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The EU-Japan relationship

Olivia Tambou, Yumiko Nakanishi

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THE EU-JAPAN RELATIONSHIP

This book is the result of international cooperation between ten legal academics and practitioners aiming at giving a cross-view of the evolution of the EU and Japan relations. In its first part, this book analyses the new strategic Partnership Agreement between EU and Japan. After an overview of the international significance of this new agreement, the Human Rights approach and the cooperation in the field of security are discussed. The second part focuses on five important sectorial aspects of the Economic Partnership Agreement between EU and Japan: the rules of origin, intellectual property, the precautionary principle, governmental procurement, and personal data transfers.

Dr. Yumiko Nakanishi is a Professor of European Union Law at Graduate School of Law, Hitotsubashi University, Tokyo.

Dr. Olivia Tambou is an Associate Professor at the University Paris-Dauphine, PSL Research University.



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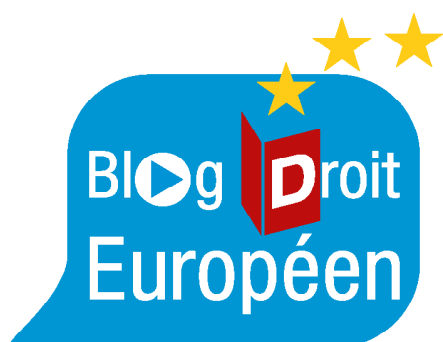


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EDITED BY DR. OLIVIA TAMBOU

E-CONFERENCE

THE EU-JAPAN RELATIONSHIP



Edited by Dr. Yumiko Nakanishi and Dr. Olivia Tambou

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Tambou O., Bourton S. (Eds.), *The Right to be Forgotten in Europe and Beyond/ Le droit à l'oubli en Europe et au-delà* (Series Open Access Book, Blogdroiteuropéen 2018)

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The EU-Japan Relationship

Collection Open Access Book

Edited by Dr. Olivia Tambou

Edited by Dr. Yumiko Nakanishi and Dr. Olivia Tambou



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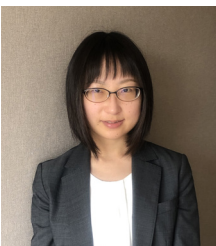
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PREFACE



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I am very happy to publish this e-book with Dr. Olivia Tambou. This e-book is actually her idea. I have known her since summer 2018, when I was a visiting fellow of Max Planck Institute Luxembourg. I met her through Dr. Edoardo Stopionni (at that time, research fellow of MPIL, now, professor of University of Strasbourg). I have developed an academic cooperation with her, him and Dr. Alessandra Donati (senior research fellow of MPIL), who are also contributors to the book. After a while, Olivia proposed an idea to hold an e-conference “The EU and Japan Relationship”. This was good timing. The EU and Japan concluded the Economic Partnership Agreement (EPA) as well as the Strategic Partnership Agreement (SPA). The EPA entered into force and the SPA began to apply provisionally on 1 February 2019. This e-book is based on e-conference “The EU and Japan Relationship” from May to June 2020 at the blogdroiteuropéen, for which Olivia is responsible. I appreciate academic cooperation between the EU and Japan. Furthermore, I am thankful to Prof. Dr. Hélène Ruiz Fabri for giving me an opportunity to research at MPIL (I am now a visiting fellow of MPIL again) and develop relationships with other researchers. Last not but least, I would like to thank Japanese contributors, who are always ready to cooperate with me.

OPENING REMARKS



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I- INTRODUCTION

The purpose of this short introduction is to contextualize the future papers of this e-conference on EU- Japan relations. This Open Access book is based on an e-conference which took place in Spring 2020 on EU-Japan Relations.

II- WHY AN E-CONFERENCE ON EU-JAPAN RELATIONS?

The year 2020 marks the first anniversary of the new step in EU-Japan relations within the provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part,¹ and the Economic Partnership Agreement which entered into force on 1 February, 2019.²

One year is a short time to assess the real impact of these new agreements, but this is the time to analyse their significance more deeply and to offer our readers details on their contents. The e-conference will consist of a dozen working papers from both European and Japanese colleagues, which will present aspects of both agreements.

Beyond this temporal reason, material reasons justify the need to strengthen our common knowledge of EU-Japan relations. It appears that despite the dynamic academic cooperations, few studies of EU-Japan relations are available. In a former post, Edoardo Stopponi interviewed the professor Yumiko Nakanishi and presented a lively Japanese community interested in the EU and EU law studies.³ This interview

1 Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part, OJ L 216, 24.8.2018, p. 4–22, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22018A0824\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22018A0824(01))

2 Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27.12.2018, p.3 http://publications.europa.eu/resource/ellar/d40c8f20-09a4-11e9-81b4-01aa75ed71a1.0006.02/DOC_1

3 See <https://blogdroiteuropeen.com/2018/09/18/petite-genealogie-de-la-recherche-sur-le-droit-de-lunion-europeenne-au-japon-entre->

highlighted the Europeans' lack of information on the European-Japanese reality. It heightened our curiosity on the specificity of the EU-Japan relations which is why we thought it would be a good topic to celebrate the fourth anniversary of Blogdroiteuropeen.

III- WHAT IS THE HISTORICAL BACKGROUND OF EU-JAPAN RELATIONS?

According to the literature available (see below), the relations between Japan and the EU started to converge around 1991, following a period of relative isolation. After 1991, geopolitical and economic changes enabled a real structuring of the relations between the EU and Japan. Some key points on both of these periods will be explained briefly for a better understanding of the current situation.

A- FROM RELATIVE ISOLATION TO THE FIRST STRUCTURING OF THE RELATIONS (1959-1991).

An imbalanced and asymmetrical interest had been the key trend of the first relations between the European Communities and Japan. After World War II, the European Communities and Japan focused respectively on their own reconstruction. Japan had strong relations primarily with the USA. Japan preferred traditional bilateral trade discussions with individual European states, rather than with a supranational entity such as the European Commission. Nevertheless, the nomination of the first Japanese ambassador to the European Communities dates back to 1959, whereas the first EC delegation to Japan was not created until 1974. One of the reasons for the creation of this EC delegation was to allow the European actors to be more, and better, informed of the Japanese political and economic situation. At this stage, the economic relations between the EC and Japan were characterized by a strong deficit in favour of Japan. In vain, the EC Commission and the European Parliament asked Japan to open its market to the European actors. In this conflictual context, the EC-Japan Summit was created

<https://blogdroiteuropeen.com/tien-avec-la-professeure-yumiko-nakanishi-par-edoardo-stopponi/>

<https://blogdroiteuropeen.com>

OPENING REMARKS

in 1984,⁴ as an annually bilateral summit. This period ended with the Joint Declaration of The Hague in 1991,⁵ in which both sides agreed on the need for the « intensification of their dialogue and to strengthen their cooperation and partnership. » This included a diplomatic dialogue towards safeguarding global peace in a post-communist world.

B- TOWARD THE INSTITUTIONALISATION OF EU-JAPAN RELATIONS (1991 TO THE PRESENT).

Despite the Joint Declaration of The Hague, the European Commission⁶ noticed the marketing, market restrictions and discriminations practices in the electronics, information and communication industries in Japan, in 1995.⁷ This led to anti-dumping rights.

Therefore, the turning point came much more in 2001 with the adoption of an Action Plan for EU-Japan Cooperation at the 10th EU-Japan Summit⁸. This plan was the first step on the path to the current agreements. The principle of an EU-Japan trade agreement was adopted in the 20th EU-Japan Summit, in 2011.⁹ In other words, 1991, 2001, and 2011 marked the main milestones from with the Strategic Partnership Agreement (SPA) and the Economic Partnership Agreement negotiations started. More details will be given on this negotiation in the working papers of the e-conference. At this stage, one should remember that despite 60 years of relations, these agreements are the first mixed agreements between the EU and Japan. These agreements were negotiated in a new legal context, because the Treaty of Lisbon significantly improved the European Parliament's powers to ratify of such agreements. Last but not least, the significance of these agreements need to

be understood with the current redistribution of the power in Asia, in particular the strategic position of China.

IV- HOW THIS OPEN ACCESS BOOK WAS CONCEIVED?

This book is the result of an international cooperation launched through an e-conference organised from May 2020 to July 2020 on [blogdroiteuropeen](http://blogdroiteuropeen.com), for its fourth anniversary. It brings together ten papers of legal academics or practionners from the EU and Japan. The e-conference and this book were organised by Yumiko Nakanishi, Professor of European Union Law at the Graduate School of Law, Hitotsubashi University, Tokyo, and Dr. Olivia Tambou, Associate Professor at the University of Paris-Dauphine, Editor of [Blogdroiteuropeen](http://blogdroiteuropeen.com).

Special thanks to both Dr. Edoardo Stopionni and Dr. Alessandra Donati, senior research fellows at the Max Planck Institute of Luxembourg and members of the [blogdroiteuropeen](http://blogdroiteuropeen.com) team, for their contribution to the organisation of the e-conference.

Last but not least, many thanks to Sam Bourton, Lecturer in Law at the University of West England for her care and attention in formatting this Open Access book.

4 See the report from the Commission COM(95)78 Final, accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995DC0078&qid=1588593833958&from=FR>

5 Hosoya Chihiro : « Relations between the European Communities and Japan, » *Journal of Common Market Studies* 18, no. 2 (December 1979): 159-174 ; Monjal, Pierre-Yves : *l'Union européenne et le Japon ou la double ouverture économique. Considérations générales sur les relations économiques entre le Levant et le Couchant*, *Revue de droit de l'Union européenne* 4/2015 p. 1-70; Yakemtchouk Romain, *L'Union européenne et le Japon*, *Revue du Marché commun et de l'Union européenne* 2007 p. 430

6 Joint Declaration on Relations between the European Community and its Member States and Japan, The Hague, 18 July 1991 https://eeas.europa.eu/archives/docs/japan/docs/joint_pol_decl_en.pdf

7 See the report from the Commission COM(95)78 Final, accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995DC0078&qid=1588593833958&from=FR>

8 See *Shaping our Common Future: An Action Plan for EU Japan Cooperation*, accessible at https://ec.europa.eu/research/iscp/pdf/policy/jp_action_plan_2001.pdf

9 See 20th EU-Japan Summit Brussels, 28 May 2011 Joint Press Statement

Part 1: Analysis of the Strategic Partnership Agreement between EU and Japan

SIGNIFICANCE OF THE STRATEGIC PARTNERSHIP AGREEMENT BETWEEN THE EUROPEAN UNION AND JAPAN IN INTERNATIONAL ORDER



By Professor Dr. Yumiko Nakanishi

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I- INTRODUCTION

The 20th EU-Japan Summit took place in Brussels on 28 May 2011, shortly after the Great East Japan Earthquake on 11 March 2011. The joint press statement from the summit referred to the Year of Solidarity and “Kizuna” (the bonds of friendship) in light of the earthquake and identified the next steps for stronger EU-Japan relations.¹ That statement indicated the leaders’ agreement to begin parallel negotiations for an FTA and a binding agreement, which cover political, global, and multisectoral cooperation.

In the beginning, Japan only wanted an FTA, while the EU requested for a political framework agreement. Parallel negotiations began in April 2013 and both parties signed the Economic Partnership Agreement (EPA)² and the Strategic Partnership Agreement (SPA)³ on 17 July 2018.⁴ The EPA entered into force on 1 February 2019. The first year of the EPA’s implementation resulted in an increase in EU exports to Japan by 6.6% compared to the same period a year before wherein Japanese exports to Europe grew by 6.3%.⁵ On the other hand, the SPA has not yet entered into force because it not only needs ratification by the EU and Japan, but also by the Member States of the EU. However, majority of the

SPA has already been provisionally applied.

This paper focuses on the Japan-EU SPA and seeks to illustrate how the EU’s strategy is embedded in it as well as clarify how it rules the relationship between the EU and Japan.

II- MEANING OF THE JAPAN-EU SPA

The meaning of the SPA has changed between the past and the present. This means that the existence of a SPA has become increasingly important not only for the EU, but also for Japan because of the changes in international situations. In fact, during Japanese Prime Minister Shinzo Abe’s speech on 27 September 2019 at the Europa Connectivity Forum in Brussels, he said that the EPA and the SPA worked in tandem to propel Japan and the EU into the future. In the USA, Mr. Trump became president and champions the America First policy as well as other protectionist policies.⁶ This has consequently affected the world order. In Europe, the UK notified a will of withdrawal from the EU in March 2017 under Article 50 of the Treaty on European Union (TEU) and ultimately left the EU on 31 January 2020. As a result, European citizens have growing mistrust of existing political parties and support the new alternative parties in Germany, France, and Italy. The rule of law is in danger in Poland⁷ and the international order, which Western democracies have developed, is currently at risk. Considering such changing situations, the Japan-EU SPA shows the importance of cooperation in order to maintain peace in the international community, fight against terrorism, maintain the rule of law, and

1 20th EU-Japan Summit Brussels, 28 May 2011 Joint Press Statement, <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/122305.pdf>, accessed 24 February 2020.

2 Text of the EPA, see, <https://www.mofa.go.jp/ecom/ie/page4e_000875.html>, accessed 24 February 2020.

3 Text of the SPA, see, <<https://www.mofa.go.jp/files/000381942.pdf>>, accessed 24 February 2020.

4 As a general remark regarding the EPA and the SPA, see, Nakanishi, Yumiko, ‘The Economic Partnership Agreement and the Strategic Partnership Agreement between the European Union and Japan from a Legal Perspective’, *Hitotsubashi Journal of Law and Politics*, Vol. 47, 2019, 1-15, <<http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/30076/1/HJlaw047000010.pdf>>, accessed 24 February 2020.

5 News, 31 January 2020, First year of EU-Japan Economic Partnership Agreement shows growth in EU exports, <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2107>>, accessed 24 February 2020.

6 There is an article to combat together the protectionism of the Trump administration. Article 13 (1) Economic and financial policy stipulates that ‘The Parties shall enhance the exchange of information and experiences with a view to promoting close bilateral and multilateral coordination to support their shared objectives of sustainable and balanced growth, fostering job creation, countering excessive macroeconomic imbalances and combating all forms of protectionism.’ (underlined by author)

7 For example, *CJEU Commission v Poland*, Case C-619/18, ECLI:EU:C:2019:531, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0619&qid=1582537948294&from=EN>>.

SIGNIFICANCE OF THE STRATEGIC PARTNERSHIP AGREEMENT BETWEEN THE EUROPEAN UNION AND JAPAN IN INTERNATIONAL ORDER

address global challenges such as climate change.

Following the Treaty of Lisbon, which entered into force on 1 December 2009, Article 2 of the TEU explicitly stated that the EU has its own values (e.g. human dignity, freedom, democracy, equality, the rule of law, respect for human rights). Article 21 (1) first subparagraph of the TEU lays down the political principles, which apply to the EU's external action. These are democracy, the rule of law, human rights and fundamental freedoms, human dignity, and others. Article 21 (1) second subparagraph of the TEU stipulates that the EU shall seek to develop relations and build partnerships with third countries, which share the said principles. These principles used to be a conditionality for when the EU supports developing countries and other countries.⁸ However, after the Treaty of Lisbon, the EU requested to negotiate and conclude strategic partnership agreements with all countries including developed countries.

The Japan-EU SPA was signed in the form of a mixed agreement, that is so say, an agreement between Japan and the EU and its Member States. Article 37 of the TEU and Article 212 (1) of the Treaty on the Functioning of the EU (TFEU) serve as its legal basis. In particular, Article 37 of the TEU is the legal basis for matters concerning the Common Foreign and Security policy (CFSP) and Article 212 (1) of the TFEU is for economic, financial, and technical cooperation with third countries. As mentioned, the SPA has not yet been implemented, but began to provisionally apply on 1 February 2019. It is composed of a preamble and 51 articles.⁹

8 Nakanishi, Yumiko, 'Political Principles in Article 21 TEU and Constitutionalism', *Hitotsubashi Journal of Law and Politics*, Vol. 42, 2014, 11, 12-13, <<http://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/26442/1/HJlaw042000110.pdf>>, accessed 24 February 2020.

9 Article 1 (Purpose and general principles), Article 2 (Democracy, the rule of law, human rights and fundamental freedoms), Article 3 (Promotion of peace and security), Article 4 (Crisis management), Article 5 (Weapons of mass destruction), Article 6 (Conventional arms, including small arms and light weapons), Article 7 (Serious crimes of international concern and the International Criminal Court), Article 8 (Counter-terrorism), Article 9 (Chemical, biological, radiological and nuclear risk mitigation), Article 10 (International and regional cooperation and reform of the United Nations), Article 11 (Development policy), Article 12 (Disaster management and humanitarian action), Article 13 (Economic and financial policy), Article 14 (Science, technology and innovation), Article 15 (Transport), Article 16 (Outer space), Article 17 (Industrial cooperation), Article 18 (Customs), Article 19 (Taxation), Article 20 (Tourism), Article 21 (Information society), Article 22 (Consumer policy), Article 23 (Environment), Article 24 (Climate change), Article 25 (Urban policy), Article 26 (Energy), Article 27 (Agriculture), Article 28 (Fisheries), Article 29 (Maritime affairs), Article 30 (Employment and social affairs), Article 31 (Health),

The terms of the Japan-EU SPA do not make it conducive to conditionality. It states that the EU and Japan must be very strategic partners in order to construct international order together. This can be better understood through the following section of the preamble: 'as like-minded global partners, of their shared responsibility and commitment to setting up a just and stable international order...'

III- LIKE-MINDED GLOBAL PARTNERS

The EU has maintained and strengthened its international presence, not through military power, but soft power in broadening its own values and norms or standards in the world. The preamble mentions the phrase 'conscious, ... as like-minded global partners, of their shared responsibility and commitment to setting up a just and stable international order...'. Here, the EU explicitly positions Japan 'as like-minded global partners' and vice versa. They agree on being jointly responsible for the construction of a fair and stable international order.

The following section examines three key points in the SPA: (1) Share and promote values and principles, (2) cooperation in international fora, and (3) setting norms and standards.

A- SHARE AND PROMOTE VALUES

Article 2 of the TEU lays down the EU's values and Article 21 of the TEU enumerates the EU's principles in its external action. These values and principles are all reflected in the SPA as a characteristic of the EU's political framework agreement. In fact, similar elements can be found in other agreements such as the EU-Korea Framework Agreement and the EU-Canada SPA¹⁰ which were signed after the Treaty of Lisbon. However, the Japan-EU SPA has some features as well.

Article 32 (Judicial cooperation), Article 33 (Combating corruption and organised crime), Article 34 (Combating money laundering and financing of terrorism), Article 35 (Combating illicit drugs), Article 36 (Cooperation on cyber issues), Article 37 (Passenger name records), Article 38 (Migration), Article 39 (Personal data protection), Article 40 (Education, youth and sport), Article 41 (Culture), Article 42 (Joint Committee), Article 43 (Dispute settlement), Article 44 (Miscellaneous), Article 45 (Definition of the Parties), Article 46 (Disclosure of information), Article 47 (Entry into force and application pending entry into force), Article 48 (Termination), Article 49 (Future accessions to the Union), Article 50 (Territorial application), and Article 51 (Authentic texts).

10 The SPA text was signed on October 30, 2016. Provisional application of much of the agreement began on April 1, 2017, see, <<https://www.international.gc.ca/europe/assets/pdfs/can-eu-spa-text-eng.pdf>>, accessed 24 February 2020.

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The Japan-EU SPA preamble states: 'reaffirming their commitment to the common values and principles, in particular democracy, the rule of law, human rights and fundamental freedoms, which constitute the basis for their deep and long-lasting cooperation as strategic partners'. Furthermore, Article 1 (d), entitled 'Purpose and general principles', rules that one of the SPA's purposes is to jointly contribute to the promotion of shared values and principles, in particular democracy, the rule of law, human rights, and fundamental freedoms; and Article 2, entitled 'Democracy, the rule of law, human rights and fundamental freedoms', stipulates the following:

'1. The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, human rights and fundamental freedoms which underpin the domestic and international policies of the Parties. ...

2. The Parties shall promote such shared values and principles in international fora. The Parties shall cooperate and coordinate, where appropriate, in promoting and realising those values and principles, including with or in third countries.' (underlined by author).

Notably, Article 2 of the SPA not only confirms to uphold shared values and principles, but also obliges the EU and Japan to promote shared values and principles in international fora. The EU-Korea Framework Agreement and the EU-Canada SPA do not explicitly require the promotion of shared values and principles in international fora. This difference comes from the acknowledgment that the EU and Japan are not simply equal partners,¹¹ but like-minded global partners' (「志を同じくする世界的なパートナー」(Japanese); '*partenaires mondiaux animés par des préoccupations*' (French); '*gleichgesinnte globale Partner*' (German)).

Furthermore, another notable aspect is the constant linkage between the EU's FTAs and political framework agreements (e.g. SPAs, Framework Agreements, Partnership and Cooperation Agreements (PCAs), etc.). Then, if values and principles indicated in the latter were violated, the former would be suspended or terminated. In fact, there is an interconnection between the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the SPA. Article 28 (7) of the EU-Canada SPA specifies that the Parties recognise that a particularly serious and substantial violation of human rights or non-proliferation could serve as grounds for the termination of the CETA. Although

¹¹ Article 1 (7) of the EU-Korea Framework Agreement; Article 1 (3) of the EU-Canada SPA.

the EU-Korea Framework Agreement does not contain such clause for the suspension of the EU-Korea FTA a joint interpretative declaration concerning Article 45 and 46 of the Framework Agreement covers the substantial violation of an essential element of the Framework Agreement (democratic principles, human rights and fundamental freedoms, and the rule of law). In addition, the EU-Korea Framework Agreement is an overarching political cooperation agreement with a legal link to the EU-Korea FTA.¹²

However, there is no linkage between the EPA and the SPA with Japan; and the latter makes no reference to the EPA. As a result, only the SPA (i.e. not the EPA) may be suspended under Article 43 (6) of the SPA.

Japan and the EU share values, democracy, rule of law, respect of human right. In this context it is important to note that human dignity, which is one the most important values for the EU, is not shared with Japan.

B- COOPERATION IN INTERNATIONAL FORA

The Japan-EU SPA urges cooperation in international organisations or fora. The preamble indicates that the Parties have determined to 'enhance their cooperation and to maintain the overall coherence of the cooperation, including by strengthening consultations at all levels and by taking joint actions on all issues of common interest' (underlined by author). Moreover, Article 1 states that the purpose of the SPA is '(a) to strengthen the overall partnership between the Parties by furthering political and sectoral cooperation and joint actions on issues of common interest, including regional and global challenges' and '(b) provide a long-lasting legal foundation for enhancing bilateral cooperation as well as cooperation in international and regional organisations and fora' (underlined by author).

Some concrete examples are as follows:

First, is the coordination of their positions. For example, Article 10 states that 'the Parties shall endeavour, in support of their commitment to effective multilateralism, to exchange views and enhance cooperation and, where appropriate, to coordinate their positions in the frameworks of the United Nations and of other international and regional organisations and fora.' The EU and its Member States are therefore required to cooperate in upholding the

¹² Article 15.14 (1) of the EU-Korea FTA rules, 'The present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement. It constitutes a specific Agreement giving effect to the trade provisions within the meaning of the Framework Agreement.'

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former's position on international organisations and fora. It is essential for them to speak as one in order to strengthen the EU's voice. The coordination of the positions of the EU and Japan on international fora has this effect. Similar phrases can be found in following articles: Article 11 (2): Development policy ('The Parties shall, where appropriate, coordinate their positions on development issues in international and regional fora.');

Article 12 (1): Disaster management and humanitarian action ('The Parties shall enhance cooperation and, where appropriate, promote coordination at the bilateral, regional and international levels...');

Article 26: Energy ('The Parties shall endeavour to enhance cooperation and, where appropriate, close coordination in international organisations and fora...');

Article 36 (1): Cooperation on cyber issues ('The Parties shall enhance the exchange of views and information on their respective policies and activities on cyber issues, and shall encourage such exchange of views and information in international and regional fora.').

C- SETTING NORMS AND STANDARDS

The EU has been committed to set up international norms and standards that are based on its own and it agreed with Japan to cooperate in this field. Several articles advocate this objective: Article 17 (1): Industrial cooperation ('The Parties shall promote industrial cooperation to improve the competitiveness of their enterprises. To this end, they shall enhance the exchange of views and best practices on their respective industrial policies in areas such as innovation, climate change, energy efficiency, standardisation, ...' (underlined by author)); Article 21 (d): Information society ('standardisation and dissemination of new technologies' (underlined by author)); Article 36 (2): Cooperation on cyber issues ('...based on the understanding that international law applies in cyberspace, they shall cooperate, where appropriate, in establishing and developing international norms and promoting confidence building in cyberspace' (underlined by author)).

IV- PRIORITY AREAS

The Japan-EU SPA is a comprehensive political framework agreement with three priority areas: (1) peace and security, including crime and terrorism; (2) environment and energy; and (3) new technologies.

A- PEACE AND SECURITY

The preamble mentions: 'conscious...as like-minded global partners, of their shared responsibility and commitment...to achieve peace, stability and prosperity

of the world as well as human security'; 'resolved... to work closely to address major global challenges that the international community has to face, such as proliferation of weapons of mass destruction, terrorism...'; and 'resolved...that the most serious crimes of concern to the international community as a whole must not go unpunished' (underlined by author).

The above-mentioned goals are concretely manifested in following articles: Article 3 (Promotion of peace and security); Article 4 (Crisis management); Article 5 (Weapons of mass destruction); Article 6 (Conventional arms, including small arms and light weapons); Article 7 (Serious crimes of international concern and the International Criminal Court); Article 8 (Counter-terrorism); Article 9 (Chemical, biological, radiological and nuclear risk mitigation); Article 33 (Combating corruption and organised crime); Article 34 (Combating money laundering and financing of terrorism); Article 35 (Combating illicit drugs); and Article 36 (Cooperation on cyber issues). All these articles except Articles 3, 4, and paragraph 1 of Article 5 do not apply yet because most of them are related to the Common Foreign and Security Policy (CFSP) and belong to the competence of the EU Member States and therefore require their ratification.

The rule of law is of the EU's own values and the Japan-EU SPA refers the rule of law in the preamble, Article 1 (1) and Article 2. It is important to note that Article 29, entitled 'Maritime affairs', states 'the Parties shall promote dialogue, enhance mutual understanding on maritime affairs and work together promote: (a) the rule of law in this area, including freedoms of navigation and overflight an the other freedoms of the high seas as reflected in Article of UNCLOS...' (underlined by author). Political issues regarding the rule of law in the South China Sea are aware.

B- ENVIRONMENT AND ENERGY

The EU has been in the forefront of environmental protection, which includes climate change, since the effectuation of the Single European Act of 1987. The EPA explicitly references the Paris Agreement concerning climate change. Although it is technically a free trade agreement, it contains a special chapter on environmental protection. The SPA also contains several provisions that are oriented towards the environment as environmental protection and energy are among its priorities.

In particular, Chapter 16 (trade and sustainable development) of the EPA covers pertinent environmental

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issues.¹³ Environmental protection under the EPA is taken in the context of trade and investment. On the other hand, the SPA emphasises cooperation between the EU and Japan at an international level. For example, Article 23 (2) of the SPA (Environment) states, 'The Parties shall endeavour to enhance cooperation in the frameworks of relevant international agreements and instruments, as applicable to the Parties, as well as international fora.' (underlined by author) Although both the EPA and the SPA consider environmental protection, they tackle with it in different ways.¹⁴

Climate change is regarded as a major global challenge faced by the international community. Although the EPA also considers climate change, it does not contain a special article for it. On the contrary, the SPA does have a special article for climate change (i.e. Article 24). According to the article, the EU and Japan must take the lead in combating climate change and its adverse effects and they are obliged to work towards enhancing cooperation in international fora. Climate change is not only covered in Article 24, but also in Article 16 (Outer space), Article 17 (Industrial cooperation), Article 25 (Urban policy), Article 27 (Agriculture), Article 28 (Fisheries), and Article 29 (Maritime affairs).

While the EPA does not particularly consider issues concerning energy, the SPA does have a special article for it. Article 26 of the SPA stipulates, 'The Parties shall endeavour to enhance cooperation and, where appropriate, close coordination in international organisations and fora, in the area of energy, including energy security, global energy trade and investment, the functioning of global energy markets, energy efficiency and energy-related technologies.'

The new European Commission under the President Ursula von der Leyen advocates the European Green Deal. The SPA provisions that are related to the environment are already being provisionally applied. It requires the EU and Japan to strive to improve cooperation in the frameworks of relevant international agreements and instruments, when applicable to the Parties as well as international fora.

The EU also took the lead in dealing with marine plastic waste management. It adopted a directive on 5 June 2019, which is geared towards the reduction of the

impact of certain plastic products on the environment through regulating single-use plastic products. The directive entered into force on 2 July 2019.¹⁵ Initially, Japan passively dealt with the marine plastic waste; however, this later changed upon the implementation of the strategy towards resource circulation of plastics in on 31 May 2019. The Osaka G20 Summit took place on 28-29 June 2019. The leaders' declaration includes the statement, '... we share ... as a common global vision, the "Osaka Blue Ocean Vision" that we aim to reduce additional pollution by marine plastic litter to zero by 2050 through a comprehensive life-cycle approach that includes reducing the discharge of mismanaged plastic litter by improved waste management and innovative solutions while recognizing the important role of plastic society...'. Cooperation in international fora by the EU and Japan is also expected.

C- NEW TECHNOLOGIES

The third priority area is new technologies. Digital Single Market or the shaping of Europe's digital future is one of the most important issues in the EU and the SPA consequently contains a number of relevant articles. First, Article 14 (Science, technology and innovation) states that based on the 2009 Agreement between the European Community and the Government of Japan on Cooperation in Science and Technology, the EU and Japan are 'obliged to enhance cooperation in the area of science, technology and innovation...'. Article 16 (Outer space) also refers to space science and technologies, but the more relevant article would be Article 21 (Information society). According to the latter, 'The Parties shall exchange views on their respective policies and regulations in the area of information and communications technologies to enhance cooperation on key issues, including: (a) electronic communications, including internet governance and online safety and security...' (underlined by author) Despite Artificial Intelligence (AI) becoming increasingly important nowadays, it is not bound by fixed rules, but mere ethical guidelines.¹⁶ The need for the legislation of hard laws and the specific laws that have to be implemented must be discussed in the future. On the other hand, international ethical guidelines or soft legislations will definitely be necessary. Therefore, cooperation

13 Nakanishi, Yumiko, 'Climate Change and Environmental Issues in the Economic Partnership Agreement and the Strategic Partnership Agreement Between the European Union and Japan', *Hitotsubashi Journal of Law and Politics*, Vol. 48, 2020, 9, 11-15, <<https://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/30992/1/HJlaw0480000090.pdf>>, accessed 1 March 2020.

