

# INTERIM OR WAIVED?: THE FUTURE OF THE U.S.- JAPAN AND PHASE ONE TRADE AGREEMENTS

KYLE RICE\*

*The Trump Administration negotiated notable trade agreements with two of the United States' largest Asian trading partners in the latter half of its term: the U.S.-Japan Agreement in 2019 and the Phase One Agreement with China in 2020. Although the texts in the agreements are remarkably different, on their face both are difficult to reconcile with World Trade Organization (WTO) rules, which prohibit some bilateral preferential trade agreements. There are, however, two potential means by which the United States could reconcile these two agreements with the WTO system: First, by characterizing them as "interim" agreements toward free-trade areas or custom unions; or second, by seeking an official waiver of its WTO obligations from the other WTO members.*

*This note argues that, under current WTO rules and past practice of WTO members, it is unlikely that the Phase One Agreement qualifies as an interim agreement and unlikely that the United States would receive a waiver for it. The prospect of characterizing the U.S.-Japan Agreement as "interim" is more promising, especially if the United States and Japan seriously pursue trade liberalization together. Even though neither agreement is likely to be the subject of a trade dispute at the WTO's dispute settlement mechanism, they both signify a sharp departure from WTO rules. As such, they present an opportunity for trade law reformers to address the potential for members to negotiate similar agreements in the future even in violation of the WTO's most-favored-nation principle.*

I. INTRODUCTION . . . . .	624
II. ARTICLE XXIV CUs, FTAs, AND INTERIM AGREEMENTS . . . . .	627
A. <i>Legal Text and Relevant Understandings</i> . . . . .	627
B. <i>GATT Practice with Respect to Interim     Agreements</i> . . . . .	629
C. <i>WTO Practice with Respect to Interim     Agreements</i> . . . . .	633
D. <i>Application of State Practice to the U.S.-Japan     and Phase One Agreements</i> . . . . .	638
i. <i>The U.S.-Japan Agreement</i> . . . . .	638

---

\* J.D. Candidate, New York University School of Law, 2022. I would like to thank Professor Robert Howse for his insights and guidance. I would also like to thank the editors of the *Journal of International Law & Politics* for their comments and revisions during the editorial process. All views expressed herein, as well as any errors, are my own.

ii.	<i>The Phase One Agreement</i> . . . . .	644
III.	WAIVERS FOR DEROGATION OF WTO	
	COMMITMENTS . . . . .	646
	A. <i>Legal Text and State Practice under the GATT and WTO</i> . . . . .	646
	B. <i>Waiver Prospects for the U.S.-Japan and Phase One Agreements</i> . . . . .	650
IV.	PROSPECTS FOR THE AGREEMENTS IN THE BIDEN ADMINISTRATION . . . . .	654

#### I. INTRODUCTION

For observers of international trade, the last four years have been busy and tumultuous. Given the campaign rhetoric leading up to the 2016 U.S. election, it is unsurprising that trade wars and transactional deals with allies and adversaries alike characterized the previous Administration's trade policy.<sup>1</sup> Many observers, however, did not anticipate the degree to which the executive would exercise its authority in the realm of trade, mostly unencumbered by checks and balances that exist elsewhere in the U.S. federal government.<sup>2</sup> Driven by the outlook that trade has been fundamentally unfair for the past fifty years, the Trump Administration placed duties on steel and aluminum imports from various countries and on hundreds of billions of dollars of goods imported from China.<sup>3</sup> The Administration also regularly used threats of duties on sensitive products like automobiles to bring trading partners

---

1. See Nick Corasaniti, Alexander Burns & Binyamin Appelbaum, *Donald Trump Vows To Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), <https://perma.cc/LGF3-AL4U> (summarizing the criticisms and threats Donald Trump made during his campaign to end trade deals with China and Mexico); *Read Donald Trump's Speech on Trade*, TIME (June 28, 2016, 4:55 PM), <https://time.com/4386335/donald-trump-trade-speech-transcript/> (outlining seven steps for a Trump administration trade policy, including renegotiation of the North American Free Trade Agreement and application of Section 301 tariffs against China).

2. See *generally Can Biden Make Trade Boring Again?*, TRADE TALKS, at 10:14 (Nov. 11, 2020), <https://perma.cc/5722-B8R9> (explaining how Donald Trump used national security as a basis to act unilaterally in imposing steel tariffs on Chinese imports).

3. See CHAD P. BOWN & MELINA KOLB, PETERSON INST. FOR INT'L ECON., *TRUMP'S TRADE WAR TIMELINE: AN UP-TO-DATE GUIDE* (Oct. 31, 2021), <https://perma.cc/52EV-CXY3> (documenting the tariffs the Trump administration placed on various imported goods).

to the negotiating table and to increase leverage in those negotiations.<sup>4</sup>

To resolve the trade disputes it began, and to correct a system of trade it deemed inherently unfair, the Administration negotiated several agreements: (1) the United States-Mexico-Canada Agreement (USMCA) to correct the defects of the North American Free Trade Agreement (NAFTA);<sup>5</sup> (2) various exemptions from increased steel and aluminum tariffs with countries such as Turkey;<sup>6</sup> (3) the Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic Of China (the Phase One Agreement) to address intellectual property violations by China; and (4) the Trade Agreement between the United States and Japan (U.S.-Japan Agreement) to improve market access in Japan for U.S. agricultural exports.

It is clear that the unilateral measures discussed above, along with the continued blockage of new members at the WTO's Appellate Body (AB), have destabilized the existing rules-based multilateral trading system.<sup>7</sup> What is less clear—

---

4. Leika Kihara & Kaori Kaneko, *Deadline Looming, Japan Struggles To Elude Trump Tariff Threat*, REUTERS, Sept. 9, 2019, <https://perma.cc/B5RM-XWK5> (discussing the role of tariff threats in negotiations between the United States and Japan).

5. See OFF. OF THE U.S. TRADE REPRESENTATIVE, THE UNITED STATES-MEXICO-CANADA AGREEMENT FACT SHEET, AUTOMOBILES AND AUTOMOTIVE PARTS (last visited Dec. 23, 2021), <https://perma.cc/DZ3F-KD38> (summarizing USMCA improvements on the trade of automobiles and auto parts).

6. See generally *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1249–53 (Ct. Int'l Trade 2020) (holding changes in tariff exemption proclamations with respect to Turkey were not permitted without following certain U.S. administrative procedural requirements); Press Release, U.S. Trade Representative, United States Announces Deal with Canada and Mexico To Lift Retaliatory Tariffs (May 17, 2019), <https://perma.cc/AC2A-AZGP> (announcing that the United States had agreed to provide Canada and Mexico exemptions to tariffs on steel and aluminum).

7. See, e.g., Tom Miles, *Trump Threats, Demands Spark 'Existential Crisis' at WTO*, REUTERS, Oct. 24, 2018, <https://perma.cc/PP8J-BUKP> (discussing the increased tensions resulting from the Trump administration's blocking of Appellate Body judges). The blockage of appointment of members to the WTO AB began under the Obama Administration, but became much more material on December 10, 2019, when the number of AB members fell below three, the number of AB members required to hear an appeal at the WTO's Dispute Settlement Body. See Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?* 22 J. INT'L ECON. L. 297, 297

and often less analyzed—is the extent to which the agreements identified above have contributed to this destabilization. In the case of the USMCA, the agreement was built on a foundation laid by an existing free trade agreement that had long operated alongside the WTO.<sup>8</sup> The Administration justified aluminum and steel tariffs (and their exemptions) by using a long-recognized exception for national security, even if that justification has rarely been invoked.<sup>9</sup> The Phase One Agreement and the U.S.-Japan Agreement, however, are more difficult to fit readily within the WTO framework. They seem to violate one of the two foundational pillars of the rules-based, multilateral trading system—the most favored nation principle (MFN)—because they confer benefits to their parties at the exclusion of other trading partners. Still, members may depart from MFN in their trade agreements in some circumstances without violating their WTO obligations.

This paper will address whether these two agreements—the Phase One Agreement and the U.S.-Japan Agreement—fit within the WTO system, using both WTO law and the member practice of the WTO and the General Agreement on Tariffs and Trade (GATT). Part II will address whether the two agreements fit within Article XXIV of the GATT provisions for customs unions (CUs), free-trade areas (FTAs), and interim agreements. Part III of the paper addresses the prospect for the United States, China, and Japan to receive waivers from their obligations under Article IX of the WTO Agreement. Finally, considering the degree to which the Phase One Agreement and the U.S.-Japan Agreement fit within the WTO framework, the paper will address how the Biden Administration can manage these two agreements with China and Japan.

---

(2019) (noting that the AB would be unable to function after December 10, 2019, when only one AB member would remain in office).

8. See Tamara Lytle, *Goodbye NAFTA, Hello USMCA*, SHRM (Nov. 14, 2020), <https://perma.cc/5V4Z-R9JT> (noting that the USMCA replaced NAFTA, which went into effect in 1994).

9. See David Lawder, *U.S. Court Upholds Trump's National Security Tariffs on Steel Imports*, REUTERS, Feb. 4, 2021, <https://perma.cc/KV87-GX3Y> (noting Trump applied “Cold War-era trade law” by invoking a national security justification for the tariffs).

