

The fate of ZTE has now become intertwined with the broader China-U.S. trade negotiations. On May 13, Trump indicated that he and President Xi Jinping were working together to try and stop the collapse of ZTE.³¹

Developments Relating to U.S. Trade Negotiations—KORUS, NAFTA, and Trade Promotion Authority

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Consistent with his approach on the campaign trail, President Trump has demonstrated a continued interest in revamping U.S. trade agreements. By the late spring of 2018, the Trump administration had negotiated modest changes to the United States–Republic of Korea Free Trade Agreement (KORUS) in favor of U.S. interests. It had yet to reach any final agreement with regard to the North American Free Trade Agreement (NAFTA), despite the expiration of an initial deadline that was designed to ensure adequate time for a vote on the negotiated agreement by the present Congress. To ease the passage of future trade deals, Trump has triggered the three-year extension of a process that provides expedited congressional consideration of negotiated trade agreements.

On March 28, 2018, U.S. Trade Representative Robert Lighthizer released a joint statement with South Korea’s Minister for Trade announcing that “the United States and the Republic of Korea have reached an agreement in principle on the general terms of amendments and modifications to the United States–Republic of Korea Free Trade Agreement.”¹ This agreement is the culmination of a review initiated in 2017, which involved two special sessions of the Joint Committee established under KORUS’s Article 22.2.² Under this provision, in addition to various supervisory obligations, the Joint Committee may “consider amendments to this Agreement or make modifications to the commitments therein.”³

³¹ Donald J. Trump (@realDonaldTrump), TWITTER (May 13, 2018, 11:01 AM), at <https://twitter.com/realDonaldTrump/status/995680316458262533>; see also Ana Swanson, *Trump Administration Plans to Revive ZTE, Prompting Backlash*, N.Y. TIMES (May 25, 2018), at <https://www.nytimes.com/2018/05/25/us/politics/trump-trade-zte.html> (reporting that the Commerce Department had reached a deal with ZTE that would lift the ban in exchange for the payment of a fine and internal restructuring). As of late June, members of Congress had begun efforts to block such a deal through legislative action. See Sarah Ferris & John Bresnahan, *Senate GOP Fires Another Warning Shot at Trump over Chinese Telecom Giant*, POLITICO (June 25, 2018), at <https://www.politico.com/story/2018/06/25/trump-zte-senate-chinese-telecom-671845> (describing some of these efforts, including a provision passed by the Senate as part of a broader appropriations bill).

¹ Office of the U.S. Trade Rep. Press Release, Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim (Mar. 28, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade> [<https://perma.cc/T4PK-6677>] [hereinafter KORUS Joint Statement].

² Office of the U.S. Trade Rep. Press Release, USTR Calls a Special Session Under the U.S.–Korea Free Trade Agreement (July 12, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-calls-special-session-under-us> [<https://perma.cc/5GTC-E4HH>]; Office of the U.S. Trade Rep. Press Release, USTR Announces Second Special Session of the U.S.–Korea FTA Joint Committee (Sept. 22, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/september/ustr-announces-second-special> [<https://perma.cc/4AWB-XV44>].

³ United States–Republic of Korea Free Trade Agreement, Art. 22.2, para. 3(c), June 30, 2007.

At the time of the announcement, negotiators were still finalizing the terms of the agreement, which remain “subject to domestic procedures in both nations before provisions can be brought into force.”⁴ The announcement nonetheless identified what appear to be the main revisions. According to the South Korean Ministry of Trade:

Under the updated agreement, Korea will allow the U.S. to extend its 25 percent tariff on imports of Korean pickup trucks by additional 20 years to 2041. The tariff was originally scheduled to expire in 2021. Korea will also allow U.S. automakers selling fewer than 50,000 units per year in Korea to be exempt from Korean safety standards as long as they meet U.S. safety standards, up from 25,000 vehicles previously.⁵

A press release from the White House noted these same terms, while emphasizing that “South Korea is simplifying the sales environment for U.S. cars and parts by taking into account U.S. environmental and emissions standards.”⁶ South Korea agreed to “expand the number of ‘eco-credits’ available for U.S. automakers to meet South Korean emissions standards” and to take “U.S. corporate average fuel economy regulations into account” when setting fuel economy standards.⁷ The agreement on a renegotiated KORUS occurred at the same time that the two countries reached an understanding whereby South Korea obtained an exemption from recently imposed U.S. tariffs on steel imports in exchange for reducing the amount of steel it exports to the United States.⁸

When the negotiations were initiated in 2017, several members of Congress, including the chairmen of the House Ways and Means Committee and the Senate Finance Committee, signaled some unease regarding the authority of the Joint Committee in a letter to Lighthizer:

[W]hile KORUS established a Joint Committee under Article 22.2 to supervise implementation, consider ways to further enhance trade relations between the Parties, and consider amendments to the Agreement, the United States cedes no sovereignty to the Joint Committee. Indeed, any changes affecting the United States resulting from the work of that Joint Committee cannot take effect unless either the President exercises his authorities as delegated to him by Congress or Congress makes changes to U.S. statutes.⁹

As negotiated, the amendments do not appear to contain new concessions by the United States to South Korea. This will likely enable the executive branch to move forward with

⁴ KORUS Joint Statement, *supra* note 1.