14 See, Nakanishi, *ibid.*, 18-20.

15 Official Journal of the EU 2019 L 155/1, Directive 2019/904, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0904&qid=1582562356236&from=EN>>, accessed 24 February 2019.

16 European Commission, COM (2018) 237, Artificial Intelligence for Europe, <<https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-237-F1-EN-MAIN-PART-1.PDF>>, accessed 24 February 2020; Japanese Cabinet Office (Naikaku-fu), Social Principles of Human Centric AI, see, <<https://www8.cao.go.jp/cstp/english/humancentricai.pdf>>, accessed 24 February 2020.

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between the EU and Japan in this area is vital. Given this, the protection of personal data is also of crucial importance and this has prompted the EU to adopt the General Data Protection Regulation (GDPR).¹⁷ On a similar note, Japan's Act on the Protection of Personal Information has also been amended. The European Commission considered Japan as third country which ensures an equivalent guarantee, meaning that data transfer from the EU to Japan is possible. Moreover, Article 39 (Personal data protection) of the SPA is also relevant.

These SPA provisions have all been provisionally applied.

V- APPLICATION OF THE SPA

A- MEETINGS OF THE JOINT COMMITTEE

The Japan-EU SPA started to apply on 1 February 2019 according to Article 47 para. 2. Article 42 provides a Joint Committee of representatives of Japan and the EU. The Joint Committee meets once a year in Tokyo and Brussels alternately (Article 47 para. 4).

The first Joint Committee was held in Tokyo on 25 March 2019.¹⁸ Japan and the EU discussed sustainable connectivity and quality infrastructure and global issues. Furthermore, they decided to strengthen their cooperation on challenges related to the digital economy. The Joint Committee makes decisions by consensus (Article 47 para. 3). In addition, the Rules of Procedures of the Joint Committee were adopted according to Article 47 para. 5. The Rules are composed of 12 articles (Article 1 Tasks and Composition, Article 2 Chairs, Article 3 Meetings, Article 4 Publicity, Article 5 Secretaries, Article 6 Participants, Article 7 Agendas for meetings, Article 8 Minutes, Article 9 Decisions and Recommendations, Article 10 Expenses, Article 11 Working Groups and Article 12 Modification of the rules of procedure).¹⁹

The Second Joint Committee was held in Brussels on 31 January 2020.²⁰ The representatives discussed

cooperation based on the document 'the Partnership on Sustainable Connectivity and Quality Infrastructure between Japan and the EU' signed by them in September 2019, and exchanged views.

B- THE DOCUMENT 'THE PARTNERSHIP ON SUSTAINABLE CONNECTIVITY AND QUALITY INFRASTRUCTURE BETWEEN JAPAN AND THE EUROPEAN UNION'

I mentioned then Japanese Prime Minister Shinzo Abe's speech at this beginning of this paper. On the occasion of the speech, he signed the document 'The Partnership on Sustainable Connectivity and Quality Infrastructure between Japan and the European Union'²¹ with Jean-Claude Juncker (the former President of the European Commission) on 27 September 2019 in Brussels. According to this document, Japan and the EU will cooperate to promote 'openness, transparency, inclusiveness and a level playing field for those concerned, including investors and businesses in connectivity'. They will work together in international and regional bodies in view of their commitment to promoting rules-based connectivity globally. Moreover, they will cooperate to boost private investment and to facilitate financing of sustainable connectivity with the engagement of private sector. Furthermore, they will continue to cooperate to enhance sustainable transport connectivity. In addition, they will cooperate 'in areas such as hydrogen and fuel cells, electricity markets regulation and the global market for liquefied natural gas'.

C- AGREEMENT ON CIVIL AVIATION SAFETY

Japan and the EU signed an agreement on civil aviation safety on 22 June 2020.²² The agreement aims to reduce the burden imposed on the aviation industry by removing duplication in inspections in exporting and importing civil aeronautical products and to facilitate the free flow of civil aeronautical products. A press release of the European Commission commented that the signature of the agreement showed mutual trust and commitment to deepen the strategic partnership between Japan and the EU.²³ The press release says that the agreement will strengthen transport connectivity in line with the EU's Connecting Europe and Asia Strategy, referring to the signature of the document 'The Partnership on Sustainable Connectivity and Quality

17 Official Journal of the EU 2016 L 119/1, Regulation 2016/678, see, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&qid=1582562703197&from=EN>>, accessed 24 February 2020; see, Tambou, Olivier, *Manuel de droit européen de la protection des données à caractère personnel*, (Bruylant, 2020).

18 See, <https://www.mofa.go.jp/press/release/press4e_002392.html>, accessed 14 September 2020.

19 Cf. Council Decision 2019/524 on the position to be taken on behalf of the European Union within the Joint Committee, OJ 2019 L86/66.

20 See, <https://www.mofa.go.jp/erp/ep/page22e_000945.html>, accessed 14 September 2020.

21 See, <<https://www.mofa.go.jp/files/000521432.pdf>>, accessed 14 September 2020.

22 See, <https://www.mofa.go.jp/press/release/press4e_002846.html>, last accessed 14 September 2020.

23 The European Commission, Press release, 22 June 2020, 'Commission signs aviation agreement with Japan'.

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Infrastructure between Japan and the European Union’.

D- SUPPORT FACILITY FOR THE IMPLEMENTATION OF THE SPA

Japan and the EU have organised an ‘EU-Japan Webinar Series on COVID-19’.²⁴ The Webinar Series is held in the framework of support facility of the implementation of the SPA. The series deals with topics including climate change, international trade, energy, health care and digitalisation of society.

VI- CONCLUDING REMARKS

The phrases, ‘the Parties shall enhance’, ‘the Parties shall endeavour to cooperate’, and ‘the Parties shall promote dialogue’, may make the SPA seem to not have teeth. However, it is important to note that it is a legally binding document that requires the EU and Japan to cooperate with each other. It is also remarkable that the SPA aims to provide a ‘long-lasting legal foundation for enhancing bilateral cooperation as well as cooperation in international and regional organisations and fora’ (underlined by author) (Article 1 (1) (b) SPA). Furthermore, it is notable that the Joint Committee was established under Article 42 and this gives the SPA an institutionalised character. The Joint Committee has met twice. In addition, the Rules of Procedures have been adopted.

The current world situation under COVID-19 particularly necessitates cooperation between the EU and Japan in international organisations and fora. The SPA can be a meaningful tool for these two parties in addressing global challenges. Since 1 February 2019 the SPA has applied provisionally. Indeed, Japan and the EU are strengthening cooperation under the SPA. Now, based on the SPA, it is time to concretize the relevant projects such as a hydrogen society to tackle climate change as well as boost the economy.

²⁴ See. <<https://www.eujapanspa.jp/>>, last accessed 14 September 2020.

SOME REFLECTIONS ON THE HUMAN RIGHTS DISCOURSE IN THE EU-JAPAN STRATEGIC PARTNERSHIP AGREEMENT



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I-INTRODUCTION

The very starting point of the EU-Japan SPA is anchored in the respect of fundamental and shared values between the Parties. Among these, human rights constitute a fundamental component:

“Reaffirming their commitment to the common values and principles, in particular democracy, the rule of law, human rights and fundamental freedoms, which constitute the basis for their deep and long-lasting cooperation as strategic partners”.

The SPA is based on a common understanding regarding the axiological importance of certain rules, which require a further development in this treaty. The treaty instrument therefore begins with the celebration of a common vision. It can be questioned if the Asian vision of international law would not lead to considering human rights differently from what Europeans have considered to be the unique way of conceiving them; idea that is tackled in the famous Eurocentric perspective critique.

Considered in this way, human rights therefore appear at strategic locations in the agreement, as in Article 1, affirming that the very purpose of the SPA is to “contribute jointly to the promotion of shared values and principles, in particular democracy, the rule of law, human rights and fundamental freedoms”.

An Article 2 is entirely dedicated to them and functions on two fundamental levels. The first paragraph reaffirms the commitment to human rights instruments, such as the Universal Declaration of 1948, as their principles “underpin the domestic and international policies of the Parties”. Here is an idea of multi-level protection that is considered as a mutually shared vision of the structural protection of human rights. There again, one could wonder if the Japanese and the EU legal structures could be equated so easily as only the latter

has developed such a particular multi-layered approach to the supra-national protection of human rights.

The second paragraph confirms that the parties promote human rights “in international fora”, as well as “with or in third countries”. Here is an idea of necessary expansion of these values, beyond the limited scope of application of the treaty. The underlying idea could be that human rights are obligations *erga omnes* and not *erga omnes partes*, their respect has to be promoted beyond the bilateral relations linking the parties. Indeed, the ICJ had already enunciated this idea in the 1951 advisory opinion on the Reservations to the Genocide Convention, while claiming that the “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”¹. Building on this *dictum*, the Court clarified their *erga omnes* obligations status in 1970, stating that “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”².

Interestingly enough, for the rest human rights are mentioned in relation to two particular issues: counter-terrorism (Article 8 aiming at countering “acts of terrorism in all its forms and manifestations in accordance with applicable international law, including [...] international human rights law”) and cooperation on cyber issues (Article 36 aiming at promoting “human rights and free flow of information to the maximum extent possible in cyberspace”). It is striking to see that

¹ ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion of 28th May 1951, ICJ Reports 19-51, p. 23.

² ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, ICJ Reports 1970, p. 32.

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these are two fields in which the CJEU has strongly promoted the development of a certain “culture of human rights”, being confronted to the weakness of the international level of protection³. One can simply think about the *Kadi* philosophy⁴, where dualism allows introducing fundamental freedoms concerns in an area of counter-terrorism where the UN mechanism was not taking them into serious account. One can also think about the case law of the court on data protection after the *Digital Rights* case⁵, developing standards that are now used in many different contexts.

The purpose of this article is therefore to question the very starting point, the very assumption of the discourse of the EU-Japan SPA, according to which the human rights protection is undeniably a common value and therefore a common fight to be pursued with a common strategy because nothing divides the two legal traditions in this field. It tries to question the premises of this discourse to contextualize the meaning of this commitment to human rights (1), as well as the vision according to which they must be protected in a multi-level way (2). Does this SPA starting point take into consideration the different legal traditions of the parties, or does it strengthen a Eurocentric approach that Japan simply endorsed, for whatever political reasons?

II- DECONSTRUCTING THE COMMITMENT TO HUMAN RIGHTS

The discourse of human rights commitment in the EU-Japan SPA tremendously recalls the linguistic structure of two important EU law provisions. The first is the preamble of the Charter of fundamental rights of the EU, stating at its very *incipit* that

“The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values”

There is a complete parallelism between the two preambles, as they both stress the idea of “common values” as an axiological source of the legal instrument of human rights protection. Now, of course, the common values convergence between EU member

States and their common constitutional traditions cannot be totally equated to the community of values existing between the EU and Japan.

The second provision is Article 3(5) TEU, recalling the commitment of the EU to the respect and development of international law :

“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.

This idea of protection of fundamental rights *via* the respect and development of international law is mirrored in the philosophy of Articles 1 and 2 of the SPA. They both start declaring the intention to spread the message of human rights beyond the limits of the legal sphere of validity of the instrument at stake. What is more, the SPA is meant to contribute to the strict observance of international human rights law. And yet the hegemonic intention of human rights diffusion is placed before the idea of respect of international norms.

If the legal strategy is indeed the same, one can wonder if the context should not call for particular caution. Is transposing ideas from an internal context to the external relations setting as easy as it may seem? The Marxist analysis on human rights is a good starting point for the deconstruction of this discourse⁶. Marxist philosophy has challenged the very idea of human rights considering the right-holder a sacred (bourgeois) entity acting at the expenses of the collective dimension of a political society.

The fundamental problem of the European conception of human rights would be to focus exclusively on the individual and to forget the group. Alternative perspectives show that this focus is not endemic to the human rights philosophy but has a clearly cultural dimension. The Inter-American Court of Human Rights as well as the African Court of Human and People's rights have constructed a much more balanced case

³ For this parallelism, see the brilliant ongoing doctoral work of Lola Tonini Alabiso at the University of Luxembourg.

⁴ De Búrca, Gráinne. “The European Court of Justice and the international legal order after *Kadi*.” *Harv. Int'l LJ* 51 (2010): 1.

⁵ Fabbrini, Federico. “Human rights in the digital age: The European court of justice ruling in the data retention case and its lessons for privacy and surveillance in the United States.” *Harv. Hum. Rts. J.* 28 (2015): 65.

⁶ Žižek, Slavoj. “Against human rights.” *Wronging Rights?: Philosophical Challenges to Human Rights* (2005): 149-67.

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law in this regard. The praetorian work of these Courts has used (sometimes weak) textual premises to increase the protection of collective rights, so as to create a fine-tuned balance between the individual and the collective dimension. This achievement is for example accomplished by the African Commission in its cases against Nigeria⁷, where it drew from a very elusive article 19 of the Charter on the right to self-determination not a right to secession but a right of local populations to sufficient and dignified economic resources. There where the UN Human Rights Committee has considered Article 1 on self-determination as not subject to individual violation requests, the African Court has started from its collective dimension to change its morphology and to give it a substantial content that can be invoked before a court. A similar objective was pursued in the case law of the Inter-American Court regarding indigenous populations or reparations, where the judgments of the Court recall the importance of the collective dimension of rights (think about all the non-monetary remedies asking States to build memorial monuments or organize collective awareness events). A recent example is the case law regarding Article 26. In the *Lagos del Campo v Peru* case of 2017⁸, the Court has substantially reshaped the content of the article to include economic and social rights as part of the Conventional protection, which is also the starting point for a further protection of a collective dimension of human rights.

Now, Japanese culture has always been described as putting a stronger focus on the collective dimension as opposed to the individual perspective. Cross-cultural social psychology theorized this shift with the “individualism vs collectivism” divide⁹. Historians, following Ginzo Uchida’s groundbreaking work on the topic¹⁰, have maintained that this collectivism is the result of the traditional *sakoku*, the isolationist foreign policy that started with the Tokugawa shogunate¹¹. Sociologists have intensively worked on this “worldwide

stereotype that Japanese, compared to Americans, are oriented more toward collectivism”¹². Lawyers have also argued that the “*sakoku* mentality” imbued Japanese mentality and lead to a peculiar legal attitude¹³.

Constitutional lawyers have adopted an alternative reading. They stress that the relation between the State and the individual is deeply rooted in a different philosophical conception of the role of the State¹⁴. For instance, Takashi Miyajima has theorized the Japanese State as an *ie* (literally “house”): the State is conceived as a multi-layered conjunct of intermediate social groups that convey the authority of the State, instead of functioning as limits to the power of the sovereign in the Occidental fashion¹⁵.

In his *The Spirit of Japanese Law*, John Owen Haley theorized the role of community in Japanese law in a very subtle fashion. From a historical perspective, “the law will be used to protect the individual from expulsion by the community but not prevent the community’s routine control over the individual”¹⁶: if human rights are a discourse against power, in Japanese law they are seen first of all as a tool to protect against the expulsion from the community. Looking at the way national courts used “good faith” or general standards, he concluded that “legal rules establish standards of conduct in a communitarian society. To the extent that judges themselves retain the public’s trust and accurately express the sense of the community, their views carry weight, and the rules they articulate do not require coercion to be effective”¹⁷.

It goes beyond the scope of this article to take a position on the peculiar nature of the human rights experience in the Japanese culture. What is evident nevertheless from the existing doctrinal discourse is that the particularism of the Japanese vision of fundamental rights should be studied deeper from the legal perspective. For this reason, banalizing it risks to

7 ACommHPR, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC v Nigeria)*, Communication 155/96, para. 56.

8 IACHR, *Lagos del Campo vs Peru*, Case No. 12.795, Judgment of 31 August 2017 (Preliminary Objections, Merits, Reparations and Costs).

9 Triandis, Harry. “Collectivism v. individualism: A reconceptualisation of a basic concept in cross-cultural social psychology.” *Cross-cultural studies of personality, attitudes and cognition*. Palgrave Macmillan, London, 1988. 60-95.

10 Ginzo, Uchida. “Nihon keizai shi no kenkyū.” *Tokyo: Dōbunkan* (1921).

11 Howell, David L. “Territoriality and collective identity in Tokugawa Japan.” *Daedalus* 127.3 (1998): 105-132.

12 Kobayashi, Emiko, Harold R. Kerbo, and Susan F. Sharp. “Differences in individualistic and collectivistic tendencies among college students in Japan and the United States.” *International Journal of Comparative Sociology* 51.1-2 (2010): 59-84.

13 *Ex multis*, Nagatomo, Jun. *Migration as transnational leisure: The Japanese lifestyle migrants in Australia*. Brill, 2014, p. 50.

14 Higuchi, Yōichi, and Christian Sautter. *L’État et l’individu au Japon*. Ecole des hautes études en sciences sociales, 1990.

15 Miyajima, Takashi. “Aperçu historique des mouvements de défense de l’individu”, in Higuchi, Yōichi, and Christian Sautter. *L’État et l’individu au Japon*. Ecole des hautes études en sciences sociales, 1990, p. 135.

16 Haley, John Owen. *The spirit of Japanese law*. University of Georgia Press, 2006, p. 123.

17 *Ibid.*, p. 155.

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create a problematic hiatus. If the mutual commitment to human rights is undeniable and welcome, what do we exactly mean by human rights in the SPA?

III- DECONSTRUCTING THE MULTI-LEVEL PROTECTION LAYERS

The second fundamental structural characteristic of the SPA approach to human rights is the attention given to a multi-level protection in its Article 2. This perspective is yet again replicating a European perspective, deeply rooted in legal pluralism, according to which the interconnection of different normative spheres can achieve a better level of protection *via* judicial dialogue and mutual support.

Indeed, in pluralist terms, the interconnection of constitutional traditions, a supranational level of protection (be it EU law or the ECHR) and the international human rights mechanisms has been considered as the materialization of the philosophy of “multi-level constitutionalism”¹⁸. The philosophy of what Habermas has called a new “postnational constellation”¹⁹ mirrors the pluralist dialogue between the national and the EU legal systems, functioning in harmony in a “contrapunctual law” philosophy²⁰.

The transposition of this idea to the SPA calls for two kind of comments. First, Japan does not have the same multi-level approach to fundamental rights protection structurally. In his fundamental work on international human rights law in the Japanese legal system, Yuji Iwasawa concluded in 1998 that “Japanese courts are reluctant to deal with international law because of their unfamiliarity with this new branch of law” and that “Japanese law has significantly improved through the revision of laws, and even though direct invocation of international human rights law is unsuccessful before the courts, the laws are often eventually amended in the political process (...) international human rights adjudication has been less effective as a legal weapon for winning cases in the courts than it has a political means of giving legitimacy to movements to change Japanese laws”²¹. This analysis showed clearly that the traditional attitude of the Japanese legal order towards human rights is not one of pluralism or monism, not of direct

integration but of indirect consideration. Despite the eventual concrete convergence of results, the Japanese tradition does not seem to be ontologically inclined towards a multi-level constitutionalism philosophy.

Japanese constitutional law literature confirms this claim. It is generally acknowledged that the concrete use of the *a posteriori* constitutional concretizes in a lack of dynamism of the Supreme Court. Its case law would be imbued with a strong deference towards the legislature, translated in an important use of the theories of *actes de gouvernement* or of the margin of appreciation that paralyze a ripe use of constitutional fundamental rights control²². For this reason, Masami Itô, who was professor of constitutional law and became judge at the Supreme Court, considered that it would be necessary to create a self-standing constitutional judge, as the Supreme Court has demonstrated a lack of sensitivity towards constitutionality issues²³.

Second, even from a European perspective, one has to be aware that the multi-level constitutionalism approach is not always a promise of human rights development but can be used for human rights restriction.

It is obvious that the *Solange* approach, started by the German and Italian Constitutional Courts to encourage the CJEU to introduce human rights concerns in a legal order that had forgotten them, is a pluralist tool for fundamental rights protection. But this kind of judicial dialogue can be used in both directions. As was aptly remarked by Constance Grewe, starting from the *Lisbon* decision, the German constitutional court has started affirming its exclusive power to define what is the content of the notion of “constitutional identity”, refusing any intervention of the ECJ in this sort of *domaine réservé*. This approach has been replicated by the Italian Constitutional Court in *MAS* or by the Czech and Polish judges. Similarly, the Hungarian constitutional court has been citing the evolution in the case law of the *Bundesverfassungsgericht* to replicate an increasing attitude of closure towards European integration, showing that the *Solange* can be used not only to increase human rights protection but also to pursue an increased nationalism²⁴.

IV- CONCLUSION

Applying discourse analysis to the SPA provisions on

18 Pernice, Ingolf. “Multilevel constitutionalism in the European Union.” *European law review* 27.1/6 (2002): 511-529.

19 Habermas, Jürgen. *The postnational constellation: Political essays*. John Wiley & Sons, 2018.

20 Maduro, Miguel Poiares. “Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in N Walker (ed), *Sovereignty in Transition*. (2003).

21 Iwasawa, Yūji. *International law, human rights, and Japanese law: the impact of international law on Japanese law*. Oxford University Press, 1998, p. 288.

22 Ueno, Mamiko. *Justice, constitution et droits fondamentaux au Japon*. LGDJ, 2010, notably p. 229.

23 Masami, Ito. *Saibankan to gakusha no aida* [Between Judge and Scholar]. 1993, p. 116.

24 See my interview with Prof Grewe on the blog (<https://blogdroiteuropeen.com/2019/12/03/entretien-avec-la-prof-constance-grewe/>).

human rights, we can wonder whether these articles are the product of a real attempt to distillate provisions reflecting two different visions of a same goal (the increased protection of the individual), or whether they are the replication of the EU law discourse on fundamental rights.

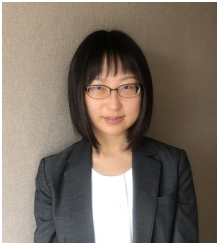
The EU-Japan SPA tends to demonstrate rather the latter tendency. The discursive form of its commitment towards human rights law and its recognition of a necessary multi-level protection structure can lead to question if these ideas really reflect a Japanese approach towards fundamental rights. If the Eurocentric vision of international human rights law has been criticized as being problematic in many ways, we can wonder whether this hegemonic discourse can seriously be transposed to an instrument concluded with a country whose legal philosophy can be quite different. Beyond the political considerations that can explain this discourse, it could be interesting to wonder whether working more on finding the particularism of the Japanese approach to human rights would not enrich the European tradition. We may wonder whether, instead of replicating the European discourse, listening to another language on a common interest could not enrich our own idiom.

Adopting a “trans-civilization” perspective, embracing all the complexity of a multipolar and multicivilizational world, the Japanese international lawyer Yasuaki Onuma tried in his book to attract “the readers’ attention to the situations and perspectives of non-Western people, which have tended to be ignored by major treatises. If human rights is a problem directly affecting human dignity, the situations and perspectives of those representing some 90 percent of humanity—the very subjects of human rights—should not be overlooked”²⁵. This is probably also what the reader of the SPA and of any future agreement of the EU should bear in mind. Indeed, going beyond the case of Japan, “In nations where memories of past interventions by Western powers under such slogans as ‘humanity’ or ‘civilization’ remain, ‘human rights’ sometimes sound like another beautiful slogan by which Western powers rationalize their interventionist policies”²⁶.

²⁵ Yasuaki, Onuma. *International Law in a Transcivilizational World*. Cambridge University Press, 2017, pp. 360-361.

²⁶ Ibid.

EU-JAPAN COOPERATION IN THE SECURITY FIELD FROM THE PERSPECTIVE OF JAPAN'S LEGAL FRAMEWORK



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I- INTRODUCTION

The aim of this paper is to examine the current state of the EU-Japan security relationship from the perspective of Japan's legal framework. While the typical partner both for the EU and Japan is the US and it can be said that "the prospect of a Japan-EU security alliance may seem about as meaningful as a relationship between a bald and comb",¹ the Japan Self-Defence Forces (JSDF) actually cooperates with the European troops often because operations by both are similar – they are often engaged in lower risk activities as compared to combat operations by the US armies.² For instance, in Iraq, the JSDF troops were dispatched to reconstruct Iraq in the area where the UK and the Netherlands were working on maintaining the public order.³

Furthermore, EU-Japan Strategic Partnership Agreement prescribes that they cooperate in the security field.⁴ However, although it does not include concrete rules, it shows the intention by both parties to cooperate with each other.

In this context, Thierry Tardy mentions two advantages for the EU having partners as part of the Common Security and Defence Policy (CSDP).⁵ First, the participants provide the EU with their own assets and

personnel that the EU lacks, thus improving capacity. Second, the EU can impose some conditions for the participation of non-EU countries in CSDP, which gives it a political advantage.

Moreover, cooperation with the EU is advantageous for Japan as well. It contributes to reviewing Japan's out-and-out pro-US security policy and Japan's new foreign policy that takes a panoramic perspective of the world map and proactive contribution to peace – which are policies advocated by Japanese Prime Minister Shinzo Abe⁶ – without provoking neighbouring countries.

However, Japan generally takes a cautious stance in terms of sustaining its military strength and consequently, security cooperation with other countries. This attitude goes back to the end of the Second World War, after which Japan restricted exercising military power through security-related acts under Article 9 of the Constitution, which prescribes the renunciation of war. However, the Japanese government has sometimes had to change the interpretation of this article to adapt to the changes in international circumstances. One such recent change is the lift in the ban on exporting of arms in 2014 and the amendment of security-related Acts in 2015, which enabled Japan to cooperate with the EU in the field of security.

II- POSITIVE SIDE OF COOPERATION WITH THE EU

A- AMENDMENT OF THE SECURITY-RELATED ACTS

Before the reforms in the security-related acts, the fundamental legal basis of the deployment of the JSDF overseas was based on the Act on Cooperation with the United Nations Peacekeeping operations and other operations (hereinafter, the Act on Peacekeeping Operations) passed in 1992. However, this act only covers deployments to UN peace keeping operations.⁷

1 Midford P., *By Land and by Sea: The Potential of EU-Japan Security Cooperation*, Japan Forum, 24 (3), (2012) 289.

2 Ibid. 290; Tsuruoka M., 'Japan-EU Security and Defence Cooperation making progress silently' (2015) EU MAG (in Japanese) <<http://eumag.jp/behind/d0715/>> accessed 27 February 2020.

3 Tsuruoka, Ibid.

4 Art 1, 1 (C) prescribes that the parties contribute jointly to international peace and stability; Art 1, 3 prescribes that the parties shall strengthen their partnership through dialogue and cooperation on matters of mutual interest in the areas of foreign and security policies; Art 3 prescribes the promotion of peace and security; Art 4 prescribes crisis management; Art 5 prescribes weapons of mass destruction; Art 6 prescribes conventional arms; Art 9 prescribes chemical, biological, radiological and nuclear risk mitigation.

5 Tardy T., *CSDP: Getting Third States on Board*, European Union Institute for Security Studies Brief Issue, no. 6 (2014) 3-4.

6 Japan Ministry of Foreign Affairs, *Diplomatic Bluebook* (2015) 11-12.

7 Paragraph 1 of Article 2 of the old Act on Cooperation with United

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Consequently, the Japanese government has had to legislate the acts on an ad hoc basis to deploy the JSDF for non-UN operations.⁸

In 2015, the Japanese Lower House passed two bills in July that were then passed by the Upper House in September. These two bills lifted some restrictions on sending to the JSDF abroad. One is the Bill for the Partial Amendment of the Japan Self Defence Forces Act and Other Matters, to Contribute to Ensuring the Peace and Security of Japan and the International Community.⁹ This Act amends the ten existing security-related acts including the Act on Peacekeeping Operations. The new Act on Peacekeeping Operations allows the JSDF to join “internationally cooperative peace security operations,” which includes non-UN led operation and stipulates that they may also join EU-led operations.¹⁰

The other bill is the Bill on Cooperative Support Activities for Other Countries Conducted by Japan on the Occasion of Joint Activities to Deal with Matters Affecting International Peace and Other Matters,¹¹ which enables Japan to send the JSDF overseas without new legislation or ad hoc measures to provide logistic support to other countries’ armies in the international dispute. The aforementioned two acts were brought into effect on 29 March 2016. Thus, the reform of the security-related acts allows Japan to send the JSDF to operations led by the EU, including CSDP missions.

In addition to the legal basis to participate in EU missions, the reform of the acts also extended the case in which JSDF members may use weapons. Before the reform of the security-related acts, there were several restrictions on the use of weapons by the JSDF. This is illustrated by the deployment to Iraq in 2003–2009 where JSDF members were protected by Dutch forces.

Nations Peacekeeping Operations and Other Operations.

8 For instance, Antiterrorism Special Measures Law enacted in 2001, Act on Special Measures concerning Humanitarian and Reconstruction Assistance in Iraq in 2003, Act on Special Measures concerning Implementation of Replenishment Support Activities towards the Anti-Terrorism Maritime Interdiction Operation enacted in 2008 – all Acts are temporary statutes.

9 Bill for the Partial Amendment of the Japan Self-Defence Forces Act and Other Matters to Contribute to Ensuring the Peace and Security of Japan and the International Community: <<http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anbun-heiwaanzenhouseiseibihou.pdf>> (in Japanese) accessed 27 February 2020.

10 Paragraph 1 of Article 2, Item 2 of Paragraph 1 of Article 3 of new Act and Item 3 of Paragraph 1 of Annex 1 of the new act on Cooperation with the United Nations Peacekeeping Operations and Other Operations.

11 Bill on Cooperative Support Activities for Other Countries Conducted by Japan on the Occasion of Joint Activities to Deal with Matters Affecting International Peace and Other Matters <<http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anbun-kokusaiheiwasienshou.pdf>> (in Japanese) accessed 27 February 2020.

After the withdrawal of the Dutch forces in March 2005, the UK agreed to cooperate in to provide for the safety of the Japanese forces. Consequently, one of the aims of the reform of these acts was to solve the problem of being dependent on other armies for protection.

Furthermore, according to the new Act on Peacekeeping Operations, Japan can now use weapons to rescue people in remote locations¹². Additionally, JSDF personnel can also use weapons to protect local inhabitants, patrol and conduct traffic inspections¹³ and protect military camps even when they are not targeted; before the legal revision, they could only use weapons when they were the targets of attacks.¹⁴

From these changes in the aforementioned acts and the new Act on Peacekeeping Operations, Japan is now able to participate in EU-led operations. For instance, during the special committee meeting on Japan’s security legislation in the House of Councillors in the 180th Diet on 30 July 2015, Masaaki Taniai, a representative belonging to the Koumei Party, asked the Defence Minister, Gen Nakantani, to clarify what non-UN led operations that the Japanese government may take part in as per the legislative reforms and what these were for. In response, the Defence Minister mentioned the Aceh Monitoring Mission, which was led by the EU, as an example of the type of operation the JSDF could participate in under the new legislation.¹⁵

Furthermore, according to a Japanese newspaper, Asahi Shimbun, the Japanese Ministry of Foreign Affairs had considered making the JSDF participate in EU-led anti-terrorism operations in Mali and Niger before the legislative reform. However, although the EU expected Japan to send JSDF to cooperate in these countries, the Ministry gave up on the idea because the Act on Peacekeeping Operations did not allow participation in these operations. This became impetus for the Japanese government to revise the security-related

12 (w) of Item 5 of para. 1 (5) of Article 3 of the Act on Cooperation with United Nations Peacekeeping Operations and Other Operations; Paragraph 2 of Article 26 of the Act on Cooperation with United Nations Peacekeeping Operations and Other Operations.

