

# Analysis of the US-Japan Trade Agreement

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**White & Case, LLP**

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On October 7, 2019, the Office of the US Trade Representative (USTR) published the official text of the US-Japan Trade Agreement (USJTA), which will reduce or eliminate tariffs on bilateral trade in certain agricultural and industrial products. The USJTA consists of the following elements: (1) a core text setting out the scope and operation of the Agreement and the Parties' core commitment to improve market access; (2) Annexes detailing the specific market access commitments to be undertaken by each Party and the rules of origin applicable to goods covered by the Agreement; and (3) six side letters containing additional commitments by the Parties with respect to alcoholic beverages, beef, rice, safeguards, skimmed milk powder, and whey. The text of the USJTA confirms that, as expected, the Agreement covers a relatively small share of bilateral trade between the United States and Japan (*i.e.*, approximately 5% of total US goods imports from Japan, and less than 18% of Japan's total goods imports from the United States). Nevertheless, the Agreement will have important implications for certain industries, and perhaps for future trade negotiations between the United States and Japan. This report provides an overview of the Agreement, its implications, and the procedures that each side must complete before the Agreement may enter into force.

## **I. Background**

In a Joint Statement issued on September 25, President Trump and Prime Minister Abe announced that, after a year of negotiations, the United States and Japan had completed the US-Japan Trade Agreement and the US-Japan Digital Trade Agreement, and are aiming for these agreements to enter into force "in the very near future[.]"<sup>1</sup> In addition, they agreed to initiate a second stage of negotiations after the USJTA enters into force. In particular, they stated that "[w]ith the conclusion of these early achievements, the United States and Japan intend to conclude consultations within 4 months after the date of entry into force of the United States-Japan Trade Agreement and enter into negotiations thereafter in the areas of customs duties and other restrictions on trade, barriers to trade in services and investment, and other issues in order to promote mutually beneficial, fair, and reciprocal trade." Thus, the USJTA has been characterized as an "early harvest" agreement that will be followed by a comprehensive FTA between the United States and Japan. The Trump administration's desire to quickly mitigate the competitive disadvantages faced by US agricultural exporters as a result of the US withdrawal from the TPP in 2017 (and the subsequent entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the EU-Japan FTA) was the primary impetus for this two-stage approach to the negotiation.

## **II. Scope of the Agreement**

The Agreement is limited to trade in goods. It heavily emphasizes specific tariff measures (as opposed to non-tariff barriers) and lacks "horizontal" commitments (*i.e.*, obligations that are generally applicable to measures affecting trade in goods between the parties, regardless of the product in question). In particular, the core obligation of the Agreement, set forth in Article 5, is a commitment that each Party "shall improve market access in accordance with Annex I or Annex II," which contain commitments by the Japan and the United States, respectively, to reduce customs duties and modify tariff-rate quotas for specific items. The Agreement does not cover other issues related to trade in goods – such as customs procedures, technical barriers to trade, and sanitary and phytosanitary measures – that are typically addressed in modern FTAs.

## **III. Market Access Commitments of the United States**

The United States' market access commitments, set forth in Annex II to the Agreement, provide for the reduction of customs duties on a list of products of Japan comprising 241 tariff lines at the 8-digit level of the Harmonized Tariff Schedule of the United States (HTSUS). US imports of these products from Japan were valued at approximately \$7.1 billion in 2018, and accounted for less than 5 percent of total US imports of goods from Japan that year (valued at approximately \$142.4 billion). The United States has committed to fully eliminate tariffs for certain of the covered products immediately upon the entry into force of the Agreement, but the majority of the covered products will be subject to staging (*i.e.*, tariffs will be eliminated incrementally over periods ranging from 2 to 10 years). Moreover, for certain products covered by the Agreement, the United States has committed to reduce the applicable rates of duty

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<sup>1</sup> An overview of the US-Japan Digital Trade Agreement will be provided in a forthcoming report.

by no more than 50 percent of the “base” (*i.e.*, most-favored nation) duty rate. This outcome reflects the constraints set forth in Section 103(A) of the US trade promotion authority statute (TPA), which authorizes the President to enter into agreements regarding tariff barriers and to unilaterally modify US tariff rates in order to implement such agreements, subject to the following limitations (among others):<sup>2</sup>

- The President may not reduce any rate of duty (other than a rate of duty that does not exceed 5 percent) to a rate that is less than 50 percent of the rate that applied on the date of TPA’s enactment.
- The President also may not reduce the rate of duty on any “import sensitive agricultural product” below the rate applicable under the Uruguay Round Agreements or a successor agreement.
- Any tariff reductions exceeding the above limitations may take effect “only if a provision authorizing such reduction is included within an implementing bill provided for under section 106 [of TPA] and that bill is enacted into law.”