⁵ Republic of Korea Ministry of Trade, Industry and Energy Press Release, Korea, US Reach Agreement on Trade Deal and Steel Tariff Exemption (Mar. 26, 2018), at http://english.motie.go.kr/en/pc/photonews/bbs/bbsList.do?bbs_cd_n=1&bbs_seq_n=678 [<https://perma.cc/AUS2-L6L8>].

⁶ White House Press Release, President Donald J. Trump is Fulfilling His Promise on The U.S.–Korea Free Trade Agreement and on National Security (Mar. 28, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fulfilling-promise-u-s-korea-free-trade-agreement-national-security> [<https://perma.cc/Y339-ARNB>].

⁷ *Id.* (also noting a few other aspects of the deal).

⁸ See Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 501 (2018).

⁹ Letter from Kevin Brady, Chairman House Ways and Means Committee, Orrin Hatch, Chairman Senate Finance Committee, Richard E. Neal, Ranking Member House Ways and Means Committee, and Ron Wyden, Ranking Member Senate Finance Committee, to Robert E. Lighthizer, U.S. Trade Representative (July 17, 2017), available at <https://waysandmeans.house.gov/wp-content/uploads/2017/07/2017-07-17-KORUS-Big-4-Letter-to-Lighthizer.pdf>. The letter noted that the Trump administration had not taken the steps needed to ensure that any amendments would receive expedited consideration from Congress. *Id.*

ratifying the amendments without seeking congressional approval.¹⁰ In terms of implementation, however, a congressional law may be needed for the United States to take advantage of the negotiated right to extend tariffs on imported Korean trucks for an additional twenty years.

By the end of May 2018, no announcement had been made of the agreement's finalization and its text had not been released. In late March, Trump suggested that "I may hold it up until after a deal is made with North Korea."¹¹ He continued, "Does everybody understand that? You know why, right? You know why? Because it's a very strong card."¹² On April 24, however, Trump referenced the deal by stating, "[i]n South Korea, on our trade deal, we're doing very well."¹³

The renegotiation of NAFTA has proceeded less smoothly. Seven rounds of negotiations had taken place by the middle of May 2018, but no agreement had been reached.¹⁴ The negotiations thus continued past the initial May 17 deadline set by Speaker Paul Ryan for when the Trump administration needed to provide the negotiated deal to Congress to ensure review prior to the end of the session.¹⁵ (Ryan later relaxed this deadline, stating that there might be "wiggle room."¹⁶)

A variety of issues appear to be blocking progress, including disagreements between the United States and Mexico regarding regulations for the auto industry and resistance to U.S. demands that the agreement include a sunset clause that would allow NAFTA to expire every five years if not renegotiated.¹⁷ Disagreements have also risen over the Trump administration's desire to secure changes in Mexico's immigration policy as a part of the agreement, including an outcome that would allow the United States to turn asylum seekers from other Central American countries back at the border.¹⁸ Tensions have been exacerbated by other

¹⁰ See Jeffrey J. Schott, *Fixing the KORUS FTA—Without Fireworks*, PETERSON INST. INT'L ECON. (Jan. 26, 2018), at <https://piie.com/blogs/trade-investment-policy-watch/fixing-korus-fta-without-fireworks> (noting that "Korean officials have been pragmatic in response to US demands for additional Korean concessions without complementary US reforms" as they "recogniz[e] that US officials can only address requests for KORUS FTA revisions that do not require congressional approval"); Ellyn Ferguson, *White House Says Revised South Korea Trade Pact Within Reach*, ROLL CALL (Mar. 28, 2018), at <https://www.rollcall.com/news/politics/white-house-says-revised-south-korea-trade-pact-within-reach> (reporting that "Congress does not have to approve the final agreement").

¹¹ Katie Rogers & Jim Tankersley, *Trump Heralds South Korea Trade Deal, Then Says He Might Delay It*, N.Y. TIMES (Mar. 29, 2018), at <https://www.nytimes.com/2018/03/29/us/politics/trump-infrastructure-trade-deal-south-korea.html>.