13 (g) of Item 5 of para. 1 (5) of Article 3 of the Act on Cooperation with United Nations Peacekeeping Operations and Other Operations; Paragraph 1 of Article 26 of the Act on Cooperation with United Nations Peacekeeping Operations and Other Operations.

14 Japan Ministry of Defence, *Defence of Japan* (2019) 262.

15 Reply from Gen Nakatani, the Japanese Minister of Defence in the special committee on Japan’s security legislation in the House of Councillors in the 180th Diet on 30th July 2015 in the recording in the special committee on Japan’s security legislation in the House of Councillors (30th July 2015), no. 5, in the 189th Diet, 24 (in Japanese) <<http://kokkai.ndl.go.jp/SENTAKU/sangiin/189/0192/18907300192005.pdf>> accessed 27 February 2020.

Acts.¹⁶

To summarise, the new Act on Peacekeeping Operations offers enough legal basis for participation in CSDP missions and gives the JSDF personnel the power to use weapons in related operations.

B- AMENDMENT OF THE POLICY ON TRANSFER OF DEFENCE EQUIPMENT AND TECHNOLOGY

The Policy on Transfer of Defence Equipment and Technology – which is not prescribed in written law but is based on replies by the Prime Ministers in the Diet since 1967 – in Japan's Constitution led the government to restrict the export of arms after WWII. In this context, Prime Minister Eisaku Sato in 1967 said that Japan must not export arms to communist countries, the countries to which the UN Security Council Resolutions has banned the export of arms and the countries having international conflicts. In 1976, Prime Minister Takeo Miki added that Japan should refrain from exporting arms to the countries other than those mentioned by Prime Minister Sato.¹⁷

However, today, the Japanese government seems to want to export arms to foreign countries. Even under the Policy on Transfer of Defence Equipment and Technology, the Japanese government has allowed the export of arms in no less than 18 cases, including the transfer of military technology to the US, as exceptions from 1983 to 2010.¹⁸ In 2014, the government moved towards lifting the ban on the export of arms by summarising these exceptions, and the Cabinet approved of the new policies on the transfer of defence equipment and technology that made it clear that Japan can export defence equipment for the sake of international peace and Japan's security. This was a substantial shift from the old policy, which was a complete de facto ban on export, to the new policy, which clarifies in which cases Japan may export.¹⁹

One of the reasons behind the policy change was the weak infrastructure of domestic military production.

16 Asahi Shimbun Digital, 'Ministry of Foreign Affairs considered JSDF's participating in EU missions in Niger and Mali. Yet it does not meet the Act on Peace Keeping Operation' (3 July 2015) (in Japanese): <<http://www.asahi.com/articles/DA3S11838697.html>> accessed 27 February 2020.

17 Japan Ministry of Foreign Affairs, 'Japan's Policies on the Control of Arms Exports' <<https://www.mofa.go.jp/policy/un/disarmament/policy/index.html>> (accessed on 24 February 2020).

18 For further detail, see Kutsunugi K., Amendment of the Principle of Arms Export Ban and New Principles, *Legislation and Research*, no. 361 (2015) (in Japanese) (沓脱和人「武器輸出三原則等」の見直しと新たな「防衛装備移転三原則」『立法と調査』) 59.

19 There have sometimes been protests due to public opinions.

Moreover, due to recent advances in defence equipment technology, per unit cost and maintenance cost have risen, leading to a decrease in the number units procured. As Japan does not have a state-owned munitions factory, the Ministry of Defence procures defence equipment from private companies both in Japan and other countries. It goes without saying that it is consequently important for Japanese security that Japan retains its domestic defence industry.²⁰

However, the fall in procurement has made some companies develop a negative attitude towards accepting orders from the Ministry of Defense and even withdraw from the industry itself,²¹ thus weakening the Japanese domestic defence industry. Furthermore, the international trends in international joint developments have also driven the Japanese government to make changes in defence equipment policies.²²

The old policy on the exporting of military equipment also hampered the supply of equipment to foreign troops conducting operations. For instance, in the UN South Sudan Operation, the JSDF provided ammunition to the South Korean troops as an exception.²³ However, the new policy on this matter enables the JSDF to provide other countries' troops with ammunition. Like this, Japan now can provide some equipment to the other country's troops. Furthermore, Japan also signed the Acquisition and Cross Servicing Agreement (ACSA) with the US, Australia, the UK, France and Canada of which aim is to enable the parties to request equipment and the other to provide them.²⁴

Thus, the amendment of the security-related acts and the new policies on the export of military equipment show that Japan is willing to cooperate with foreign countries, including the EU. However, the following

20 The Japanese government explains that retaining the national military industry is significant in getting equipment that are the most suitable for Japan to create deterrents to other countries by showing that Japan has its own military industry, to procure equipment from foreign companies and bolster the domestic economy by spin-off. See, Japan Ministry of Defence, *Defence of Japan* (2014) 320.

21 Japan Ministry of Defence, *Defence of Japan* (2015) 258.

22 Japan Ministry of Defence, 'Strategy on Defence Production and Technological Bases: Toward Strengthening the Bases to Support Defence Forces and 'Proactive Contribution to Peace'' (June 2014), 3-5 <<https://www.mod.go.jp/atla/soubiseisaku/soubiseisakuseisan/2606honbuneigo.pdf>> accessed 27 February 2020.

23 The Japan Times, 'Japan to supply ammo to ROK peacekeepers in South Sudan' (23 December 2013) <<https://www.japantimes.co.jp/news/2013/12/23/national/japan-to-supply-ammo-to-rok-forces/#.Xl4CXaj7TD4>> (accessed on 27 February 2020).

24 The Japanese government is also negotiating to sign an ACSA with India.

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Fig. III-2-1-1 Current Status of the Unit Price and the Acquisition Quantity of Defense Equipment

Status of Procurement: Unit Price



Type 74 Tank: Approximately 8.58 billion yen (contracted in FY1995)
 ↓ (2.5 times increase)
 Type 10 Tank: Approximately 1 billion yen (contracted in FY2014)



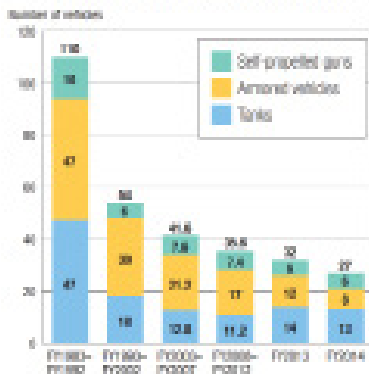
Kuroshio Type: Approximately 38.6 billion yen (contracted in FY1991)
 ↓ (1.28 times increase)
 Soryu Type: Approximately 30.1 billion yen (contracted in FY2014)



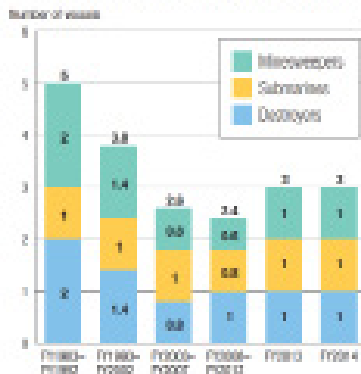
F-4EJ: Approximately 3.8 billion yen (contracted in FY1977)
 ↓ (4.2 times increase)
 F-35A: Approximately 15.9 billion yen (contracted in FY2014)

Status of Procurement: Quantity

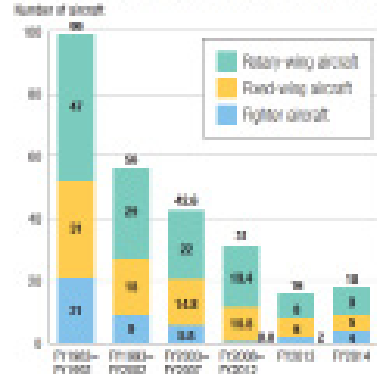
Trend in the annual average procurement quantity of the main vehicles (Data shown for the period prior to FY2012 is the annual average for each period)



Trend in the annual average procurement quantity of the main vessels (Data shown for the period prior to FY2012 is the annual average for each period)



Trend in the annual average procurement quantity of the main aircraft (Data shown for the period prior to FY2012 is the annual average for each period)



(Source of Fig. III-2-1-1: Japan Ministry of Defense, *Defense of Japan* (2015), 258)

section of this paper will show that domestic legislation is not necessarily enough for cooperation with the EU in terms of security.

III- OBSTACLES TO COOPERATION WITH THE EU

A- THE NEW ACT ON PEACEKEEPING OPERATIONS DOES NOT COVER ALL OPERATIONS

It is worth noting that the new Act on Peacekeeping Operations does not cover all operations. For instance, it does not cover anti-piracy operations Japan is a member of Combined Task Forces-151 (hereinafter, CTF-151) (January 2009 – today) by Combined Maritime Forces (CMF) that are multinational forces led by the US to promote maritime security to counter terrorist acts and related illegal activities. Additionally, the EU launched the counter piracy CSDP Operation (EUNAVFOR Atalanta). However, joining CTF-151 does not allow Japan joining the EUNAVFOR Atalanta, which is illustrated by the case of Republic of Korea (ROK) joining both.²⁵

²⁵ This is based on the EU-ROK Framework Participation Agreement. Pierre Minard said, “while South Korea has been diligent on signing the FPA, Japan’s reluctance to do so is the echo of its own internal difficulties related to the constitutional debate.” (Minard P., ‘The EU, Japan and South Korea: Mutual Recognition between Different

Moreover, the EU and Japan have already cooperated with each other to deter and prevent piracy off the coast of Somalia. EUNAVFOR Atalanta, CTF-151 operated by CMF and Ocean Shield operated by NATO have common counter-piracy coordination roles. The EUNAVFOR Atalanta Force Commander, Rear Admiral Alfonso Gómez Fernández de Córdoba, took over the coordination role from the CTF-151 commander, Japanese Rear Admiral Hiroshi Ito, during a meeting at sea on board the Operation Atalanta flagship, ESPS Galicia in July 2015.²⁶ Giving that Japan already dispatched the JSDF onto the coast of Somalia, and this is the operation in which both are cooperating closely, EUNAVFOR Atalanta is a feasible operation that Japan can and is expected to take part in. Paul Midford also assessed that before Japan takes part in CTF-151, it can join the EUNAVFOR Atalanta.²⁷

The Japanese joining CTF-151 has the following history. To respond to the UN resolutions to authorise states

Partners’ (2014) *Group for Research and Information on Peace and Security Analysis Note*, 8 <http://www.grip.org/sites/grip.org/files/NOTES_ANALYSE/2014/NA_2014-09-18_EN_P-MINARD.pdf> accessed 27 February 2020.

²⁶ EUNAVFOR Atalanta, ‘Operation Atalanta Force Headquarters Assumes Counter-Piracy Coordination Role from CTF 151’ (22 July 2015) <<http://eunavfor.eu/operation-atalanta-force-headquarters-assumes-counter-piracy-coordination-role-from-ctf-151>> accessed 27 February 2020.

²⁷ Supra 1, 301-303.

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to take on anti-piracy operations,²⁸ the Japanese government began an anti-piracy operation off the coast of Somalia.²⁹ In March 2009, the then Prime Minister Taro Aso recognized the order of maritime patrol activities issued by the Defence Minister based on Art 82 of the Act of Self Defence Forces which prescribes that with recognition by the Prime Minister, the Defence Minister may issue orders that JSDF personnel may take appropriate measures at sea when it is needed to protect life or property or maintain order at sea. Although this article does not refer to anti-piracy operations, the then Prime Minister had no choice but to rely on Art 82 of the old Act of Self Defence Forces because Japan did not have acts or articles to send the JSDF for anti-piracy operations in that time. Thus, two escort vessels left Japan and began maritime escort operations in March 2009.³⁰ In May 2009, fixed-wing patrol aircrafts (P-3C) were also added to the anti-piracy operation.³¹ However, according to Art 82 of the old Act of Self Defence Forces, the JSDF could only protect ships that belonged to the Japanese, were registered in Japan or in which the crew or cargo were Japanese. To protect ships that are not related to Japan, the Act of Punishment and Countermeasures against Piracy (hereinafter, Act of Piracy) was enacted in June 2009, which came into effect in July although “the opposition, and many Japanese people, are wary of taking any steps to water down Japan’s pacifist constitution.”³²

Then, it can be summarized that the legal basis for Japan to engage in anti-piracy operations was Art 82 of the old Act of Self Defense Forces, and currently, it is the Act of Piracy. Meanwhile, the legal basis for participation in EU-led operations is the new Act on Peacekeeping Operations, Japan may participate in the following operations: first, maintaining neutrality between parties when they agree on a ceasefire and the parties and the state where Japan dispatches

the SDF agree to allow Japan’s participation;³³ second, operations after the parties have ceased activities in the region when the state where Japan dispatches SDF agrees to allow Japan’s participation;³⁴ third, the operation in which Japan maintains neutrality between parties to prevent armed disputes on occasions when the state where Japan dispatches the SDF agrees to allow Japan’s participation.³⁵

The anti-piracy operation does not fall under these three operations in the new Act on Peacekeeping Operations. Thus, to join the EUNAVFOR Atalanta, Japan would need create a new ad hoc act.

B- THE PROBLEMS WITH USAGE OF WEAPONS

As previously mentioned, the reform of security-related acts enables personnel of the JSDF to use weapons in more situations. However, according to Art 25 of the New Act on Peace Keeping Operations, JSDF personnel are not allowed to injure other people by using these weapons except for self-defence or averting present danger.³⁶ Instead, they have to use weapons in such a manner so as not to injure people such as, for instance, by firing warning shots.³⁷ The limited power to use weapons is also a condition with the anti-piracy operations.³⁸ Namely, the JSDF’s power to use weapons is not full-fledged.

Furthermore, there is a lack of laws regarding cases where JSDF personnel accidentally kill people while on the job. Meanwhile, in Japanese territory, a person who fails to exercise due care required in the pursuit of social activities and thereby causes the death or injury of another shall be punished by imprisonment with or without work for not more than five years or a fine of not more than 1,000,000 yen.³⁹ However, this article is not applied to crimes committed outside of Japan.⁴⁰

28 UN doc S/RES/1814 (2008), UN doc S/RES/1816 (2008) and UN doc S/RES/1838 (2008).

29 Given that Japan was always against sending personnel abroad, the Japanese response to these resolutions can be assessed as being rarely positive. Additionally, the coast of Somalia is an important zone for Japan, who depends on it for trade by ships. Moreover, the Chinese decision to send ships for anti-piracy operations stimulated the Japanese government to follow suit (see, Heng Y. K., ‘Japan’s Aspiration as a Global Security Actor: The Antipiracy Mission off Somalia and the Dynamics of Great Power Intervention’ in Emma Leonard E., Ramsay G. (eds), *Globalizing Somalia: Multilateral, International and Transnational Repercussions of Conflict* (Bloomsbury Publishing 2013) 189–190).

30 Japan Ministry of Defence, *Defence of Japan* (2009) 127.

31 Ibid.

32 BBC News, ‘Japan’s MPs back anti-piracy bill’ (23 April 2009) <<http://news.bbc.co.uk/2/hi/asia-pacific/8013908.stm>> accessed 27 February 2020.

33 (a) of Item 2 of paragraph 1 of Article 3 of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

34 (b) of Item 2 of paragraph 1 of Article 3 of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

35 (c) of Item 2 of paragraph 1 of Article 3 of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations
36 Paragraph 6 of Art 25 of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations and Art 36 and 27 of Penal Code.

37 Furuya Y., *Annotation of Law concerning the Execution of Duties of Police Officials* (Revised Version, Tachibana Shobo 2007) (in Japanese) (古谷洋一『注釈 警察官職務執行法』(再訂版、2007年)) 364.

38 Art 6 of Act of Piracy; Paragraph 2 of Art 8 of Art 6 of Act of Piracy; Art 7 of the Law concerning the Execution of Duties of Police Officials translated by Ocean Policy Research Foundation.

39 Paragraph 1 of Art 211 of Penal Code.

40 Art 3 of Penal Code.

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The possibility that JSDF personnel kill people by mistake on the job cannot be ruled out. Therefore, current legislation is not enough to send the JSDF outside of Japan. In this context, it has been reported recently that the Minister of Defense is making efforts to solve the absence of legal basis covering professional negligence resulting in death outside of Japan.⁴¹

C- THE PROBLEM OF PROVIDING GOODS

As mentioned above, the Japanese government eased restrictions on the export of arms in 2014. However, this does not mean that Japanese private companies can export such equipment with no restrictions. On the contrary, companies are not allowed to share information on equipment other than information that is already known to public. This condition is an obstacle to creating appeal for their products during business negotiations.⁴²

Moreover, Japan's new policies on defence equipment is also not comprehensive as the new Act allows the JSDF to provide ammunition, refuel and conduct maintenance on aircrafts ready for taking off for combat operations while still not providing other equipment.⁴³ Additionally, it is worth noting that the EU and Japan would need to sign the ACSA to allow for the provision of ammunition.

IV- CONCLUSION

In conclusion, the second part of this paper showed that obstacles in terms of cooperation with the EU in the security field still remain. However, it is clear, as the first part of this paper showed, that Japan is changing its restrictive security policies and paving the way for cooperation with the EU. It would thus be appropriate to say that Japan is on its way to launch full-scale cooperation with the EU in the field of security.

41 NHK news, 'Minister of Defence, Considering to Solve the Problem on Accidental Homicide by Members of Self-Defence Forces' (in Japanese) (河野防衛相 海外で活動する自衛隊員の過失について対応検討へ)" (21 February 2020) <<https://www3.nhk.or.jp/news/html/20200221/k10012295491000.html>> accessed 27 February 2020.

42 CISTEC Defence Equipment Transfer WG Secretariat, 'Problems on Transfer of Defence Equipment from the Operational Perspective', CISTEC Journal, no. 165 (2016) (in Japanese) (CISTEC 防衛装備移転手続等対応WG事務局「防衛装備の移転に係る制度運用面の問題の所在(整理):安全保障輸出の観点から」『CISTEC Journal』) 101-104.

43 Japanese Ministry of Defence, *Defence of Japan* (2019) 260.

Part 2: Sectorial Approaches of the Economic Partnership Agreement between EU and Japan

RULES OF ORIGIN IN THE EU-JAPAN EPA



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I- INTRODUCTION

The European Union (EU) and Japan have agreed on progressive rules of origin in the Agreement between the European Union and Japan for an Economic Partnership ('EU-Japan EPA'¹). Rules of origin are one of the most important elements in FTAs, which set out the rules, requirements and procedures for application of preferential tariff treatment (reduced or eliminated customs duties) to originating products by the customs authority of the importing party. The EU and Japan jointly created one of the largest free and advanced economic zones in the world by the EU-Japan EPA with approximately 30% of the world GDP and 40% of world trade at the time of its entry into force on 1 February 2019,² and it is called a mega EPA/FTA.³ Considering the economic significance of the EPA and the political influence of the EU and Japan, the rules of origin in the EU-Japan EPA are important not only for those who may utilise the EPA but also for third-party countries, as these rules can be referred to as model provisions with modern and high-standard elements for future negotiations of other FTAs.⁴

1 Japan has traditionally named its FTA the 'Economic Partnership Agreement (EPA)', as the Japanese EPA covers a broader range of fields and is not limited to mere elimination/reduction of customs duties. As such, in this article, 'FTA' refers to free trade agreements in general and the Japanese FTA is called the 'EPA'. It should be noted that the EU-Japan EPA is different from the EU's traditional 'EPAs', which are trade and development agreements negotiated between the EU and African, Caribbean and Pacific (ACP) partners engaged in regional economic integration processes. (The European Commission, 'Economic partnerships' <<https://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/>> accessed 10 September 2020).

2 Ministry of Foreign Affairs of Japan, 'Japan-EU EPA' <<https://www.mofa.go.jp/files/000013835.pdf>> accessed 10 September 2020.

3 There is no particular definition of a mega EPA/FTA. However, an EPA/FTA with significant economic impacts is usually called a mega EPA/FTA.

4 The utilisation rates of the EU-Japan EPA during the first year after its entry into force (February to December 2019) calculated from the statistics exchanged between the European Commission and Japan was as follows: the EU export to Japan: 54%, Japan export to the EU: 39%. Ministry of Foreign Affairs of Japan, 'Exchange of import statistics in 2019 based on Article 2.32 of the Japan-EU EPA' <https://www.mofa.go.jp/ecm/ie/page22e_000915.html> accessed 10 September 2020.

The purpose of this article is not to cover every aspect of the rules of origin in the EU-Japan EPA equally but to analyse and evaluate significant provisions to reveal considerations behind them and organise points of future discussion. In order to achieve this goal, Section II starts with an introduction of two different concepts of originating products. Then, Section III explains the importance of the achievement of full accumulation and analyses the logical relationship between the concepts of originating products and accumulation systems. Thereafter, Section IV describes special rules in relation to certain vehicles and parts of vehicles, especially focused on the cross-accumulation system, which is an ambitious attempt to connect the EU-Japan EPA with various other FTAs. After that, in Section V, a historical analysis of trends regarding origin certification is provided with reference to certification procedures in the EU-Japan EPA, followed by Section VI, which discusses the verification system.

II- ORIGINATING PRODUCTS

A- CONCEPT OF ORIGINATING PRODUCTS

The EU and Japan shall grant preferential tariff treatment to 'originating products of the other Party' in accordance with respective tariff schedules set out in Annex 2-A (Tariff Elimination and Reduction).⁵ Within the FTA context, originating products are generally classified in two different ways and each FTA adopts either one of them: (1) originating products of a party or (2) originating products produced in the territory of the FTA. Under the former concept of 'originating products of a party', it is examined whether a product acquired originating status in the territory of the exporting party. Under this concept, products originating in another party(ies) of the FTA are considered non-originating products of the party. On the other hand, under the latter concept of 'originating products produced in the territory of the FTA', all products that acquired originating status within the territory of any party of the FTA are considered originating products under the FTA, and all production processes conducted within the territory of any party of the FTA are allowed to be

⁵ Article 2.8.

included in the consideration of satisfaction of origin requirements. This difference in the concept brings different functions of accumulation systems, which is elaborated on in Section III-B.

The EU-Japan EPA adopts the concept of 'originating products of a party'. As the contracting parties of the EU-Japan EPA are the EU and Japan (each member state of the EU is not a party⁶), products that acquire originating status in an EU member state are considered originating products of the EU and not originating products of the particular EU member state. For example, if products produced in France satisfy the requirements of originating products, they shall be considered originating products of the EU and not of France. On the other hand, products originating in Japan shall be dealt with as originating products of Japan.

In contrast to the EU-Japan EPA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP', also known as TPP11⁷), another mega EPA/FTA in which Japan is a party, is based on the concept of 'originating products produced in the territory of the FTA'. Accordingly, products originating in Japan under the CPTPP are considered 'originating products of the CPTPP', and there is no concept of originating products of Japan or other contracting countries.

B- THREE CATEGORIES OF ORIGINATING PRODUCTS

a) Overview

Under the EU-Japan EPA, three categories of products are considered originating products: (1) wholly obtained or produced products, (2) products produced exclusively from materials originating in the EU or Japan and (3) products produced using non-originating materials provided they satisfy all applicable requirements of

⁶ As a result, the EU-Japan EPA will automatically cease to be applied to the UK from 1 January 2021 unless otherwise additional arrangement is made as the transition period after the Brexit is scheduled to end on 31 December 2020. Japan and UK have agreed in principle on the Japan-UK Comprehensive Economic Partnership Agreement on 11 September 2020, which is the UK's first major trade agreement after the Brexit. This EPA is expected to be effective on 1 January 2021. Under the EPA, originating products produced in the EU which meet requirements under the EU-Japan EPA can be considered as originating products produced in Japan or UK, and production carried out in the EU can be considered as production in Japan or UK.

⁷ The TPP11 is named after the 11 original signatories of the agreement. As of 10 September 2020, the CPTPP is in force with Japan, Australia, Canada, Mexico, New Zealand, Singapore and Vietnam. The other four original signatory countries, namely Brunei, Chile, Malaysia and Peru, have not completed its national ratification procedures, and hence, the CPTPP has not entered into force in relation to these countries.

Annex 3-B (Product Specific Rules of Origin 'PSR'). This three-category classification of originating products is traditionally used in Japanese EPAs. The EU's FTAs generally classify originating products in two different categories: (i) wholly obtained or produced products and (ii) products obtained in a party incorporating materials that have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the party concerned.⁸ This is purely a difference of categorisation. Under the EU's categorisation system, products produced in a party exclusively from products specified in the list of other originating products are included in wholly obtained or produced products.

b) Wholly obtained or produced products

Wholly obtained or produced products are products to which the entire production process takes place in either the EU or Japan. For example, plants such as rice harvested in the EU or Japan, live animals such as horses born and raised there and minerals or other naturally occurring substances such as gold extracted there are considered to satisfy the requirements.

c) Products produced exclusively from materials originating in the EU or Japan

In this category, materials originating in the EU or Japan include the materials that acquired originating status by using non-originating materials of the EU or Japan and satisfied the relevant PSR. This means the secondary materials used in production of originating material can be non-originating materials as long as it satisfies the relevant PSR and this is the difference with wholly obtained or produced products.

d) Products satisfying the PSR

Products produced using non-originating materials shall satisfy all applicable requirements of Annex 3-B (PSR). The PSR are classified into three categories: (1) change in tariff classification, (2) production process and (3) maximum value of non-originating materials or minimum regional value content.⁹ Each product shall meet one or multiple PSR requirements pertaining to the product in order to claim preferential tariff treatment.

III- ACCUMULATION OF ORIGIN

A- FULL ACCUMULATION

⁸ E.g., Article 2(a) of Protocol 1 of the FTA between the EU and the Republic of Singapore.

⁹ Article 2 of Note 1 of Annex 3-A.

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A system of accumulation¹⁰ of both (1) product and (2) production is provided under the EU-Japan EPA.¹¹ 'Full accumulation' is the term to refer to an FTA with both accumulation systems. Full accumulation greatly facilitates the acquisition of originating status of products, as explained below.

First, accumulation of product means that a product that qualifies as originating in a party shall be considered as originating in the other party if used as a material in the production of another product in the other party. For example, if a company in the EU imports vehicle components that are originating products of Japan, the company may treat them as originating products of the EU in the calculation of the regional value content of the vehicles produced by the company in the EU. Second, accumulation of production means that production carried out in a party on a non-originating material may be taken into account for determining whether a product is originating in the other party. For instance, if a company in the EU imports computer parts that are not originating products of Japan but a company in Japan added value to them, the company in the EU may include such value added to the computer parts in the calculation of the regional value content of the computers produced by the company in the EU. In addition, accumulation of production is also applicable to satisfy production process requirements of PSR.

However, as an important exception, neither accumulation system is applicable if the production carried out in the other party does not go beyond one or more of the operations listed as insufficient working or processing in Article 3.4(1).¹² For example, preserving operations, changes of packaging, washing and simple mixing of products are considered insufficient working or processing of products.

B- RELATION BETWEEN CONCEPT OF ORIGINATING PRODUCTS AND ACCUMULATION SYSTEM

Since the EU-Japan EPA adopts the concept of 'originating products of a party' as explained in Section II-A above, an originating product of Japan (i.e. non-originating product of the EU) or production carried out in Japan in its nature cannot be included in the consideration of whether the final products produced in the EU acquire originating status. Hence, the accumulation system in the EU-Japan EPA is a

remedial provision enabling the inclusion of the value added to or certain production processes conducted on non-originating products. In contrast, in the FTAs adopting the concept of 'originating products produced in the territory of the FTA', products originating in and production carried out in another party(ies) of the FTA are considered elements to increase originating status without accumulation system. In that sense, accumulation systems in these kinds of FTAs are merely confirmatory provisions.

IV- SPECIAL RULES IN RELATION TO CERTAIN VEHICLES AND PARTS OF VEHICLES

A- OVERVIEW

Reflecting the high demand for the trade of vehicles and parts of vehicles, there are four special rules of origin applicable to certain vehicles and parts of vehicles under the EU-Japan EPA. These rules are (1) suppliers' declarations, (2) interim threshold of PSR for vehicles and parts of vehicles, (3) special PSR for certain motor vehicles through production processes related to certain parts and (4) cross-accumulation.¹³

B- SUPPLIER'S DECLARATIONS

Where a supplier in Japan provides a producer in Japan certain parts of vehicles (HS84.07, 84.08, 87.01-87.08) with the information necessary to determine the originating status of the products, a supplier's declaration may be provided by the supplier.¹⁴ This treatment enables the suppliers to avoid disclosing confidential information to the vehicle manufacturing company, including price information of the parts produced by the supplier. As the supplier's declaration system has already taken place in the EU, this provision is only applicable to Japanese entities.

C- INTERIM THRESHOLD FOR VEHICLES AND PARTS OF VEHICLES

For motor vehicles principally designed for the transport of persons (HS87.03) and certain parts of vehicles (HS84.07, 84.08, 87.06-08), requirements on maximum value of non-originating materials or minimum regional value content in a product are temporarily relaxed.¹⁵ For said motor vehicles, 10% relaxation is applicable from the first year until the end of the third year, 5% relaxation is applicable from the fourth year until the end of the sixth year and the agreed maximum value of non-originating materials or minimum regional value

¹⁰ The EU generally uses the term 'cumulation' and accepted Japanese terminology of 'accumulation' in the EU-Japan EPA. There is no difference in concept.

¹¹ Article 3.5

¹² Article 3.5(3).

¹³ Appendix 3-B-1.

¹⁴ Section 1 of Appendix 3-B-1.

¹⁵ Section 2 of Appendix 3-B-1.

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content in the PSR is applied from the beginning of the seventh year (i.e. six years of relaxation). Regarding the parts of vehicles, 5% relaxation is applicable from the first year until the end of the third year, and agreed rates are applied from the beginning of the fourth year (i.e. three years of relaxation). This temporary relaxation treatment is designed to serve as a preparation period for carmakers to re-organise their supply chain to adapt to the EU-Japan EPA.

D- SPECIAL PSR FOR CERTAIN MOTOR VEHICLES THROUGH PRODUCTION PROCESSES RELATED TO CERTAIN PARTS

For certain parts of vehicles listed in Section 3 of Appendix 3-B-1, if listed materials such as (i) toughened glass, (ii) bumpers or (iii) drive-axles with differential, whether or not provided with other transmission components, are (a) used in the production of motor vehicles and (b) carrying out of specific production processes, such as (i) tempering, (ii) production from certain non-originating semi-finished steel products or (iii) production of drive shaft and differential gears from non-originating flat-rolled metal (corresponding to the same numbering item, respectively), such parts shall be considered originating in a party. The application of this special production process can be employed as an alternative to the PSR rules for respective products, and it is expected to facilitate the acquisition of originating status.