## II. ARTICLE XXIV CUs, FTAs, AND INTERIM AGREEMENTS

### A. *Legal Text and Relevant Understandings*

Along with the principle of national treatment, MFN is one of the key pillars of the rules-based multilateral trading system. In fact, the drafters of the GATT thought it so important that they included it in Article I of the agreement. The article required members to accord “any advantage, favour, privilege or immunity granted . . . to any product originating in or destined for any other country . . . to the like product originating in or destined for the territories of all other contracting parties.”<sup>10</sup> Likewise, the same MFN principle is included in Article 2 of the General Agreement on Trade in Services (GATS) and in Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>11</sup> The MFN requirement, then, permeates each of the foundational multilateral trade agreements that are part of the WTO system.

Still, the GATT does allow for departures from MFN in certain situations.<sup>12</sup> Recognizing the ability of regional trade agreements (RTAs) to liberalize trade incrementally beyond what can be achieved at multilateral level, Article XXIV allows WTO members to negotiate CUs, FTAs, or “interim agreement[s] leading to [the] formation of a customs union . . . [or] free-trade area.”<sup>13</sup> Article XXIV specifies that CU mem-

---

10. General Agreement on Tariffs and Trade pt.1, art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; *see also* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] (incorporating the 1947 agreement as part of the 1994 agreement).

11. General Agreement on Trade-Related Aspects of Intellectual Property art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 199, 33 I.L.M. 1197 (1994); General Agreement on Trade in Services art. II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

12. In addition to the agreements and waivers discussed in this paper, WTO members may give preferential treatment in spite of the MFN principle in other instances. The Enabling Clause, for example, allows members to derogate from MFN in for developing countries. *See Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 203, 203 (1979).

13. GATT 1994, *supra* note 10, art. XXIV:4, art. XXIV:5(a)–(b).

bers must apply “substantially the same duties and other regulations of commerce . . . to the trade of territories not included in the union” and must eliminate “duties and other restrictive regulations of commerce . . . with respect to substantially all trade between the constituent territories of the union.”<sup>14</sup> More relevant for the Phase One Agreement and the U.S.-Japan Agreement, an FTA also requires members of the area to eliminate “duties and other restrictive regulations of commerce . . . on substantially all the trade between the constituent territories.”<sup>15</sup>

Interim agreements to establish an RTA also have their own requirements. Interim agreements must “include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”<sup>16</sup> FTA interim agreements must also be “leading to the formation of a free-trade area” and parties to such agreements should “promptly notify” WTO members upon “deciding to enter” an interim agreement.<sup>17</sup> After receiving information from the parties about the proposed agreement, if WTO members

find that such agreement is not likely to result in the formation of . . . a free-trade area within the period contemplated by the parties to the agreement . . . , the CONTRACTING PARTIES shall make recommendations to the parties to the agreement . . . [and the] parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.<sup>18</sup>

The text of Article XXIV reflects the drafters’ worries that members could otherwise use CUs, FTAs, and indefinite “interim” agreements to circumvent MFN obligations. Without careful review of such agreements, GATT members could style

---

14. *Id.* art. XXIV:8(a)(i)–(ii).

15. *Id.* art. XXIV:8(b).

16. *Id.* art. XXIV:5(c).

17. *Id.* art. XXIV:7(a), 5(c). See also *Transparency Mechanism for Regional Trade Agreements*, ¶ 3, WTO Doc. WT/L/671 (Dec. 14, 2006) [hereinafter *RTA Transparency Mechanism*] (requiring notification of agreements “as early as possible” and “before the application of preferential treatment between the parties”).

18. GATT 1994, *supra* note 10, art. XXIV:7(b).

an agreement as an Article XXIV interim agreement that gives some members preferential treatment over others while not meeting the more onerous requirements of full CUs or FTAs that achieve substantial trade liberalization, thereby violating MFN. In order to prevent this, GATT members included significant safeguards like notification requirements and a review process. Most importantly, members not party to the interim agreement could make recommendations to parties to the agreement.<sup>19</sup> Therefore, if other members believe that the agreement does not lead to a full CU or FTA—either because the contemplated liberalization of trade did not rise to “substantially all the trade” or because the elimination of restrictions on trade would take longer than a “reasonable” period—they can recommend changes to the agreement to bring the parties in line with their Article XXIV obligations.<sup>20</sup> These structural safeguards in Article XXIV, then, made it more difficult for members to use interim agreements to circumvent MFN obligations by giving other members preferential treatment.

#### B. *GATT Practice with Respect to Interim Agreements*

In addition to the legal text concerning CUs, FTAs, and interim agreements, state practice under the GATT and WTO may shed light on whether the Phase One Agreement or the U.S.-Japan Agreement could plausibly fit within Article XXIV. Jürgen Huber’s *The Practice of GATT in Examining Regional Arrangements Under Article XXIV* highlights four instances of state practice in the GATT era with respect to interim agreements.<sup>21</sup>

First, in the case of the South Africa-Southern Rhodesian Customs Union, Professor Jürgen Huber notes how GATT members grappled with the problem that indefinite interim agreements could become de facto preferential trade agreements that violate MFN principles. South Africa and Southern

---

19. *Id.* art. XXIV:7(b).

20. *Id.* art. XXIV:8(b), 5(c); *see also* Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ¶ 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 219 (1994) [hereinafter Understanding on Article XXIV] (setting ten years as the presumptive lifetime for an interim agreement before it must mature into a CU or FTA).

21. Jürgen Huber, *The Practice of GATT in Examining Regional Arrangements Under Article XXIV*, 19 J. COMMON MKT. STUD. 281, 287–89 (1981).

Rhodesia concluded the “interim agreement” in 1948 “directed to the re-establishment of a Customs Union” between the two countries.<sup>22</sup> Although the interim agreement lacked definite steps to accomplish a full CU, a working party approved the agreement subject to the incorporation of recommendations from GATT members, who asked that the parties: (1) complete the full CU in ten years; (2) submit a definite plan for trade liberalization within five years; and (3) submit annual reports on the progress of achieving a CU. Because the parties agreed to these, the GATT members declared that South Africa and Southern Rhodesia were “entitled to claim the benefits of Art. XXIV,” despite the indefinite quality of the interim agreement.<sup>23</sup> GATT members, then, decided not to enforce the definite “plan and schedule” requirement for interim agreements with respect to the South Africa-Southern Rhodesian Customs Union that is otherwise required in Article XXIV.<sup>24</sup>

Second, Huber notes the legal controversy related to the Montevideo Treaty of 1960.<sup>25</sup> That agreement included goals for annual tariff reductions, with the final reductions on substantially all trade occurring after twelve years.<sup>26</sup> The agreement, however, did not provide specific schedules that indicated how the parties would achieve those goals, although it did require annual negotiations “setting forth the annual reductions in duties . . . [in] a Common Schedule listing the products.”<sup>27</sup> Despite this lack of definite commitments, the GATT members did not make recommendations and allowed the parties to continue with the agreement’s application.<sup>28</sup> Again, GATT members did not enforce the requirement of a strict plan and schedule to create a CU or FTA within a reason-

---

22. *Id.* at 287. See Agreement Directed to the Re-establishment of a Customs Union, S. Afr.-S. Rhodesia, Dec. 6, 1948, GATT Doc. CP.3/24/Annex (1948) [hereinafter S. Afr.-S. Rhodesia Agreement].

23. Huber, *supra* note 21, at 287.

24. GATT 1994, *supra* note 10, art. XXIV:5(c).

25. Huber, *supra* note 21, at 287–88.

26. *Id.* at 288.

27. Treaty Establishing a Free-Trade Area and Instituting the Latin American Free Trade Association art. 4, Feb. 18, 1960, GATT Doc. L/1157/Rev.1 [hereinafter Montevideo Treaty of 1960].

28. Huber, *supra* note 21, at 288.



able time.<sup>29</sup> Moreover, although the Montevideo Treaty had more definite obligations for trade liberalization than the South Africa-Southern Rhodesian Customs Union interim agreement, it also had a longer period for implementation of the FTA—twelve years—indicating that GATT members might be lenient regarding the “reasonable” length of time requirement if the parties’ obligations for liberalization were more definite.<sup>30</sup>

Third, Huber discussed the New Zealand-Australia Free Trade Area, which included a schedule for trade liberalization of about fifty percent of the trade between the parties.<sup>31</sup> Although the parties did provide for a more definite schedule of tariff liberalization than the two agreements discussed above, some members noted that the plan was not sufficiently definite to liberalize “substantially all” trade because it only covered fifty percent of trade between the parties.<sup>32</sup> The agreement also allowed Australia and New Zealand to “agree that import duties on any scheduled goods . . . be reduced or eliminated over a longer period than” the period provided in the schedule, allowing the parties to delay the movement towards a true FTA if they both agreed to do so.<sup>33</sup> In the context of a multilateral agreement, like the Montevideo Treaty of 1960, such a provision might present fewer concerns about achieving an FTA within a reasonable period since delays could only be based on positive consensus.<sup>34</sup> Because the agreement was bilateral, however, Australia and New Zealand could easily agree

---

29. The ten-year standard for a reasonable length of time would not be agreed to until 1994, Understanding on Article XXIV, *supra* note 20, ¶ 3, however, the parties had recommended a ten-year time frame in their South Africa – Southern Rhodesian Customs Union recommendations. Huber, *supra* note 21, at 287.

30. Montevideo Treaty of 1960, *supra* note 27, art. 2.

31. Huber, *supra* note 21, at 288.

32. *Working Party on New Zealand/Australia Free-Trade Agreement*, ¶ 15, WTO Doc. L/2628 (Apr. 4, 1966) [hereinafter *Report on New Zealand/Australia*].

