TRUSTED FUTURE

# FROM EPISODIC TO SYSTEMIC:

## RESOLVING U.S.–KOREA DIGITAL TRADE FRICTION

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The critically important U.S.–Korean trade relationship rests upon a foundation of trust built over decades. But there are growing questions about whether that trust is being put at risk, and how it can be resolved.

To advance trade progress, last year the U.S. and Korea jointly announced their Strategic Trade and Investment Deal framework with the goal to increase mutually beneficial trade and investment and address longstanding barriers that American exporters have faced in the Korean market. The joint statement was unusually direct about eliminating non-tariff digital barriers including for online platform regulations and strengthening procedural fairness in competition enforcement. Both countries gain from predictable, enforceable trade progress – especially when both countries have dynamic technology sectors that benefit from foreign investment, innovation, and trade.

To mark the anniversary of the framework, embodied in the resulting "Fact Sheet," Trusted Future hosted a discussion to take a closer look at these issues – where we stand, and the choices left ahead. We brought together some of Washington's top experts including Demetrios Marantis, former acting U.S. Trade Representative; Jonathan McHale, Vice President, Digital Trade at the Computer & Communications Industry Association (CCIA); and Nigel Cory, Nonresident Fellow at the National Bureau of Asian Research. They led such an informative and insightful discussion that we wanted to share the key takeaways from the event more broadly here:

### COMPLEMENTARY ECONOMIES IDEAL FOR DIGITAL TRADE

One point of emphasis that came across in the conversation is that the United States and South Korea are complementary economies that both prosper from a mutually beneficial and trustworthy trade relationship – especially around technology.

One of the main technologies in the current trade relationship is Korea's export of semiconductors, driven by an AI memory chip boom supplied from Korea's SK Hynix and Samsung, and integrated into America's rapidly growing AI infrastructure. It demonstrates the symbiotic relationship of the two highly integrated and technologically sophisticated countries. Each side has its own comparative advantage, and both do better by trading with each other. In fact, what drove a large part of the success from KORUS, the landmark United States–Korea Free Trade Agreement signed in 2007 and implemented in 2012, was that the Korean government understood that opening its market to more competition, more participation, and more investment was good for Korea. At the time, plenty of Korean companies pushed back. But there was a commitment to opening the market, because there was an understanding that Korean citizens themselves would benefit greatly from the better goods and services that come from more, and more competitive, market participants.

Unfortunately today, the experts shared concerns that mounting evidence demonstrates that leaders have forgotten these critical lessons on the many ways opening markets in non-discriminatory ways is mutually beneficial.

## DIGITAL NONDISCRIMINATION REMAINS THE KEY IRRITANT IN THE RELATIONSHIP

The U.S.–Korea trade and economic relationship has always been important and has helped both economies flourish. Yet the trade relationship has also always had episodic challenges too. Korea, for all of its amazing economic success, has unfortunately had a history of protectionism, which ebbs and flows over time. But the experts who have played important roles over decades to advance U.S.–Korea trade progress explained that today we are at one of the worst periods of U.S.–Korea trade friction in decades. The protectionist instinct in Korea has now manifested itself largely in the digital trade arena. There is a growing political concern in the United States that the playing field has been tilted significantly by the Korean government to disfavor U.S. providers of digital services and to favor Korean — and Chinese — providers. As Demetrios Marantis stated, "What seemed episodic ten years ago is now becoming systemic."

> **"WHAT SEEMED EPISODIC TEN YEARS AGO IS NOW BECOMING SYSTEMIC."**
>
> **— DEMETRIOS MARANTIS, FORMER ACTING U.S. TRADE REPRESENTATIVE**

KORUS was built to stop exactly this kind of systemic trade friction. It was adopted with unusually broad bipartisan support, including support from organized labor, because it tied the trade relationship to nondiscrimination rules to avoid recurring flare-ups. Today's digital barriers undercut that original bargain. There were additional interim changes made in 2019 to address some of the nondiscrimination issues, which is how trade agreements are designed to work: using consultative mechanisms that highlight concerns, and work toward resolution.