E- CROSS-ACCUMULATION

There are notable provisions under the EU-Japan EPA with regard to the potential accumulation of product (not accumulation of production) system in relation to specific parts of vehicles produced in certain third countries.¹⁶ This special accumulation is called cross-accumulation. To be specific, the EU and Japan may decide¹⁷ that petrol engines (HS84.07), wire harnesses (HS85.44) and parts and accessories of motor vehicles (HS87.08) originating in a third country used in the production in the EU or Japan of motor vehicles principally designed for the transport of persons (HS87.03) are considered originating materials under the EU-Japan EPA under three conditions:

- (a) both the EU and Japan have an FTA with that third country, within the meaning of Article XXIV of GATT 1994;
- (b) an arrangement is in force between the EU/

Japan and that third country on adequate administrative cooperation ensuring full implementation of the cross-accumulation and the EU/Japan notifies the other party of such arrangement; and

- (c) the EU and Japan agree on any other applicable conditions.

In relation to requirement (a), Canada, Chile, Mexico, Singapore, Switzerland and Vietnam are current candidate countries with which FTAs are in force with both the EU and Japan. It should be noted, however, that cross-accumulation is not automatically applied in relation to these candidate countries, as requirements (b) and (c) shall also be satisfied before the decision to introduce the cross-accumulation system is made by the EU and Japan.

This cross-accumulation system is an ambitious attempt to connect the EU-Japan EPA with other FTAs. This may allow car manufacturing companies in the EU and Japan to procure necessary vehicle parts in a certain third-party country(ies). In particular, Mexico and Vietnam seem to be two of the best candidate countries for cross-accumulation, since there are already remarkable production bases in these countries.

For Japan, the EU-Japan EPA is the very first EPA to introduce potential cross-accumulation provisions. On the other hand, the EU has adopted this kind of provision in the FTA with Canada (CETA). Moreover, the EU has traditionally used diagonal accumulation systems, such as the FTA with Serbia and the FTA among the EU, Colombia and Peru. In the diagonal accumulation system, (i) the FTA with the common third-party country shall be in force respectively and (ii) the rules of origin of these FTAs are required to be identical. The latter requirement is rather difficult to meet. In this regard, it is pointed out that diagonal accumulation and cross-accumulation have some similarity, but the former requires harmonisation and the latter is based on mutual recognition.¹⁸ Although the Committee on Regional Trade Agreements of the WTO, which mandated the consideration of individual FTAs, has not reported any concerns regarding the conformity of the cross-accumulation and diagonal accumulation systems with the most-favoured-nation treatment obligation under the WTO Agreement, it may require further detailed analysis and discussion as these accumulation systems involve only particular third countries.

V- ORIGIN CERTIFICATION

¹⁶ Section 5 of Appendix 3-B-1.

¹⁷ This expression elaborates the intention of the EU and Japan that separate agreement is required to introduce cross-accumulation system.

¹⁸ Maria Donner Abreu, 'Preferential rules of origin in regional trade' in Rohini Acharya (ed), *Regional Trade Agreements and the Multilateral Trading System* (Cambridge University Press, 2016) 66.

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A- ADOPTION OF SELF-CERTIFICATION

The originating status of products shall be proved to the customs authority of the importing party upon importation of the products in order to claim for preferential tariff treatment, unless such products are sent as small packages from private persons to private persons or form part of travellers' personal luggage and meet price requirements.¹⁹ The self-certification (self-declaration) system is introduced in the EU–Japan EPA as a means of origin certification. To be specific, a claim for preferential tariff treatment shall be based either on a statement on origin²⁰ or the importer's knowledge.²¹

B- BRIEF HISTORY ON TRANSITION OF ORIGIN CERTIFICATION SYSTEM

a) EU

The introduction of self-certification systems is a recent trend in the FTAs of developed countries, including the EU and Japan, as it facilitates logistics with regard to the preparation of proof of origin and enables exportation with shorter lead-time with less cost.²² To understand the importance of the self-certification system, a brief history of the transition of the origin certification system in the EU is explored, as shown in **Chart 1**.



[Chart 1: Transition of origin certification system in the EU]

In the past, the EU's FTAs have adopted a dual origin certification system: approved exporters system and third-party certification system, such as in the FTA with Mexico (entered into force on 1 July 2000) and the FTA with Chile (entered into force on 1 February 2003) (Phase 1). Under the approved exporters system, only exporters who meet certain qualifications are allowed to issue origin certificates by themselves.

¹⁹ Pursuant to article 3.20, for importation to the EU, 500 euros in the case of small packages or 1,200 euros in the case of products forming part of travellers' personal luggage. For importation to Japan, a statement on origin or the importer's knowledge is not required where the total customs value is less than 200,000 yen.

²⁰ Article 3.16.2(a).

²¹ Article 3.16.2(b).

²² The US has adopted the self-certification system since the early days of its FTA history, including the NAFTA. ASEAN is introducing self-certification system on a trial basis.

Other non-approved exporters are required to request the relevant authority (e.g. customs authority) to issue origin certificates (EUR.1), and this requires a certain period of time and fees (called third-party certification system). The European Commission issued the then-new trade strategy *Global Europe: Competing in the World*²³ in 2006. In this strategy paper, the European Commission emphasised that 'we should also ensure Rules of Origin in FTAs are simpler and more modern and reflect the realities of globalization' [emphasis added]. This is considered to mean abolishment of the third-party certification system and integration of the origin certification system into the approved exporters system (later leading to the introduction of the self-certification system). The FTA with South Korea (entered into force on 1 July 2011) and the FTA with Singapore (agreed in principle on October 2014 and entered into force on 21 November 2019) only adopted the approved exporters system in line with *Global Europe: Competing in the World* (Phase 2).

Recently, the EU has moved to introduce the self-certification system in FTAs (Phase 3). To date, the FTA with Canada (entered into force provisionally on 21 September 2017) and the EU–Japan EPA (entered into force on 1 February 2019) solely adopt the self-certification system.

In addition, the aforementioned FTA with Mexico is undergoing the finalisation of the text of the amendment agreement, and that with Chile is currently under negotiation for amendment, both of which are expected to abolish the approved exporters system and replace it with the self-certification system.

The difference between approved exporter system and self-certification system is that there is no requirement of prior approval from the authority to conduct self-certification in the later system. Accordingly, self-certification system would make FTA available to more entities.

b) Japan

²³ Com/2006/567 (4 October 2006).

Japan is also moving forward to introduce the self-certification system.²⁴ The Japan–Australia EPA (entered into force on 15 January 2015) introduced the self-certification system in addition to the third-party certification system as the very first Japanese EPA to adopt the self-certification system. After that, the Trans-Pacific Partnership Agreement (signed on 4 February 2016 by 12 countries, including the US, ‘TPP12’) was supposed to be the first Japanese EPA to solely adopt the self-certification system. However, the TPP12 has not entered into force, since the US withdrew from it on 30 January 2017.²⁵ Thereafter, Japan took the lead to conclude the CPTPP (TPP11) without the US, and it entered into force on 30 December 2018. As the rules of origin in the TPP12 are fully maintained in the CPTPP, the CPTPP and the EU–Japan EPA are the first and second Japanese EPAs to solely adopt the self-certification system, respectively.²⁶ As the EU and Japan are influential actors in internal trade, the trend of the introduction of the self-certification system may spread to other upcoming FTAs, especially those of developed countries. In contrast, developing countries may find it too early to introduce such a system given their lack of reliance on capabilities for stable self-certification in their own countries.

C- STATEMENT ON ORIGIN

The statement on origin shall be made out by the exporter (including producers of products,²⁷ the same shall apply hereafter) using one of the linguistic versions²⁸ of the text set out in Annex 3-D (Text of Statement on Origin, see Table 1) on an invoice or on any other commercial document²⁹ that describes the

24 Traditionally, Japan has solely adopted the third-party certification system in most of its EPAs. As exceptions, the EPAs with Mexico, Peru and Switzerland have adopted both the third-party certification and approved exporters system.

25 The Office of the United States Trade Representative, ‘The United States Officially Withdraws from the Trans-Pacific Partnership’ <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>> accessed 10 September 2020.

26 Under the CPTPP, Vietnam is temporarily exempted from the self-certification system and using the third-party certification system under Annex 3-A (Other Arrangement) of Chapter 3 of the CPTPP.

27 Article 3.1(c).

28 23 out of 24 EU official languages excluding Irish, and Japanese.

29 There is no legal definition of what constitutes a ‘commercial document’, which nonetheless can be considered a written record of a commercial transaction. It therefore covers, apart from the invoice itself, different types of documents, such as a pro-forma invoice, a shipping document (packing list, delivery note), etc. (quoted from the European Commission ‘EU–Japan EPA Guidance on Statement on Origin’ dated 16 December 2019, p.7). <https://ec.europa.eu/taxation_customs/sites/taxation/files/eu-japan-epa-guidance-statements-on-origin.pdf> accessed 10 September 2020.

originating product in sufficient detail to enable its identification.³⁰ The importing party shall not require the importer to submit a translation of the statement on origin. The statement on origin can be used either for a single shipment of one or more products imported into a party or for multiple shipments of identical products within a period not exceeding 12 months.³¹

[Table 1: Text of Statement on Origin (note omitted)]

(Period: from to)
The exporter of the products covered by this document (Exporter Reference No) declares that, except where otherwise clearly indicated, these products are of preferential origin.
(Origin criteria used)
.....
(Place and date)
.....
(Printed name of the exporter)
.....

D- IMPORTER’S KNOWLEDGE

Importers are allowed to claim preferential tariff treatment based on their knowledge that particular products originate in the exporting party and satisfy the requirements provided for in Chapter 3 (Rules of Origin and Origin Procedures).³² In order to claim preferential tariff treatment based on importer’s knowledge, importers need to obtain necessary information as a proof of originating status of the imported products from exporter and/or producer of the products. For importation based on importer’s knowledge, the text of statement on origin is not used.

VI-VERIFICATION

A- REQUEST FOR INFORMATION FROM THE IMPORTER

The customs authority of the importing party may conduct verification in order to verify whether a product imported into the party originates in the other party or the other requirements of Chapter 3 (Rules of Origin and Origin Procedures) are satisfied.³³ It may conduct verification at the time of the customs import declaration, before the release of products or after the release of products. In any case, the customs authority of the importing party shall first request information

30 Articles 3.17(1) and 3.17(2).

31 Article 3.17(5).

32 Article 3.18.

33 Article 3.21.

The EU-Japan Relationship

PART 2: SECTORIAL APPROACHES OF THE ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND JAPAN



RULES OF ORIGIN IN THE EU–JAPAN EPA

from the importer who made the claim for preferential tariff treatment under the EU–Japan EPA.

B- INDIRECT VERIFICATION FOR THE EXPORTER

If the claim for preferential tariff treatment was based on a statement on origin made by the exporter, the customs authority of the importing party has two options for further verification. First, it may also request information from the customs authority of the exporting party within a period of two years after the importation of the products if the customs authority of the importing party conducting the verification considers that additional information is necessary in order to verify the originating status of the product.³⁴ Second, the customs authority of the exporting party may, if requested by the customs authority of the importing party, request documentation or examination by calling for any evidence or by visiting the premises of the exporter to review records and observe the facilities used in the production of the product in accordance with its laws and regulations.³⁵ As both verification options require involvement of the customs authority of the exporting party, verification to the exporter under the EU–Japan EPA is called indirect verification.

By contrast, under the CPTPP, the customs authority of the importing party may conduct direct verification including a written request for information from the exporter or producer of the product or a verification visit to the premises of the exporter or producer.³⁶ As the exporter is required to deal directly with the customs authority of the importing party even for the verification visit for its company or factory,³⁷ the burden of arrangement is much higher in direct verification.

C- ADDITIONAL INFORMATION REQUEST FOR THE IMPORTER

If the claim for preferential tariff treatment was based on the importer's knowledge, the customs authority of the importing party may request additional information from the importer.³⁸

VII- CONCLUSION

The EU and Japan were good trade partners even

before the entry into force of the EU–Japan EPA, and they recently further tightened their ties by the EPA. As mentioned above, the rules of origin of the EU–Japan EPA, with their open, progressive and well-balanced contents, are models of modern rules of origin in FTAs. Under the growing protectionist trend around the world, the EU and Japan should lead free, fair and open trade, which supports global development and poverty reduction. As its operation and detailed rules as well as guidance information are developing on a daily basis, the EU–Japan EPA will surely become more sophisticated in the near future, and it is expected that such meaningful experiences will be shared with the world.

³⁴ Article 3.22(2).

³⁵ Article 3.22(3).

³⁶ Article 3.27(1)(b)(c) of the CPTPP.

³⁷ Support from the exporting party may be available upon request from the exporter or producer pursuant to Article 3.27(7) of the CPTPP.

³⁸ Article 3.21(5).

INTELLECTUAL PROPERTY

By Karl-Friedrich Lenz

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I- INTRODUCTION

The Economic Partnership Agreement between the EU and Japan¹ has come into force in February 2019. I will refer to it with “EPA” in this post.

The EPA has many Articles written over hundreds of pages. One of the areas it is concerned with is intellectual property, in Chapter 14 of the EPA, in Articles 14-1 to 14-55, with over 9,500 words not counting relevant Annexes.

I will not say much about individual rules the parties agreed on. Everyone interested can read those in the English version already without knowing any Japanese or anything about Japanese law.

In contrast, people not familiar with Japan or the language may be interested in where Japanese law before the EPA was different from the EPA. And they may be interested in what Japan has done to implement the provisions of the EPA into Japanese law.

The situation in this respect is similar to the EU enacting a Directive and Member States needing to both implement the Directive and report to the EU Commission on the implementation. This article will try to give some information on what has changed in Japanese intellectual property law as a result of the EPA.

I will also compare the new rules to existing international treaties on intellectual property, with a focus on TRIPS.

The limits on the number of words in this blog post and the limits of my own time and qualifications require a focus on a subset of the rules agreed in the EPA. That requires some method for choosing.

One of the criteria should be if the rule in question is important in the practical application of intellectual property law in Japan.

Another one is if the standard in question is new. The principle that nobody should be discriminated against because of their nationality codified in Article 14.4 of the Agreement is a concept firmly recognized in international intellectual property law since the 19th Century Berne Convention². So finding this concept as part of the general rules in the EPA is not much of a big surprise or new development. In contrast, having a copyright term of 70 years after the death of the author is new, exceeding the previous minimum standard of 50 years in the Berne Convention, so it needs more attention.

And the third one should be how much the EPA deviates from previous Japanese law, and especially how Japanese law was changed because of the EPA, or at least at about the same time.

II- HISTORIC CONTEXT OF SECTION A “GENERAL PROVISIONS”

Chapter 14 on intellectual property consists of a Section A “General provisions” (Articles 14-1 to 14-7), a Section B “Standards concerning intellectual property” (Articles 14-8 to 14-39), a Section C “Enforcement” (Articles 14-40 to 14-51), and a Section D “Cooperation and institutional arrangements” (Articles 14-52 to 14-55). I think the section on enforcement is the most important point. The fact that the Chapter has a section dedicated to this reflects the Commission’s point of view to try to strengthen enforcement in future international trade agreements expressed in the 2006 strategy I will mention later.

An earlier attempt to strengthen enforcement over the TRIPS standard was the Anti-Counterfeiting Trade Agreement, a multilateral agreement that Japan

¹ Agreement between the European Union and Japan for an Economic Partnership, Official Journal of the European Union, L 330/3 of 27.12.2018, publications.europa.eu/resource/cellar/d40c8f20-09a4-11e9-81b4-01aa75ed71a1.0006.02/DOC_1.

² Berne Convention for the Protection of Literary and Artistic Works, 1886, wipolex.wipo.int/en/text/283698, Article 3.

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ratified, but the EU Parliament rejected in a 478 to 39 vote on July 4th 2012, the first time Parliament exercised its Lisbon Treaty power to reject international treaties.³

Article 14-2 EPA lists the following general principles:

“Having regard to the underlying public policy objectives of domestic systems, the Parties recognise the need to

- (a) promote innovation and creativity;
- (b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and
- (c) foster competition and open and efficient markets”.

This list of principles shows some desire for balance between strong intellectual property rights and the interest of the public in free competition. But actually in Japan the balance is much in favor of strong intellectual property rights for about the last 20 years.

When addressing the “General provisions” section, it is necessary to be aware of the historic context in Japan. Japan has a very strong policy of expanding intellectual property protection for the last 20 years. It shares that general direction with the EU, but is even more strongly invested in a strong intellectual property system.

A-CHIZAI RIKKOKU (FOUNDING THE COUNTRY ON INTELLECTUAL PROPERTY)

Japan has chosen intellectual property as the economic foundation of the country for the 21st Century in 2002 under the Koizumi government.

The basic idea was that Japan was served well by producing and selling goods to the world for the 20th Century, scoring big growth numbers in the latter half of that century and joining the developed nations. That worked well.

However, now the Japanese are facing competition from China, with much lower labor cost. Under these circumstances, it does not make much sense to compete for the market in cheap goods. Instead the new strategy is to base the economy on intellectual property.

Intellectual property in all of its forms gives the owner monopoly rights. If you own the copyright on Pokemon

games, like Nintendo does, you don't have to worry about the competition from China selling the same game for less. The Pokemon games alone have scored total revenue of \$95 billion since 1996, making it the number one media franchise of the world (less known competition like Mickey Mouse and Star Wars are placed at rank 4 and 5).⁴

The strategy of “Founding the Country on Intellectual Property” is called Chizai Rikkoku in Japanese. It was adopted by a cabinet decision in Summer of 2002 and led to enacting the Basic Law on Intellectual Property⁵ later that year. That law requires that a working group headed by the Prime Minister (Intellectual Property Policy Headquarters) pays attention to intellectual property issues, with an aim of improving intellectual property in three aspects.

The first one is to improve the creation of intellectual property. Encourage game developers so that someone comes up with the next Pokemon smash hit. Encourage inventors so they develop more technology and more patents. Encourage people to come up with good brand names and make them popular.

The second aspect is improving the use of existing intellectual property. A patent is not worth much if it is just a paper sitting in a nice frame decorating a wall. It is worth only as much as people are interested in actually using the technology and paying for the privilege. That in turn requires some selling effort.

And the third aspect is the one closest to law. Improve enforcement of intellectual property. A patent is not worth much if you had no way to enforce it. Take the theoretical case that someone is sued for patent infringement now, in 2020. A verdict at the district court level is expected for 2520. The defendant could of course completely ignore that patent and the lawsuit. The same would be true if the plaintiff could expect to collect 500,000 Euros in damages but pay double that to his lawyers (a more realistic example). The situation would be the same as if the patent owner had no intellectual property right in the first place.

That is a theoretical case, but it shows that enforcement of intellectual property is vital in order to actually realize any economic value from it. This aspect is also especially close to the EPA, since one of the ideas is to improve enforcement of intellectual property in an international setting.

⁴ Wikipedia, List of highest-grossing media franchises, en.wikipedia.org/wiki/List_of_highest-grossing_media_franchises.

⁵ Basic Law on Intellectual Property, Law No. 122 of 2002, Translation at the Prime Minister website: japan.kantei.go.jp/policy/titeki/hourei/021204kihon_e.pdf.

³ Parliament press release, www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta.

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The Basic Law on Intellectual Property requires in its Article 23 that the working group develop and publish regular plans on how to strengthen the intellectual property system. These plans are an important source when looking for what has happened and what is on the agenda for implementing the intellectual property chapter of the EPA.

In September 2019, the working group published a paper on the “Cool Japan” initiative.⁶ That is an exercise in the branding of Japan that is going on for already about a decade and is aimed at improving Japan’s image in the world. It has resulted in a large increase in tourism to Japan over the five years from 2012 to 2018, from 8.4 million to 31.2 million, by a factor of around 3.7.

The latest yearly plan from the working group, the first one after the EPA came into force, was published in June 2019.⁷ It puts forward the vision of a “society designing new value”, which is supposed to be realized over the mid-term (2025-2030) and is based on identifying and helping individuals with non-average abilities. For example, it wants to advance things like startup clubs at schools and universities or young inventor clubs. Noting that non-average talent often appears at young age, the report proposes making it easy for children to participate in this kind of activity (page 6). This new idea is an extension of the original idea of trying to make it easier to develop new intellectual property.

The 2019 yearly plan does not mention the EPA in any way. Having a whole chapter of the EPA devoted to intellectual property would seem to be a good reason to take some time in the 2019 plan to give some information about what changes in Japanese law the Japanese government thinks are necessary to comply with the EPA requirements. I could not find any such reference in that plan.

B-EU STRATEGY

The EU is like Japan interested in strong intellectual property rights. And like Japan, it competes on the world market not with cheap goods built by cheap labor, but by high class products backed up by intellectual property.

When the EU Commission published their strategy for

⁶ Chiteki Zaisan Senryaku Honbu (Working Group on Intellectual Property Strategy), Kuuru Jyapan Senryaku (Cool Japan Strategy), www.kantei.go.jp/jp/singi/titeki2/kettei/cj190903.pdf.

⁷ Chiteki Zaisan Senryaku Honbu (Working Group on Intellectual Property Strategy), Chiteki Zaisan Suishin Keikaku 2019 (2019 Plan for the Advancement of Intellectual Property), <https://www.kantei.go.jp/jp/singi/titeki2/kettei/chizaikeikaku20190621.pdf>.

international trade agreements in 2006, they noted⁸ that the EU share of international trade had been about constant over the ten years since the WTO was founded. The EU achieved that success by relying on high quality products. That in turn requires strong intellectual property protection.

At the time, reform of the multilateral WTO trade framework was stuck. That in turn meant a more important role for bilateral trade agreements. And the EU Commission said that it intended to have intellectual property as one of the elements of all bilateral trade agreements. Just as the WTO agreement is not only about tariffs, like the original GATT agreement it developed further, but also has a new intellectual property part in the TRIPS agreement, bilateral trade agreements in the future were supposed to have such an element as well.

They also mentioned specifically aiming for better enforcement of intellectual property.⁹ That may be a reason why this EPA has a Section C on enforcement. And in my view, that is the most important aspect of this whole chapter, as enforcement is difficult in Japan because plaintiffs have to pay their own attorney costs (I will discuss this in more detail later).

Korea was almost a decade ahead of Japan in getting a trade agreement with the EU done.¹⁰ And that trade agreement also contained a section on intellectual property, exactly like the 2005 EU Commission strategy said it would. It is Chapter 10 there, Articles 10.1 to 10.69.

That is just like the WTO, which also was expanded to contain rules on intellectual property.

C-WTO

Why does the WTO have an intellectual property agreement, the TRIPS agreement? Does every country in the WTO (essentially all countries) share the interest of the EU and of Japan of having strong intellectual property rights?

No.

Developing countries like India would be much better

⁸ EU Commission, GLOBAL EUROPE, COMPETING IN THE WORLD, A Contribution to the EU’s Growth and Jobs Strategy, 4.10.2006, COM(2006) 567 final, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:en:PDF, page 4.

⁹ Communication (previous note), page 10.

¹⁰ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127/6 of 14.5.2011.

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III- COPYRIGHT (SECTION B, SUB-SECTION 1, ARTICLES 14-8 TO 14-17)

off without the TRIPS agreement. India did not extend its patent system to drugs at the time of the TRIPS agreement. And it did not have any interest in doing so.

That's because Indian industry did not own a lot of patents for drugs. Recognizing patents means that the owner of the patent gets some extra profit at the expense of the consumers that buy drugs for the purpose of staying alive and healthy. Those owners of patents would be American, EU, and Japanese companies and shareholders. And the consumers needing to pay more would be the Indian citizens.

In that market, consumers don't have much of a choice. If you think that the latest Pokemon game is too expensive, you can just skip buying it and do something more useful with your time. If you think that some drug or other is expensive but vital for staying alive, you will still be buying it, if you can find the funds.

So it did not make much sense for India and other developing countries to agree to the TRIPS treaty. They only did so because developed nations agreed to stop putting import quotas on apparel trade in exchange.¹¹

Anyway, in this conflict the positions of the EU and of Japan were aligned. EU and Japan both own lots of intellectual property, so they are interested in strong protection for those rights. And Article 14-52 of the EPA requires both Japan and the EU to cooperate by exchanging information about the intellectual property situation in third countries, helping each other out enforcing these rights, and cooperating "with regard to activities for improving the international intellectual property regulatory framework, including by encouraging further ratification of existing international agreements and by fostering international harmonisation, administration and enforcement of intellectual property rights and on activities in international organisations including the WTO and the WIPO"(Paragraph 3).

That in turn means that neither is going to go ahead and abolish the patent system any time soon. As far as this EPA goes, it is not really necessary to have obligations to have a patent system in the first place. It is somewhat like an obligation to wash your hands while there is a coronavirus panic going on. People are going to do that anyway.

The most significant change of Japanese intellectual property law in recent years related to this EPA was an extension of the copyright term to match that of the EU.

The EPA requires setting a copyright term of 70 years after the death of the author in Article 14-13 Paragraph 1, as opposed to the 50 years required as a minimum standard by the Berne Convention and the TRIPS Agreement.

That is aligned with the EU rules on copyright, which have set the copyright term to 70 years since the relevant 1993 Directive.¹² That term was already the standard of the EU-Korea free trade agreement, in Article 10.6 there.

So in this case the EPA extends this rule of EU copyright to the whole EPA area. The situation is similar to Japan joining the EU and then being obliged to implement the relevant Directive.

This in turn means an exception to the rule of Article 41 of the Japanese Constitution, which says that Parliament is the only legislative organ, with some exceptions. This rule change was not discussed and decided in Parliament, but by the public servants negotiating this Agreement behind closed doors.

On the other hand, the Japanese Parliament did ratify the EPA, so that concern is somewhat mitigated. If the Members of Parliament read and understood the hundreds of pages of the EPA before ratifying it, the requirement of restricting legislation to Parliament would still be met, at least in a formal view.

And in contrast to the situation in the EU, where secondary legislation can change the copyright rules even if all Members of Parliament of some Member State are opposed, any change to the EPA requires that the Japanese Parliament ratifies that change.

There has been ample discussion about the wisdom of extending copyright terms to 70 years after the death of the author. In the United States, this question was litigated up to the Supreme Court¹³, when the United States extended their copyright term to align with EU rules. Some people were opposed to extending

11 Srinivasan, The TRIPS Agreement, A Comment Inspired by Frederick Abbott's Presentation, 2002, www.researchgate.net/publication/2851811_The_TRIPS_Agreement_A_Comment_Inspired_by_Frederick_Abbott's_Presentation.

12 Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31993L0098.

13 *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

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copyright terms. They of course have a point, since every extension of every intellectual property right automatically restricts the freedom of everyone else.

I am not convinced that authors need to be paid for two generations after their death in the first place. No one else gets that kind of treatment. Everyone else is paid until they retire, which usually happens considerably before their death.

And the only authors where a copyright term longer than fifty years matters in the first place are those that sell a lot. They will become rich before their death in most cases anyway and then can just let their children and grandchildren inherit that wealth.

If you accept the idea that copyright should give two generations after the original author an income,¹⁴ it does make sense to calculate two generations as seventy years and not as fifty, since average life expectations have gone up since the 19th Century when the Berne Convention adopted that term. And it does make sense to have a unified standard.

Japanese copyright was changed to extend the copyright term to 70 years after the death of the author already with a law taking effect at the end of 2018.¹⁵ That change came before the EPA took effect. And it was made because the TPP treaty¹⁶ coming into effect on 30.12.2018 required an extension to 70 years in its Article 18.63.

The EPA also requires Japan to comply with the Berne Convention and the TRIPS Agreement in Article 14-3 Paragraph 2. That is nothing new, but when noting this, it is an interesting opportunity to point out that Japan, even while as a general rule following a maximalist intellectual property policy to the point of saying they want to base the economy of the 21st Century on intellectual property, actually may be in violation of Article 5, Paragraph 2 of the Berne Convention, which states that “the enjoyment and the exercise of these rights shall not be subject to any formality.”

Japan has introduced a limitation on copyright for the purpose of running a search engine in 2010.¹⁷ That is worth noting since Japan was the first country introducing such a limitation, motivated by a desire

to make it easier for Japanese startup companies to compete with Google. As far as needed for that purpose, Google may copy files on the Internet and transform them into their search engine, creating a derivative work in their search database. Authors can opt out of this limitation by modifying the “robots.txt” file on their website.

This latter opt-out option may constitute a “formality” in the sense of Article 5. The prohibition against any such formality is caused by the fact that asking authors to follow the copyright laws of many nations and jump through all the hoops to keep their rights places a large burden on them. In this case, the opt-out in question is not contained in the copyright law, but only in an administrative ordinance by the Ministry of Culture, making it difficult to access in the first place and close to impossible to access for foreign authors.

Anyway, I think it is remarkable that Japan grants such a limitation, without even requiring Google to pay a part of their massive advertising revenue derived from the collective effort of all the authors writing the files on the Internet to these authors. Google gets to use all those rights for free under that policy, which explains why it has become the world’s largest media company.

IV- TRADEMARKS (SUB-SECTION 2, ARTICLES 14-18 TO 14-21)

The sub-section on trademarks is brief, Articles 14-18 to 14-21. It does not address the issue of exhaustion. It does not address the question if you are allowed to register a trademark in Japan that is non-descriptive in a different language, like a common word in one of the languages of the EU. It does not address the issue of Internet domain name protection. All these questions are left for the parties to decide as they want.

V- GEOGRAPHICAL INDICATIONS (SUB-SECTION 3, ARTICLES 14-22 TO 14-29)

Japan has adopted an Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs in 2014.¹⁸ That is in the time frame the EPA was negotiated, but before it came into force. For the very least that means that Japan already has fulfilled its obligation under the EPA to set up a protection scheme for geographical indications.

In contrast to other sub-sections of the Chapter on intellectual property, there is a seven year

14 Recital 5 of Directive 93/98/EEC.

15 Law No. 108 of 2018, www.bunka.go.jp/seisaku/chosakuken/hokaisei/kantaiheiyo_hokaisei/.

16 Trans-Pacific Partnership Agreement, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng.

17 Law No. 53 of 2010, www.bunka.go.jp/seisaku/chosakuken/hokaisei/h21_hokaisei/.

18 Law No. 84/2014, elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=426AC0000000084. See discussion by Van Uytsel, ZJapanR 42 (2016), 179.

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transition period under Article 14-25 Paragraph 5. It concerns “operations comprised of grating, slicing and packaging” carried out in Japan for the Japanese market, which will stay legal. Under Paragraph 6 the Parties shall review this question with a view to reaching a mutually acceptable solution before the end of the transition period.

The protection of geographical indications is to be enforced by both parties ex officio, without the need for any individual to file a lawsuit against an infringing company. That is a unique approach to enforcement not found for other forms of intellectual property and also exceeding the level of protection already found in the TRIPS Agreement.