33. Free Trade Agreement, Austl.-N.Z., art. 4, ¶ 7, Aug. 31, 1965, 554 U.N.T.S. 169.

34. See Paul Krugman, *Regionalism Versus Multilateralism: Analytical Notes*, in CENTRE FOR ECONOMIC POLICY RESEARCH, *NEW DIMENSIONS IN REGIONAL INTEGRATION* 58, 73 (Jaime de Melo & Arvind Panagariya eds., 1993) (noting that regional agreements might be simpler to negotiate because fewer parties are involved).

to postpone liberalization of substantially all trade indefinitely, according to the agreement's text.

In response to questions from several members of whether the agreement was consistent with Article XXIV, Australia and New Zealand argued that

other regional arrangements presented to the GATT had not been judged perfect . . . . The main concern should be not the presentation of a theoretically perfect interim agreement but the consistency of the Agreement with the objectives of Article XXIV and in particular its likely effect on the development of world trade.<sup>35</sup>

Australia and New Zealand's focus on simply liberalizing trade and fueling economic development, notwithstanding the legal requirements of interim agreements, convinced the GATT members to forgo substantive recommendations.<sup>36</sup> The members only recommended Australia and New Zealand "give serious consideration to" agree upon a "sufficiently comprehensive plan and schedule . . . as soon as possible."<sup>37</sup> In short, with respect to the New Zealand-Australia Free Trade Area, GATT members chose to endorse the underlying economic objectives of CUs and FTAs explicit in Article XXIV:4 rather than enforce the textual requirements in Article XXIV:5(c).

Finally, Huber noted that the Agreement on Trade and Commercial Relations between Australia and Papua New Guinea (PATCRA) showed the "inability . . . of GATT to enforce the requirement that a plan and schedule . . . shall be included in [an] interim agreement."<sup>38</sup> The PATCRA was different from the previous three agreements in that Australia and Papua New Guinea presented the agreement as a full FTA upon notification. Even though ninety-five percent of Papua New Guinea exports to Australia lacked tariffs, this amounted to only eighty-two percent of the two-way trade being duty free.<sup>39</sup> The agreement, however, included no plan or schedule

---

35. *Report on New Zealand/Australia*, *supra* note 32, ¶ 17.

36. *Id.* ¶ 18.

37. *Id.*

38. Huber, *supra* note 21, at 289.

39. *Report of the Working Party on the Australia/Papua New Guinea Trade and Commercial Relations Agreement*, ¶ 6, WTO Doc. L/4571 (Oct. 14, 1977) [hereinafter *Report on Australia/Papua New Guinea*].

to liberalize the remainder of trade between the two countries.<sup>40</sup> This led some members of the working party to express doubts about whether the agreement conformed with Article XXIV because: (1) Papua New Guinea was not required to reciprocally liberalize trade; (2) it did not provide for “significant further liberalization”; (3) and it did not contain a plan or schedule.<sup>41</sup> Other members, however, agreed that Australia and Papua New Guinea had in fact already established an FTA. In the end, the Working Party simply recommended that the parties provide a report biennially to the GATT members and clarified “that the Agreement would in no way be considered as affecting the legal rights of contracting parties,” alluding to an understanding that the approval should not be treated as precedential.<sup>42</sup>

Taken together, these four agreements indicate a poor record of GATT members enforcing the textual requirements of interim agreements in Article XXIV. In several instances, GATT members were willing to approve, or tacitly approve, interim agreements without definite schedules or plans to achieve a full CU or FTA within a reasonable period of time. In the GATT era, members seemed content to allow agreements for the prospective trade liberalization even if they did not conform to strict requirements. Nevertheless, members still pressed parties that did not commit to definite timetables in their proposed CUs, FTAs, or interim agreements to do so. Members also consistently asked parties to report regularly on the progress towards the full CU or FTA. Overall, this reflects a leniency in allowing agreements that remove trade restrictions, but also a commitment to continually monitor progress towards liberalizing substantially all trade.

### C. *WTO Practice with Respect to Interim Agreements*

Several developments since the start of the WTO era are relevant to state practice with respect to FTAs and interim agreements under the regime. First, the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (Understanding on Article XXIV) was

---

40. Huber, *supra* note 21, at 289 (noting that waivers had been granted for trade not liberalized by the agreement).

41. *Id.*

42. *Report on Australia/Papua New Guinea*, *supra* note 39, ¶ 19.

agreed upon at the Uruguay Round of negotiations along with the WTO Agreement. It notes that notifications for CUs, FTAs, and their corresponding interim agreements “shall be examined by a working party . . . [which] shall submit a report to the Council for Trade in Goods” that in turn will make recommendations to the WTO members.<sup>43</sup> With respect to interim agreements specifically, the working party may make recommendations on the timeframe proposed by the parties to the interim agreement and on the measures that will be required to complete the formation of the CU or FTA.<sup>44</sup> Furthermore, if the parties to an interim agreement fail to “include a plan and schedule,” the working party will recommend a plan and schedule in its report.<sup>45</sup> Despite this authority to make recommendations, recommendations themselves are not binding, even though the Understanding does include a vague obligation that parties to a proposed CU, FTA, or interim agreement should “not maintain or put into force . . . [an] agreement if they are not prepared to modify it in accordance with these recommendations.”<sup>46</sup>

Second, shortly after the Understanding on the Interpretation of Article XXIV, the Committee on Regional Trade Agreements was created, replacing the role working parties had previously filled in analyzing proposed CUs, FTAs, and interim agreements.<sup>47</sup> Absent consensus to make its own recommendations, the Committee would report to a higher body within the WTO.<sup>48</sup>

To address “ineffectiveness” of the Committee on Regional Trade Agreements, WTO members adopted the Transparency Mechanism for Regional Trade Agreements (Transparency Mechanism), which established more detailed reporting requirements for parties notifying a CU, FTA, or interim

---

43. Understanding on Article XXIV, *supra* note 20, ¶ 7.

44. *Id.* ¶ 8.

45. *Id.* ¶ 10.

46. *Id.*

47. *Committee on Regional Trade Agreements*, ¶ 1, WTO Doc. WT/L/127, (Feb. 7, 1996), <https://perma.cc/6CDJ-6FLQ> (establishing the Committee on Regional Trade Agreements to, among other things, examine proposed CUs, FTAs, interim agreements, and associated reporting requirements).

48. Lorand Bartels, ‘Interim Agreements’ Under Article XXIV GATT, 8 *WORLD TRADE REV.* 339, 341 (2009).

agreement.<sup>49</sup> At the negotiations stage, members are called to “endeavor to . . . inform the WTO” of the negotiations and are required to notify the agreement “before the application of preferential treatment between the parties.”<sup>50</sup> As part of the Transparency Mechanism, parties to notified agreements are also required to provide “information on the RTA, including . . . scope, . . . [and] any foreseen timetable for its entry into force or provisional application” to the Committee on Regional Trade Agreements and the WTO Secretariat, which is to provide the members with a report of that information.<sup>51</sup> The Mechanism also requires parties to “specify under which provision[s] of the WTO agreements [the RTA] is notified” as well as the text of the agreement, related schedules, or annexes that include tariff-line level preferential duties “to be applied over the transition period” if necessary.<sup>52</sup> The Secretariat itself is not allowed to make “value judgements” concerning the notified agreement, but other WTO members may do so at “a single formal meeting . . . devoted to consider each notified RTA [and through] additional exchange of information . . . in written form.”<sup>53</sup>

In practice, these changes in the WTO era had several major impacts on state practice of notification of RTAs and corresponding recommendations. By shifting the heightened reporting requirements to the Secretariat, instead of a working party or committee that can make its own recommendations in some instances, the immediate ability of members not party to the RTA to make recommendations is stifled. Only once the

---

49. *Id.* at 342. A party notifies a regional trade agreement to the WTO by submitting a form to the Committee on Regional Trade Agreements. *See* Committee on Regional Free Trade Agreements, Council for Trade in Services, *Notification of Regional Trade Agreement*, WORLD TRADE ORG. <https://perma.cc/9LQ9-LP8W> (last visited Dec. 6, 2020) (template notification form).

50. *RTA Transparency Mechanism*, *supra* note 17, ¶¶ 1(a), 3.

51. *Id.* ¶¶ 1(b), 2.

52. *Id.* ¶ 4, Annex. The WTO also provides members a Handbook of Notification Requirements for RTAs that identifies the notification requirements. *See* WORLD TRADE ORG., TECHNICAL COOPERATION HANDBOOK ON NOTIFICATION REQUIREMENTS: LEGAL PROVISIONS RELATING TO REGIONAL TRADE AGREEMENTS (RTAs) (Apr. 4, 2021), <https://perma.cc/65WC-SULY>.

53. *See RTA Transparency Mechanism*, *supra* note 17, ¶¶ 9, 11 (proscribing value judgment by the WTO Secretariat and permitting general consideration at a single formal meeting for each notified RTA).