Because the Trump administration entered into the US-Japan Trade Agreement pursuant to Section 103(A) and is seeking to implement the agreement unilaterally (*i.e.*, without submitting implementing legislation to Congress), the Agreement is subject to the aforementioned limitations. Accordingly, the United States has committed in its schedule to (1) fully eliminate duties on 169 products that currently are subject to MFN duties of 5 percent or less; and (2) reduce duties to 50 percent of the MFN rate for 72 products that currently are subject to MFN duties of greater than 5 percent. As discussed in the next sections, the vast majority of imports covered by the US schedule to Annex II fall into the former category.

Products subject to full tariff elimination (staging categories A-E)

The United States will immediately eliminate customs duties on 57 of the covered tariff lines on the date that the USJTA enters into force. These products, set forth in staging category A, have an annual import value of approximately \$2.4 billion and include, among other things, camera lenses, components of air conditioning machines, tools, and parts of gas turbines. Duties on another \$4 billion worth of goods (set forth in staging categories B-C) will be phased out over 2 years, including machining centers for working metal, horizontal lathes, injection-molding machines, certain chemical products, and certain types of pneumatic tires. A smaller group of products valued at approximately \$18 million will be subject to 5- or 10-year phase-outs, including soy sauce and chewing gum.

Trade Value of Imports from Japan Subject to Full Tariff Elimination Under USJTA Annex II		
Staging Category	Tariff Elimination Schedule	2018 Import Value (USD Actual)
A	Duty-free upon entry into force	\$ 2,415,719,246
B	Duties to be reduced by three percentage points upon entry into force; duty-free in Year 2	\$ 4,050,685,862
C	Duties to be eliminated in two equal annual stages, duty-free in Year 2	\$ 1,514,433
D	Duties to be eliminated in five equal annual stages, duty-free in Year 5	\$ 17,622,857
E	Duties to be eliminated in ten equal annual stages, duty-free in Year 10	\$ 638,990
<b>Total</b>		<b>\$ 6,486,181,388</b>

<sup>2</sup> 19 U.S.C. § 4202(a)

## Products subject to partial tariff reduction (staging categories F-K)

The United States will immediately reduce customs duties on 22 products (staging category F) to 50 percent of their base rates on the date that the Agreement enters into force. These products have an annual import value of approximately \$238 million and include certain metal-cutting tools, articles of iron or steel (e.g., washers and flanges), and musical instruments. Duties on another \$306 million worth of goods (staging categories G and I) will be reduced by 50% over two years, including certain herbicides and other chemicals, parts and accessories for bicycles, and self-tapping screws. For a smaller subset of products valued at approximately \$64 million (staging categories H, J, and K), duties will be reduced to 50 percent of their current rates over periods ranging from 3-5 years. Such products include telescopic sights for rifles and certain food products (green tea, yams, and sugar confections).

Trade Value of Imports from Japan Subject to Partial Tariff Elimination Under USJTA Annex II		
Staging Category	Tariff Reduction Schedule	2018 Import Value (USD Actual)
F	Duties to be reduced to 50% of base rate upon entry into force	\$ 238,130,270
G	Duties to be reduced by three percentage points upon entry into force; reduced to 50% of base rate in Year 2	\$ 304,052,232
H	Duties to be reduced by three percentage points upon entry into force, three percentage points in Year 2, and reduced to 50% of base rate in Year 3	\$ 43,347,077
I	Duties to be reduced to 50% of base rate in two equal annual stages	\$ 2,279,707
J	Duties to be reduced to 50% of base rate in three equal annual stages	\$ 9,122,102
K	Duties to be reduced to 50% of base rate in five equal annual stages	\$ 11,327,928
<b>Total</b>		<b>\$ 608,259,316</b>

Notably, the United States has not committed in the USJTA to reduce tariffs on automobiles and automotive parts, which are among Japan's top exports to the United States. However, the two sides have agreed that, after the USJTA enters into force, they will enter into consultations and subsequently initiate negotiations for a comprehensive FTA that will reduce customs duties on a wider range of products than those covered by the USJTA.<sup>3</sup> Annex II contains a reference to these future negotiations, stating that "[c]ustoms duties on automobile and auto parts will be subject to further negotiations with respect to the elimination of customs duties." However, the timing and outcome of any such negotiations are uncertain.

