

Scope Of US-Korea Trade Deal Overhaul Still Taking Shape

By **Alex Lawson**

Law360, New York (January 9, 2018, 6:30 PM EST) -- The Trump administration's decision to reopen the U.S.-South Korea trade agreement has big implications for the two countries' economic partnership, but experts tracking the process still have substantial questions about how aggressive the two sides will be in reshaping the 2012 accord.

Following up on two preliminary meetings in the second half of last year, U.S. and South Korean trade officials held their first formal session to revise the deal, known colloquially as KORUS, on Friday. The meeting concluded with U.S. Trade Representative Robert Lighthizer conceding that there is "much work to do" for both sides to get a new deal.

For right now, the talks appear to be going in a one-way direction, with the U.S. seeking changes in the South Korean market to help companies gain better access there. But former trade negotiator Wendy Cutler told Law360 that the U.S. may be in for a rude awakening if it continues to proceed down that path.

"My advice to the U.S. would be to stay realistic and respectful, and to see what you can do for Korea," she said. "Based on my experience, Korea cannot bring home a one-sided deal. The Korean National Assembly are just not going to support that and the worst thing that can happen for these negotiations would be to create any friction in our overall bilateral relationship."

Notably, Lighthizer's office has not triggered the formal congressional notification process required under the Trade Promotion Authority law passed in 2015. That law requires the White House to keep Congress in the loop about new trade talks in exchange for a clean, amendment-free vote once those deals are ready to be ratified.

Because the U.S. is envisioning changes only on Korea's side and not its own, it has sent no notification to Capitol Hill. But skeptical lawmakers like Senate Finance Committee Chairman Ron Wyden, D-Ore., are nevertheless demanding a closer look and expressing disappointment with USTR for not following the TPA protocol.

"As it stands, the public has been kept in the dark as to the administration's specific intentions regarding the renegotiation of a bilateral trade agreement that is second only to NAFTA in size," Wyden said in a statement to Law360. "The administration must change course and shed some much needed light on its discussions."

The administration's decision to go it alone means that it will have to balance its calls for dramatic changes to the deal with the relatively narrow authority it has to change agreements without congressional input.

USTR is using the TPA process to renegotiate the North American Free Trade Agreement, but its decision to forgo it in the case of South Korea casts any talks with the country in a fundamentally different light, according to Troy Stangarone, senior director at the Korea Economic Institute.

"It narrows the scope of what can be discussed in general, which means that USTR can ask less of Korea than it can of Canada and Mexico, because there is no way for the USTR to reciprocate in large scale," Stangarone told Law360.

President Donald Trump began expressing his distaste for KORUS soon after taking office, nodding to the U.S. trade deficit with South Korea, despite repeated warnings from economists and business groups about using the deficit as a metric for judging a trade agreement.

But even the most ardent supporters of KORUS have said that implementation of the deal has been spotty. Since the deal's 2012 enactment, USTR's annual National Trade Estimate has been riddled with complaints about sluggish market access, specifically in the automotive sector.

Lighthizer's statement following the opening session indicated that the U.S. side had begun discussing proposals to improve access for U.S. cars and car parts. If the two sides intend to broaden the scope of the talks, they would likely find a good bit of common ground regarding possible improvements to the agreement, according to Robert Holleyman, a Crowell & Moring LLP partner and former U.S. trade official.

While KORUS was enacted in 2012, much of it was written more than a decade ago, indicating that the U.S. may have an opportunity to update its terms regarding digital trade issues, he noted.

"There are much more complete digital economy packages around cross-border data flows, localization, things of that sort that the U.S. pioneered in the [Trans-Pacific Partnership] negotiation that we're putting on the table in NAFTA, and we only scratched the surface of that with KORUS," Holleyman told Law360. "I think you can imagine a full digital chapter being included in a revised KORUS."

Just as he has in the context of NAFTA, Trump has signaled in the past that he will withdraw from KORUS if the deal is not amended to his liking. But the administration has dialed that rhetoric back a bit as talks with Seoul have gained traction.

That is likely due to the need for the U.S. to maintain strong ties with South Korea as it navigates uncharted terrain with North Korea. Cutler said that the negotiators would be wise to keep this dynamic top of mind as the talks get more serious.

"Given what's going on in the Korean peninsula, this is the time when there should be no daylight between the United States and Korea," she said. "I hope that both sides approach this negotiation professionally and constructively and don't see this negotiation adding any tension in our relationship."