But today, the experts explained that what is happening in Korea goes far outside of the norms. Jonathan McHale, for example, notably pointed to "Korea's extraordinary use of criminalization in the competition space" as going far beyond even those countries and jurisdictions that engage in discriminatory practices. This unusual use of criminal penalties (outside of price-fixing) in competition cases compounds problems by giving regulators coercive leverage over the companies they investigate.

These challenges don't just impact U.S. investment decisions in the Korean market. The panel cautioned that foreign investors are watching these practices too. Businesses around the world are seeing the discriminatory treatment of foreign firms in its market, which leads other foreign investors everywhere to discount Korea, not just American investors.

## PROGRESS SINCE THE FACT SHEET: TWO STEPS FORWARD, ONE STEP BACK

Jonathan McHale summed up the year since the Fact Sheet as "two steps forward, one step back." Korea has made real but limited concessions on long-standing issues, while advancing new measures that threaten to erase those gains.

### BY THE NUMBERS

**5×**

**MORE LIKELY TO BE FINED**

U.S. firms vs. their market presence in Korea, per CCIA's analysis of KFTC enforcement

**15**

**YEARS TO OPEN MAP DATA**

A long-standing U.S. ask, now committed to but not yet fully implemented

**~20**

**YEARS SINCE KORUS**

A bipartisan agreement built on nondiscrimination, signed in 2007

A brief review of what was discussed includes:

**SCORECARD: ONE YEAR SINCE THE FACT SHEET** — **"TWO STEPS FORWARD, ONE STEP BACK"**

**5 ▲ STEPS FORWARD**
Real but limited concessions on long-standing issues

**3 ▼ STEPS BACK**
New measures that threaten to erase those gains

| DEVELOPMENT | DIRECTION | SIGNIFICANCE |
|---|---|---|
| Map data opening | ▲ FORWARD | A 15-year effort, though follow-through remains incomplete |
| Attorney-client privilege in KFTC investigations | ▲ FORWARD | Technical, but a meaningful procedural safeguard |
| Withdrawal of an aggressive KFTC competition bill | ▲ FORWARD | Undercut by the platform fairness bill that replaced it |
| FSC pause on physical separation for financial institutions | ▲ FORWARD | Driven by AI-era cybersecurity needs rather than trade talks |
| Privacy reform removing explicit consent for data transfers | ▲ FORWARD | Eases cross-border data flows |
| Platform fairness bill | ▼ BACK | Expands KFTC discretion |
| Proposed KFTC power expansion, EU/DMA-style interoperability and DST | ▼ BACK | New legislation trending in the wrong direction – potentially making future challenges even worse. |
| KFTC discriminatory enforcement posture | ▼ BACK | Continued at full speed despite the certainty of a U.S. reaction |

However, there is significant unfinished business that remains. The panel identified discriminatory competition enforcement and public-sector cloud access as two of the most serious barriers, with a set of older irritants and a wave of new legislation further compounding them. Several of these issues are more than a decade old, and in each case comparable markets have already demonstrated a workable alternative.

KFTC enforcement. The core concern is not existing Korean competition law itself but how the KFTC exercises its discretion over who to investigate and how hard to penalize them. For example, Jonathan McHale explained that CCIA's statistical analysis finds U.S. companies are roughly five times more likely to be fined than their market presence would suggest.

In interviews conducted for a major National Bureau of Asian Research study, Nigel Cory found competition officials at U.S. firms describing near-continuous investigations and said responding to the KFTC consumed more time and resources than any other jurisdiction, including the notoriously challenging EU market. Demetrios Marantis, speaking as a former senior trade official, called the disproportion in fines an "open and shut case of discriminatory treatment."

New legislation. Rather than working to resolve these concerns, Seoul appears to be moving to expand regulatory discretion, and exacerbate U.S. digital trade frictions. Pending or proposed measures that could further exacerbate friction include a platform fairness bill, EU Digital Markets Act–style interoperability mandates, expanded KFTC investigative powers, and a possible digital services tax.