## Rules of Origin

The US tariff concessions described above will apply only to goods that qualify as "originating" under the applicable rules of origin set forth in Annex II. These general and product-specific rules of origin may be summarized as follows:

- **General rules of origin.** A good will qualify as originating, and will therefore be eligible for preferential tariff treatment, if it is:<sup>4</sup>
  - (a) wholly obtained or produced entirely in one or both of the Parties;
  - (b) produced entirely in one or both of the Parties, exclusively from originating materials; or

<sup>3</sup> See Joint Statement of the United States and Japan (September 25, 2019), available at <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-japan-2/>.

<sup>4</sup> In addition to satisfying one of these criteria, the good must satisfy all other applicable requirements of the Rules of Origin and Origin Procedures set forth in Annex II.

(c) produced entirely in one or both of the Parties, using non-originating materials provided such materials satisfy the applicable change in tariff classification requirement under the Product-Specific Rules of Origin set forth in Annex II and described below.

In addition, paragraph 4(a) of Annex II provides that a good that contains non-originating materials that do not satisfy the applicable product-specific rule of origin is nonetheless an originating good of Japan if the value of all such materials does not exceed 10 percent of the value of the good and the good meets all the other applicable requirements of the USJTA rules of origin and origin procedures.

- **Product-specific rules of origin.** Annex II sets forth a product-specific rule of origin for each of the 241 tariff lines on which the United States has committed to reduce duties. Each product-specific rule of origin is based on a **tariff-shift methodology**, whereby non-originating materials used in the production of a good become originating when they undergo the change in tariff classification specified in the rule. Depending on the product at issue, the rules require a change in tariff classification at either the 2-, 4-, or 6-digit level for a good to qualify as originating (sometimes in combination with additional criteria).

Many of the product-specific rules set forth in Annex II are similar to those agreed by the United States and Japan in the Trans-Pacific Partnership (TPP), though this is not the case for all products. Among other differences, the USJTA's product specific rules of origin do not permit any good to qualify as originating on the basis of regional value content (RVC), whereas the TPP would have permitted certain goods to qualify as originating by satisfying RVC thresholds as an alternative to the tariff-shift requirement. An example of this difference is provided below: a color television reception apparatus with a flat panel screen classified under HTSUS number 85287272 could qualify as originating under the TPP by undergoing a tariff shift at the four-digit level or by satisfying RVC requirements ranging from 30-50 percent, whereas the same product can qualify under the USJTA only by undergoing a tariff shift at the 6-digit level. Thus, the USJTA rules of origin are not equivalent in all cases to those agreed by the United States and Japan in TPP.

Sample Comparison of USJTA and TPP Rule of Origin	
USJTA Rule of Origin	TPP Rule of Origin
<b>85287272:</b> A change in tariff classification at the 6-digit level	<p><b>85.28:</b> A change to a good of heading 85.28 from any other heading; or</p> <p>No change in tariff classification required for a good of heading 85.28, provided there is a regional value content of not less than:</p> <p>(a) 30 per cent under the build-up method; or</p> <p>(b) 40 per cent under the build-down method; or</p> <p>(c) 50 per cent under the focused value method taking into account only the non-originating materials of heading 85.28.</p>

#### IV. Market Access Commitments of Japan

Annex I to the Agreement sets forth Japan's concessions to the United States with respect to market access for agriculture-related products. Annex I consists of three sections: Section A sets forth general provisions while Sections B and C provide for Japan's tariff commitments and rules of origin, respectively. Section B is the core of Annex I and is further divided into five subsections, which are (1) general notes, (2) tariff elimination or reduction, (3) tariff rate quotas (TRQs), (4) agricultural safeguard measures, and (5) Japan's schedule of concessions. The rules of origin provided under Section C are generally equivalent with the rules of origin in the CPTPP with respect to products covered in Annex I. In addition, the United States and Japan exchanged several side letters pertinent to the Agreement (*i.e.*, side letters concerning alcoholic beverages, beef, rice, safeguards, skimmed milk powder, and

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whey). In the following sections, we review the main elements of Section B, the core of Japan's concessions in the Agreement, with references to the side letters.