VI- INDUSTRIAL DESIGNS (SUB-SECTION 4, ARTICLE 14.31)

The EPA requires the protection of industrial designs just like the TRIPS Agreement, but it sets the term of the protection to at least 20 years, which is double the ten years of the previous TRIPS standard.

VII- UNREGISTERED APPEARANCE OF PRODUCTS (SUB-SECTION 5, ARTICLE 14.32)

This Article obliges Parties to provide protection for the appearance of products, even if not registered as trademark or industrial design.

There is no such obligation in the TRIPS Agreement, so this is another point where the EPA exceeds the existing international standard.

VIII- PATENTS (SUB-SECTION 6, ARTICLES 14-33 TO 14-37)

The Sub-Section on patents does not bring much in the way of new rules compared to the already existing international standards.

But it is worth noting that Article 14.33 Paragraph 3 asks the parties to establish a unitary patent judicial system, reading:

“The Parties recognise the importance of providing a unitary patent protection system including a unitary judicial system in their respective territory.”

Japan has a unitary judicial system in place for patents. This is aimed at the EU, which is in the process of setting one up. Anyway, this is not a rule obliging both parties to get a unitary judicial system, since it only says “recognize the importance of”. It only shows that

Japan approves of the idea of changing the EU system in this regard.

IX- ENFORCEMENT (SECTION C, ARTICLES 14-40 TO 14-51)

One of the most important differences between Japanese law and EU law is the treatment of attorney fees.

Under Japanese law, as a general rule of civil procedure, each party pays their own attorney. That in turn means that even if the plaintiff wins a case, he only collects whatever is left after paying his attorney out of the settlement. It also means that the defendant has a choice between giving up and paying the plaintiff and fighting and paying his own attorney.

In a case where the claim is well founded, the plaintiff will never receive full compensation. In a case where the claim is very dubious, the defendant will never get away completely without payment.

That in turn gives an incentive for the defendant to settle even in cases where the plaintiff does not have a valid claim. It also makes it harder for right holders to enforce their intellectual property rights. Attorney fees can be substantial. They may be a deterrent to actually enforcing intellectual property rights.

The EPA has a new rule on this in Article 14-48. It reads:

“Costs

Each Party shall provide its judicial authorities, where appropriate, have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of intellectual property rights, that the prevailing party be awarded payment by the losing party of court costs or fees and appropriate attorney’s fees, or any other expenses as provided for under its laws and regulations.”

This is close to the wording of Article 45 Paragraph 2 of the TRIPS Agreement, which reads:

“The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney’s fees, in appropriate cases.”

Both TRIPS and the EPA do not require unconditionally that the losing party pay the other party’s attorney fees. They only require that “where appropriate” (EPA) or “in appropriate cases” (TRIPS).

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That is a less restrictive standard than that of Article 14 of the Directive on Enforcement of Intellectual Property,¹⁹ which says:

“Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.”

The EU-Korea free trade agreement contains exactly the same rule as the Directive, in Article 10.51, so it is significant that the EU was not able to push that through unchanged in their negotiations with Japan. Japan has been reluctant to agree unconditionally with the idea of having the unsuccessful party pay.

While there have been discussions on changing the rule on who has to pay for attorney costs in the past in Japan, I am not aware of any proposal to change them now as a consequence of Article 14-48 of the EPA. As noted above, the latest plan on intellectual property does not mention the EPA at all, and it does not propose any change of civil procedure cost rules for intellectual property.

It would actually be somewhat open to doubt to change this point only for intellectual property lawsuits. If the model of having the unsuccessful party pay for both sides' attorney fees is the reasonable thing to do, what exactly is the difference to all other civil lawsuits that would justify a different model? If you start changing this, shouldn't it be changed in a uniform way for all areas of civil procedure, as opposed to only the lawsuits concerning intellectual property law? And shouldn't it be changed as a result of broad discussion in Parliament as opposed to as a result of trade deal negotiations with the EU behind closed doors?

Again, Article 14-48 is not much different in its wording from what the TRIPS Agreement already required in its Article 45. There certainly has not been any change in the treatment of attorney costs in Japanese intellectual property civil procedure law as a consequence of the TRIPS Agreement.

So maybe there will be none as well for implementing Article 14-48 of the EPA.

On the other hand, it may be possible to comply with this Article by changing precedent. While it is true

that as a general rule each party has to pay their own lawyer in Japan, there is an exception for tort cases, where the plaintiff may be able to claim the legal cost as part of the damages.²⁰ One could imagine extending that exemption to this situation.

That solution would however only affect one of the possible outcomes. If the plaintiff wins, he may be able to charge the attorney cost as part of the damages. This does not work in the other case, when the defendant wins. And introducing a rule that only one party may be liable for the other party's cost if they lose departs from the general principle of civil procedure law giving both parties the same weapons to fight with.

Therefore, if going this route one would need to also extend the opposite case law²¹ giving the defendant a claim based on torts when faced with the need to pay attorney costs to defend against a baseless claim.

¹⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004L0048-20040430

²⁰ Supreme Court 27.2.1971, www.courts.go.jp/app/hanrei_jp/detail2?id=55036.

²¹ Supreme Court 26.1.1988, www.courts.go.jp/app/hanrei_jp/detail2?id=52197.

THE PRECAUTIONARY APPROACH IN THE ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND JAPAN: A THREAT TO THE EUROPEAN PRECAUTIONARY PRINCIPLE?



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I- INTRODUCTION

A “momentous event with global impact occurred on 1 February 2019. On that day, tariff walls fell, as economies covering one-third of the world’s gross domestic product, and a total of around 639 million people, sought to establish a level playing field for mutual trade. It was the day when then Economic Partnership Agreement (“EPA”) between Japan and the European Union (“EU”) came into force”¹. Together with a more general Strategic Partnership Agreement (“SPA”) - provisionally entered into force and subject to ratification - EPA has become the cornerstone of an enhanced relationship between EU and Japan². While the SPA is deemed to foster the cooperation between EU and Japan in identified areas for joint action such a disaster management, energy security, and cybercrime, EPA contains a number of provisions that will simplify trade and investment procedures, reduce export and investment-related costs³. Namely, tariffs on more than 90% of Japan’s imports from the EU will be eliminated. This will affect a wide range of sectors covering agriculture and food products, industrial products (including textiles, clothing), as well as forestry and fisheries. At the same time, exporters of Japanese products will benefit from the removal of European barriers. Besides, non-tariff barriers are expected to be substantially reduced for motor vehicles, medical devices, and the “quasi-drugs” sectors. Finally, EPA will facilitate the export of services from the EU to the Japanese market and will affect a significant number of industries from telecommunications to

postal services and the financial sector⁴.

Against this backdrop, Article 16.9 EPA states that: “when preparing and implementing measures with the aim of protecting the environment or labour conditions that may affect trade or investment, the Parties shall take account of available scientific and technical information, and where appropriate, relevant international standards, guidelines or recommendations, and the *precautionary approach*.” The understanding of Article 16.9 is of high importance. First, the implementation of precautionary measures involves a significant degree of uncertainty and discretion, which could be hard to coordinate with the multilateral trade regime established by EPA. Precautionary measures may be the source of controversies between EU and Japan because they could create regulatory barriers aimed at protecting, at the domestic level, environmental and labour standards and conditions. Moreover, such barriers could be hard to remove. Once a country has considered necessary to implement precautionary measures for a particular risk, it is likely to require a certain amount of time, depending on the specific features of the risk and uncertainty at stake, before the regulation of this risk comes under new consideration. From this perspective, to understand if and how precautionary measures could entail a restriction to EU-Japan’ trade and investments, it is worth analyzing the scope and the conditions for the application of the precautionary approach under EPA. Second, the reference to the precautionary approach contained in EPA shall be coordinated with the precautionary principle set forth by article 191 of Treaty on the Functioning of the European Union (“TFUE”) and with the obligation of European institutions to pursue a high level of protection of the environment (Art. 191 TFUE), public health (Art. 168 TFUE) and consumers (Art. 169 TFUE). In this regard, the question arises whether the

1 Gilson J., *EU-Japan Relations and the Crisis of Multilateralism* (Routledge 2019) 1.

2 Commission, ‘Japan’ <<https://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/>> accessed 28 February 2020.

3 Commission, ‘Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan’, COM(2018) 192 final.

4 EU-Japan Centre for Industrial Cooperation, ‘About the EU-Japan EPA’ <<https://www.eubusinessinJapan.eu/issues/economic-partnership-agreement/about-eu-japan-epa>> accessed 28 February 2020.

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precautionary approach under EPA has the potential to jeopardize the high standards of health, environment, and consumer protection set forth by EU law. In other words, shall EPA's precautionary approach hinders the EU institutions from applying the precautionary principle as established within EU law? To tackle these issues, Section II of this paper will draw a comparison between the precautionary approach set forth by Article 16.9 EPA and the precautionary principle enshrined in Article 191 § 2 TFUE. Furthermore, Section III will provide an assessment of the potential impact of EPA on the implementation of the precautionary principle under EU law. Section IV will address some concluding remarks.

II- A COMPARISON BETWEEN THE EPA'S PRECAUTIONARY APPROACH AND THE EU'S PRECAUTIONARY PRINCIPLE

The comparison between the precautionary approach provided for by Article 16.9 EPA and the precautionary principle set forth by Article 191 § 2 TFEU will be carried out by taking into account the legal status (A) and the scope of application (B) of precaution under EPA and EU law.

A- THE LEGAL STATUS OF PRECAUTION

Precaution has a different legal status under EU law (1) and EPA (2).

a) The status of precaution under EU law

Under article 191 § 2 TFEU, precaution is qualified as a *principle* of EU environmental law. As it was argued by Eric Naim-Gesbert, if the binding force of the precautionary principle has been long controversial, it is no longer part of the "puzzle" of EU environmental law⁵. This conclusion is drawn from the interpretation of Article 191 § 2 TFEU. This article provides that the Union's policy on the environment *shall* be based on the precautionary principle. The use of the indicative (and not the conditional) shows the will of the legislator to make recourse to the precautionary principle obligatory and thus to oblige the authorities to act in the direction indicated by this principle⁶. This was, moreover, the interpretation put forward by the Court of First Instance of the European Union [now the General Court] which, in the *Artegodan* case of 26 November 2002, considered that "the precautionary

principle is expressly enshrined in Article 174(2) EC [now Article 191 § 2 TFEU], which establishes the *binding nature* of that principle⁷." This interpretation has also been validated by the Court of Justice of the European Union ("CJEU") which, in several cases, has affirmed that the precautionary principle *requires* the competent authorities to take appropriate measures in order to prevent potential risks to the environment and public health⁸. In line with the statements of the Court of Justice, a large majority of the doctrine recognizes today that precaution is a binding principle of EU law⁹. Nevertheless, although recognized, the binding force of the precautionary principle remains "weak"¹⁰. The precautionary principle is a "soft" principle which epitomizes a non-authoritarian legal direction of conduct¹¹. Texts indicate objectives that it would be desirable to achieve, set guidelines that it would be appropriate to follow, make recommendations that it would be good to respect, but they do not specify the binding force of the precautionary principle¹². From this perspective, Article 191 § 2 TFEU provides that European policy on the environment shall be based on the precautionary principle, but no further details are given. This implies that it is not possible to deduce, with precision, the obligations arising from the precautionary principle and that, consequently, EU institutions have a wide margin of appreciation as to the modalities of its application.

The precautionary principle, as a soft principle, is only *procedurally binding* on its recipients¹³. This can be explained if one considers that such a principle is applied in order to prevent the realization of uncertain

7 CFI, *Artegodan GmbH e.a. v. EC Commission*, joint cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, para 182, EU:T:2002:283.

8 CJEU *National Farmers' Union e.a.*, Case C-157/96, para 64, EU:C:1998:191; CJCE, *United Kingdom v. EC Commission*, Case C-180/96, para 100, EU:C:1998:192; CJEU, *EC Commission v. Kingdom of the Netherlands*, C-41/02, para 45, EU:C:2004:762.

9 De Sadeleer N, *EU environmental law and the internal market*, *op. cit.*, 41; Hilsen C., 'Rights and principles in EU law: a distinction without foundation' (2008), v° 15, n° 8, 93-216; Winter G., 'The legal nature of environmental principles in international, EC and German law' in Macrory R. (eds), *Principles of European environmental law* (Europa Law, 2004) 19-22.

10 Donati A, *Le principe de précaution en droit de l'Union européenne* (Thèse, Université Paris 1 Panthéon Sorbonne 2019) 21.

11 Delmas-Marty M., 'Où va le droit ? Entre pot au noir et pilotage automatique, le droit peut-il nous guider vers une mondialité apaisée ?', *La Semaine Juridique* (2018) n° 14, 677.

12 Chevallier J., 'Vers un droit post-moderne ? Les transformations de la régulation juridique', *Revue du droit public et de la science politique*, *Librairie Générale de Droit et de Jurisprudence* (1998) n° 3, 677-678.

13 Donati A, *Le principe de précaution en droit de l'Union européenne*, *op. cit.*, 21.

5 Naim-Gesbert E., *Droit général de l'environnement* (Lexis-Nexis, 2014) 91.

6 De Sadeleer N., *EU environmental law and the internal market* (OUP, 2014) 41-42.

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risk. In this context, it is difficult, if not impossible, to predetermine the factual elements that decision-makers will face in each case, and thus, the content of the actions they will have to implement. Uncertainty does not allow prognoses to be made based on experience or a causal relationship. Given the impossibility of fixing in advance the substantive content of the precautionary principle, it is preferable to set general objectives (in this case, the protection of the environment and public health) and the procedural obligations that decision-makers will have to meet in order to achieve them¹⁴. A careful reading of the EU secondary legislation containing a reference to the precautionary principle shows that the binding force of that principle must be interpreted in the sense of an *obligation to take into account*¹⁵. In these texts, whether it concerns the transboundary movement or deliberate release of GMOs into the environment, waste management, the safety of toys or the placing on the market of food or biocidal products, the obligation for decision-makers to apply the precautionary principle is conceived as an obligation to take into account. Such an obligation has procedural content. As stated by the General Court, compliance with procedural obligations constitutes the primary *raison d'être* of the precautionary principle¹⁶. This means, from one side, that EU institutions must take into account the results of the scientific expertise, which shall be carried out before the adoption of any precautionary measure¹⁷. The obligation to take into account the scientific expertise entails a duty of care and of motivation¹⁸. For the CJEU, the duty of care implies the obligation of the decision-makers to analyse carefully and completely all the elements likely to determine their decision¹⁹, as well as the obligation to carry out an adequate instruction of the file by gathering the appropriate factual elements²⁰. As regards the obligation of motivation, decision-

makers shall indicate the factual and legal elements on which their decision is based and, if they wish to depart from the results of the scientific assessment, they shall support their decision on the basis of another opinion of a scientific level at least equivalent to that of the opinion departed from²¹. From the other side, in addition to any available scientific evidence, EU institutions should take into account all the other costs and benefits of the action²². When carrying out a cost-benefit analysis, decision-makers enjoy a wide discretion. Still, they shall take into account their obligation to give precedence to environmental and public health protection requirements over economic considerations²³.

b) The status of precaution under EPA

Unlike EU law, under Article 16.9 EPA, precaution is not defined as a *principle*, but rather as an *approach*. This qualification represents a step backward, as the term “approach” is generally regarded as less stringent and more ambiguous than “principle”²⁴. As a result, if the precautionary approach expresses the same awareness of the limits of scientific knowledge and of the need to take action to prevent a risk, it is not granted with the same legal status as the precautionary principle²⁵. As stated by the judge Laing in his individual opinion relating to the cases *New Zealand v. Japan* and *Australia v. Japan* before ITLOS, “adopting an approach, rather than a principle, judiciously offers some room for *manoeuvre* and tends, even if not voluntarily, to indicate a reluctance to pronounce prematurely on desirable normative structures²⁶.”

The soft nature of precaution under EPA agreement is also confirmed by the fact that, according to Article 16.17, provisions under Chapter 16 of EPA are not subject to the general dispute settlement mechanism under Chapter 21 EPA. As a result, in

14 Lopez-Jurado Escribano F., ‘Los procedimientos administrativos de gestión del riesgo’, in Barnes J. (eds), *La transformación del procedimiento administrativo* (Global Law Press Editorial Derecho Global, 2008) 153.

15 Regulation 1946/2003 (CE), whereas 22; Directive 2001/18 (CE) whereas 8; Directive 2008/98 (CE), art. 4; Directive 2009/48 (CE), art. 39; Regulation 178/2002 (UE), art. 6 (3); Regulation 528/2012 (UE), art. 1(1).

16 CFI, *Pfizer Animal Health v. Conseil*, Case T-13/99, para 170-172, EU:T:2002:209.

17 CJEU, *Monsanto Agricultura Italia*, Case C-236/01, para 113-114, EU:C:2003:431.

18 Donati A., *Le principe de précaution en droit de l'Union européenne*, *op. cit.*, 235.

19 CFI, *Michael Becker v Court of Auditors of the European Communities*, Case T-93/94, para 37, EU:T:1996:30.

20 GC, *Animal Trading Co, and others v European Commission*, T-333/10, para 84, EU:T:2013:451.

21 CFI, *Pfizer Animal Health v. Conseil*, *supra*, para 199.

22 Commission, ‘Communication on the precautionary principle’, COM (2000)1 final, 19.

23 CJEU, *United Kingdom v. EC Commission*, Order, C-180/96, para 93, EU:C:1996:308; CJEU *Affish*, C-183/95, para 43 and 57, EU:C:1997:373.

24 Dinnen N., ‘Precautionary discourse. Thinking through the distinction between the precautionary principle and the precautionary approach in theory and practice’, *Politics and the Life Sciences* (2013) 2.

25 Gaillard E., ‘Principe de Précaution - Systèmes juridiques internationaux et européens’, *Fascicule 2415, JurisClasseur Environnement et Développement durable* (2017) 40.

26 ITLOS, 27 August 1999, cases n° 3 et 4, *New Zealand vs. Japan and Australia vs. Japan*, Independent Opinion, M. Laing, Rec. TIDM 1999, 19.

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case of disagreement between EU and Japan on any matter regarding the interpretation or application of the precautionary approach (and, more in general, of Chapter 16), the following procedure shall apply. First, the parties shall enter into government consultations (Article 16.17). Second, if no solution is reached through consultation, the Committee on Trade and Sustainable Development shall be convened (Article 22.3). If no later than 75 days of the date of request by a Party to convene the Committee, the parties do not reach a mutually satisfactory resolution of their dispute, a party may request that a Panel of Experts be convened (Article 16.18). The Panel of Experts shall issue a final report to the Parties no later than 180 days after the date of its establishment. The report of the Panel of Experts is nonetheless neither binding on the parties nor able to issue any form of penalty for breaches of Chapter 16. Thus, due to the *de facto* lack of enforceability of these provisions, their actual legal relevance remains to be determined and will primarily depend on the willingness of the EU and Japan to live up to their commitments.

Several reasons could explain the choice to refer to a precautionary approach under EPA. First, while under EU law, since 1992 (Treaty of Maastricht), precaution has been enshrined in the TFUE and has been qualified as a principle of EU law, in Japan, to date, it is unclear whether the basic Japanese environmental law includes precaution²⁷. Indeed, no legal provisions directly make reference to this principle, but as suggested by professor Otsuka, “it might be possible to interpret that Article 4 of the Japanese basic environmental law, which provides that interference with environmental conservation can be anticipatively prevented through enhancing scientific knowledge, recognizes the precautionary principle”²⁸. The different regime under the contracting parties’ national legislation could justify their decision to opt for a more “nuanced” version of precaution. Second, the reference to a precautionary approach instead than a precautionary principle reflects the controversy which characterizes the legal status of precaution under international law²⁹. Both the diversity of treaties mentioning precaution and the plurality of approaches adopted by international judges

have led to the conclusion that if an international consensus exists today on the scope of precaution, this consensus can be described as negative, that is to say, that it resides in the non-recognition of precaution as a general principle of international law³⁰. For the rest, the precautionary principle remains a highly controversial principle that is expressed in various forms and is the subject of uncertainty. Third, the uncertainties as to the legal status of precaution have been confirmed under WTO law, which sets forth the common ground of trade relations between the EU and Japan. Indeed, under Article 1.9 EPA, “nothing in this Agreement shall require either Party to act in a manner inconsistent with its obligations under the WTO Agreement.” As a result, EPA can be seen as defining additional obligations on top of WTO rules and obligations, which remains the basis of their trade relations. From one hand, the WTO Sanitary and Phytosanitary Agreement (“SPS Agreement”) does not contain a reference to precaution. However, Article 5.7 has been interpreted as the “clearest reflection” of precaution in the SPS Agreement³¹. By allowing the possibility to maintain or introduce a provisional measure even though it has not been adequately backed up by scientific evidence, Article 5.7 indirectly recognizes a precautionary approach under the SPS Agreement³². On the other hand, insight regarding the relationship between precaution and WTO law comes from the interpretation of the WTO Appellate Body in the EC – Hormones case³³. In this case, the WTO Appellate Body called to evaluate the European decision to ban hormone-treated beef on the basis of, *inter alia*, the precautionary principle, considered that the status of the precautionary principle in international law is the subject of debate among academics, law practitioners, regulators, and judges. Therefore it stated

30 Le Bris C., ‘Les différents visages de la « précaution » : l’interprétation variable des juridictions internationales’, in D’Ambrosio L., Giudicelli-Delage G., Manacorda S. (eds), *Principe de précaution et métamorphose de la responsabilité* (Collection de l’Institut des sciences juridiques et philosophiques de la Sorbonne, 2018) 43-55.

31 Zander J., ‘The application of precaution in international law’, *op. cit.*, 43; Ruiz-Fabri H., ‘La prise en compte du principe de précaution par l’OMC’, *Revue Juridique de l’Environnement*, numéro spécial (2000) 61.

32 Article 5.7 SPS Agreement: “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time”.

33 WTO AB, *European Communities – Measures Concerning Meat and Meat Products*, January 16, 1998 (EC Hormones ABR).

27 Nakanishi Y., ‘Climate change and environmental issues in the economic partnership agreement and the strategic partnership agreement between the European Union and Japan’, *Hitotsubashi Journal of Law and Politics* 48 (2020) 17.

28 Otsuka T., *Environmental Law* (Japanese), 3 ed., 2010, Yuhikaku, 55, cited by Nakanishi Y., *ibidem*.

29 Zander J., ‘The application of precaution in international law’, in Zander J., *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (CUP, 2010); Gaillard E., ‘Principe de Précaution – Systèmes juridiques internationaux et européens’, *op. cit.*

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“that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question”³⁴.

If the EU precautionary principle diverges from the EPA’s precautionary approach about its legal status, other differences can be identified as to their respective scope of application.

B- THE SCOPE OF APPLICATION OF PRECAUTION

Both under EU law and EPA, precaution nurtures a close relationship with the notion of sustainable development. Pursuant to the Brundtland Commission, sustainable development is defined as the one that meets the needs of the present without compromising the ability of future generations to meet their own needs³⁵. In line with the Brundtland Commission’s definition, sustainable development is understood under EPA as composed of three dimensions: economic development, social development and environmental protection³⁶. Since it aims to avoid the realization of uncertain risks that could cause severe damage to the environment and public health, the precautionary principle is the crucial element of sustainable development policies. By anticipating the time of public action in the face of uncertainty, precaution makes it possible to safeguard the future by preventing future generations from having to bear the unpredictable consequences of our actions³⁷. It is for this reason that the latest 7th EU Environment Action Program enshrines precaution as the basis for European policy up to 2020³⁸ and that the EU sustainability strategy expressly refers to the precautionary principle as one of the pillars of sustainable development³⁹. It can be argued that it is for the same reasons that precaution has been inserted in Chapter 16 of EPA dedicated to trade and sustainable development.” In this context, the Parties recognize, from one side, “the importance of promoting the development of international trade

in a way that contributes to sustainable development, for the welfare of present and future generations” and, from the other side, that “the purpose of this Chapter is to strengthen the trade relations and cooperation between the Parties in ways that promote sustainable development⁴⁰.”

If a correlation can be found between EU law and EPA as to the recognition of a link between precaution and sustainable development, some differences exist as to the delimitation of the scope of application of precaution under EU law (1) and EPA (2).

a) The scope of application of precaution under EU law

The precautionary principle applies, first of all, in sectors that fall under European environmental law. Article 191 § 2 TFEU states that Union policy on the environment shall be based on the precautionary principle. The notion of “environment” is heterogeneous. As it has been stated, in the search for a definition of environment, we “encounter a hundred”⁴¹. The term environment is a neologism imported from the United States in the 1960s, which expresses the act of surrounding⁴². It implies a binary relationship, that which a center (man and other living species) has with its surroundings (the natural environment). By environment, we thus mean, all the factors that influence the environment in which man lives: the quality of air, water and soil, the preservation of natural habitats and biodiversity, climate protection, waste management and the fight against nuisances are all factors that have an impact on the environment in which man lives and which are generally included within the scope of EU environmental law. The breadth of the definition of the environment explains the diversity of uses of the precautionary principle under EU law. This principle has been applied to prevent the realization of an uncertain risk concerning: the protection of marine ecosystems⁴³; the control of invasive alien species⁴⁴; the limitation of the emission of certain pollutants in ozone⁴⁵; the monitoring and assessment of the level of exposure to certain greenhouse gas emissions⁴⁶; waste management⁴⁷; the authorisation of the placing on the

³⁴ *Ibidem*, para. 123.

³⁵ The Commission on Environment and Development was established in 1987 by the 38th session of the United Nations General Assembly.

³⁶ Nakanishi Y., ‘Climate change and environmental issues in the economic partnership agreement and the strategic partnership agreement between the European Union and Japan’, *Hitotsubashi Journal of Law and Politics* 48 (2020) 11.

³⁷ Prieur M., *Droit de l’environnement, droit durable* (Bruylant, 2014) 56.

³⁸ Decision 1386/2013 of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, 20 November 2013.

³⁹ Council, New strategy of the EU for sustainable development, 26 June 2006, n° 10917/06.

⁴⁰ Article 16.1 EPA.

⁴¹ Van Lang A., *Droit de l’environnement* (4 Edition, PUF 2016) 13.

⁴² Prieur M. (eds), *Droit de l’environnement* (Dalloz, 2016) 1.

⁴³ Directive 2008/56 (CE); Directive 2014/89 (UE).

⁴⁴ Regulation 1143/2014 (UE).

⁴⁵ Directive 2001/81 (CE); Regulation 850/2004 (UE) art. 1.

⁴⁶ Regulation 525/2013 (UE).

⁴⁷ Directive 2008/98 (CE).

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market of biocidal products⁴⁸, pesticides⁴⁹, and chemical products⁵⁰.

Since no other TFEU provision contains a reference to the precautionary principle, it could be considered that this principle applies only to environmental matters. However, since the *National Farmers' Union and United Kingdom v Commission* judgments of 5 May 1998, the Court of Justice has consistently held that the precautionary principle may also be invoked in the field of public health⁵¹. The CJEU considers that the extension of the scope of the precautionary principle to the field of public health can be explained in terms of the integration between EU environmental and health policies. First, both environmental policy and public health policy occupy a privileged position in EU law since they must be considered in a cross-cutting manner. On the one hand, Article 168 TFEU requires that a high level of human health protection be ensured in the definition and implementation of all Union policies and activities and, in similar terms, Article 9 TFEU provides that in defining and implementing its policies and activities, the Union shall take into account requirements relating, *inter alia*, to a high level of human health protection. On the other hand, under Article 11 TFEU, environmental protection requirements are to be integrated into the definition and implementation of Union policies and activities. Secondly, Article 191 § 2 TFEU states that Union policy on the environment shall contribute to further protecting human health. Health protection is thus seen as one of the objectives of environmental policy. This means that, when taking action to protect the environment, decision-makers must also ensure the protection of health⁵². Based on these two arguments, the CJEU states that the precautionary principle, enshrined in Article 191 § 2 as one of the principles of environmental policy, may also be applied in the field of public health. The precautionary principle is most often invoked today in the field of public health⁵³. However, a definition of public health has not yet been formulated under EU law. While the Commission recognizes that this includes human, animal, and plant health issues, no

further clarification is given as to how these concepts should be interpreted⁵⁴. The difficulty of defining the concept of public health, as well as the flexibility and complexity of the precautionary principle, could explain the variety of applications of the precautionary principle. This latter has been invoked to counter uncertain risks associated both with the consumption or ingestion of enzymes⁵⁵, flavourings⁵⁶, additives⁵⁷, food supplements⁵⁸ as well as with the placing on the market of cosmetic products⁵⁹, and medicinal products for human use⁶⁰.

b) The scope of application of precaution under EPA

The scope of application of the precautionary approach under EPA is narrower than the one of the EU precautionary principle. On the one hand, Article 16.9 EPA states that a precautionary approach shall be applied "when preparing and implementing measures." The reference to the need to have a *measure* seems to exclude the possibility of invoking a precautionary approach in all cases in which the handling of uncertain risks does not materialize in the adoption of such measure. Unlike EU law, where precaution is an open-context principle that can be invoked in any case in which the EU institutions need to act to manage an uncertain risk, under EPA, the application of precaution is conditional upon the execution of a measure. It is true that one may consider that the notion of *measure* under EPA is sufficiently broad to cover any act, independently of its legal nature and content, which falls within the scope of EPA. However, this limitation is not trivial if compared to EU law. Under this latter, decision-makers are granted with a wide margin of discretion to decide whether and how to act on the basis of the precautionary principle. Since the precautionary principle is only binding on the procedural side, decision-makers are free to decide, on the substantial side, the content and the modalities of the precautionary action. This means that they could adopt a precautionary measure, but they are not obliged to do so. Considering the features of the risk and the uncertainty at stake, decision-makers could, for example, decide that the adoption of a specific risk-management measure is not necessary and/or appropriate, and they could opt for a further re-evaluation of the situation. In this event,

48 Regulation 528/2012 (UE).

49 Regulation 1107/2009 (UE).

50 Regulation 1907/2006 (UE).

51 CJEU, *National Farmer's Union*, Case C-157/96, para 64, EU:C:1998:191; CJEU, *United Kingdom v. EC Commission*, C-180/96, para 100, EU:C:1998:192.

52 CJEU, *National Farmer's Union*, *supra*, para 63- 64 ; CJEU, *United Kingdom v. EC Commission*, *supra*, para 99-100.

53 CJEU, *Codacons and Federconsumatori*, Case C-132/03, EU:C:2005:310; CJEU, *Agrarproduktion Staebelow*, Case C-504/04, EU:C:2006:30; CFI, *Malagutti-Vezinhet*, Case T-177/02, EU:T:2004:72; GC, *Acino v. Commission*, Case T-539/10, EU:T:2013:110.