Secretariat has released its report on the notified RTA may members make formal recommendations either in writing or at the formal meeting. This “shifts the onus” to members to challenge a notified RTA they believe either does not or will not meet the requirements of a CU or FTA to do so using the dispute settlement mechanism.<sup>54</sup> Indeed, panels and the Appellate Body have found it appropriate to review the legality of notified agreements under Article XXIV.<sup>55</sup>

Second, these changes also impacted how members notify their agreements. Instead of notifying agreements either as a full CU, full FTA, or a temporary interim agreement, RTAs after the adoption of the Transparency Mechanism are simply notified as CUs or FTAs “pursuant to . . . Article XXIV:7(a) of GATT 1994” with “transition periods” identified in the Annex of the Transparency Mechanism.<sup>56</sup> Even though “virtually none” of the agreements notified meet the requirements of a full CU or FTA, the agreements are not formally notified as “interim agreements” as was the practice in the GATT period.<sup>57</sup> Legal scholar Lorand Bartels argues the U.S.-Chile and E.C.-Chile free trade agreements are examples of such agreements that do not meet the requirements of an FTA upon notification, but are nonetheless treated as such at the time of notification rather than being treated as interim agreements.<sup>58</sup> Upon notifying its RTA, the European Community, for example, claimed the RTA was a “fully fledged FTA” despite a ten year transition period for most products.<sup>59</sup> The U.S.-Chile agreement had an even longer period before substantially all duties were eliminated, but was still notified as a full FTA with a transition period.<sup>60</sup>

---

54. Bartels, *supra* note 48, at 343.

55. *See, e.g.*, Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999) (ruling on a dispute between India and Turkey).

56. Committee on Regional Free Trade Agreements, *supra* note 49.

57. Bartels, *supra* note 48, at 344.

58. *Id.*

59. Committee on Regional Free Trade Agreements, *Examination of the Interim Agreement Between the EC and Chile*, ¶¶ 9–10, WTO Doc. WT/REG164/M/1 (Oct. 6, 2005).

60. Committee on Regional Trade Agreements, *Examination of the Free Trade Agreement between the United States and Chile, Goods and Services*, ¶¶ 4, 9, WTO Doc. WT/REG160/M/1 (Mar. 14, 2005).

As of April 15, 2020, more than 145 agreements that were notified as CUs or FTAs with transition periods and had implementation reports that were due or overdue to the Committee on Regional Trade agreements.<sup>61</sup> The U.S.-Chile agreement is one such notified agreement where the United States claimed that “[a]s of January 1, 2015, all goods originating from the United States enter Chile duty free” yet had not submitted an implementation report as required in the Transparency Mechanism.<sup>62</sup> According to the Committee, this backlog results in continual difficulties in adhering to its work program, including collecting information for the WTO Secretariat to develop their own RTA reports.<sup>63</sup> This in turn inhibits the abilities of members to comment on proposed RTAs and make recommendations.

A third impact of the new notification and reporting requirements, then, has been a large “backlog in the receipt of delayed data and comments.”<sup>64</sup> This is in large part due to the detailed reporting requirements for RTA parties at both the notification stage and thereafter, since they are required to notify “changes affecting the implementation of [the] RTA” and provide “written reports on the realization of the liberalization commitments in the RTA as originally notified.”<sup>65</sup>

Still, the backlog has not prevented some members from recently questioning the legality of notified RTAs or their degree of implementation. The European Union, for instance, has questioned the legality and implementation processes of several notified RTAs. One of these is the 1980 Treaty of Montevideo that created the Latin American Integration Association (LAIA). The European Union has questioned LAIA parties about the more than a dozen bilateral agreements meant to implement the FTA, including specific questions regarding

---

61. Committee on Regional Trade Agreements, *Regional Trade Agreements Subject to Implementation Reports*, 1 tbl.2, WTO Doc. WT/REG/W/148 (May 4, 2020).

62. *Chile Free Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/MQ38-25WZ> (last visited Dec. 1, 2020).

63. Committee on Regional Trade Agreements, *Draft Report (2020) of the Committee on Regional Trade Agreements to the General Council*, ¶ 5.2, WTO Doc. WT/REG/W/153/Rev.1 (Nov.9, 2020).

64. Committee on Regional Trade Agreements, *Report (2020) to the General Council*, ¶ 5.2, WTO Doc. WT/REG/31 (Nov. 23, 2020).

65. *RTA Transparency Mechanism*, *supra* note 17, ¶¶ 14–15.

“preferential agreements” in those treaties.<sup>66</sup> Canada also has sought clarification regarding the MFN clause in the E.U.-Japan Economic Partnership Agreement, for example.<sup>67</sup>

This reaction from several members to notified RTAs may also explain recent practice of members no longer notifying RTAs as interim agreements even if they might have been considered as such in the GATT era. According to the WTO database of preferential trade agreements, there are 496 preferential trade agreements that have been notified to the GATT or WTO.<sup>68</sup> From the perspective of the average WTO member, this presents a dizzying array of complicated agreements to track if a member is to make substantive comments and police the degree to which the RTAs actually conform to Article XXIV requirements. Were a country to notify their agreement as an “interim agreement,” it would essentially highlight that the agreement is being implemented in non-compliance with the requirements of a full CU or FTA, allowing otherwise overwhelmed members an easy target for questioning and comment. Thus, members are less likely to notify their RTAs as interim.

#### D. *Application of State Practice to the U.S.-Japan and Phase One Agreements*

Neither the U.S.-Japan Agreement nor the Phase One Agreement have been notified to the WTO. Applying GATT and WTO law and practice to these agreements may shed light on: (1) whether they should be notified to the WTO; (2) whether they can be plausibly notified as FTAs or interim agreements; and (3) what reaction they might receive if notified.

##### i. *The U.S.-Japan Agreement*

The U.S.-Japan Agreement was signed on October 7, 2019, to “liberaliz[e] market access between” the countries

---

66. Committee on Regional Trade Agreements, *Communication from the European Union*, § 1.1(a), WTO Doc. WT/REG/W/124 (Oct. 30, 2017).

67. Committee on Regional Trade Agreements, *Economic Partnership Agreement Between the European Union and Japan, (Goods and Services): Questions and Replies*, 6, WTO Doc. WT/REG396/2 (Oct. 14, 2019).

68. *RTA Tracker*, WORLD TRADE ORG.: REGIONAL TRADE AGREEMENTS DATABASE, <https://perma.cc/XR49-28Q5> (last visited Dec. 27, 2021).



and to “conclud[e] a high-standard digital trade agreement.”<sup>69</sup> The agreement contains a schedule that eliminates, or substantially reduces, tariffs on some goods in a matter of years depending on the category to which the product belongs. Once the agreement is fully implemented, over ninety percent of U.S. food and agricultural exports to Japan will enter duty-free. The agreement also reduces Japan’s ability to use safeguards against certain U.S. imports. For Japan, the United States also reduced or eliminated tariffs on consumer and industrial goods, such as washers, fasteners, steam turbines, bicycles, and musical instruments.<sup>70</sup>

The scope of the agreement, however, is otherwise relatively limited. The agreement will only eliminate tariffs on \$40 million in U.S. agricultural imports from Japan, less than six percent of the \$767 million in total agricultural imports from Japan that occurred in 2019.<sup>71</sup> Of the thousands of possible tariff lines, the U.S. schedule only covers 241 tariff lines and the Japanese schedule only includes 380 tariff lines at the 7-digit level.<sup>72</sup> Furthermore, other substantive elements of the U.S.-Japan trade relationship are unaddressed in the agreement, including services, government procurement, and other sectoral agreements that are typically part of comprehensive U.S. free trade agreements.<sup>73</sup>

It is clear that the U.S.-Japan agreement is not a full-fledged FTA. In not liberalizing much of the market access between the two countries, especially in terms of most industrial goods, the agreement does not eliminate barriers on “substantially all the trade” between the U.S. and Japan.<sup>74</sup> This is also

---

69. *Fact Sheet on U.S.-Japan Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/VX9X-BH6L> (last visited Dec. 1, 2020).

70. *Id.*

71. *Id.*; *Japan*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/6SC8-XV2U> (last visited Dec. 1, 2020).

72. The 7-digit level refers to product codes according to the Harmonized System administrated by the World Customs Organization. *See What’s an HS or HTS Code?*, DESCARTES, <https://perma.cc/C5L7-UVFU> (last visited Dec. 2, 2021) (explaining how Harmonized System codes work).

73. *See, e.g., KORUS FTA Final Text (as of January 1, 2019)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/RLG5-LXQC> (last visited Dec. 2, 2020) (containing links to the text of the Korean – U.S. FTA agreement, which addresses trade in services and government procurement, among other areas).

74. GATT 1994, *supra* note 10, art. XXIV:8(b).

true because “restrictive regulations of commerce” other than duties are largely unaddressed in the agreement.<sup>75</sup> Were the U.S. to notify the agreement to the WTO, thus claiming it is a full FTA, other WTO members may step in and challenge the agreement either within the context of the Committee on Regional Trade Agreements or by requesting consultations at the Dispute Settlement Body (DSB), initiating a dispute along the lines of *Turkey — Textiles*.<sup>76</sup> Moreover, to do so, the United States would have to alter its own opinion on whether the agreement is a full FTA, since it does not list the agreement on its official list of free trade agreements.<sup>77</sup> Designation as a full FTA, then, is unlikely.

It is less clear whether the U.S.-Japan Agreement could be styled as an “interim agreement.” The agreement has a definite timeline and schedule for the goods it includes and, perhaps reflecting the requirement in the Understanding on Article XXIV that implementation periods “should rarely exceed ten years,” the longest period to eliminate or reduce duties for the United States in the agreement is ten years.<sup>78</sup> For all but a small subset of goods, products in Japan’s schedule have duties that will be reduced or eliminated in ten years or less.<sup>79</sup> The exceptions are subcategories of animal products—eggs, meat, and milk whey—whose duty reduction or elimination periods can last up to twenty years in Japan’s schedule.<sup>80</sup> Still, having schedules with implementation periods longer than ten years was not unprecedented in the GATT era, when members allowed the application of the Montevideo Treaty of 1960 that

---

75. *Id.*

76. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 21, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999).