### Tariff reduction and elimination

As noted in our Trade Alert of September 27, 2019, Japan under the Agreement has committed to eliminate or reduce tariffs on a group of US food and agricultural exports valued at approximately \$7.2 billion annually, according to the fact sheet released by USTR. USTR also stated that “the tariff treatment for the products covered in this agreement will match the tariffs that Japan provides preferentially to countries in the CP-TPP agreement.” The legal text of the USJTA confirms that the levels of tariff reduction and elimination provided for the products covered under both the CPTPP and the USJTA are generally the same. Although the USJTA will likely enter into force about one year after CPTPP went into effect, the tariff levels that US exporters will face under the USJTA will match those faced by exporters from the CPTPP parties (*i.e.*, the tariff levels provided for in Year 2 of the USJTA will match those provided for in Year 3 of CPTPP, and so on for the following years). However, the CPTPP covers a wider range of agricultural products than the USJTA. For example, while all poultry meat, eggs, and egg products are covered under CPTPP, fresh or chilled poultry meat and eggs in shells are not covered under the USJTA (though Japan's imports of such products have been minimal). Other products for which Japan agreed to reduce or eliminate tariffs under CPTPP but not under the USJTA include fishery and forestry products.

### TRQs

Japan has agreed to establish country-specific TRQs (CSQs) for nine categories of products under the Agreement. These products are (1) mixes and doughs and cake mixes, (2) wheat, (3) non-roasted malt, (4) roasted malt, (5) processed cheese, (6) whey, (7) glucose and fructose, (8) corn and potato starch, and (9) inulin. CSQs of the same levels are provided under the CPTPP, but that agreement provided a CSQ for one additional product – rice – that is not covered under the USJTA. Rice is one of the most sensitive agricultural commodities in trade negotiations for Japan. Japan agreed to establish a new duty-free CSQ for 70,000 MT of US rice under CPTPP, but it did not create such a CSQ under the USJTA. The side letter concerning rice confirms only that Japan will continue its transparency-related practice (*i.e.*, publication of certain information relating to its rice purchases through government tenders), and thus does not appear to provide for improved market access. Furthermore, while CPTPP sets forth CPTPP-wide TRQs for 33 categories of products, *e.g.*, butter, condensed milk, barley, and sugar, Japan did not create new CSQs for the United States for these products under the Agreement, thus denying US producers similar benefits.

Japan has also agreed to reduce “mark-ups” with respect to wheat, at the same level as that provided by CPTPP. The vast majority of wheat imported into Japan is purchased by the Ministry of Agriculture, Forestry and Fisheries (MAFF) through tenders. Under this scheme, MAFF imports wheat duty-free and sells wheat to flour millers at the import price plus a margin – or, mark-up – some of which is used for promotion of domestic wheat production. This margin in effect raises the price of imported wheat in the Japanese market, and the mark-up reduction is expected to lead to better market access for foreign producers. Securing this commitment in the USJTA appears to have been a US priority, considering that competing exporters of wheat products to Japan, in particular in Canada and Australia, have been enjoying such improved market access since CPTPP went into effect. Japan also reduced mark-ups for barley under the USJTA.

### Agricultural safeguard measures

Like the CPTPP, the USJTA will permit Japan to impose agricultural safeguard measures in the form of increased tariffs if imports of particular products covered by the Agreement exceed specified thresholds. While most provisions concerning agricultural safeguard measures are identical between CPTPP and the USJTA, the trigger levels set forth under the two agreements are different in that, for certain products, CPTPP concerns the aggregate volume of imports from all CPTPP parties whereas the USJTA focuses on US-specific import volumes. The USJTA agricultural safeguard measure for beef, for example, would be triggered if import volumes from the United States exceed 242,000 MT for Year 2 (April 1, 2020 to March 31, 2021) whereas the trigger level for beef under CPTPP is 613,600 MT based on the aggregate volume of imports from all CPTPP parties for the same period. However, the USJTA and

one of its side letters provide for certain consultation requirements, according to which the trigger levels may be modified to include import volumes from CPTPP parties after a certain number of years. In the case of beef, the two countries would have a consultation by the end of the first half of Year 4 for the modification of the trigger level for Year 5 and thereafter. The side letter also provides that the two countries will enter into consultations to adjust the trigger levels when an agricultural safeguard measure is imposed.