54 Commission, 'Communication on the precautionary principle', *op. cit.*, 2.

55 Regulation 1332/2008 (UE).

56 Regulation 1334/2008 (UE).

57 Regulation 1333/2008 (UE).

58 Directive 2002/46 (CE).

59 Regulation 1223/2009 (UE).

60 Directive 2001/83 (CE).

The EU-Japan Relationship

PART 2: SECTORIAL APPROACHES OF THE ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND JAPAN



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the precautionary principle would be applied even if no concrete measures are adopted. If we accept the interpretation given to Article 16.9, this scenario would not be possible under EPA, where the implementation of precaution would necessarily be linked to the adoption of a specific measure handling the uncertain risk at stake.

On the other hand, under Article 16.9 EPA, a precautionary approach shall be applied to the preparation and implementation of measures aimed at “protecting the environment or labour conditions that may affect trade or investment.” Despite EU law, where the precautionary principle applies to any risk related to the environment and public health to ensure a high level of protection of the environment and public health, under EPA, its scope of application is more limited. First, a precautionary approach shall only be adopted with regard to measures that have the potential to affect the trade and investment regime provided for by EPA. The scope of application of precaution is therefore limited by the need to prove a potential attempt to trade or investment. Second, a precautionary approach shall only be implemented with the purpose of protecting the environment and labour conditions of the contracting parties. No reference is included in EPA to the protection of human, animal, and plant health. From this perspective, Article 16.9 shall be read together with Article 16.2 according to which: “1. [...] each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.”

III- AN ASSESSMENT OF THE IMPLICATIONS OF EPA' PRECAUTIONARY APPROACH ON THE EU PRECAUTIONARY PRINCIPLE

In light of the less stringent legal status and the narrower scope of application of precaution under EPA, a question could be raised: has EPA the potential to hinder and inhibit the EU to continue regulating environmental and public health matters in accordance with its own precautionary principle? The answer to this question is not straightforward, and two different arguments could be made.

On the one hand, one might consider that the EU precautionary principle is sufficiently safeguarded by EPA⁶¹. Three different reasons could explain this

statement. First, *the right to regulate* under Article 16.2 § 1 EPA preserves the right of each Party to “determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify its relevant laws and regulations”. Accordingly, “each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection”. As a consequence, according to Article 16.2 § 2, “the Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations.” Therefore, in case of divergences between EU and Japan as to the level of protection associated with the adoption of a precautionary measure, Article 16.2 EPA grants to each party the right to maintain its domestic level of environmental and labour protection, provided that this level is sufficiently high. Second, Article 18.1 § 3 EPA on *regulatory cooperation* provides the right of each party to continue “adopting, maintaining, and applying regulatory measures in accordance with its legal framework, principles, and deadlines in order to achieve its public policy objectives at the level of protection it deems appropriate.” For the EU, such principles include those established in the TFEU as well as in regulations and directives adopted pursuant to Article 289 TFEU. Since the precautionary principle is set forth by Article 191 § 2 TFEU, its application under EU law should not be prevented or hindered by the execution of the trade agreement between the EU and Japan. Third, under Article 1.9 EPA, WTO rules continue to apply in full between the parties to EPA. As indicated above, the WTO SPS Agreement does not contain a reference to precaution. However, by allowing the possibility to maintain or introduce a provisional measure even though it has not been adequately backed up by scientific evidence, Article 5.7 has been interpreted as indirectly recognizing a precautionary approach under the SPS Agreement. From this perspective, the continuous application of the precautionary principle would be guaranteed by the implementation of the WTO law in the trade relations between the EU and Japan.

On the other hand, it could be argued that the EU precautionary principle is not sufficiently protected by EPA's provisions⁶². First of all, as to the right to

61 See for example, Commission, *An introduction to the EU-Japan Economic Partnership Agreement - Precautionary principle*, (2019)

https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155718.pdf accessed 5 March 2020.

62 See, for example, The Greens, European free alliance, 'EU-Japan agreement Preliminary Review on behalf of the Green/

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regulate and the regulatory cooperation mechanism, if it is true that these provisions do not directly and openly contradict the precautionary principle, it can, however, be considered that their methods and basic assumptions “do not sufficiently safeguard the precautionary principle as a regulatory approach⁶³.” Although these provisions acknowledge the parties’ commitment to high standards of environmental and labour protection and preserve the parties’ right to apply their legal principles, they don’t prevent the emergence of a potential regulatory clash in the handling of risks. As it was noted, the language used in these chapters roots in modern regulatory methodology and culture, which generally favors an approach that calls for proving causation of a risk for measures to be taken against it. Therefore, “notwithstanding that scientific foundation of regulation forms an important part of the EU precautionary principle as well, such language will make it hard for the EU to introduce other regulatory criteria than science in case there is no available scientific proof for a certain risk, which is central to the EU precautionary principle⁶⁴.” As a consequence, if the parties are granted with a marge of flexibility as to the implementation of their own regulatory measures, the precise extent of the sovereignty concessions that the EU can accept and request from its trading partner, will depend on future interpretations conducted by arbitration tribunals called to interpret the relevant EPA’s provisions⁶⁵. Second, if it is true that a precautionary approach -with a limited scope of application - is recognized under the WTO SPS Agreement, the EU has lost twice in the WTO against US and Canada trying to defend its own precautionary principle (hormones and GMO cases)⁶⁶. In both disputes, the EU unsuccessfully tried to justify its protective measures concerning the specificities of the EU precautionary principle, but its reasoning was not upheld. In light of the WTO disputes and the EU’s lack of success in invoking the precautionary principle, the reference to WTO-law into EPA must appear as if “the EU conceded its position on the admissibility

of the precautionary principle”⁶⁷, and accepted “the state of affairs as they stand⁶⁸.” The reference in EPA to the WTO SPA agreement thus transfers the existing legal uncertainty on this matter in WTO-law into EPA, without clarifying the EU’s position and making use of existing margins in WTO law for the application of the precautionary principle⁶⁹. This might be problematic also in view of the recognition of equivalence of measures as envisaged under Article 6.14 EPA. Procedures for the recognition of equivalence require one party to explain the reasons for a particular regulation as well as its objectives and its basis for the other party to be able to show that its standards and regulations meet the same objective. In this process, however, the EU could come under pressure, as it is required to justify its regulations by the WTO SPS Agreement and its underlying values and purposes, which do not reflect the EU precautionary principle. Although recognition of equivalence does not directly change European standards of protection, the precautionary principle and its implementation could be constrained. Indeed, Japan’s products could be recognized as equivalent to the European ones and marketed in the EU, without being previously authorized under an EU regime according to the precautionary principle⁷⁰.

IV- CONCLUSION

The execution of EPA marked a milestone for the economic relations between EU and Japan and is expected to boost trade in goods and services between these two countries by creating new opportunities of exchange and investments⁷¹. However, at this stage, it is hard to evaluate the impact that the precautionary approach, under article 16.9 EPA, will exercise in the trade and investment relations between EU and Japan and in the implementation of the precautionary principle under EU law. From the one side, the soft legal nature and the flexible/open content of the precautionary approach under EPA transfers to the Parties and, in case of controversies, to the Committee on Trade and

EFA Trade Working Group’, <<https://www.greensefa.eu/files/doc/docs/3c6173360eb7d066246880001c0740c.pdf>> (2018) accessed 28 February 2020.

63 For similar considerations as to CETA and the TTIP, see: Tobias P., Douma W.T., De Sadeleer N., Patrick A., ‘CETA, TTIP and the EU precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’ <file:///C:/Users/DonatiA/Downloads/2016-06-21_foodwatch-study_precautionary-principle.pdf> accessed 28 February 2020.

64 *Ibidem*.

65 *Ibidem*.

66 WTO, EC Measures Concerning Meat and Meat Products (Hormones), Appellate Body Report of 16 January 1998; WTO, European Communities - Measures Affecting the Approval and Marketing of Biotech Products, Panel Report of 29 September 2006.

67 Tobias P., Douma W.T., De Sadeleer N., Patrick A., ‘CETA, TTIP and the EU precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’, *op. cit*.

68 Zank M. W., ‘The effects of Ceta on the continuous implementation of the precautionary principle within the European Union’, *Global trade and customs journal* (2019) 179-198.

69 Tobias P., Douma W.T., De Sadeleer N., Patrick A., ‘CETA, TTIP and the EU precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’, *op. cit*.

70 *Ibidem*.

71 EU-Japan Centre for Industrial Cooperation, ‘About the EU-Japan EPA’ <<https://www.eubusinessinJapan.eu/issues/economic-partnership-agreement/about-eu-japan-epa>> accessed 28 February 2020.

The EU-Japan Relationship

PART 2: SECTORIAL APPROACHES OF THE ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND JAPAN



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Sustainable Development and the Panel of Experts, the duty to interpret and implement, in each specific case, the precautionary approach. On the other side, precaution grants a large marge of appreciation to Japan and EU institutions to fix the level of protection they deem appropriate and to adopt the protective measure they consider necessary to achieve such level. The EU precautionary principle and its future application are not sufficiently anchored and safeguarded in the text of EPA to exclude any possible interference in its use. Still, at the same, its implementation is not necessarily threatened by the entry into force of EPA. The right to regulate and the regulatory cooperation mechanism to be exercised under the framework of EPA and the WTO law ensures a minimum defense to the EU precautionary principle but don't consistently prevent the incurrence of regulatory clashes and trade disputes over the adoption of a precautionary measure. Thus, it remains to be seen how, on a case by case basis, the relevant authorities will make use of their discretionary power: will they use it to align the trade and investment relations between EU and Japan to the higher standards of protection set forth under EU law? Or will they take advantage of the softness of the precautionary approach to decrease such level of protection? The answer to these questions is not yet given, and many different factors, including the political will to protect the environment and public health over economic interests, will play a key role in shaping not only this answer but also the future of EU-Japan trade relations.

DEVELOPMENT OF THE GOVERNMENTAL PROCUREMENT SCHEME THROUGH THE JAPAN-EU ECONOMIC PARTNERSHIP AGREEMENT (JEUEPA)

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I- FORWARD

Procurement of products and services by governmental or public organizations has been one of major topics gathering much attention in multilateral, pluri-lateral or bilateral trade negotiations since, depending on size of relevant state economy and budget of a government, a share of the government procurement market in its economy is said to be generally between 10 percent and 15 percent of GDP¹.

Some reasons, such as needs for protection of domestic economy and industries or national security, have been raised from states for limiting access to the government procurement markets in the state. At the same time, it is said that such the circumscription of the government procurement markets prevents a government to maximize the utility of its budget as this kind of policy may be a hazard for the government to procure the best possible goods or services at a possible reasonable price. It is also pointed out that discrimination between domestic and foreign supply of goods or services create an arbitrary barrier against competitive markets, which distorts fair and equitable conditions for providers of goods and services in a long run, and prevent building a free trade system and order despite this might help a government to achieve its objective in a short run. Moreover, it is said that this could induce an inefficient economy in a state since this may give a protected industry less incentives to improve their goods and services.

Based on such the circumstances and ideas mentioned above, there have been discussions in several occasions and places on how to manage the government procurement and some international disciplines have been created. Chapter 10, Government Procurement,

¹ WTO and government procurement, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm. It is said that OECD member states spend 12% for the public procurement and that over 250,000 public authorities in the EU spend around 14% of GDP (around €2 trillion per year) for the procurement of services, works and supplies. https://ec.europa.eu/growth/single-market/public-procurement_en.

of the Agreement between the European Union and Japan for an Economic Partnership (JEUEPA) is an output of such discussions, which this paper analyzes.

The section I and section II of this paper outline some materials and notions relating to the government procurement which are the bases of this agreement². Section III explains the text and commitments of Japan and the EU in the JEUEPA. Section IV makes a short observation regarding the relationship of it with the Brexit. Analysis is delivered in Section V.

This article is written based on the personal recognition and opinion of the author and does not reflect the standings of the organization to which the author belongs.

II- GOVERNMENT PROCUREMENT IN THE WTO³⁴

A- WTO TEXTS – GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) / GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Article 3-8-(a) of the GATT provides that “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale”. This is the

² cf. GATT Article 24 and GATS 5. However, as being mentioned in later part, the government procurement is excluded from the obligation of the national treatment in the GATT (Article 3-8-(a)) and the obligations regarding the market access commitments in the GATS (Article 13-1).

³ In the contexts of negotiations taken places in the WTO, the Working Group on Transparency in Government Procurement was established in accordance with Doha Development Agenda, which is not active currently.

⁴ The article 13(2) of GATS provides a multilateral negotiating mandate regarding the government procurement of services and the discussions has been taken a place in the Council for Trade in Services. Cf. https://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm.

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provision exempting a government procurement from the application of the National Treatment regarding the trade in good⁵.

The article 13-1 of the GATS, clause for the general exception, provides as follows.

“Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.”⁶

This is the article exempting a government procurement from the application of the GATS.

As above, however the WTO has been working “to promote transparency, integrity and competition in this market⁷”, it has not reached to have a multilateral scheme regarding the government procurement yet. But there is a pluri-lateral agreement regarding the government procurement.

B- GOVERNMENT PROCUREMENT AGREEMENT (GPA)

Although it is included in Annex 4 to the Marrakesh Agreement Establishing the WTO, the Government Procurement Agreement (GPA)⁸ is a pluri-lateral

⁵ It is mentioned that the MFN obligation stipulated in the Article 1 of the GATT does not apply to government procurement. Cf. Arrowsmith and Robert D. Anderson ed., *The WTO Regime on Government Procurement: Challenge and Reform* (hereinafter Arrowsmith et al.), (Cambridge Univ. Pr. 2015), 6.

⁶ The second provision of this article provides that “There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.” Based on this provision, there were some discussion taken places, but it seems not active in recent years.

⁷ WTO and government procurement, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.

⁸ Government procurement was one of the original agenda in the negotiation regarding the International Trade Organization (ITO). In 1979, during the Tokyo Round, the 1979 Tokyo Round Government Procurement Code (1235 U.N.T.S. 258. <https://treaties.un.org/doc/Publication/UNTS/Volume%201235/v1235.pdf>) was agreed and put into force in 1981. It based on the preparatory work of the OECD (cf. OECD, PURCHASING IN EUROPE, NORTH AMERICA AND JAPAN - REGULATIONS AND PROCEDURES (1966)).

The Code was a limited one as it applied, basically, only to the procurement of goods (since the scope of Tokyo Round is limited only to the trade in goods) and only to the procurement by the central government entities with the certain financial threshold. However there were such the limitations, this is said meaningful since this put the member states under the basic obligations of national treatment and most-favored nation and provided for the negotiations to begin within three years for extending coverage of entities and for including services.

In 1983, the negotiation based on this code was started and the

agreement among the members of the WTO⁹.

The purposes of the GPA are to achieve greater liberalization and expansion of international trade in the government procurement market through the improvement of the framework for it, not to make measures regarding government procurement being prepared, adopted or applied to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services and to make the integrity and predictability of government procurement systems so that it contribute to the efficient and effective management of public resources, the performance of the parties' economies and the functioning of the multilateral trading system.

The main parts of the GPA are composed with two parts, i.e., the text of the agreement and parties' market access schedules of commitments.

a) Text

The text of the GPA provides disciplines on measures, i.e., any law, regulation, procedure, administrative guidance or practice, or any action, of its parties regarding the government procurement covered by it. The major elements of the disciplines included in it are as follows.

The Article 4 provides the guarantees of national treatment and non-discrimination for the suppliers of parties to the GPA with respect to procurement of covered goods, services and construction services as set out in each party's schedules.

Article 6 to Article 15 provides the detailed procedural requirements regarding the procurement process. These articles provide the conditions designed to ensure that a covered procurement under the GPA is

code was revised in 1987 and came into force in 1988. The revised code (https://www.wto.org/english/tratop_e/gproc_e/gpa_rev_text_1988_e.pdf) improved in several points including such as installation of the new prohibition of discrimination based on the foreign ownership or affiliation but, with regard to the coverage, only a slight reduction in some threshold was adopted.

Later in 1994, Agreement on Government Procurement (GPA 1994) (https://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm) was adopted and entered into force on 1st Jan., 1996.

In Feb., 1997, preparatory work for negotiations to revise GPA 1994 was started and it was concluded in December 2011 and the outcome of the negotiations was adopted in Mar., 2012. The requirement for the effectuation was fulfilled on 7 Feb., 2014 and the revised Agreement consequently entered into force on 6 April 2014.

⁹ Currently there are 48 parties to GPA which are the member states of the WTO and 34 WTO members/observers joined to the GPA Committee as observers. https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

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carried out in a transparent and competitive manner and does not discriminate against the goods, services or suppliers of other parties.

Article 6 is an article regarding how to publish information of the procurement system. It provides that any information such as law, regulation, judicial decision, administrative ruling or standard contract clause shall be published in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public.

Article 7 is an article regarding the notice of a procurement. It provides that procuring entity shall publish a notice of intended procurement, which includes adequate information, in the appropriate paper or electronic medium.

Article 8 is an article regarding the condition for participation. It requires a procuring entity to limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities.

Article 9 is an article regarding the qualification of suppliers. It provides several norms concerning the registration systems and qualification procedures, such as that a party shall not adopt or apply any registration system or qualification procedure with the purpose or having the effect of creating unnecessary obstacles to the participation of suppliers of another party of the GPA in its procurement.

Article 10 is an article regarding the technical specifications and tender documentation. In relation to the technical specification, it provides norms such as that a procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or having the effect of creating unnecessary obstacles to international trade. In relation to the tender specification, it provides that a procuring entity shall make available to suppliers tender documentations that includes all information necessary to permit suppliers to prepare and submit responsive tenders.

Article 11 is an article relating to the time-periods regarding the procurement procedure. It provides such a norm that a procuring entity shall provide enough time for suppliers to prepare and to submit requests for participation and responsive tenders. In relation to the length of a period, it requires to take into account such factors as the nature and complexity of the procurement, the extent of anticipated subcontracting

and the time necessary for transmitting tenders by non-electronic means from foreign as well as domestic points where electronic means are not used. Moreover, it provides that the time-periods, including any extension of the time-periods, shall be the same for all interested or participating suppliers.

Article 12 is an article regarding the negotiation in relation to the procurement procedure. It requires a procuring entity to ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation and that a procuring entity provides a common deadline for the remaining participating suppliers to submit any new or revised tenders.

Article 13 is an article regarding the limited tendering, i.e., a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice. It provides that the limited tendering may be used, provided that it is not used for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other party or protects domestic suppliers. It also provides circumstances in which a procuring entity may use limited tendering and may choose not to apply some norms provided in the GPA.

Article 14 is an article regarding conditions for conducting a procurement using an electronic auction.

Article 15 is an article regarding the treatment of tenders and awarding of contracts. In relation to the treatment of tenders, it provides that a procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders. In relation to the awarding of contracts, it requires the conditions such as that a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation. It is also required that a supplier shall be selected from those satisfying the conditions for participation and that an entity shall award a contract to a supplier which is capable to fulfill the terms of the contract and that has submitted the most advantageous tender or, where price is the sole criterion, the lowest price.

Article 16 provides additional requirements regarding transparency of procurement-related information including information provided to suppliers, publication of award information, maintenance of documentation, reports and electronic traceability and collection and

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reporting of statistics.

Article 17 is an article regarding the disclosure of information. It provides norms relating those such as provision of information to parties and non-disclosure of information.

Article 18 provides requirements regarding availability and nature of domestic review procedures for supplier challenges which must be put in place by all parties to the GPA.

Article 19 provides modifications and rectifications of parties' coverage commitments.

Article 20 provides the application of the WTO Dispute Settlement Understanding in relation to the GPA.

Article 21 establishes a Committee on Government Procurement.

b) Market access schedules of commitments

The schedules of parties¹⁰ are an integral part of the GPA and are contained in Appendix I to the Agreement. The schedule is consisted with the following seven annexes, i.e., Annex 1: central government entities, Annex 2: sub-central government entities, Annex 3: other entities, Annex 4: goods, Annex 5: services, Annex 6: construction services, Annex 7: general notes, which define the concerned party's commitment with respect to four dimensions of coverage, i.e., the procuring entities covered by the GPA, the goods, services and construction services covered by it, the threshold values above which procurement activities are covered by it and exceptions to the coverage.

Only the procurement activities carried out by a covered entity purchasing covered goods, services or construction services of a contract valued above the relevant threshold, and not specifically exempted in the notes to the schedules, are subject to the GPA's rules.

III- INSTRUMENTS OF OTHER INTERNATIONAL ORGANIZATIONS RELATING TO THE GOVERNMENT PROCUREMENT

In relation to the trade negotiation regarding the government procurement, there are some activities of some international organizations relating to the government procurement¹¹.

¹⁰ https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm.

¹¹ https://www.wto.org/english/tratop_e/gproc_e/information_e.htm.

A- OECD

As mentioned above, OECD provided the basis for the Tokyo code.

In 2015, OECD issued the Recommendation on Public Procurement¹² which was built upon the foundational principles of the 2008 OECD Recommendation on Enhancing Integrity in Public Procurement¹³.

The OECD Recommendation on Public Procurement provides the following 12 recommendations.

- Adherents ensure an adequate degree of transparency of the public procurement system in all stages of the procurement cycle.
- Adherents preserve the integrity of the public procurement system through general standards and procurement-specific safeguards.
- Adherents facilitate access to procurement opportunities for potential competitors of all sizes.
- Adherents recognize that any use of the public procurement system to pursue secondary policy objectives should be balanced against the primary procurement objective.
- Adherents foster transparent and effective stakeholder participation.
- Adherents develop processes to drive efficiency throughout the public procurement cycle in satisfying the needs of the government and its citizens.
- Adherents improve the public procurement system by harnessing the use of digital technologies to support appropriate e-procurement innovation throughout the procurement cycle.
- Adherents develop a procurement workforce with the capacity to continually deliver value of money efficiently and effectively.
- Adherents drive performance improvements through evaluation of the effectiveness of the public procurement system from individual procurements to the whole system, at all levels of government where feasible and appropriate.
- Adherents integrate risk management strategies

¹² <https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf>.

¹³ <https://www.oecd.org/gov/ethics/48994520.pdf>.

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for mapping, detection and mitigation throughout the public procurement cycle.

- Adherents apply oversight and control mechanisms to support accountability throughout the public procurement cycle, including appropriate complaint and sanctions processes.
- Adherents support integration of public procurement into overall public finance management, budgeting and services delivery processes.

B- UNCITRAL

a) History

It is pointed out that the GPA is extensively harmonized with the UNCITRAL Model Law on Procurement¹⁴.

The UNCITRAL Model Law on Public Procurement of Goods, Construction and Services¹⁵ was adopted at its twenty-seventh session (New York, 31 May-17 June 1994). This model law was formulated for addressing inadequate or outdated legislation that had been observed in many countries, which resulted in inefficiency and ineffectiveness in the procurement process, abuse, and the failure to obtain adequate value in return for the expenditure of public funds. This was also recognized as an obstacle to international trade, a significant amount of which is linked to procurement and the promotion of which is a major aspect of the UNCITRAL.

For the purpose of making it to serve as a model for all states for the evaluation and modernization of their procurement laws and practices and of supporting the harmonization of procurement regulation internationally, the revision of the 1994 Model Law was decided at the thirty-seventh session (New York, 14-25 June 2004) of the UNCITRAL. The UNCITRAL Model Law on Public Procurement was adopted at its forty-fourth session (Vienna, 27 June-8 July 2011).

b) Outline

While the UNCITRAL Model Law is primarily intended to be used in designing legislation at the national level, it was also intended to harmonize it, to the

extent possible, with other international agreements or text addressing public procurement, which impose obligations regarding the national procurement legislation in states.

Preamble of the UNCITRAL Model Law states the following purposes.

- Achieving economy and efficiency
- Wide participation by suppliers and contractors, opening procurements to international participation
- Maximizing competition
- Ensuring fair, equal and equitable treatment
- Assuring integrity, fairness and public confidence in the procurement process
- Promoting transparency

The UNCITRAL Model Law raises the followings as principles for fulfilling the requirements provided in the objectives of the Model Law.

- The applicable law, procurement regulations and other relevant information are to be made publicly available (article 5)
- Requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33-35) and ex post facto notice of the award of procurement contracts (article 23) are to be provided in a national law.
- Requirements for items to be procured are to be described in accordance with article 10 (that is, objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis)
- Requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, and the particular criteria that will determine whether or not suppliers or contractors are qualified in a particular procurement procedure are to be advised to all potential suppliers or contractors (articles 9 and 18)
- Open tendering is to be the recommended procurement method (article 28)¹⁶.

¹⁴ Robert D. Anderson and Anna Caroline Müller, "The revised WTO Agreement on Government Procurement (GPA): Key design features and significance for global trade and development", (WTO Working Paper ERSD-2017-04, 2017)¹⁴, (https://www.wto.org/english/res_e/reser_e/ersd201704_e.htm).

¹⁵https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement/guide.

¹⁶ Requirements regarding the objective justification for the use of

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The Model Law also provides some elements regarding the procurement procedures which should be included in a national law.

- The availability of other procurement methods to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialized items or services) and conditions for use of these procurement methods (articles 29-31)
- A requirement for standard procedures for the conduct of each procurement procedure (chapters III-VII)
- A requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7)
- A requirement for mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22 (2))
- Mandatory challenge and appeal procedures if rules or procedures are breached (chapter VIII).

The UNCITRAL Model Law comprises with eight chapters.

Chapters I and II provide general principles and procedures applied to several methods for procurements provided in the following chapters. Chapter I provides measures how the objectives set out in the preamble are to be implemented, through such regulations ensuring all terms and conditions of any procurement procedure to be determined and publicized in advance. They also include institutional and administrative requirements such as regulations on maintenance of documentary records, which are necessary to allow the procurement system to function as intended.

Chapter II provides methods of procurement and the conditions for the use of them.

Chapters III-VII contain the procedures for the procurement methods and techniques under the Model Law.

Chapter VIII sets out a series of procedures that enable

any other procurement method is also provided in this article.

decisions in the procurement process to be challenged by potential suppliers and contractors.

IV- JEUEPA

A- TEXT

JEUEPA deals the government procurement in the chapter 10 and Annex 10.

This chapter provides disciplines regarding any procurement of goods and services, which value is more than the thresholds set in this agreement, by procuring entities covered by this agreement.

The GPA is the basis of this chapter through the incorporation into and being made part of this chapter. Regarding the relationship between the chapter 10 and the GPA, the rules and procedures provided for in the GPA specified in Part 1 of Annex 10 of the JEUEPA apply to procurement covered by Part 2 of Annex 10, which is the additional commitment of Japan and the EU to those committed in the GPA (Article 10.2), and the articles 10.4 to 10.12 of the JEUEPA are applied to both the procurement covered by the annexes of Japan and the EU to Appendix I to the GPA and the procurement covered by Part 2 of Annex 10 of the JEUEPA (Article 10.3).

The following are the major elements provided in the Chapter 10 of the JEUEPA.

- Notices of intended or planned procurement under Article VII of the GPA shall be directly accessible by electronic means in free of charge through a single point of access on the internet. (Article 10.4)
- A procuring entity shall not exclude a supplier established in the other Party from participating in a tendering procedure due to whether a supplier must be a natural person or a legal person¹⁷. (Article 10.5(1))
- A procuring entity shall not impose the condition regarding the prior experience that such a prior experience must have been acquired within the territory of that Party¹⁸. (Article 10.5(2))
- Interested suppliers may request their registration

¹⁷ This provision does not apply to procurement within the scope of the Act on Promotion of Private Finance Initiative of Japan (Law No. 117 of 1999).

¹⁸ In establishing the conditions for participation, a procuring entity may require relevant prior experience where it is essential to meet the requirements of the procurement in accordance with subparagraph 2(b) of Article VIII of the GPA.

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at any time and are provided certain information when a party maintains a supplier registration system under which suppliers are required to register. A procuring entity should inform those suppliers within a reasonably short period of time whether their registration has been granted. (Article 10.6(1))

- Japan shall ensure its authorities to carry out a Business Evaluation (Keiejikoshinsa) (also known as Keishin) under the Construction Business Law of Japan (Law No. 100 of 1949) in a non-discriminatory manner and taking due account on indicators of the supplier realized outside Japan when it is required to undergo to a supplier established in the European Union. (Article 10.6(2))
- When a procuring entity limits the number of suppliers for a given procurement in accordance with paragraphs 4 and 5 of Article IX of the GPA, the number of suppliers permitted to submit a tender shall be sufficient to ensure competition without affecting the operational efficiency of the procurement system¹⁹. (Article 10.7)
- Each party shall ensure that specifications are appropriate to define the characteristics of the goods or services that are the object of a contract, are based on objectively verifiable and non-discriminatory criteria and are accessible to all interested suppliers when a procuring entity applies environment-friendly technical specifications as set out for environmental labels or as defined by relevant laws and regulations in force within the European Union or Japan. (Article 10.8)
- When requiring the submission of a test report or a certificate issued by a conformity assessment body, each party shall accept the results of conformity assessment procedures that are conducted by the registered conformity assessment bodies of the other Party in accordance with paragraph 1 of Article 2 of the Agreement on Mutual Recognition between the European Community and Japan. (Article 10.9)
- When an impartial administrative authority is designated by a party under paragraph 4 of Article XVIII of the GPA, that party shall ensure that the authority provides timely, effective, transparent and non-discriminatory procedures and may take measures such as corrective actions including the

removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or any other document relating to the tendering procedure and conduct of new procurement procedures. (Article 10.12)

- Each party shall make the other party available the comparable statistical data relevant to the procurement covered by this agreement (Article 10.13)

In addition to those elements mentioned above, this chapter also contain the provisions regarding the modifications and rectifications to coverage (Article 10.14) as well as Committee on Government Procurement (Article 10.16) and Contact points (Article 10.17) for the effective implementation and operation of this chapter.

B- ANNEX

The part 1 of the annex 10 of this agreement provides the rules and procedures provided for in the provisions of the GPA which are applied to procurement covered by part 2 of annex 10 of JEUEPA.

The articles 10.4 to 10.12 of this agreement are applied to both the procurement covered by the annexes of Japan and the EU to Appendix I to the GPA and the procurement covered by Part 2 of Annex 10 of this agreement, which provides the additional commitment of Japan and the EU to those committed in the GPA.

As above, the commitments under JEUEPA build upon the GPA. While the thresholds for Japan and the EU set under the JEUEPA are basically the same as those under the GPA, the scope of entities subject to commitments is expanded compared to the specific entities listed in the GPA.

a) Commitments of the EU²⁰

In comparison with the annex 3 of the GPA, the EU expands its commitments regarding other entities to include bodies governed by public law, such as hospitals or universities. The EU also expands its commitments on procurement of railway-related goods and services and adds commitments on services sectors procurement that broaden the commitments listed under Annex 5 of the EU Appendix.

¹⁹ This article applies only to central government entities for Japan.

²⁰ Cf. Secretariat of the WTO, Factual Presentation – Economic Partnership Agreement between the European Union and Japan, para. 5.41(WT/REG396/1, 12 Aug., 2019).