¹² *Id.*

¹³ Donald J. Trump, Remarks Prior to an Expanded Bilateral Meeting with President Emmanuel Macron of France, 2018 DAILY COMP. PRES. DOC. 2 (Apr. 24, 2018).

¹⁴ Office of the U.S. Trade Rep. Press Release, USTR Robert Lighthizer Issues Statement on Status of NAFTA Renegotiation (May 14, 2018), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/ustr-robert-lighthizer-issues-statement> [<https://perma.cc/4LLV-PH7J>].

¹⁵ Adam Behsudi, *Ryan Says May 17 Is Deadline to Assure 2018 NAFTA Vote*, POLITICO (May 10, 2018), at <https://www.politico.com/story/2018/05/10/paul-ryan-nafta-vote-deadline-1200989>.

¹⁶ Vicki Needham, *Lighthizer says NAFTA Countries Are "Nowhere" Near Reaching a Deal*, THE HILL (May 17, 2018), at <http://thehill.com/policy/finance/388263-lighthizer-says-nafta-countries-are-nowhere-near-reaching-a-deal>.

¹⁷ Maham Abedi, *4 Challenges NAFTA Negotiations Are Facing as Deadline Looms*, GLOBAL NEWS (May 15, 2018), at <https://globalnews.ca/news/4209888/nafta-negotiations-disagreements>.

¹⁸ Ana Swanson & Elisabeth Malkin, *Chance of NAFTA Deal in 2018 Diminishes as Talks Drag Past Congressional Deadline*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/politics/nafta-deal-deadline-congress.html>.

threats and actions by the Trump administration, including assertions that the United States might exit the agreement entirely¹⁹ and the imposition of steel and aluminum tariffs, which the president has linked to the failure to renegotiate NAFTA.²⁰ On May 17, Lighthizer described the negotiators as “nowhere near close to a deal.”²¹

In terms of domestic legal process, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 allows for an expedited process for congressional approval for trade agreements,²² a process known as Trade Promotion Authority (TPA). Assuming that a specific set of circumstances are met, TPA ensures that the agreement receives floor consideration in a timely manner, imposes limits on debate, and prohibits amendments.²³ Passage of the agreement requires only an up-or-down vote.²⁴ TPA is designed to expire by July 1, 2018,²⁵ unless an extension is requested by the president and “neither House of Congress adopts an extension disapproval resolution . . . before July 1, 2018.”²⁶ In that case, TPA is extended until July 1, 2021.²⁷

On March 20, 2018, Trump requested the extension of TPA.²⁸ In his letter to Congress, he noted the ongoing NAFTA renegotiations and more generally his administration’s pursuit of “new and better trade deals for America’s workers, farmers, ranchers, and businesses.”²⁹ He described TPA’s extension as “essential to fulfill that task and to demonstrate to our trading partners that my Administration and the Congress share a common goal when it comes to trade.”³⁰ As of the end of May, neither the House nor the Senate had adopted a resolution of disapproval of the extension.

¹⁹ *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 1, 2018, 10:25 AM), at <https://twitter.com/realDonaldTrump/status/980451155548491777> (“Mexico is doing very little if not NOTHING, at stopping people from flowing into Mexico through their Southern Border, and then into the U.S. They laugh at our dumb immigration laws. They must stop the big drug and people flows, or I will stop their cash cow, NAFTA. NEED WALL!”).

²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 5, 2018, 6:47 AM), at <https://twitter.com/realDonaldTrump/status/970626966004162560>; *see also* Galbraith, *supra* note 8, at 502.

²¹ Needham, *supra* note 16.

²² Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (codified at 19 U.S.C §§ 4201–4210).

²³ CHRISTOPHER M. DAVIS & IAN F. FERGUSSON, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS, CONG. RES. SERV. 21 (Apr. 10, 2018).

²⁴ *Id.* at 1.

²⁵ 19 U.S.C. § 4202(a)(1)(A)(i).

²⁶ *Id.* § 4202(c)(1)(B). This use of a one-house veto may be constitutionally questionable under *INS v. Chadha*, 462 U.S. 919 (1983), which invalidated a one-house veto provision on the ground that it was inconsistent with the Constitution’s Bicameralism and Presentment Clauses. Nonetheless, as a practical matter, Congress may be in a position to take account of any use of a one-house veto in deciding whether to engage in the expedited approval process.

²⁷ 19 U.S.C. § 4202(c)(1)(B).

²⁸ H.R. DOC. NO. 115-104, at 1 (2018).

²⁹ *Id.*

³⁰ *Id.*