77. *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/T8X4-T3HG> (last visited Dec. 2, 2020).

78. Understanding on Article XXIV, *supra* note 20, ¶ 3; Trade Agreement, Japan-U.S., Annex II, at 1, Oct. 7, 2019, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/G5KL-TWDJ> (last visited Dec. 27, 2021) (containing links to text of the agreement and its annexes and side letters, including the link to “Annex 2 Tariffs and Tariff-Related Provisions of the U.S.” in which the ten-year provision can be found).

79. *See* Trade Agreement, Japan-U.S., *supra* note 78, Annex I, at I-B-2-8 to 9 (providing only four subcategories of goods whose tariffs will be eliminated over more than ten years).

80. *Id.* Annex I, at I-B-5-1, I-B-5-10 to 11, I-B-5-13.

had an implementation period of twelve years.<sup>81</sup> Schedules with full implementation periods longer than ten years in the WTO era are also not unheard of. For instance, the U.S.-Korea Free Trade Agreement has full tariff implementation periods of fourteen years for the United States and seventeen years for Korea, although arguably both countries liberalized substantially all trade in ten years.<sup>82</sup> In terms of the implementation period of the schedule as it exists in the agreement, then, there is support for the U.S.-Japan agreement for classification as an interim agreement.

Still, there is a clear distinction between the comprehensive and all-encompassing list of goods in the U.S.-Korea Free Trade Agreement and the relatively limited scope of the products included in the U.S.-Japan Agreement. First, there is a clear imbalance in the commitments to trade liberalization. Japan made significantly more commitments to reduce tariffs than did the United States, perhaps because of an unspoken agreement that the United States would not impose duties on Japanese exports of automobiles.<sup>83</sup> This imbalance, too, is not entirely unprecedented considering the imbalance in trade liberalization in the PACTRA between Australia and Papua New Guinea. Nevertheless, most preferential trade agreements with similar imbalances in trade liberalization commitments are notified, not as CUs or FTAs under Article XXIV, but under the Enabling Clause to give least developed countries market access for development purposes.<sup>84</sup> That is clearly not the case with the United States and Japan.

Aside from the imbalance, the agreement's schedule simply does not contemplate substantially all, or even a sizeable

---

81. Montevideo Treaty of 1960, *supra* note 27, art. 2.

82. See Committee on Regional Trade Agreements, *Factual Presentation: Free Trade Agreement Between the United States and the Republic of Korea*, 10, WTO Doc. WT/REG311/1 (Sept. 1, 2014) (showing that Korea and United States liberalized substantially all trade between them from 2012 to 2021).

83. See David Lawder & Jeff Mason, *U.S., Japan Sign Limited Trade Deal, Leaving Autos for Future Talks*, REUTERS, Sept. 25, 2019, <https://perma.cc/Y5PQ-PJ7C> ("Although the agreement does not cover trade in autos, Abe said he had received reassurances from Trump that the United States would not impose previously threatened 'Section 232' national security tariffs on Japanese car imports.").

84. See, e.g., Stephan Klasen et al., Comm. for Dev. Pol'y, *Trade Preferences for Least Developed Countries. Are They Effective? Preliminary Econometric Evidence*, CDP POL'Y REV. SERIES, Oct. 2016, at 1.

fraction, of the massive amount of trade between the United States and Japan. The United States is Japan's top trading partner and Japan is the United States' fourth largest trading partner; however, the agreement leaves billions of dollars in trade between the two countries untouched.<sup>85</sup> Indeed, the United States admits that it "looks forward to further negotiations with Japan for a comprehensive agreement," indicating that perhaps additional sectors will be added to a second agreement.<sup>86</sup> In terms of precedent from the GATT era, then, the level of definite liberalization in the U.S.-Japan Agreement's schedule lies somewhere between the South Africa-Southern Rhodesian Customs Union with a lack of any definite commitments to liberalize trade, and the New Zealand-Australia Free Trade Area, which liberalized about fifty percent of the trade in goods between the parties.<sup>87</sup> In both cases, the GATT parties did approve of the agreements; however, the GATT parties also recommended the parties to those agreements commit to more definite and more comprehensive schedules, respectively.

This prior practice suggests some precedent for the United States to notify the non-comprehensive U.S.-Japan Agreement as an "interim agreement," at least according to GATT practice. However, if the United States were to notify the agreement, it should prepare to face recommendations that it develop a more comprehensive schedule to liberalize a much greater percentage of trade with Japan. This might even occur over a highly accelerated timeframe that might be difficult for the United States and Japan to achieve given the complex and sensitive nature of the trade relationship.<sup>88</sup> On the other hand, since most WTO agreements notified by both of

---

85. *Foreign Trade*, U.S. CENSUS BUREAU (Dec. 10, 2021) <https://perma.cc/GQL6-ESGN>.

86. *Fact Sheet on U.S.-Japan Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/96SA-AC45> (last visited Dec. 1, 2020).

87. S. Afr.-S. Rhodesia Agreement, *supra* note 22; *Report on New Zealand/Australia*, *supra* note 32.

88. See C. FRED BERGSTEN ET AL., INST. FOR INT'L ECON., NO MORE BASHING: BUILDING A NEW JAPAN-UNITED STATES ECONOMIC RELATIONSHIP 125 (2001) (noting that both tariff and nontariff barriers to trade remain to be negotiated between the United States and Japan); see also Mathew P. Goodman et al., *The U.S.-Japan Trade Deal*, CSIS (Sept. 25, 2019), <https://perma.cc/R25R-474B> (explaining that the 2019 trade deal between the United States and Japan, while significant, is "limited in scope" and does not meet WTO requirements).

these parties have much more comprehensive schedules, other WTO members might point to those agreements to argue the U.S.-Japan agreement is not an “interim” agreement as it now exists.<sup>89</sup>

Finally, the fact that neither the United States nor Japan have notified the agreement to the WTO yet, despite signing it in late 2019, might caution against notification now. Members are to “endeavor to . . . inform the WTO” of agreements at the start of negotiations and are required to notify the agreement to the WTO before preferential treatment goes into effect.<sup>90</sup> Since the United States and Japan have allowed the agreement to go into effect without notifying it, other WTO members could argue that the agreement does not now deserve protections against MFN derogation because neither party offered other members transparency into the agreement. Through this estoppel-like argument, then, the agreement’s non-notification might favor the conclusion that it is not an “interim” agreement.

In sum, there is some precedent for parties notifying similarly indefinite interim agreements while also signaling their plans to continue negotiations. However, this precedent is limited. Were the United States and Japan to do so, it would likely elicit strong reactions from other WTO members in the context of the Committee on Regional Trade Agreements. However, it is unclear whether members would recommend the United States and Japan end the agreement. Instead, other members would likely opt to recommend the United States and Japan quickly negotiate a more comprehensive agreement. A request for consultations at the DSB to challenge the legality of the agreement itself is also possible.

---

89. See, e.g., World Trade Org., *Japan*, REGIONAL TRADE AGREEMENTS DATABASE (Dec. 4, 2020), <https://perma.cc/68QH-EFYT> (containing links to the texts of the India – Japan, Japan – Australia, and Japan – Chile RTAs and their respective comprehensive schedules); World Trade Org., *United States of America*, REGIONAL TRADE AGREEMENTS DATABASE (Dec. 4, 2020), <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?membercode=840> (containing links to the texts of the Korea – United States, United States – Australia, and United States – Chile RTAs and their comprehensive schedules).

90. *RTA Transparency Mechanism*, *supra* note 17, ¶¶ 1(a), 3.

ii. *The Phase One Agreement*

On January 15, 2020, the United States and China signed the Phase One Agreement, an agreement that put a pause on an escalating trade war.<sup>91</sup> In April 2018, the United States announced tariffs on \$50 billion in Chinese imports in reaction to what it called “unfair” intellectual property practices.<sup>92</sup> In response, China announced its own \$50 billion tariff list, to which the United States responded with a \$200 billion tariff list on imports from China.<sup>93</sup> When both sides announced pauses to the tariff expansions in anticipation of the Phase One Agreement, both parties had announced plans to increase the rates of their existing tariffs and the United States had announced plans to place tariffs on almost all remaining imports from China.<sup>94</sup>

In the agreement, China commits to reforms in “the areas of intellectual property, technology transfer, agriculture, financial services, and currency and foreign exchange.”<sup>95</sup> China also agreed that it would increase its purchase of U.S.-manufactured goods, agricultural products, energy products, and financial services by \$200 billion over two years to redress what the United States argues is a severe trade imbalance between the two countries.<sup>96</sup> Unlike the U.S.-Japan Agreement, the Phase One Agreement does not contemplate trade liberalization in the form of reducing or eliminating tariffs. In fact, the agreement does nothing to address the hundreds of billions in tariffs that escalated leading up to it, as many of these tariffs remained in effect.<sup>97</sup>

---

91. Economic and Trade Agreement, China-U.S., Jan. 15, 2020, <https://perma.cc/PH69-8SK5>.

92. BOWN & KOLB, *supra* note 3, at 8.

93. *Id.* at 8–11.