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In relation to the services, the EU made commitments regarding procurement for the following services, in addition to the services listed under Annex 5 of the European Union to Appendix I to the GPA.

- (i) for entities covered under Annex 1 of the European Union to Appendix I to the GPA or under paragraph 1 of the Section A of the Part 2 of the Annex 10: Food serving services and Beverage serving services (CPC 642, 643); Telecommunications related services (CPC 754); Photographic services (CPC 87501 to 87503, 87505, 87507, 87509); Packaging services (CPC 876); Other business services (CPC 87901, 87903, 87905 to 87907);
- (ii) for entities covered under Point 1 of Annex 2 of the European Union to Appendix I to the GPA or under paragraph 2 of the Section A of the Part 2 of the Annex 10: Beverage serving services (CPC 643); General management consulting services (CPC 86501); Financial management consulting services (except business tax) (CPC 86502); Marketing management consulting services (CPC 86503); Human resources management consulting services (CPC 86504); Production management consulting services (CPC 86505); Other management consulting services (CPC 86509); and (c) for all covered entities: Real estate services on a fee or contract basis (CPC 8220).

b) Commitments of Japan²¹

Commitments of Japan are set out in Section B of Part 2 of Annex 10. While the thresholds for tender in principle remain unchanged from those under the GPA, Japan expands the scope of covered entities in comparison with its commitments in Annex 2 to Appendix I to the GPA.

In paragraph 1 of Section B of Part 2 of Annex 10, Japan notes that, in addition to procurement by sub-central entities listed in Annex 2 to Appendix I of the GPA, Japan includes (a) procurement by Kumamoto-shi and (b) procurement by local independent administrative agencies of goods and services, as specified in Japan's Annexes 4 to 6 to Appendix I of the GPA. In relation to (b), Japan also lists 89 entities such as hospitals and universities captured by the new commitment as of 1 February 2018 for reference purposes.

Japan also includes in sub-paragraph (c) of paragraph 2 in Section B of Part 2 of Annex 10 procurement related to the production, transport or distribution of electricity by sub-central entities listed in Japan's Annex 2 to Appendix I to the GPA as well as by Kumamoto-shi, with the same thresholds set out in that Annex will be covered by the Agreement. A list of 28 covered sub-central government entities that as of 1 February 2018 is contained for reference purposes in sub-paragraph (c). In paragraph 2, Japan also includes procurement by «Core Cities» in which suppliers of the EU will be accorded treatment no less favorable than that accorded to locally established suppliers including, if and where such exist, access to any review procedures available to locally established suppliers. Any obligations in Chapter 10 of the JEUPEA other than that described in the preceding sentence do not apply to Core Cities of Japan.

Japan also expressly retains a temporary reservation in respect of procurement of goods and services related to the operational safety of transportation. In note (d) to paragraph 2, Japan expressly provides that the commitments in the paragraph do not apply to the procurement of construction services (CPC 51).

With respect of Japan's commitments in Group B of its Annex 3 to Appendix I to the GPA for «Other Entities», Japan lowers the threshold to 100,000 SDR for goods and services. Architectural, engineering and other technical services related to construction services are excluded from this lowered threshold (which in Japan's GPA commitments is 4,500,000 SDR).

With respect of Group B of Japan's Annex 3 to Appendix I of the GPA, Japan adds 6 entities whose procurement of goods and services is opened to EU suppliers.

Japan also provides access to procurement related to the operational safety of transportation by Hokkaido Railway Company, Japan Freight Railway Company, Japan Railway Construction, Transport and Technology Agency, Shikoku Railway Company and Tokyo Metro Co., Ltd. with the commitment entering into force one year after entry into force of the Agreement, or 6 July 2019, whichever is the later.

For services, in paragraph 5 of Section B of Part 2 of Annex 10, Japan expands the services listed in Annex 5 of its GPA commitments, with the addition of 21 service sectors for procurement by entities listed in Japan's Annex I to Appendix of the GPA. Japan also includes procurement in 11 service sectors by entities listed in Japan's Annex 2 to Appendix I of the GPA and Kumamoto-shi.

²¹ Cf. Secretariat of the WTO, Factual Presentation – Economic Partnership Agreement between the European Union and Japan, para. 5.43(WT/REG396/1, 12 Aug., 2019).

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V- BREXIT AND GOVERNMENT PROCUREMENT

A- CURRENT SITUATION

United Kingdom (UK) withdrew from the EU on 1st January 2020. In accordance with the withdrawal agreement between the UK and EU²², the UK and EU are in a transition period until the 31 December 2020^{23,24}. During the transitional period, unless otherwise provided, laws of the EU are applicable to and in the UK²⁵ and the UK must respect all international agreements which the EU has signed²⁶.

In relation to the trade agreements concluded by the EU, the EU formally notified with its note verbale²⁷ to its international partners about the UK's withdrawal and the transitional arrangements stipulated in the withdrawal agreement, which includes the arrangement regarding the international agreements concluded between the EU and its international partners. The note verbale informs international partners that the UK is treated as a member state for the purposes of international agreements of the EU during the transition period.

It was sent after signature of the withdrawal agreement to international partners and, in relation to the GPA, parties to it gave their final approval to the UK for its accession in its own right to it once it leaves the European Union at a meeting of the WTO's Committee on Government Procurement on 27 February²⁸.

The JEUEPA is applied between Japan and the UK during the transitional period.

B- FUTURE ARRANGEMENT

The EU and the UK will use the transitional period to

²² https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en.

²³ Article 126 of the Withdrawal Agreement.

²⁴ It can be extended once by up to one to two years. Such a decision must be taken jointly by the EU and United Kingdom before 1 July 2020.

²⁵ Article 127 of the Withdrawal Agreement.

²⁶ In relation to this arrangement, unless authorized to do so by the EU, the UK will not be able to apply new agreements in areas of EU exclusive competence, however the UK can conclude international agreements with third countries and international organizations in areas of EU exclusive competence, provided that these agreements do not apply during the transition period.

²⁷ https://ec.europa.eu/commission/publications/template-note-verbale-sent-international-partners-after-signature-withdrawal-agreement_en

²⁸ https://www.wto.org/english/news_e/news19_e/gpro_27feb19_e.htm. Cf. The United Kingdom's withdrawal from the European Union (communication from the United Kingdom), WT/GC/206(1 Feb., 2020).

agree on a new and fair partnership for the future, based on the Political Declaration²⁹ agreed between the EU and the UK in October 2019.

Regarding the relationship between Japan and the UK, it was mentioned in the joint press statement issued on an occasion of Japan-UK Foreign Ministers' Strategic Dialogue 2020³⁰ that Japan and the UK reaffirmed their previous commitment to use the JEUEPA as the basis for the future economic partnership and Japan and the UK will work quickly to make the new partnership as ambitious, high standard and mutually beneficial as the Japan-EU EPA.

VI- ANALYSIS

It is mentioned in the context of negotiation regarding the GPA in the WTO that the GPA will continue to evolve to reflect new developments in government procurement and the GPA parties have already decided to conduct discussions on following topics³¹.

- participation of small and medium-sized enterprises in government procurement
- sustainable procurement
- restrictions and exclusions in GPA parties' market access commitments
- collection and reporting of statistical data
- public-private partnerships
- common classification of goods and services in government procurement
- standardized procurement notices.

Some of those challenges are approached in the JEUEPA and Japan and the EU show an example how to deal with them. In this regard, Chapter 10 of the JEUEPA could be an example for leading the discussion on the government procurement in the WTO as well as in various forum for negotiations on FTAs in the world.

In relation to this points, it would be noteworthy that the JEUEPA establishes the Committee on Government Procurement and it was held on 27th November 2019, which could take a role to improve the government

²⁹ https://ec.europa.eu/commission/publications/revised-political-declaration_en.

³⁰ <https://www.mofa.go.jp/mofaj/files/000566013.pdf>.

³¹ https://www.wto.org/english/thewto_e/20y_e/gpa_brochure2015_e.pdf.

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procurement chapter of JEUEPA³².

VII- CONCLUSION

In addition to the size of government procurement market mentioned in the beginning of this article, government procurement is very important since it is a source and basis to build a sound public infrastructures and systems. In this regard, it is needed for states to improve a procurement system.

It is hoped that JEUEPA will be valuable not only for Japan and the EU but also for other states as one of leading examples to be followed.

32 Cf. <https://www.mofa.go.jp/mofaj/files/000561389.pdf>.

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I- MUTUALLY BENEFICIAL DATA PROTECTION

Both the European Commission and Japanese Personal Information Protection Commission (PPC) publicised their adequacy decisions on 23 January 2019. While the EU gave adequacy decision to the first third country under the General Data Protection Regulation, Regulation (EU) 2016/679 (GDPR) and the first Asian country¹, Japan issued its first equivalency decision under the Act on the Protection of Personal Information (APPI)².

It is not easy to bridge two legal systems, regardless of its different cultures and social norms. However, this has been achieved through the mutual adequacy decisions, thus opening a new chapter of data protection law throughout the world. The mutual adequacy does not mean that the EU and Japan have completely integrated their data protection laws and practices, rather, the two have agreed to live together remotely while trusting each other to protect personal data. Indeed, data transfer regulations can work as tools to connect different systems through trust and future assurances to cooperate for progress.

Unless they do not have any economic, cultural, or social relationships with the EU, no third country or international organisation can ignore the EU's adequacy framework. The 'essence' of data protection in the EU is partly and externally guaranteed through the adequacy framework. As the 'Brussels effect'³

1 European Commission, Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information.

2 Personal Information Protection Commission, Foreign countries which have the system of protection of personal information that ensure the equivalent level as Japan in protecting rights and interests of the individual (listing 31 EEA countries), 23 January 2019. https://www.ppc.go.jp/files/pdf/190123_h31iinkaikokuji01.pdf (in Japanese). As for the United Kingdom, the PPC maintains the equivalency status after 1 February 2020. https://www.ppc.go.jp/enforcement/cooperation/cooperation/brexit_200128/ (in Japanese)

3 Anu Bradford, The Brussels effect, *Northwestern University Law Review*, vol.107 no.1, 2012 p. 1.

stands for the EU influences posed to third countries, the effects of the adequacy framework from within the EU also have external global effects. At the same time, the adequacy scheme may become a form of 'carrot and stick', thus rewarding third countries (such as Japan). However, this threatens countries outside the EU in matters related to trade (e.g. the EU-US Safe Harbour decision, which was later invalidated by the Court of Justice of the European Union (CJEU)).

This article discusses the mutual adequacy decisions and assignments consequently given to Japan for the next step. For one thing, it raises potential risks related to the partial adequacy decision, which only covers the private sector and may therefore be revised by the Japanese legislators in the near future. In sum, the mutual adequacy decision between the EU and Japan was a forward-looking and mutually beneficial political choice that will shape the 'essence' of data protection philosophy for decades.

II- EU ADEQUACY DECISION

A- DATA TRANSFER REGULATIONS

As the OECD Privacy Guidelines in 1980 explains 'transborder flows of personal data' are sources of a major concern; the initial agreement was 'to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data'⁴. However, European nations became aware that existing regulatory instruments were 'not necessarily adequate for all the new and specific concerns involved'⁵. In regard to drafting the adequacy framework, data transfer regulations stemmed from 'a Europe of merchants rather than a Europe of human rights'⁶ in the early stage. Despite the potential trade conflict, the EU approach to data transfer regulations was nevertheless shaped and later reinforced by a

4 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980).

5 Cees J. Hamelink, *Transnational Data Flows in the Information Age*, Studentlitteratur AB, Chartwell-Bratt, edited by Transnational Data Reporting Service, Amsterdam, The Netherlands, 1984, p.94.

6 A.C.M. Nugter, *Transborder Flow of Personal Data within the EC*, Kluwer Law and Taxation Publishers, 1990 p.295.

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human rights concept. In *Schrems* case, the Court of Justice of the European Union justified the adequacy framework for the third country to ensure 'a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order'⁷.

According to Professor Christopher Kuner, cross-border data flow regulations come in two forms; namely, this includes the geographically-based approach, which is focused on the location where the data are to be transferred, and the organisationally-based approach, which is focused on the organisations that received the data abroad⁸. The EU chose the geographically-based approach in regard to adequacy decisions that apply to third countries or international organisations. The Asia-Pacific Economic Cooperation (APEC) has chosen the organisationally-based approach through its accountability principle. While the two approaches are not mutually exclusive, it should be noted that they may still be incompatible in some regards. For instance, a third country may have an adequate level of protection through its personal data legislations, but the residing organisations may not comply with such level of protection, and vice versa. The adequacy framework therefore exerts a strong influence on the third country, which is not the only way to export the EU's data protection philosophy to the that nations. The GDPR prepared for several venues by ensuring the level of protection when transferring personal data from the EU. For instance, it established the Binding Corporate Rules (BCRs), standard data protection clauses, codes of conduct and certifications (Art. 46 & 47). In one example, the leading Japanese e-Commerce company, Rakuten, obtained from the Luxembourg data protection authority before the GDPR entered into effect⁹.

B- ADEQUACY REVIEW AND PROCESS

The adequacy framework came in 1995 EU Data Protection Directive, which provides that transfer the transfer to a third country of personal data may take place only if the third country in question ensures 'an adequate level of protection' (Art. 25 (1)). The 'an adequate level of protection' phrase is also used in the GDPR (Art.45(1)), but with additional clarifications regarding the assessment criteria. The Police Directive 2016/680 also included similar provisions related to the the adequacy decision (Art. 36(1)). The Court of

Justice elaborated the concept of adequacy as a level of protection for fundamental rights and freedoms which is 'essentially equivalent' rather than 'identical' to the EU legal order¹⁰.

According to the Art. 45 (2) of the GDPR, the following three criteria are taken into account for the European Commission to assess adequacy decisions. In short, these criteria are

- i) The rule of law, respect for human rights and fundamental freedoms, relevant legislation as well as effective and enforceable data subject rights and effective administrative and judicial redress
- ii) The existence and effective function of independent supervisory authorities
- iii) International commitments (such as accession to the Council of Europe's Convention 108 (recital 105))

In addition to the text of the GDPR, the Article 29 Data Protection Working Party, since replaced by the European Data Protection Board (EDPB), adopted a paper on 'Adequacy Referential', which was originally published as a Working Document on transfers of personal data to the third countries (WP12)¹¹. In this paper, the assessment details are categorised into two components, including (i) content principles (i.e., concepts, grounds for lawful and fair processing for legitimate purposes, the purpose limitation principle, the data quality and proportionality principle, data retention principle, the security and confidentiality principle, the transparency principle, the right of access, rectification, erasure and objection, restrictions on onward transfers, and additional contentment principles such as special categories of data, direct marketing and automated decision making and profiling) and (ii) procedural and enforcement mechanism (i.e., competent independent supervisory authority, the data protection system which ensures a good level of compliance, accountability and the data protection system providing support and help to individual data subjects in the exercise of their rights and appropriate redress mechanisms). After the *Schrems* case, the adequacy criteria also addressed essential guarantees for law enforcement and national security access in order to limit interferences to fundamental rights in third countries¹². For that reason, the following points

⁷ Case C362/14, *Maximillian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650 para 96.

⁸ Christopher Kuner, *Transborder Data Flows and Data Privacy Law*, Oxford University Press, 2013 p.64

⁹ The company list of the BCRs is available at https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/binding-corporate-rules-bcr_en

¹⁰ Case C 362/14, *Schrems*, para 73.

¹¹ Article 29 Data Protection Working Party, Adequacy Referential, adopted on 6 February 2018; Article 29 Data Protection Working Party, Working Document on Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU Data Protection Directive, adopted on 24 July 1998.

¹² Case C-362/14, *Schrems*, para 88 [... limit any interference with

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also require consideration in the context of government access to private data; i) processing should be based on clear, precise and accessible rules (legal basis), ii) necessity and proportionality with regards to legitimate objectives pursued need to be demonstrated, iii) the processing has to be subject to independent oversight, and iv) Effective remedies need to be available to the individuals. In this regard, the EU adequacy set ‘the global data protection bar at a high level’¹³.

The process of adequacy decision process is ‘long and tortuous’¹⁴, with some review cases taking a few years to complete¹⁵. In case of Japan, it took approximately two year and ten months after the first dialogue between the PPC and the European Commission in April 2016. Yet, a careful review is required for third countries due to the different legal regimes, backgrounds, and practices. Furthermore, the limited availability of open sources in English prompts experts including a local expert in the third country to prepare for the assessment reports for the European Commission during the adequacy review process. The adequacy decisions process involves the following specific steps¹⁶;

- A proposal from the European Commission
- An opinion of the European Data Protection Board
- An approval from representatives of EU countries
- Adoption of the decision by the European Commission

the fundamental rights of the persons whose data is transferred from the European Union to the United States, interference which the State entities of that country would be authorised to engage in when they pursue legitimate objectives, such as national security].

13 Christopher Kuner, Reality and Illusion in EU Data Transfer Regulation post *Schrems*, *German Law Journal*, vol. 18 (2017) p.893.

14 European Commission, Comparative Study on Different Approaches to New Privacy Challenges, in Particular in the light of Technological Developments, Working Paper 2: Data Protection Laws in the EU (Douwe Korff), p.66.

15 For instance, in the case of Israel, the adequacy review process took nearly three and a half years to complete (starting from 12 July 2007 to 31 January 2011). See Article 29 Data Protection Working Party, Opinion 6/2009 on the level of protection of personal data in Israel, adopted on 1 December 2009; Commission Decision of 31 January 2011 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by the State of Israel with regard to automated processing of personal data.

16 European Commission, Adequacy decisions: How the EU determines if a non-EU country has an adequate level of data protection. https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en#documents.

Prior to the GDPR’s application, the European Commission listed 11 countries (i.e., Andorra, Argentina, Canada (commercial sector), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, and Uruguay) in addition to the EU-US Privacy Shield as providing adequate protections. It is considered ‘politically provocative or at least discriminatory’ if the European Commission prepares a black-list not ensuring adequate levels of protection¹⁷.

In January 2017, the European Commission publicised an adequacy strategy with four following criteria; i) the extent of the EU’s commercial relations, ii) the extent of personal data flows from the EU, reflecting geographical and/or cultural ties, iii) the pioneering role the third country plays in the field of privacy and data protection that could serve as a model for other countries in its region, and iv) the overall political relationship¹⁸. The Commission, then recognising ‘a diverse range of privacy systems, representing different legal traditions, as being adequate’ and ‘will actively engage with key trading partners in East and South-East Asia, starting from Japan and Korea in 2017’¹⁹.

C- JAPAN’S PREPARATION FOR ADEQUACY REVIEW

Although the original APPI was enacted in 2003 and took full effect in April 2005, there was almost no possibility to obtain adequacy from the EU. This was mainly because no independent supervisory authority existed. Furthermore, the original APPI reflected the 1980 OECD Privacy Guidelines instead of the EU Data Protection Directive. At least in the Diet, there were no substantive discussions on adequacy until the Consumer Affairs Agency published a study report on EU adequacy in March 2012²⁰.

17 Article 29 Data Protection Working Party, Working Document on Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU Data Protection Directive, adopted on 24 July 1998, p.27.

18 European Commission, Communication on Exchanging and Protecting Personal Data in a Globalised World, 10 January 2017 p.8.

19 *Id.*

20 The House of Representatives, Cabinet Committee, The 181st Diet, 7 November 2012, Chief Cabinet Secretary, Osamu Fujimura’s Statement. During the preparation of the original draft of APPI, the government responded that it explained the effectiveness of the Japanese self-regulation to the EU. House of Representatives, Plenary Session, 145th Diet, 13 April 1999, Minister of Foreign Affairs Masahiko Komura’s statement. The Consumer Affairs Agency’s study report on the international standards regarding the personal information protection system (March 2012) is available at https://www.ppc.go.jp/files/pdf/personal_report_2403caa.pdf (in Japanese).

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The Japanese government later publicised a plan to request the European Commission to initiate an adequacy assessment in April 2015 when the amendments bill of the APPI was submitted to the Diet (Japanese Parliament). Then-Minister of State Shunichi Yamaguchi announced in the Diet that ‘the government, in the relation with the EU, will make progress toward obtaining adequacy finding from the EU after passing the amendments bill in order to improve the business environment for the corporations within the EU’²¹. Japanese industries then pushed the Japanese government to request adequacy findings in order to realise a business environment entailing free flow of personal data between the EU and Japan²².

The Japanese strategy for adequacy was to seek a positive decision solely for the commercial private sector in order to promote industrial data flows. Furthermore, the structure of the Japanese legal regime meant that the European Commission could assess only the private sector and exclude the public sector not being supervised by an independent authority. Japanese data protection laws are divided the APPI which covers the privacy sector, and both the Act on the Protection of Personal Information Held by Administrative Organs (APPIHAO) and the Act on the Protection of Personal Information Held by Incorporated Administrative Agencies, etc. (APPI-IAA) which cover the public sector. Laws that apply to the public sector are supervised by the Ministry of Internal Affairs and Communications, while the Japanese independent authority known as PPC has jurisdiction over the APPI, thus overseeing the private sector (with some exceptions such as non-identifiable processing information and national identification numbers). As such, PPC has no authority to supervise law enforcement and national security agencies in Japan. Before the PPC was established in 2016, the competent Ministry system was adopted through the APPI, under which each Ministry could issue instructions, recommendations and orders to each business field.

Prior to the official request for an adequacy review, the Japanese government was aware of some missing elements, including a lack of an independent supervisory authority, sensitive data, small business exemptions, data transfer restriction, and the need to clarify

the right to access²³. In addition, Professor Graham Greenleaf extensively examined the Japanese law and practice, concluding that there was ‘a lack of evidence that the legislation is effective, which could be remedied somewhat by Ministries gathering and publishing more detailed data on compliance, enforcement, breaches and remedies’²⁴. These improvements were incorporated into APPI amendments in 2015. Most importantly, the PPC was thereby established as an independent authority consisting of one chairperson and eight commissioners with diverse backgrounds; these individuals were tasked with supervising the private sector. The amended APPI also stipulated that sensitive data called as special-care required personal information, in which race, creed, social status, medical history, criminal record, fact of having suffered damage by a crime are listed. Furthermore, small enterprise exemptions were abolished, by which even the small business handling personal data from 5,000 individuals or less are now required to comply with the APPI. Finally, as the original APPI did not contain an article regarding data transfer, a similar provision to the EU was introduced as ‘equivalent’ level of protection of personal data (Art. 24)²⁵.

The new APPI entered into effect into May 2017, which then was officially ready to proceed with an adequacy review from the European Commission. Yet, during the PPC’s dialogue with the European Commission, the PPC realised that some areas in the APPI needed improvement. In April 2017, the PPC suddenly publicised a draft Guidelines on handling personal data transferred from the EU under the adequacy finding to be followed by public consultation. The draft Guidelines included the

23 House of Representatives, Plenary Session, Minister Shunichi Yamaguchi’s statement, The 189th Diet, 15 May 2015.

24 European Commission, Comparative Study on Different Approaches to New Privacy Challenges, in Particular in the Light of Technological Developments- B5 Japan, 2010 (Graham Greenleaf).

25 A personal information handling business operator, except in those cases set forth in each item of the preceding Article, paragraph (1), shall, in case of providing personal data to a third party (excluding a person establishing a system conforming to standards prescribed by rules of the Personal Information Protection Commission as necessary for continuously taking action equivalent to the one that a personal information handling business operator shall take concerning the handling of personal data pursuant to the provisions of this Section; hereinafter the same in this Article) in a foreign country (meaning a country or region located outside the territory of Japan; hereinafter the same) (excluding those prescribed by rules of the Personal Information Protection Commission as a foreign country establishing a personal information protection system recognised to have equivalent standards to that in Japan in regard to the protection of an individual’s rights and interests; hereinafter the same in this Article), in advance obtain a principal’s consent to the effect that he or she approves the provision to a third party in a foreign country. In this case, the provisions of the preceding Article shall not apply.

21 House of Representatives, Plenary Session, The 189th Diet, 23 April 2015, Minister Shunichi Yamaguchi’s statement.

22 The 11th annual meeting of the EU-Japan Business Round Table, Recommendations to the EU and Japan from Multilateral and bilateral trade & investment, and regulatory cooperation, 6-7 July 2009. [‘... the government of Japan should request the European Commission to launch the adequacy-finding procedure on the basis of Article 25(6) of Directive 95/46/EC’].

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five following points. i) Special care-required personal information now also includes data concerning a natural person's sex life or sexual orientation and trade-union membership, which are not explicitly mentioned in the APPI. ii) Retained personal data is protected irrespective of the period in which it is set to be deleted, though the Cabinet Order excludes personal data retained for less than six months. iii) The business operator must confirm and record the purpose for which personal data is received from the EU, in addition to items to be confirmed and recorded under the APPI. iv) As to the restriction on data transfers to a third party in a foreign country, a third party must obtain consent from data subjects in advance, or the third party's country must meet the level of protection equivalent to that in Japan, and the third party then implements appropriate and reasonable measures such as contract or binding arrangements within a company group. v) Anonymously processed information should make the de-identification of the individual irreversible for anyone, though there are only requirements of non-identifiable and non-restorable information under the APPI. Among these five elements, the data transfer restrictions are notably stricter than the original PPC's Guidelines, which allows the company to use the APEC Cross-Border Privacy Rules to fit the e-commerce scheme in this region²⁶.

The draft Guidelines were later changed after the public consultation its name into 'Supplementary Rules', which by itself insists 'binding' nature. However, there were still doubts about this binding nature due to the lack of a direct legal grounds under the APPI in addition to the absence of any endorsements via the democratic process of the Diet²⁷. Furthermore, the Supplementary Rules discriminate between the domestic personal data and the one transferred from the EU in that the domestic Japanese LGBT data or labour union data is not treated as sensitive data while the only the data from the EU will be protected as such. Enforcement of these 'Supplementary Rules' by PPC would inevitably raise constitutional questions of due process, equal protection, and legislative delegation.

²⁶ PPC, Supplementary Rules under the Act on the Protection of Personal Information for the Handling of Personal Data Transferred from the EU based on an Adequacy Decision, September 2018. Available at https://www.ppc.go.jp/files/pdf/Supplementary_Rules.pdf

²⁷ Art.6 of the APPI provides that '[t]he government shall ... take necessary legislative and other action', which does not automatically lead a binding nature of related Guidelines. See Graham Greenleaf, Japan's proposed EU adequacy assessment: substantive issues and procedural hurdles, *Privacy Laws & Business International Report* Issue 154 (2018) p.8 (quoting Professor Shizuo Fujiwara's article of questioning the binding nature of the Supplementary Rules).

With these legislative amendments, as an international commitment, Japan became a member of the International Conference of Data Protection and Privacy Commissioners' (now the Global Privacy Assembly) in 2017 (which was initially rejected in 2016 because the amended APPI had not been fully implemented at that time). Japan has also been attending the Council of Europe's data protection meetings as an observer, but has not yet accessed the Convention 108⁺²⁸.

D- THE COMMISSION'S DECISION

The European Commission finally issued an adequacy decision on 23 January 2019 after extensive and objective examination of the APPI and the related Japanese laws and practices concerned with personal data protection. The Commission's adequacy decision of Japan covered the APPI as complemented by the Supplementary Rules set out in Annex I, together with the official representations, assurances and commitments contained in Annex II. Annex II regarding government access is the official documents signed by several Ministries and Agencies with the detail descriptions of the Japanese legal framework²⁹.

On 23 January 2019, the European Commission and PPC issued a joint statement which highlighted 'the world's largest area of safe data transfers' with 'the high degree of convergence between the two systems'³⁰. The Japan Business Council in Europe welcomed the adequacy decision, with the statement that 'international trade and data protection rules should and can be developed in tandem to stimulate investment, innovation and partnerships in the data economy'³¹.

The data transfer agreement has remained one of the highest political commitments between the EU and Japan. In July 2018, both leaders from the EU and Japan welcomed 'the talks paving the way for a simultaneous finding of an adequate level of protection by Japan and the EU'³². In terms of the political climate, the

²⁸ Japan formally ratified the Budapest Convention on Cybercrime of the Council of Europe (CETS No.185) which entered into effect on 1 November 2012.

²⁹ Minister of Justice, et. al., Collection and use of personal information by Japanese public authorities for criminal law enforcement and national security purpose, 14 September 2018. Available at https://www.ppc.go.jp/files/pdf/letter_government_access.pdf

³⁰ Joint Statement by Haruhi Kumazawa, Commissioner of the Personal Information Protection Commission of Japan and Věra Jourová, Commissioner for Justice, Consumers and Gender Equality of the European Commission, 23 January 2019.

³¹ JBCE, The JBCE welcomes adequacy decision for data transfer with EU, 23 January 2019.

³² Japan-EU Summit Joint Statement, 17 July 2018, Tokyo. Available

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EU-Japan Economic Partnership Agreement (EPA) entered into effect, after a series of negotiations that began in April 2013, nearly a week after the mutual agreement, on 1 February 2019. One may be able to see the coincidence of trade agreement and adequacy decision. The European Commission repeatedly stated that the protection of personal data was ‘non-negotiable’ in the context of and trade agreement³³. Reflecting this attitude, the data transfer agreement is separate from the trade agreement at least in text, both of which have become practically entangled in the name of ‘digital trade’³⁴. The EPA includes a disclaimer which provides that each party may ‘define or regulate its own levels of protection in pursuit of or furtherance of its public policy objectives in areas’ of ‘personal data’ (Art.18.1(2)(h) in Chapter 18 Good regulatory practices and regulatory cooperation)³⁵. Through ‘the world’s largest area of safe data flows’³⁶ between the EU and Japan, a practical observation should be undertaken to determine how this EPA provision will influence the mutual adequacy decision.

Japan’s adequacy decision was issued after receiving both the EDPB’s opinion³⁷ and an European Parliament (EP)’s resolution³⁸, both of which included several critical assessments, clarifications, and concerns regarding the Commission’s draft adequacy decision. Three important issues should be noted here before examining the substances of this decision and later developments in the next section. First, Japan’s adequacy decision was not comprehensive one, rather it was a partial decision that only applied to the commercial private sector. On the other hand, the Japanese public sector institutions are required to seek other options or accept a binding agreement in regard to data transfers from the EU. For instance, the National Police Agency of Japan and Europol reached an agreement on information sharing

at <https://www.mofa.go.jp/files/000382201.pdf>

33 European Commission, Communication on Exchanging and Protecting Personal Data in a Globalised World, 10 January 2017, p.6; Viviane Reding, speech: Restoring trust and building the digital single market, 17 September 2013.

34 See Marija Bartl and Kristina Irion, The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun (October 25, 2017). Available at SSRN: <https://ssrn.com/abstract=3099390>.

35 The EU-Japan EPA text is available at <https://www.mofa.go.jp/files/000382106.pdf>

36 European Commission, Press Release: European Commission adopts adequacy decision on Japan, creating the world’s largest area of safe data flows, 23 January 2019.

37 EDPB, Opinion 28/2018 regarding the European Commission Draft Implementing Decision on the adequate protection of personal data in Japan, 5 December 2018.