Regarding the form of an agricultural safeguard measure, Japan may increase its tariff rate to a level not to exceed the lesser of (a) the MFN rate in effect at the time the agricultural safeguard measure is applied; (b) the MFN rate in effect on the day immediately preceding the date of entry into force of the USJTA; and (c) the specific rate set out in the USJTA.

#### Overview of Japan's market access concessions

The following table summarizes Japan's market access concessions for major agricultural products, and compares those concessions to the commitments undertaken by Japan under the CPTPP.

Comparison of Japan's Agricultural Market Access Concessions Under USJTA and CPTPP	
Wheat	<p><b>TRQ:</b> CPTPP-equivalent level (US-CSQ 120,000MT in Year 1 ⇒ 150,000MT in Year 8)</p> <p><b>Mark-up reduction:</b> CPTPP-equivalent level (45-50% reduction depending on the wheat variety by Year 8).</p>
Beef	<p><b>Tariff reduction:</b> CPTPP-equivalent level (Base rate 38.5% ⇒ 26.6% in Year 1 ⇒ 9% in Year 15)</p> <p><b>Safeguard:</b> Generally equivalent to CPTPP except for the trigger level. While CPTPP provides for a trigger level based on CPTPP-wide aggregate volumes of imports, the trigger level set forth under the Agreement is specific to the volume of imports from the United States. However, a clause in Annex I and the side letter concerning agricultural safeguard measures provide that the trigger level may be combined with the aggregate volume of imports from CPTPP parties subject to consultations between Japan and the United States under certain conditions.</p>
Pork	<p><b>Tariff reduction:</b> CPTPP-equivalent level (maintaining the gate price mechanism for certain fresh and frozen pork meat, with the reduction of the maximum gate price to 50 yen per kg by Year 9)</p> <p><b>Safeguard:</b> For Year 1 to Year 3, the trigger level is specific to the volume of imports from the United States, which is generally equivalent to the trigger level with regard to an individual party under CPTPP. For Year 4 and thereafter, for certain pork meats that are below threshold price levels, Japan may impose safeguard measures based on aggregate import volumes of the United States and CPTPP parties combined. The trigger level in this respect is no different between CPTPP and the USJTA.</p>
Dairy Products	<p><b>TRQ:</b> With respect to certain dairy products for which Japan had created a CPTPP-wide TRQ under CPTPP (e.g., butter and condensed milk), Japan did not establish a new TRQ for the United States under the USJTA.</p>
Fresh Oranges	<p><b>Tariff reduction:</b> CPTPP-equivalent level (tariff elimination by Year 5 or Year 7, depending on the importing period of the year – e.g., tariffs for oranges imported between April 1 and May 31 will be reduced from the base rate of 32% to 0% by Year 5)</p>



	<b>Safeguard:</b> More preferable than CPTPP. CPTPP provides for a trigger level based on the aggregate volume of imports from all CPTPP parties whereas the trigger level under the Agreement is specific to import volumes from the United States. Despite this difference and Australia being a large orange exporter to Japan, the trigger level under the USJTA is almost the same as that of CPTPP (e.g., aggregate import volumes of 39,000 MT for Year 3 under CPTPP versus US-specific import volumes of 37,050 for Year 2 under the Agreement.)
<b>Soybean meal and soybean oil</b>	<b>Tariff reduction:</b> CPTPP-equivalent level (Base rate 4.2% ⇒ immediate elimination for soybean meal; Base rate 10.90 or 13.20 yen per kg ⇒ tariff elimination by Year 5 for soybean oil)
<b>Rice</b>	<b>Coverage:</b> No additional market access concession was made with respect to rice under the USJTA, whereas Japan had agreed to establish a duty-free CSQ for US rice (50,000MT in Year 1 ⇒ 70,000 MT in Year 13) under CPTPP. The side letter concerning rice only confirms that Japan will continue its transparency-related practice with respect to its rice procurement through government tenders.
<b>Fishery / Forestry products</b>	<b>Coverage:</b> No coverage under the USJTA; whereas Japan has committed to eliminate tariffs on such products for CPTPP parties.