94. *Id.* at 8–13.

95. *United States and China Reach Phase One Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Dec. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach>.

96. OFFICE OF THE U.S. TRADE REPRESENTATIVE, ECONOMIC AND TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE’S REPUBLIC OF CHINA FACT SHEET: EXPANDING TRADE (Jan. 15, 2020) <https://perma.cc/FDG4-K46J>.

97. See Reuters Staff, *What’s in the U.S.-China Phase 1 Trade Deal*, REUTERS, Jan. 15, 2020, <https://perma.cc/S6SW-U2J9> (noting that “U.S. tariffs of 25%

To resolve disputes concerning the agreement, each party may appeal what they believe to be violations to the newly formed Bilateral Evaluation and Dispute Resolution Offices of the party with the alleged violations.<sup>98</sup> The USTR and a Vice Premier in the Chinese government may step in to negotiate a resolution to an alleged violation if the offices are unable to resolve the dispute.<sup>99</sup> Absent a negotiated resolution, a complaining party may act by “suspending an obligation under this Agreement or by adopting a remedial measure[.]” to which the alleged violator “may not adopt a counter-response” other than withdrawing from the entire agreement if it believes the complaining party adopted the remedial measures in bad faith.<sup>100</sup>

The Phase One Agreement is certainly neither a full RTA nor is it an “interim agreement” to create one. The only connection the agreement has with prior practice might be the South Africa-Southern Rhodesia Customs Union, although even this comparison is attenuated. Neither agreement has a comprehensive schedule to liberalize trade, but at least the Customs Union agreement contemplates trade liberalization. In contrast, the Phase One Agreement only seeks to remedy what one party deems unfair trade practices by requiring the other party to adopt measures that ultimately run afoul of MFN and prohibitions in the Safeguards Agreement on “orderly marketing arrangements . . . on . . . the import side,” including “compulsory import cartels.”<sup>101</sup>

Thus, because the aim of the Phase One Agreement is not to liberalize trade between the United States and China and leaves in place highly restrictive unilateral tariffs, it cannot, in good faith, be considered either an RTA or an interim agreement. In the unlikely event that it is notified as such, other WTO members would immediately challenge it, both in the

---

on \$250 billion worth of Chinese goods . . . will remain immediately unchanged.”).

98. Economic and Trade Agreement, China-U.S., art. 7.4, ¶ 1, Jan. 15, 2020, <https://perma.cc/92Q8-7CGU>.

99. *Id.* art. 7.4, ¶ 4(a).

100. *Id.* art. 7.4, ¶ 4(b).

101. Agreement on Safeguards art. 11, ¶ 1(b) & n.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994).

context of the Committee on Regional Trade Agreements and probably at the DSB.

### III. WAIVERS FOR DEROGATION OF WTO COMMITMENTS

While there is a plausible path for the U.S.-Japan Agreement to be notified as an interim agreement with more substantive negotiations to immediately follow, the Phase One Agreement cannot be notified as such in good faith. Another option for both of these agreements would be to receive a waiver from the other WTO members to address the degree to which the agreements violate MFN and obligations in the Safeguards Agreement.

#### A. *Legal Text and State Practice under the GATT and WTO*

According to Article XXV:5 of the GATT,

In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.<sup>102</sup>

Because the power to bestow waivers for obligations was given to a two-thirds majority of members voting, analysis of whether a member might receive a waiver is inherently political.<sup>103</sup> Aside from the voting requirements for a waiver, seemingly, the only other legal requirements for waivers were that they are requested for “exceptional circumstances not elsewhere provided for in this Agreement.”<sup>104</sup> Still, these legal re-

---

102. GATT 1994, *supra* note 10, art. XXV:5.

103. See *Members and Observers*, World Trade Org. (July 29, 2016), <https://perma.cc/UER2-8PV5> (demonstrating that the granting of a waiver must be political since a state must solicit a 2/3 majority from a large volume of states, which inherently implicates foreign policy and politics).

104. GATT 1994, *supra* note 10, art. XXV:5; see also Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶¶ 380–83 WTO Doc. WT/DS27/AB/RW2/ECU (adopted Dec. 11, 2008) [hereinafter *EC—Bananas III (Ecuador)*] (discussing the requirements for requesting, issuing, and interpreting a waiver under GATT); *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 of the DSU*



quirements are interpreted by the parties themselves upon the request of a waiver by a WTO member since they are the ones voting.<sup>105</sup>

There are several instances of state practice that illuminate the “exceptional circumstances” requirement. Greece, for instance, requested a waiver from its MFN obligations in 1970 to give the USSR better market access.<sup>106</sup> This was part of a bilateral agreement between the two countries meant to counter greater market access between Greece and the European Economic Community.<sup>107</sup> In reaction, a working party claimed that the request raised “precedent . . . of utmost importance” but that members “were not convinced that exceptional circumstances as required under Article XXV:5 existed.”<sup>108</sup> Greece, therefore, was denied a waiver.<sup>109</sup> In a separate instance, the United States’ request for a waiver to give certain countries preferential treatment via the Caribbean Basin Economic Recovery Act of 1983, also implicated the requirement of exceptional circumstances. The United States claimed the “economic recovery of the fragile economies of the region” qualified as an exceptional circumstance allowing it to derogate from MFN by giving certain countries preferential treatment.<sup>110</sup> The United States received a waiver to do so.

Perhaps the most significant waiver granted during the GATT era was for the European Coal and Steel Community in 1952. The Community eliminated trade barriers on steel and

---

by the United States, ¶¶ 380–83, WT/DS27/AB/RW/USA (adopted Dec. 22, 2008) [hereinafter *EC—Bananas III (U.S.)*] (same).

105. GATT 1994, *supra* note 10, art. XXV:5 (suggesting that a vote is enough to meet all legal requirements for a waiver by providing that contracting parties can cause a waiver by a two-thirds majority of votes cast).

106. WORLD TRADE ORG., ANALYTICAL INDEX OF THE GATT 885–87, <https://perma.cc/3CBE-TQ7E>.

107. *See id.* (explaining that the EEC-Greece Association Agreement provided tariff reductions for EEC product imports, thus putting USSR imports at a disadvantage).

108. *Id.*

109. *See id.* (quoting the Working Party Report which concluded that Greece’s bilateral agreement with the USSR did not constitute an “exceptional circumstance” and noting that the Greek waiver request was one of two not granted by the WTO).

110. *Id.*; *see also* Council for Trade in Goods, *Request for a Waiver: Caribbean Basin Economic Recovery Act*, 3, WTO Doc. G/C/W/508/Add.1 (Mar. 17, 2005), (*granting waiver to Caribbean nations due to exceptional circumstances*).

coal between its members but would not meet the requirements of a full customs union for several decades. Therefore, it required a waiver from its MFN obligations that would otherwise require it to provide the same market access to other GATT members. The six members proposed that the Community would “benefit not only the member States but all” GATT members by increasing the supply of steel and coal outside the Community and by increasing demand for certain goods within the community.<sup>111</sup> The members would achieve this by harmonizing regulatory schemes and by avoiding placing export barriers on coal and steel to non-members.<sup>112</sup>

Geopolitics played a significant role in the waiver process for the Community. Czechoslovakia, then part of the Soviet bloc, strongly opposed the waiver, arguing management of the military materials of coal and steel violated GATT principles of “peaceful co-operation among nations with different economic systems.”<sup>113</sup> The United States was also initially opposed because the European states had argued the GATT lacked the ability to prevent the members from forming the Community, presenting a meaningful threat to the authority of the young institution.<sup>114</sup> Eventually, the United States and twenty-six other GATT members voted for the Community’s waiver, in part to encourage European unity, and in part because they “had little choice over whether or not to accept the [Community].”<sup>115</sup> Indeed, the Belgian ambassador spoke of the waiver as a forgone conclusion, mainly because the GATT could not afford to allow six of its significant members to openly flout its rules, a situation the French ambassador called “perilous.”<sup>116</sup>

When the GATT members signed the Marrakesh Agreement creating the WTO in 1994, they raised the threshold for

---

111. Press Release, European Office of the United Nations, *Note on the Waivers Granted by the Contracting Parties to the Six Member Countries of the European Coal and Steel Community*, 1, GATT Doc. Press Release GATT/102 (Nov. 10, 1952).

112. *Id.* at 2.

113. See Francine McKenzie, *The GATT—EEC Collision: The Challenge of Regional Trade Blocs to the General Agreement on Tariffs and Trade, 1950–67*, 32 INT’L HIST. REV. 229, 232 (quoting Czech representative Dr. Karel Svec’s argument in opposition to the waiver).

114. *Id.* at 232–33.

115. *Id.* at 233.

116. *Id.* at 232–33.