## A STRONG BIPARTISAN ISSUE IN WASHINGTON

One of the loudest and clearest messages from the panel was the bipartisan nature of U.S. concerns. Following the recent Congressional election, Marantis said that Korea would be making a "very big mistake" if it expects a Democratic Congress to drop these issues.

Going back to the beginning of this century, there has been bipartisan support around advancing the U.S.–Korea trade relationship, and opening Korea's market. The issue of protectionism has always been a concern, but there was a consensus that ran through the George W. Bush administration, the Obama administration, and carried through by Democrats and Republicans in Congress, that a fair and robust two-way trade relationship, based on reciprocity, was critical for economic and national security. This Congressional bipartisanship with respect to trade with Korea has been anchored in the principle of nondiscrimination, as a way of deepening the relationship, and addressing the challenges the two countries have had over the years. Instead of episodic flare-ups of trade conflict, Congress developed a mechanism so the relationship can proceed: rules that ground the relationship in nondiscrimination.

That was one of the main reasons KORUS achieved such bipartisan support. It was seen as an investment in a critical ally and, on the U.S. side, as a way of addressing persistent challenges U.S. exporters faced in the Korean market. It worked pretty well. There were episodic challenges, but the infrastructure of the agreement was able to handle them.

Now, almost 20 years later, members of Congress on both the Democratic and Republican sides see unfairness in the market. This is particularly the case when the U.S. market is so open to Korean companies, which have thrived in the U.S. Recent bipartisan letters from committee chairs and ranking members point to an expectation of aggressive Ways and Means and Finance Committees, and eventual congressional pressure on the administration, and particularly USTR, to do more.

This led to the question of whether USTR would launch a potential digital Section 301 investigation. Cory expressed an expectation that Korea would receive top billing in any digital Section 301 action, alongside or even ahead of the EU. Prior Section 301 actions on digital services taxes show how such an investigation could be used as leverage. As former USTR Marantis put it, the best way for Korea to prepare for a 301 investigation is to proactively address the issues so one is never needed.

With an eye towards a bigger long-term picture of the relationship, panelists expressed a concern about the alliance overall. They noted that there is a risk that U.S. lawmakers who see Korean firms thriving in an open U.S. market, while U.S. firms are disadvantaged in Korea, will begin to question the economic health of the alliance itself.

## THE PATH FORWARD FOR KOREAN AND U.S. OFFICIALS

Emerging from the conversation were a series of fixes that require no change to Korea's inherent right to regulate, and would benefit Korean firms as much as American ones.

### FOR THE GOVERNMENT OF KOREA

- Adopt a KFTC safeguards framework before expanding the commission's powers. The KFTC should guarantee due process and access to redress during investigations, transparency about the conduct under review, attorney-client privilege, and clear rules on how firms' data is handled. It should also ensure fines are proportionate and consistent across domestic and foreign firms.
- Reduce the criminalization of competition law in line with OECD standards. This reform protects Korean executives as much as foreign ones and narrows the room for regulatory coercion.
- Open public-sector cloud procurement through a nationality-neutral certification system modeled on FedRAMP, extending the logic of the Financial Services Commission's reform to government systems.

- Fully implement the map data opening that was committed to under the Fact Sheet.
- Deregulate network interconnection pricing and expand ISP competition, consistent with Korea's commitment on network usage fees.
- Reconsider the digital services tax proposal and DMA-style interoperability mandates, which have long proven to be problematic.
- Consult meaningfully before enacting digital and AI legislation, giving domestic and foreign firms a real opportunity to shape a well-informed and data-driven implementation.

### FOR U.S. POLICYMAKERS

- Treat digital issues as discrete and solvable, and press for their resolution independently of the broader framework negotiation.
- Ground the case in comparative data, such as the enforcement analyses produced by CCIA and NBR, so the discrimination argument rests on evidence rather than assertion.
- Sustain bipartisan congressional oversight to signal that these concerns will outlast any administration.
- Pair pressure with a reciprocal offer, so Seoul has an affirmative reason to act and not only a penalty to avoid.