As noted above, Japan and the United States have agreed to hold a second stage of negotiations for a comprehensive free trade agreement after the USJTA enters into force. Annex I to the Agreement contains a reference to these future negotiations, stating that “[i]n future negotiations, the United States will be seeking preferential treatment with respect to agricultural goods.” Rice, which is not covered under the USJTA, may be a focus of the United States in any subsequent negotiations with Japan concerning agricultural market access, though other areas (e.g., services, non-tariff barriers, and non-agricultural market access) are likely to be higher priorities for the United States.

## V. Dispute Settlement

Notably, the USJTA contains no formal dispute settlement mechanism. Article 6 of the Agreement establishes a consultation mechanism whereby “[n]o later than 30 days after a request by either Party, the Parties shall enter into consultations regarding any matter that might affect the operation or interpretation of this Agreement, with a view to arriving at a mutually satisfactory resolution of the matter within 60 days.” However, the Agreement provides no additional means for resolving a dispute if the Parties fail to arrive at a solution through consultations. This is a significant departure from the approach taken in most modern FTAs, which have provided for the establishment of independent dispute settlement panels where a Party alleges that another Party has acted inconsistently with its obligations under the agreement.

The United States and Japan may have agreed to forego a formal dispute settlement mechanism in the USJTA on the view that the commitments set forth in the Agreement are relatively straightforward (e.g., obligations to reduce tariffs to specified levels and establish TRQs) and thus are unlikely to give rise to disputes regarding their interpretation. However, in the event that disputes do arise under the USJTA, the complaining Party will have limited options for addressing an alleged violation, aside from seeking to resolve the issue through bilateral negotiations, derogating from some of its own USJTA commitments as “retaliation,” or terminating the Agreement entirely pursuant to Article 10 (which permits either Party to terminate the Agreement after providing the other Party four months’ notice). This outcome may have been desired by the current US administration, given its skepticism of binding, independent dispute settlement and its preference for bilateral negotiations and unilateral action as a means of resolving trade disputes.



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## VI. Other Provisions

The Agreement incorporates several exceptions and additional provisions that are standard in US FTAs. These include the following:

- A security exception, set forth in Article 5, provides that nothing in the USJTA “shall be construed to ...preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” This language mirrors that of the security exception set forth in the TPP, and in other recent US trade agreements such as the US-Mexico-Canada Agreement (USMCA). However, it is broader than the security exception set forth in GATT Article XXI, which permits a member to take any action which it considers necessary for the protection of its essential security interests (i) relating to nuclear material; (ii) relating to traffic in arms, ammunition and implements of war; or (iii) “taken in time of war or other emergency in international relations[.]” By contrast, the USJTA security exception contains no such conditions.
- A general exception, set forth in Article 3, incorporates by direct reference the general exceptions set forth in Article XX of the GATT 1994.
- Article 8 provides that the Parties may agree in writing to amend the Agreement and that such amendments shall enter into force 30 days after the date on which the Parties have notified each other in writing of the approval of the amendment in accordance with their respective applicable legal procedures, or on such other date as the Parties may decide.

As expected, the Agreement does not contain any commitment by the United States to refrain from imposing tariffs on Japanese automotive goods under Section 232 of the Trade Expansion Act. The Agreement also does not address the existing Section 232 measures on steel and aluminum imports from Japan. In the joint statement accompanying the USJTA and the US-Japan Digital Trade Agreement, the two countries agreed that “[w]hile faithfully implementing these agreements, both nations will refrain from taking measures against the spirit of these agreements and this Joint Statement. In addition, both nations will make efforts for an early solution to other tariff-related issues.” This language could be interpreted as an implicit commitment by the United States to refrain from imposing Section 232 measures on Japanese automotive goods and to discuss the possible removal of the steel and aluminum measures as part of the second stage of negotiations between the two countries. Nevertheless, given the lack of express commitments in the USJTA regarding Section 232 measures, these statements on their own have provided little certainty to the business community that such measures will be avoided in the case of automotive goods, or rolled back for steel and aluminum.

## VII. Next Steps and Implications

The USJTA could enter into force as soon as January 1, 2020, given that Japan is expected to ratify the Agreement by mid-December and the Trump administration intends to implement the Agreement unilaterally rather than seeking congressional approval. Prime Minister Abe’s Cabinet is seeking to secure parliamentary approval of the USJTA before the current extraordinary session of the Diet ends on December 9, and although some Japanese lawmakers have raised questions about the value of the Agreement – particularly given its lack of coverage for Japanese automotive exports – it is expected that the Diet will approve the Agreement this year. Once Japan has ratified the USJTA, the Trump administration may be able issue a Proclamation implementing the agreed tariff reductions (and promulgate any necessary implementing regulations) relatively quickly, allowing the Agreement to enter into force by January 1 or shortly thereafter.