WTO members to receive waivers from their obligations. First, as part of the WTO Agreement, they signed the Understanding in Respect of Waivers of Obligations Under the GATT. This Understanding requires members making “a request for a waiver” to describe their policy objectives and the reasons why they cannot achieve those objectives using measures consistent with the GATT.<sup>117</sup> Moreover, the Understanding allows members who believe their benefits are being impaired because the waiver recipients are failing to observe the terms of the waiver to pursue dispute settlement.<sup>118</sup> Article IX of the WTO Agreement also raised the voting threshold to three fourths of the WTO Ministerial Conference in which each WTO member has one vote. In practice, however, waivers essentially require consensus. Although it might be possible for a waiver to survive a handful of negative votes, one member may be able to block the waiver if it is able to form a large enough group of waiver opponents through “power-based” bargaining.<sup>119</sup> In addition, Article IX:4 also requires that a member requesting a waiver state when it will terminate, ensuring they do not continue indefinitely.<sup>120</sup>

Waivers granted pursuant to Article IX of the WTO Agreement are reported each year in the WTO’s Annual Reports. A survey of various reports reveal that the waivers granted largely fall into four categories: (1) waivers for countries that have not yet introduced changes from the latest version of the Harmonized System into their schedules;<sup>121</sup> (2) waivers for protection

---

117. Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994 ¶ 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1867 U.N.T.S. 228, (1994) [hereinafter Understanding on Waivers].

118. *Id.* ¶ 3.

119. Cf. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 341 (2002) (defining “power-based” bargaining as a set of strategies based on power extrinsic to procedural rules, instruments primarily based on market size).

120. *EC—Bananas III (Ecuador)*, *supra* note 104, ¶ 380 (explaining that Article XI:4 requires that waivers only be granted for a limited period of time); *EC—Bananas III (U.S.)*, *supra* note 104, ¶ 380 (same).

121. See, e.g., WORLD TRADE ORG., ANNUAL REPORT 61 tbl.1 (2019), <https://perma.cc/5ZTU-F5DM> (four of five waiver decisions related to the introduction of Harmonized System changes).

of agricultural staples for food security;<sup>122</sup> (3) preferential treatment schemes for least-developed countries;<sup>123</sup> and (4) extension of waivers secured during new member's accession processes.<sup>124</sup>

B. *Waiver Prospects for the U.S.-Japan and Phase One Agreements*

Turning first to the U.S.-Japan Agreement, it seems unlikely that the United States and Japan could convince three fourths of WTO members to approve a waiver that would allow the derogations from MFN in the agreement, especially based on law and practice. First, the schedule in the agreement that contemplates tariff reductions in perpetuity directly conflicts with the requirement for members to seek waivers only for definite periods.<sup>125</sup> Moreover, there are no conventional “exceptional circumstances” the United States or Japan could claim to justify the waiver. In reality, the potential for U.S. tariffs on Japanese auto exports may indeed have been exceptional circumstances for Japan to bring it to the negotiating table. However, neither Japan nor the United States need the agreement for economic development reasons, at least in a manner that would constitute “exceptional circumstances” according to state practice.

---

122. See, e.g., WORLD TRADE ORG., ANNUAL REPORT 48 tbl.1 (2015), <https://perma.cc/S84W-MCHQ> (providing waiver to the Philippines to protect Filipino rice industry); see, e.g., General Council, *Decision on Waiver Relating to Special Treatment for Rice of the Philippines*, WTO Doc. WT/L/932 (July 24, 2014) (temporarily allowing the Philippines to impose tariffs and quotas on rice imports in noncompliance with WTO covered agreements).

123. See, e.g., *id.* at 47–48 & tbl.1 (in addition to granting waiver for Filipino rice industry, also reviewing multi-year preferential treatment for “least-developed countries”).

124. See, e.g., WORLD TRADE ORG., ANNUAL REPORT 31–33 & tbl.1 (2010), <https://perma.cc/F9AG-7WG9> (discussing China's protocol of accession); see, e.g., General Council, *Mongolia—Export Duties on Raw Cashmere*, WTO Doc. WT/L/695 (adopted July 27, 2007) (extending a ten-year waiver on the elimination of Mongolia's export duty on raw cashmere by another five years, considering the economic benefits and Mongolia's existing reform efforts). The WTO maintains a full list of waivers granted between 1995 and 2015. General Council, *Note by the Secretariat: Waivers 1995–2015*, WTO Doc. WT/GC/W/718 (June 27, 2016).

125. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. IX:4, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) (requiring waivers to have a definite date of termination and requiring periodic review for waivers granted for a period of more than one year).

Nevertheless, many observers would claim the multilateral trade system is currently experiencing exceptional circumstances. The impasse at the AB has eliminated effective legal resources in trade disputes for nearly a year. The United States and China are currently flouting WTO rules by imposing unilateral tariffs on each other as part of a multi-year trade war.<sup>126</sup> Japan, too, is flouting the rules by giving the United States preferential market access as part of the U.S.-Japan Agreement.<sup>127</sup> These blatant violations are similar to those threatened by the European Community members, who eventually received a waiver.<sup>128</sup> It is plausible, then, that three quarters of the WTO members could find that exceptional circumstances exist and negotiate a waiver that restores some legitimacy to the WTO. Such a waiver could also be used as leverage against Japan and the United States to encourage future compliance or commitment to negotiating a comprehensive FTA.

Still, the three-fourths voting threshold to receive a waiver is a high bar. Several constituencies of WTO members have reason to oppose the agreement. The European Union, with its own comprehensive trade agreement with Japan, stands to lose out on market access to Japan due to increased competition. Other members of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP) are in the same situation, especially in some agriculture and foods sectors.<sup>129</sup> Least-developed and developing members, often the greatest beneficiaries of waivers, also stand to lose out if the definition of “exceptional circumstances” expands to cover the U.S.-Japan Agreement. Thus, although there may exist exceptional circumstances that warrant a waiver, economic interests

---

126. See BOWN & KOLB, *supra* note 3 (reporting a number of retaliatory tariffs between the United States and China).

127. See Mark Linscott, *The US-Japan Trade Deal Could Undermine the WTO*, ATLANTIC COUNCIL (Oct. 22, 2019), <https://perma.cc/FR2F-2UGB> (explaining the threat the agreement poses to the WTO and the MFN principle).

128. See McKenzie, *supra* note 113, at 232 (noting the “Europeans denied that the GATT could hold its members to their GATT obligations”).

129. See *Fact Sheet on U.S.-Japan Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/RZ8A-DYBQ> (last visited Dec. 1, 2020) (explaining that American farmers will have the same advantage as CP-TPP countries selling into the Japanese market once Japan implements the agreement).

of other members with respect to the U.S.-Japan Agreement will make a waiver difficult.

Prospects for a waiver for the Phase One Agreement seem more promising. The same “exceptional circumstances” discussed above with respect to the multilateral trading system also apply to the Phase One Agreement, if not more so. The United States and China have fundamental economic differences that have not only stalled several rounds of WTO negotiations, but have also led to a massive trade war. Even if it violated WTO obligations, at least the Phase One Agreement put a pause to the escalation of a trade war. Perhaps, in an effort to appease the United States and end these disruptions, enough WTO members could be convinced to approve a waiver for the Phase One Agreement in a manner similar to the Steel and Coal Community. After all, unlike the U.S.-Japan Agreement, the Phase One Agreement only calls for preferential access for two years, with only one year remaining.

Moreover, with China’s limited realizations of the purchasing targets in the past year,<sup>130</sup> other members may not lose the level of relative market access that they expected when the agreement was signed. Despite concerns about Chinese market access from members like Canada and Australia, it is nevertheless plausible that a sufficient number of WTO members could vote to give China and the United States a waiver.<sup>131</sup> Indeed, in addition to leverage over an international institution-conscious Biden Administration, such a waiver would be a goodwill gesture to the Administration to decide its trade strategy with respect to both China and Japan and to give it time to pick up the pieces left by the previous Administration.<sup>132</sup> On the other hand, if other WTO members sense the

---

130. Chad P. Bown, *US-China Phase One Tracker: China’s Purchases of US Goods*, PETERSON INS. FOR INT’L ECON. (Nov. 24, 2021), <https://perma.cc/5B6Y-XLKP>.

131. See Robert Feenstra & Chang Hong, *China’s Import Demand for Agricultural Products: The Impact of the Phase One Trade Agreement*, VoxEU CEPR, (July 25, 2020), <https://voxeu.org/article/impact-phase-one-trade-agreement#:~:text=IN%20December%202019%2C%20the%20US,billion%20in%202020%20and%202021.&text=such%20subsidies%20would%20divert%20agricultural,imports%20from%20Australia%20and%20Canada> (“Such subsidies would divert agricultural imports away from other countries, especially decreasing China’s imports from Australia and Canada.”).

132. See Swaha Pattanaik, *Breakingviews - WTO Is Early Test of Joe Biden’s Multilateralism*, REUTERS, Nov. 9, 2020, <https://perma.cc/6JS4-N8V3> (“The good-

Biden Administration is not supportive of China's purchase requirements, they are unlikely to offer a goodwill gesture to waive the commitments.<sup>133</sup>

Another obstacle for an approved waiver is the requirement that China itself must request it, since it is China's measures that derogate from its obligations.<sup>134</sup> It does not appear that China would want to use its own political clout to secure measures that primarily benefit the United States, especially because it only agreed to those measures to end the trade war between the two countries.<sup>135</sup> The Phase One Agreement's relatively weak enforcement mechanisms combined with the low likelihood that China will meet its purchasing obligations,<sup>136</sup> signals China's limited commitment to the agreement. It is possible that China could condition its seeking of a waiver on the abandonment of the purchasing commitments in the Phase One Agreement, since those elements of the agreement flagrantly violate WTO rules. Thus, much like the U.S.-Japan Agreement, it seems somewhat unlikely that the Phase One Agreement will receive a waiver from the WTO Ministerial Conference.

---

will that a more collegial approach will generate could help Biden get more of what the United States wants than his predecessor achieved.”).

