing protectionism is like locking oneself in a dark room," and "Wind and rain may be kept outside, but so is light and air."[117]

Protectionism is manifested in many different and creative forms.[118] Various NTBs have emerged, igniting an increasing number of international trade disputes.[119] Some of these measures aim to achieve, on the surface, legitimate governmental objectives, such as environmental protection,

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[117] Larry Elliott & Graeme Wearden, *Xi Jinping Signals China Will Champion Free Trade If Trump Builds Barriers*, GUARDIAN (Jan. 18, 2017, 3:19 AM), https://www.theguardian.com/business/2017/jan/17/china-xi-jinping-china-free-trade-trump-globalisation-wef-davos.

[118] *Lamy: "The World Economy Needs More Trade to Stave off Recession"*, WTO (Dec. 5, 2012), http://www.wto.org/english/news_e/news12_e/trdev_28nov12_e.htm.

[119] ASIA DEV. BANK, HOW TO DESIGN, NEGOTIATE AND IMPLEMENT A FREE TRADE AGREEMENT IN ASIA 12 (2008).

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public health enhancement, or consumer protection, but are in fact disguised trade restriction measures that have been adopted in order to circumvent otherwise applicable trade agreements. One of the recent examples include competitive currency devaluation adopted by multiple governments, as an ultimate prescription to boost exports and re-energize sagging domestic economies.[120] With the advent of protectionism and ensuing disputes over NTBs, the different perspectives of different countries have become equally apparent. Even between two closely related countries, respective understandings of trade related measures have been sometimes starkly exposed. For instance, the U.S. has been of the opinion that Korea maintains certain standards, technical regulations, and conformity assessment procedures that are burdensome and appear to have a disproportionate effect on imports.[121] Korea, however, has disagreed with the U.S. characterization.[122] The Korea–U.S. FTA generally imposes tighter rules in a wide range of sectors than the WTO-based multilateral rules, so the allegations of NTBs and related disputes have been raised steadily and will continue to be so in the future.[123] A similar situation is also observed between the U.S. and Japan in relation to the currency depreciation controversy and disputes. So, global protectionism is hard to define and comes in many different forms.

Nonetheless, if protectionism is left unattended or if countries engage in respective protectionist measures in mutual escalation, circumvention of trade agreements would be more common, which would stoke and spread skepticism toward such agreements and the rule of law in general. Such skepticism could then evolve into unilateralism or an enhanced form of unilateralism when a government aims to maximize its own short-term national interest. In a sense global protectionism has produced a gasoline oil mist in the tank of the global trading regime when the new administration of President Trump ignited a match of unilateralism and ultimatumism. The responsibility for the pursuit of this new trade policy should be placed on the Trump Administration. The blame should be also placed on the global community to the extent that it has failed to block the spread of the protectionist trend for several years.

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[120] Scott Bradford, Brigham Young U. & Petersen Inst. for Int'l Econ., Keynote Address at New Asia-Pacific Trade Initiatives Conference: An Analysis of a Possible Japan–US Free Trade Agreement 16, 17, 20-22 (Nov. 27, 2007), http://www.jef.or.jp/PDF/S2-1-2bradfordppt1107.pdf.

[121] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2012 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 1, 241, 246 (2012).

[122] Jung-a Song, *South Korea to Tighten Foreign Investment Rules*, FIN. TIMES (Dec. 28, 2007, 2:00 AM), http://www.ft.com/cms/s/0/3d0153ea-b4e6-11dc-990a-0000779fd2ac.html?ft_site=falcon&desktop=true.

[123] Korea–U.S. FTA, *supra* note 48, art. 23.2.

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VI. CONCLUDING THOUGHT

By all accounts, the existing framework of the global trading regime is now being shaken and is apparently in the process of being re-formulated with the inauguration of the Trump Administration. Other countries are holding their breath and watching carefully how the new administration of the U.S. will shape and present its new trade policy and how the new policy will affect the global trading regime.

On the one hand, the Trump Administration is taking an unequal share of the criticism. Global protectionism has been increasing steadily and inviting more trade disputes even before the inauguration of the President Trump. Apparently disguised industrial support measures and domestic market protection measures had been increasingly visible in major markets. The continuing failure of the DDA is evidence that the global consensus is anything but easy even in the face of surging protectionism. New breeds of protectionist measures in addition to existing NTBs had appeared in many jurisdictions. In short, skepticism of the existing regime has been apparent and is spreading.

The skepticism has been largely abstract and has not morphed into concrete form. The advent of the Trump Administration in January 2017 has brought skepticism into the next level, by making it more concrete and overt. A series of measures have been adopted so far and many more are in the making. If anything, the Trump Administration provided a trigger for an already existing protectionism. Through this triggering, skepticism has now taken the form of unilateralism: putting U.S. interest first and expanding the existing interest if needed. The unilateralism has been further pushed to the point where a minimum level benefit or a minimum quantum of interest is set by the U.S. and then presented to trading partners for a guarantee. As much as a preordained outcome is presented as a goal for a negotiation, this stance can be distinguished from mere unilateralism. As a virtual ultimatum is given with the possibility of termination of the agreement, it can be called “ultimatumism”.

The Korea–U.S. FTA offers a viable example showing this trend in the Trump Administration’s trade policy. While it is true that:

1. There is certainly a case for Korea to take a portion of the blame,
2. The bilateral trade between Korea and the United States has its own unique characteristics coupled with its geopolitical implications in the Korean peninsula; and
3. It is still too early to predict how the U.S. trade policy will affect the Korea–U.S. FTA, the discussions leading to the opening of the existing FTA to re-adjust or re-negotiate it showcases the changing trend of the U.S. trade policy in moving from skepticism to unilateralism.

The recent announcement of the conclusion of a deal between Japan

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and the European Union is an important development. It is apparently a positive counterweight to the unilateralism of the new U.S. administration under President Trump.[124] The trade policy of the Trump Administration, coupled with the prelude leading to the policy, arguably underscores the importance of maintaining and strengthening multilateralism for global trade. If the multilateralism holds tight, it would be difficult for the Trump Administration to present the policy that it is presenting today. This recent development thus offers a good lesson for other countries.

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[124] *See The Japan–EU Trade Warning*, *supra* note 6.

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