Once implemented, the Agreement will provide benefits for some industries in the United States and Japan. For example, the Agreement will mitigate significantly the competitive disadvantages in the Japanese market that many US agricultural exporters would have faced as a result of the United States’ withdrawal from the TPP and the recent entry into force of the CPTPP and the EU-Japan FTA. Nevertheless, the Agreement’s overall impact on bilateral trade is likely to be small, especially when compared to the bilateral market access commitments negotiated by the United States and Japan in the TPP. Whereas the TPP would have eliminated tariffs on the vast majority of US-

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Japan trade in goods, which totaled \$217.6 billion in 2018, the USJTA tariff commitments cover just a small fraction of this amount (*i.e.*, approximately \$14.3 billion in bilateral trade.)<sup>5</sup> Thus, the vast majority of US-Japan trade in goods will remain subject to MFN duty rates for the foreseeable future, leaving most industries unaffected by the USJTA. Moreover, the TPP included similar levels of liberalization for other countries, such as Vietnam, New Zealand and Malaysia, while the USJTA is of course limited to Japan.

Despite its narrow scope, the USJTA may still have important implications for the US-Japan trading relationship. In particular, the USJTA might make it more challenging to secure US political support for the negotiation and approval of a more comprehensive US-Japan FTA, or for potential US re-entry into the CPTPP. Indeed, there has been a longstanding consensus in the United States in favor of comprehensive FTAs that are negotiated as a “single undertaking”, in part because securing the necessary political support for US trade agreements is more easily achievable in the context of a broad agenda offering trade-offs and benefits to the widest possible range of stakeholders. The US agriculture sector has been among the most vocal advocates of such agreements, including the TPP, and thus has been instrumental in securing congressional support for their negotiation and approval. Given that the US agriculture sector already has secured significant access to the Japanese market under the USJTA, generating sufficient political will to complete a comprehensive FTA with Japan might now be more difficult. For this reason, many in the US business community expressed concern about the Trump administration’s “staged” approach to the negotiation with Japan.

It also remains to be seen whether WTO Members will question the USJTA’s consistency with WTO rules. GATT Article XXIV requires that regional trade agreements eliminate duties and other restrictive regulations of commerce on “substantially all the trade” among the constituent members. Given that the legal text of the USJTA confirms its relatively narrow scope, some WTO Members could question whether the Agreement meets the “substantially all the trade” requirement. While the Agreement could nonetheless be justified under WTO rules as an “interim agreement” that will lead to the formation of a free-trade area, the United States and Japan would need to include “a plan and schedule for the formation of [a customs union or free-trade area] within a reasonable length of time.” This requirement has not yet been interpreted by WTO panels or the Appellate Body, but Members might argue that the United States and Japan will need to provide a more detailed “plan and schedule” than the four-month consultation period and reference to future negotiations provided in their joint statement. The USJTA could therefore become a source of friction between the US, Japan, and other WTO Members in the future.

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<sup>5</sup> The TPP when fully implemented would have eliminated tariffs on 99.8% of US tariff lines applied to Japan and 94.7% of Japan’s tariff lines applied to the United States. See *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, US International Trade Commission (May 2016) at p. 52, available at <https://www.usitc.gov/publications/332/pub4607.pdf>.

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## Contact us

### Washington, DC

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**White & Case LLP**

701 Thirteenth Street, NW  
Washington, DC  
20005-3807  
United States

**Brian Picone**

International Trade Analyst

T +1 202 729 2427

E [brian.picone@whitecase.com](mailto:brian.picone@whitecase.com)

**Naoto Nelson Saika**

International Trade Analyst

T +1 202 729 2405

E [nelson.saika@whitecase.com](mailto:nelson.saika@whitecase.com)

### Singapore

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**White & Case Pte. Ltd.**

8 Marina View #27-01  
Asia Square Tower 1  
Singapore 018960

**Samuel D. Scoles**

Senior Trade Advisor

T +65 6347 1527

E [sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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