133. *Cf.*, Thomas L. Friedman, *Biden Made Sure 'Trump Is Not Going To Be President for Four More Years,'* N.Y. TIMES (Dec. 2, 2020), <https://perma.cc/E6JM-QQ4H> (noting that Biden said his administration “would not act immediately to remove the 25 percent tariffs that Trump imposed on about half of China's exports to the United States – or the Phase 1 agreement Trump inked with China that requires Beijing to purchase some \$200 billion in additional U.S. goods and services during the period 2020 and 2021 – which China has fallen significantly behind on”).

134. *See* Understanding on Waivers, *supra* note 117, ¶ 1 (requiring that waiver requests set out policy objectives of the member seeking waiver and the reasons the member cannot achieve its policy objectives); *see also* ANALYTICAL INDEX OF THE GATT, *supra* note 106, at 883–85 (describing procedure to apply for waiver).

135. *See* Reuters Staff, *supra* note 97 (noting how the agreement calls for cuts to U.S. tariffs in exchange for Chinese purchase commitments).

136. *See* Bown, *supra* note 131 (explaining how China has thus far consistently fallen short of its Phase One targets).

#### IV. PROSPECTS FOR THE AGREEMENTS IN THE BIDEN ADMINISTRATION

Aside from a plausible argument that the U.S.-Japan Agreement could be notified under Article XXIV and some possibilities for waivers, the options for the two agreements are somewhat limited for the Biden Administration. Moreover, the status of either agreement exists in a larger framework of relations, economic and otherwise, with both China and Japan. For China, the status of the Phase One Agreement is intertwined with issues such as human rights in Xinjiang and Hong Kong, climate change, and now Afghanistan, each of which are likely to receive more attention in the Biden Administration.<sup>137</sup>

The Biden Administration's initial treatment of both of these agreements offers some insight as to whether they might officially be deemed interim agreements or receive waivers.<sup>138</sup> President Biden has not removed the tariffs on Chinese imports, escalation of which precipitated the Phase One Agreement. In fact, the Administration has ended many of the tariff exemptions that previously existed, magnifying the impact of the tariffs on American companies.<sup>139</sup> The Administration has also kept in place the Phase One Agreement. The new U.S. Trade Representative Katherine Tai has also indicated that the Phase One Agreement will serve as the basis for future negotiations between China and the United States.<sup>140</sup> Whatever remains of a negotiating framework from the soon-to-expire Phase One Agreement will need to be balanced with Biden's

---

137. See, e.g., Michael J. Green & Gabriel Scheinmann, *How Biden Can Save His China Strategy After Afghanistan*, FOREIGN POLICY (Aug. 25, 2021, 11:24 AM), <https://perma.cc/E5SN-7SML> (arguing that the withdrawal from Afghanistan pulled attention and resources away from the administration's pivot toward countering China).

138. See Friedman, *supra* note 134 (providing Biden's December 2020 comments on China and the Phase One Agreement).

139. See David J. Lynch, *Biden Keeps Many Trump Tariffs in Place, Confounding Businesses Hoping for Reprieve*, WASH. POST (Aug. 17, 2021, 9:37 AM), <https://perma.cc/X7WP-7CFN> (detailing how companies that lost their tariff exemptions have had thinner profits and been forced to quickly find new suppliers outside of China).

140. David Lawder & Andrea Shalal, *U.S., China To Assess Phase 1 Deal Soon, Biden Trade Chief Says*, REUTERS, May 5, 2021, <https://www.reuters.com/business/us-trade-chief-expects-engage-china-near-term-phase-1-deal-2021-05-05/>.



aim of “develop[ing] a coherent strategy” in consultation with allies in Asia and Europe.<sup>141</sup> Those consultations—with allies potentially losing out on Chinese market share—are likely to caution against inclusion of purchase requirements in future U.S.-China agreements. Still, the prospect of continuing the practice of purchase requirements does offer Biden some leverage in these discussions, especially because the current impasse at the AB denies members the ability to effectively challenge the Phase One Agreement’s legality. This “leverage,” a word Biden emphasized in interviews concerning his trade strategy, might prove vital in rallying a coalition of trading partners to develop remedies against Chinese policies to which the United States objects.<sup>142</sup>

In terms of the future of the U.S.-Japan Agreement, any approach will need to reflect the importance and closeness of the U.S.-Japan relationship. For example, it may not send positive diplomatic signals to Japan were the United States to pull out of the agreement, even if the text of the agreement may allow the United States to do so at any time.<sup>143</sup> Furthermore, amidst the passage of the CP-TPP without the United States and the recent signing of the Regional Comprehensive Economic Partnership (RCEP), bilateral trade relations with Japan are particularly important to ensure the United States is not shut out of the region.<sup>144</sup>

As noted above, the U.S.-Japan Agreement is by no means a comprehensive trade agreement. The United States has already claimed it “looks forward to further negotiations with

---

141. See Friedman, *supra* note 134 (explaining that Biden wants to review the existing agreement with China and consult with U.S. “traditional allies in Asia and Europe” to develop a coherent strategy).

142. See *id.* (“When dealing with China, Biden concluded, it is all about ‘leverage,’ and ‘in my view, we don’t have it yet.’”).

143. Trade Agreement, Japan-U.S., art. 10, Oct. 7, 2019, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/C8XG-3TGP> (last visited Dec. 27, 2021) (providing that either party may submit written notice of termination at any time, with termination to be effective four months after the date of notice).

144. See Amy Gunja, *Why the U.S. Could Be the Big Loser in the Huge RCEP Trade Deal Between China and 14 Other Countries*, TIME (Nov. 17, 2020) <https://time.com/5912325/rcep-china-trade-deal-us/> (discussing how the RCEP Trade Deal is a “clear market of both China’s power and waning American influence in the Asia-Pacific region”).

Japan for a comprehensive agreement.”<sup>145</sup> Japan has expressed its desire for the United States to rejoin the CP-TPP, from which the Trump Administration backed away in 2017.<sup>146</sup> So far, however, the Biden Administration has indicated it will not rejoin the CP-TPP without stronger labor and environmental policies.<sup>147</sup> Instead of joining the CP-TPP, which would require balancing U.S. interests against the interests of eleven other countries, perhaps the United States and Japan could begin negotiations toward a deeper bilateral trade agreement. For the United States, this would not only deepen a trade relationship with a key partner in Asia, but would also defend the existing U.S.-Japan Agreement from challenges that it improperly derogates from MFN. If, for example, the United States and Japan set out an ambitious timetable to further reduce unnecessary barriers to trade, then claims by WTO members that the U.S.-Japan Agreement does not contemplate a full FTA become weaker. This may be enough to guard the agreement from challenges at the WTO while also strengthening a key trading relationship in Asia. Were the United States and Japan to eventually agree on comprehensive schedules, they could then notify an agreement to the WTO as an official FTA. This, however, is still a tall order considering a comprehensive agreement would need permission from Congress and political economy concerns could ensnare an agreement that seeks to remove protectionist barriers to trade. Presenting another hurdle, Trade Promotion Authority also expired in July 2021, which would have allowed the Biden Administration to submit a negotiated trade agreement to Congress for an up-or-down vote.<sup>148</sup> Without this fast-track mechanism in place, Con-

---

145. *Fact Sheet on U.S.-Japan Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/JU35-TLEH> (last visited Dec. 1, 2020).

146. Yuka Hayashi, *Japan Wants U.S. Back in the TPP. It Will Likely Have To Wait.*, WALL ST. J. (Apr. 16, 2021), <https://perma.cc/JF3C-QF4Z>.

147. James McBride et al., *What's Next for the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN RELS. (Sept. 20, 2021, 4:22 PM), <https://perma.cc/8CGE-J9BJ>.

148. IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 1 (2019) <https://perma.cc/AYA7-8L6G>; Doug Palmer, *Say Goodbye to Trade Promotion Authority*, POLITICO: WEEKLY TRADE (June 28, 2021, 10:00 AM), <https://www.politico.com/newsletters/weekly-trade/2021/06/28/say-goodbye-to-trade-promotion-authority-796173>.

gress could upend any trade deal by changing key components that were agreed to with U.S. trading partners.

In conclusion, trade under Biden will be balanced against other priorities in his presidency. On the international plane, re-strengthening alliances—diplomatic, military, and otherwise—is to be a high-level priority, of which trade is only one component. Furthermore, a multitude of pressing domestic issues will be prioritized.<sup>149</sup> The COVID pandemic, economic recovery, and a general restoration of the good functioning of the federal government will be of paramount importance. Still, unexpected events occur in each administration. WTO members could become more vocal in their criticism of the U.S.-Japan and Phase One Agreements than they have been thus far. One could even file a dispute settlement complaint against either agreement, at least bringing attention to the MFN-violative nature of the agreements and the inability to apply the “interim” label to either agreement. Without changes in the status quo, waivers are also a difficult path forward for the agreements. The Biden Administration, then, will have to toe a fine line between some desire to maintain the agreements on the one hand, and the considerations of trade law, state practice, and political pressures on the other, that do not support the agreements as they exist.

---

149. See generally Warren P. Strobels & Vivian Salama, *Biden's Foreign Policy Takes a Back Seat to Domestic Priorities*, WALL ST. J. ( May 1, 2021, 5:30 AM), <https://perma.cc/CU3F-6NMZ> (discussing how the Biden administration will weigh international issues against a number of domestic issues, including infrastructure and the Covid pandemic).