38 European Parliament, Resolution of 13 December 2018 on the adequacy of the protection of personal data afforded by Japan.

including transferring personal data³⁹ and the Science Council of Japan considered the impact of the partial adequacy decision for the public research institutions⁴⁰. Similar to Canada’s private sector adequacy decision⁴¹, the transfer and use of Passenger Name Records (PNRs) will prompt the EU to make a cautious agreement with Japan based on the lack of independent oversight and the absence of effective remedy for EU citizens, and a risk of processing indirectly sensitive data⁴². Second, the APPI alone is not adequate, and both the Supplementary Rules and official assurances of the Ministries regarding government access are essential requirements for Japan’s adequacy decision. It is questionable that both the Supplementary Rules and official assurances are binding and enforceable by the Japanese courts. Third and most importantly, while the adequacy decision is guaranteed for four years under the GDPR, Japan’s adequacy is subject to a first review within two years. The Commission will decide whether the two-year-cycle should be maintained (Decision (181)). This shorter review cycle will create a more intensive dialogue between the EU and Japan.

III- ANALYSING THE EDPB OPINION AND EP RESOLUTION

A- CONTENT PRINCIPLES

a) Concepts

As a starting point, the Constitution of Japan does not explicitly grant any rights to privacy nor right to protection of personal data, while the EU Charter of Fundamental Rights embraces both the right to respect private life and the right to protection of personal data.

39 ‘Working arrangement on establishing cooperative relations between the National Police Agency of Japan and Europol’ in December 2018. Available at <https://www.europol.europa.eu/agreements/working-arrangement-establishing-cooperative-relations-between-national-police-agency-of-japan-and-european-union-agency-for-law>

40 Science Council of Japan held a symposium on the GDPR and the academic institutions in March 2019.

41 See Opinion 1/15, *Avis rendu en vertu de l’article 218, paragraphe 11, TFUE*, ECLI:EU:C:2017:592. The Court noted a clear and precise manner of transfer, the models and criteria of automated processing, prior review by a court or by an independent administrative body, limited retention period, conditional disclosure to the third country, a right to individual notification, and the oversight are required for the PNR agreement.

42 European Commission, Recommendation for a council decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime, 27 September 2019. See also EDPS, Opinion 6/2019 on the negotiating mandate of an Agreement between the EU and Japan for the transfer and use of Passenger Name Record data, 25 October 2019.

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However, Japanese case law recognises the right to privacy both in privacy against public institutions and private relations. For instance, in the residential network (juki-net) case, the Supreme Court of Japan held that since Article 13 of the Constitution provides that citizens' liberty in private life shall be protected against exercise of public authority, and it can be construed that, as one of individuals', every individual has the liberty of protecting his/her own personal information from being disclosed to a third party or being made public without good reason⁴³. In regard to private relations, the Civil Code 709 also applies to tort cases relating to privacy and personal data⁴⁴.

As for the scope of personal data, the most fundamental question raised by the EP is whether the APPI takes a harm-based approach in that cabinet order excludes harming an individual's rights and interests considering their utilisation method (EP Resolution (13))⁴⁵. Contrary to the EU's rights-based approach, Japanese law allows some exceptions such as the stipulation that personal data retained only for less than 6 months is outside the scope of access, rectification and utilisation suspension due to the low risk of harm to data subjects. Although this portion was modified by the Supplementary Rules (2) of the PPC, the rights-based versus harm-based approach was found in this aspect.

The differences between the APPI and the GDPR are also clear in that the APPI does not, in principle, regard IP addresses, device IDs or telephone numbers as personal information nor does it consider personal identification code since they are automatically assigned. By contrast, the CJEU and the European DPAs, in general, interpret them as personal data⁴⁶.

43 Judgement of the Supreme Court, 6 March 2008, Minshu vol.62 no.3 p.665. https://www.courts.go.jp/app/hanrei_en/detail?pid=1276 The earliest privacy case is 'After the Banque' novel in 1964 where the Tokyo District held that the privacy right as 'the legal protection or right not to disclose private life without good reason'. Court Judgment of Tokyo District Court on September 28, 1964, Hanrei Jiho Vol. 385 p.12.

44 For instance, the Supreme Court of Japan held that it is natural that data subjects would not wish no more information than it is necessary to be disclosed to others whom the person would not let know, and this expectation should be protected as information relating to privacy. Judgement of the Supreme Court, 12 September 2003, Minshu, vol. 57 no.8 p. 973. Available at https://www.courts.go.jp/app/hanrei_en/detail?id=650

45 Professor Cécile de Terwangne described the Japanese approach as 'risk-burden balance' model, considering the short-term retained personal data. Cécile de Terwangne, Is a Global Data Protection Regulatory Model Possible?, in Serge Gutwirth, et. al. eds., *Reinventing Data Protection?*, Springer, 2009, p.180.

46 House of Representatives, Plenary Session, Cabinet Office councilor's statement, The 189th Diet, 10 March 2015. See Case C-582/14, *Patrick Breyer v Bundesrepublik Deutschland*, ECLI:EU:C:2016:779 para 49 [... a dynamic IP address registered

In addition to the definition of personal data, there is no clear distinction between 'controller' and 'processor' under the APPI, which also raises questions (EDPB (21)). The APPI provides for 'trustee' which is entrusted in handling personal data under the supervision by the original business operator.

In August 2019, a recruiting company with approximately annual 800,000 applicants created and sold the applicants scores regarding the possibility of declining the job offers. Without a clear explanation and consent from data subjects, this recruiting company specifically sold personal data to 35 contracting companies which gave personal data to the recruiting company as a 'trustee'⁴⁷. In this regard, the role of 'trustee' primarily used to justify selling personal data. Based on a comparison with the GDPR, the APPI established more flexible divisions of responsibility between original business operators and 'trustees'.

In this context, 'joint controllership' under the GDPR has some differences in 'a jointly utilising person' under the APPI. Joint controllership means that 'two or more controllers jointly determine the purpose and means of processing'. While 'a jointly utilising person' under the APPI aims to clarify the prime power of handling complaints and access requests among the joint companies. In practice, a social plugin service may lead a divergent conclusion between a 'joint controllership' and 'a jointly utilising person', in which the former may share responsibilities among controllers in processing⁴⁸, but the latter may identify a single responsibility in complaint handling and access request.

b) Grounds for lawful and fair processing for legitimate purposes

While the GDPR provides the rigid requirements for lawful processing, the APPI does not entail such obligations before processing. However, the APPI does prohibit the deceptive collection of personal data and

by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data]. See also Article 29 Data Protection Working Party, Opinion on the concept of personal data (WP 136), 20 June 2007.

47 PPC issued recommendations and instructions to the recruiting company in August and December 2019. PPC, Administrative response based on the Act on the Protection of Personal Information, 4 December 2019. Available at https://www.ppc.go.jp/files/pdf/191204_houdou.pdf (in Japanese); PPC, Recommendations based on Article 42 (1) of the Act on the Protection of Personal Information, 26 August 2019. Available at https://www.ppc.go.jp/files/pdf/190826_houdou.pdf (in Japanese).

48 See Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, ECLI:EU:C:2018:388; Case C-40/17, *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV*; ECLI:EU:C:2019:629.

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information to the data subjects for handling personal data. Most notably, the APPI does not define consent nor does it outline any concept of withdrawal of consent (EDPB (89)). The PPC explains that implicit consent can be used on case-by-case judgement basis⁴⁹. Indeed, pre-checked consent is sometimes used in Japanese business practices, which may not be compatible with the Planet 49 case in the EU⁵⁰.

c) Purpose limitation principle

Although there is no concept of 'compatibility' in regard to purpose changes under the APPI, business operators can still change the purpose if it is 'what can reasonably be considered as appropriately relevant for the original purpose'. The Supplementary Rules (3) provide that personal data transferred from the EU are also subject to the confirmation and record-keeping requirements under the APPI in order to specify the purpose of handling personal data.

d) Data quality and proportionality principle

Data quality is provided under the APPI as a matter of striving for business operators.

e) Data retention principle

As a matter of striving for business operators, the APPI provides for the deletion of personal data without delay when such utilisation has become unnecessary. Furthermore, some business industry has its own retention periods (eg. credit history is retained for up to five years in Credit Information Center⁵¹).

f) Security and confidentiality principle

Details of security measures are provided in both the PPC Guidelines addition to the APPI. Unlike the GDPR's 72-hour rule, however, there is no mandatory breach notification under the APPI. On the other hand, the PPC may be voluntarily notified (eg. 1,216 notifications in FY2018⁵²).

g) Transparency principle, the right of access,

49 PPC, Q&A regarding the Guidelines on the Protection of Personal Information & Response in the case of Breach of Personal Data etc, FQA1-57 (12 November 2019).

50 Case C-673/17, *Bundesverband der Verbraucherzentralen und Verbraucherverbände v Planet49*, ECLI:EU:C:2019:801 para 49. [... any appropriate method enabling a freely given specific and informed indication of the user's wishes, including 'by ticking a box when visiting an internet website']

51 <https://www.cic.co.jp/confidence/posession.html#sst02> (in Japanese)

52 PPC, Annual Report in FY2018. https://www.ppc.go.jp/files/pdf/010611_annual_report_h30.pdf (in Japanese)

rectification, erasure and objection

Regarding the transparency principle, data subjects 'can know' the name of the business operators, purpose, and the procedures access, rectification and suspension of utilisation or deletion including a fee etc. Here, the languages of 'can know' mean that if data subjects wish to know, they can easily gain such information in terms of time and means (eg. visiting the business operator's homepage)⁵³. In a 2019 transparency enforcement case, the PPC issued an instruction against JapanTaxi for not providing intelligible explanations, regardless of the information presented on their homepage in regard to capturing the faces of taxi users inside tablets for advertisement purposes⁵⁴.

Although this is not unique to the Japanese context, it is important to ensure that EU citizens have access to the purpose of utilisation once their data are transferred to Japan. However, linguistic barriers create a situation in which not all the Japanese business operators provide explanations in English or other EU languages in their privacy policies⁵⁵.

The most important analysis of the rights under the APPI is that, unlike in the GDPR Art.23, retained personal data excludes in advance certain categories of data relating to national security or crime prevention by cabinet order instead of balancing between the rights and public interests in front (EDPB (95)). The same is true of the APPIHAO and the APPI-IAA by excluding the data relating to national security or crime prevention among public sector organisations. A closer examination of the extent of the limitation issue makes it doubtful that the exclusion from access, rectification, or the suspension of utilisation rights in advance is compatible with the essence of fundamental rights⁵⁶. Furthermore, there is no clear balancing model under the APPI. In this regard, the EDPB noted the relevant documents were absent in order to demonstrate the restrictions to the individuals rights were 'necessary and proportionate in a democratic society and respect the

53 PPC, Guidelines regarding the Act on the Protection of Personal Information (general edition), January 2019, p.49 <https://www.ppc.go.jp/files/pdf/guidelines01.pdf> (in Japanese)

54 PPC, Instruction based on the Act on the Protection of Personal Information, 17 September 2019. Available at https://www.ppc.go.jp/files/pdf/190917_houdou.pdf (in Japanese)

55 Article 29 Data Protection Working Party, Guidelines on transparency under Regulation 2016/679, adopted on 11 April 2018, p.10 [A translation in one or more other languages should be provided where the controller targets data subjects speaking those languages].

56 See Koen Lenaerts, Limits on Limitations: The Essence of Fundamental Rights in the EU, *German Law Journal*, vol. 20 (2019) p.785.

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essence of fundamental rights'(EDPB (22)). However, the judicial balancing test is referred in practices of data protection in Japan (Decision (8)). Again, one should realise that the APPI certainly uses 'rights and interest' in Art.1, the language of which still needs clarification in regard to its approach without any indications of 'fundamental rights' in the PPC guidelines and the relevant documents so far.

Some other differences should also be noted here. For one thing, business operators are granted a fee for access, rectification and suspension of utilisation or deletion. Furthermore, the right to deletion is not an independent right and business operators can either choose to suspend the utilisation of 'or' delete personal data with narrower requirements⁵⁷.

h) Restrictions on onward transfers

One of the most complex parts of an adequacy decision is the restrictions on onward transfer, which may potentially impact other third countries. In the Japan decision, the European Commission importantly wrote that 'the requirements set forth in Supplementary Rule (4) exclude the use of transfer instruments that do not create a binding relationship between the Japanese data exporter and the third country's data importer of the data and that do not guarantee the required level of protection. This will be the case, for instance, of the APEC Cross Border Privacy Rules (CBPR) System, of which Japan is a participating economy' (Decision (79) See also EDPB (110-112)).

These sentences indicate that Japan can no longer rely on the APEC CBPR system for onward transfer. In its exclusion of the APEC channel for onward transfer, the Supplementary Rules (4) makes it seem as if the PPC is taking back its words in the Guidelines stipulating that the Japanese business operators can use the APEC CBPRs system for data transfers regardless of which third countries are listed on the PPC's white list⁵⁸. Japan adequacy provides global insight into the complex relationship between the EU adequacy and APEC CBPRs.

i) Special categories of data

⁵⁷ The Supreme Court of Japan on 31 January 2017 dismissed the right to be forgotten case where a man asked Google to delete his previous news relating to the child prostitution with a fine nearly 5 years ago. Decision of the Supreme Court, 31 January 2017, Minshu No.71 vol.1 p.63. Available at https://www.courts.go.jp/app/hanrei_en/detail?id=1511

⁵⁸ PPC, Guidelines regarding the Act on the Protection of Personal Information (transfer to the third party in the foreign country edition), January 2019 p.8.

According to the Supplementary Rules (1), the special-care required personal information now covers the special categories of data listed in the GDPR. The equality question remains that personal data such as sexual orientation or labour union membership is protected as special-care required personal information with consent in collection only when it is transferred from the EU, while the domestic Japanese data are not treated as such.

j) Direct marketing

There is no specific provision regarding direct marketing regulation under the APPI (EDPB (115) & EP (18)), while other legislations (eg. the Act on Specified Commercial Transactions) does cover direct marketing.

k) Automated decision making and profiling

There is no regulation regarding automated decision making and profiling under the APPI (EDPB (121)). Profiling was tabled in the amendments of the APPI in 2015, which became a continuous topic for the future⁵⁹. However, as stated above, the recruiting case in Japan shows how the company uses artificial intelligence in the context of human resources to single out the possibility of accepting and declining job offers or identifying a given applicant's level of qualification.

As the European Parliament concretely points out regarding the Japanese implications for Facebook/Cambridge Analytica case (EP (17)), the PPC issued instructions due to the possibility of affecting 100,948 individuals by way of the 104 users who installed the application (i.e., thisisyourdigitallife) in question. These instructions require the Facebook to provide intelligible explanations to users, obtain consent from data subjects and respond to deletion requests from data subjects. However, there was no mention of profiling in this case⁶⁰. Compared with the investigation report issued by the UK Information Commissioner's Office, which asserts that profiling of individuals is used to target messages/political adverts at potential voters⁶¹, the PPC's instructions address transparency instead of profiling itself.

B- PROCEDURAL AND ENFORCEMENT MECHANISM

⁵⁹ Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society, Policy Outline of the Institutional Revision for Utilisation of Personal Data , 24 June 2014 p.23 Available at http://japan.kantei.go.jp/policy/it/20140715_2.pdf

⁶⁰ PPC, Instructions against Facebook Inc., 22 October 2018. https://www.ppc.go.jp/files/pdf/20181022_Facebook.pdf (in Japanese)

⁶¹ See ICO, Investigation into the use of data analytics in political campaigns, 6 November 2018.

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a) Competent independent supervisory authority

The PPC was established in January 2016 through amendments to the APPI in 2015. The PPC has the highest level of independence within the administrative organisation law in Japan (apart from the Board of Audit of Japan under the Constitution Art.90). One chairperson and eight Commissioners are supported by the secretary through staffs, most of whom are posted from other Ministries⁶².

b) The data protection system which ensures a good level of compliance

One of the most difficult part of the adequacy assessment process involves compliance due to the different business cultures between Japan and Europe. Prior to the APPI amendments in 2015, Professor Greenleaf analysed that '[t]he Japanese system does not provide evidence of its effectiveness'⁶³ and, after the APPI amendments in 2015, that the PPC does 'not give any examples of specific penalties issued or compensation granted, either administrative or judicial'⁶⁴. These evaluations can be endorsed by the fact that neither the former competent Minister nor the new PPC had ever issued any fines under the APPI (EDPB (131) & EP (21)).

However, not everything can be explained based on the number of fines. For one reason, the number of violations is not always identical to the number of fines. Furthermore, some violations can be suspended or improved by persuasion or appeal other than fines. Although there is no objective quantification tool for assessing data protection compliance, one may realise that the Japanese business culture obliges the business operators to notify even minor data breach cases to PPC under the voluntary framework. In FY 2018, the PPC accepted 1,216 notifications of data breaches, of these 81.9 percent cases were minor one such as wrong delivery of documents or emails or loss of documents or electric devices⁶⁵.

With public apologies being issued even for minor data

breaches, it is not wrong to state that the reputational risks of data breach trigger a precautionary measure with enhanced compliance to Japanese data protection laws. The lack of enforcement with hard power by the PPC may reveal the weakness of these laws, while it is also true that such enforcement is not always necessary for accomplishing data protection in the context of the Japanese business culture.

c) Accountability (Decision (73))

While those are voluntary schemes, on 10 August 2017 the PPC had listed 44 authorised organisations, with the largest one, Japan Information Processing and Development Center (JIPDEC), alone counting 15,436 participating business operators (Decision (73)).

d) The data protection system providing support and help to individual data subjects in the exercise of their rights and appropriate redress mechanisms

While the PPC provides support to data subjects via telephone, there is no direct and binding remedy system under the APPI. As such, data subjects must seek litigations through the courts without any data protection NGOs in Japan. It is also true that the EU individuals may have difficulties accessing administrative and judicial redress (EDPB (134)). After the adequacy decision, the PPC prepared to take telephone calls from the EU in English or Japanese, but only in which data subjects were submitting complaints to the Japanese administrative authority (that is, not for complaints to business operators),⁶⁶.

C- GOVERNMENT ACCESS TO PRIVATE DATA FOR LAW ENFORCEMENT AND NATIONAL SECURITY PURPOSES

While there are very limited even in Japanese languages, the most important sources in the adequacy decision involves government access. In this sense, Annex II provides a precious explanation of the Japanese legal system with strong assurances and commitments from the relevant Minister and high officials. Still, one may face the difficulty in assessing the government access to private data in Japan in the absence of sufficient

⁶² Although the adequacy decision does not require 'complete' independence, one may be able to remind the requirement for 'complete' independence in its staffs and equipment. See Case C-614/10, *European Commission v Austria*, ECLI:EU:C:2012:631 para 58. [... the attribution of the necessary equipment and staff to such authorities must not prevent them from acting 'with complete independence']

⁶³ Graham Greenleaf, *Asian Data Privacy Laws*, Oxford University Press, 2014 p.264.

⁶⁴ Graham Greenleaf, Japan: EU adequacy discounted, *Privacy Laws & Business International Report*, Issue 155(2018) p.8.

⁶⁵ PPC, Annual Report FY2018, p.14.

⁶⁶ Complaint Mediation Line for Japanese administrative authorities' handling of personal data transferred from the EU and the UK based on an adequacy decision, etc. Available at <https://www.ppc.go.jp/en/contactus/complaintmediationline/>

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case law (EDPB (184)⁶⁷, (220)⁶⁸ and EP (23)⁶⁹).

Shortly before the adequacy decision in January 2019, the several newspaper articles published the facts that the Prosecutor's Office was in possession of a list containing approximately 290 companies that give customers' data to the Office on a voluntary basis⁷⁰. Furthermore, Culture Convenience Club Co., which is the largest royalty card company with over 70 million customers (more than half of the Japanese population), publicly announced that they had disclosed personal data to law enforcement agencies on a voluntary basis in order to contribute to the society⁷¹. In the wake of this newspaper article, the National Police Agency responded in the Diet that the prefectural police do not have a coercive power to investigate the businesses through written inquiries on investigative matters even under the Code of Criminal Procedure, in which case they obtain a warrant from a court⁷².

While there is a practical demand for criminal investigation by enquiry sheet, there are at least three remaining questions regarding government access to private data in Japan. First, the problem of 'voluntary basis' disclosure is not lawfulness of its system rather its 'blackboxing' of facts to the data subjects with a lack of transparency reports in Japanese businesses. As the EDPB pointed out, 'figures on the number and types of requests, as well as on the answers provided by the controllers requested' are almost all in the blackbox. On this issue, the adequacy decision cites the

67 '[T]he EDPB is not in a position to assess whether these limitations to the rights of data subjects are limited to what would be considered strictly necessary and proportionate under EU law, and would thus be essentially equivalent to the rights provide to the EU data subjects'.

68 'It is beyond the task of the EDPB to make a general assessment of the possible surveillance capabilities of the Japanese government'.

69 '[I]nvites the Commission to assess whether this [voluntary basis disclosure] is compliant with the standard of being 'essentially equivalent' to the GDPR'

70 See e.g. Prosecutor listed how to obtain customers' data and holds it from 290 companies, Tokyo newspaper, 3 January 2019 (in Japanese); Questioning information voluntary provision to police, Mainichi newspaper 22 January 2019 (in Japanese) Available at <https://mainichi.jp/articles/20190121/k00/00m/040/224000>

71 Culture Convenience Club Co., Amending the Personal Information Protection Policy, 21 January 2019. Available at https://www.ccc.co.jp/news/2018/20180121_005470.html (in Japanese).

This company later changed its policy in response to the law enforcement agency with a warrant principle. Available at https://www.ccc.co.jp/news/2019/20190823_005537.html (in Japanese)

72 House of Representatives, Committee on Judicial Affairs, 198th Diet, National Police Agency, Commissioner-General's Secretariat Counselor's Statement, 15 May 2019. See Code of Criminal Procedure Art. 197 (2) [Public offices or public or private organizations may be asked to make a report on necessary matters relating to the investigation].

transparency report for a social media company LINE (Decision footnote 99). However, transparency reports are not common in Japan.

Second, with a few exceptional cases, there is no evidence that the Japanese law enforcement agencies abuse their power in order to carry out a massive surveillance of ordinary citizens. However, the question of government access does not concern the lack of evidence for power abuses. Rather, even if there is no such evidence, the overall architecture requires sufficient supervision and oversight to provide adequate and effective guarantees against abuse⁷³. Several types of supervisions are described in the Annex II, but the EU standard may pose questions about organisational supervision (EDPB (166), (173) & (184)) In addition, data subjects cannot truly seek a remedy without being exposed to the facts contained in personal data that are shared to law enforcement agencies on a voluntary basis.

Third, there is a technical question over whether a warrant issued by a court can solve all the government access cases in relation to protection of personal data, after the GPS tracking judgment by the Supreme Court⁷⁴. In the case of GPS tracking with 19 cars attached in the theft case without a warrant, the Supreme Court of Japan held that 'GPS tracking investigation necessarily entails monitoring of an individual's behavior both continuously and comprehensively and can invade the individual's privacy' by entering into the private sphere under Constitution Art. 35 (Decision (114))⁷⁵. The Court further commented on the need for legislation for GPS tracking investigations instead of issuing inspection permit through warrants via case-by-case reviews (in Japan, 98.5 percent of warrant requests were granted in 2018⁷⁶). This judgement can be understood as the indicating the need for clear legal grounds in cases of

73 See ECtHR, *Big Brother Watch and Others v The United Kingdom*, 13 September 2018 Applications nos. 58170/13, 62322/14 and 24960/15) para 383 (referral to the Grand Chamber) [The Court affirmed the necessity of 'the supervision and oversight of the bulk interceptions capable of providing adequate and effective guarantees against abuse']

74 Judgement of the Supreme Court, 15 March 2017, Keishu vol.71 no.3 p. 13. https://www.courts.go.jp/app/hanrei_en/detail?id=1518

75 Article 35 of the Constitution provides that '[t]he right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause...].

76 Courts in Japan, The numbers of requesting and issuing warrants. https://www.courts.go.jp/vc-files/courts/2020/01_taiho.pdf (in Japanese). It is important to understand that this number should not be treated as a guesswork; one may recognise that judges pass almost all warrant requests by law enforcement agencies. Others may understand that the police are well prepared to request warrants only in necessary cases.

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government access when investigations fall into the category of compulsory investigation with monitoring of an individual's behavior both continuously and comprehensively.

IV- AMENDMENTS TO FUTURE ADEQUACY REVIEWS

A- PREPARING FOR THE FIRST ADEQUACY REVIEW

The adequacy decision process motivated the Japanese stakeholders to realise how the APPI and the relevant laws should be improved before the first adequacy review, which is scheduled for January 2021. As the most important development after the adequacy decision, the Japanese cabinet decided to submit the amendments bill to the APPI in the Diet on 10 March 2020⁷⁷. Here is an overview of the amendments bill⁷⁸.

First, the amendments bill enhances the individual right to suspend utilisation in cases of involving the potential violations of data subject's rights and legitimate interests. As such, short retention (ie, less than six months) personal data also falls into the scope of retained personal data for access, rectification, and the suspension of utilisation in order to reflect the Supplementary Rules (2).

Second, the duties of business operators are added to the bill; data breach notifications thus become mandatory in cases of potential significance regarding the rights and interests of an affected individual. The bill also prohibits use of personal information in ways that may potentially facilitate or induce illegal or unjustifiable conducts.

Third, and probably the most controversial topic in the bill, is the concept of personally relevant information, which is defined as a personal data for the recipient, but is not necessarily as such for the sender. This concept supposes that the abovementioned recruiting company case where the company intentionally avoided the APPI obligation by hashing personal data but were knowingly identified by the recipient. Such a bypass can be used through Data Management Platform, which is the target of this new concept of personally relevant information. In addition, pseudonymisation was introduced through the bill so that the businesses could promote utilisation. In 2015 amendments, anonymously processed information was introduced not many companies

have used such anonymously processed information due to the risk of re-identification and complexity of anonymous processing⁷⁹. Thus, the bill again adds a new data category of pseudonymisation, in which data utilisation entails relaxed obligation for access requests.

Fourth, the amount of fines are increased to a maximum 100 million yen for the legal person (the current APPI lists a maximum of a half million yen).

Fifth, the PPC expands the authorisation scheme for the organisations to ensure the proper handling of personal information in regard to their respective business types.

Finally, foreign business operators are subject to the collection of reports and orders backed by penalty. The intention of this newly outlined PPC power against foreign business operators can be understood as a 'GAFA (Google-Amazon-Facebook-Apple)' measure, which coincides with the Bill on the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms⁸⁰.

The amendments bill passed through in the Diet on 5 June 2020, which was promulgated on 12 June 2020.⁸¹ The partial adequacy decision may also be improved in the future through this amendments bill. The Cabinet Secretariat established the Taskforce on the Review of System of Protection of Personal Data in December 2019 in order to integrate divisive systems in the private and public sectors with a view to submitting another amendments bill in 2021. These ambitious developments of reviews in the protection of personal data were quite possibly motivated by the adequacy talks with the EU and the prospect of future adequacy reviews.

B- THE IMPACT OF THE SCHREM II

On 16 July 2020, the CJEU invalidated in the Schrems II the EU-US Privacy Shield decision, while maintaining the Standard Contractual Clauses. The Schrems II basically formulates the data transfer requirements of the level of protection 'essentially equivalent' to the EU law based on the previous Schrems I. The Court noted that i) appropriate safeguards, ii) enforceable rights and iii) effective legal remedies are the basic requirements for ensuring the continuity of the high level of protection in general principle for transfers (para92). Although

77 <https://www.ppc.go.jp/news/press/2019/20200310/> (in Japanese)

78 Before the cabinet decision of amendments of the APPI, PPC publicised the outline of the system reform. PPC, Act on the Protection of Personal Information "The Every-Three-Year Review" Outline of the System Reform, 13 December 2019. Available at https://www.ppc.go.jp/files/pdf/APPI_The_Every_Three_Year_Review_Outline_of_the_System_Reform.pdf

79 According to the newspaper research on the in-house or corporate lawyers, only 14 percent of the companies use anonymously processed information. See Anonymously processed information, Nikkei newspaper, 27 January 2020 p. 11.

80 https://www.meti.go.jp/english/press/2020/0218_002.html

81 The amendments bill is available at <https://www.ppc.go.jp/en/news/archives/2020/20200618/>

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the Schrems II dealt with the EU-US Privacy Shield, its core message will have a potential impact to the other third countries including the Japan and, in particular, the partial adequacy decision for Japan.

Most importantly, as elaborated in the reasoning of invalidating the EU-US Privacy Shield decision, data transfer scheme must ensure the effective judicial protection against the interferences to data subjects' rights. In the case of EU-US Privacy Shield, an Ombudsperson cannot be regarded as a tribunal under the EU Charter of Fundamental Rights. The Japanese legal regime might face the same criticism in the effective remedy. Under the APPI, there is no equivalent provision as to the effective remedy which is available in the GDPR (Art.77-82).

It is true that the PPC has its mandate for effective data protection only in the private sector. However, the power of the PPC does not reach the public sector unless the issues are related to the standard of de-identification. The adequacy decision states that the PPC will deal with complaints lodged by individuals in the case of unlawful or improper investigations by public authorities. It gives a procedure of dealing with the complaints that cooperation by the concerned public authorities with the PPC includes the obligation to remedy the violation. The PPC may be able to assist the remedy in its discretion by closely communicating and cooperating with the administrative organs (Art. 80 of the APPI). However, there is no legal ground under the APPI that the PPC gives effective remedy to the EU individuals in the public sector. In addition, the assurance issued by the several Ministries in the public authorities are not legally binding (EP (25)). Furthermore, the EDPB noted that the EU individuals may have difficulties accessing administrative and judicial redress (EDPB (135)). The Japanese side is aware of these concerns, which are likely to be dealt with the coming law reform in 2021 by expanding the power of the PPC into the public sector.

The effective remedy for foreign citizens is often a challenging issue. At the time of writing this paper, there is no transparent report regarding the cross-border data protection complaints between Japan and the EU based on the mutual adequacy decision. However, the Japan-EU mutual agreement may open a transparent and trustworthy procedure for the cross-border remedy mechanism for both citizens, even if it is a soft-law approach.

C- ADEQUACY AS A TOOL FOR CONVERGENCE RATHER THAN DATA TRANSFER

On the same day of the mutual adequacy decision, Prime Minister of Japan Abe declared 'data free flow with trust' at the World Economic Forum⁸². Such an initiative was shared by the European Commission⁸³. In this sense, the adequacy decision may well be explained through a political premise⁸⁴. The political nature of EU adequacy and its legal effects may motivate 'the political will'⁸⁵ of a third country to reconsider the domestic data protection system. This is indeed the case for Japan.

The EU-Japan mutual adequacy decisions may be a successful political agreement, but one should note the extent to which it unites two systems with different philosophical ideas on data protection. For instance, the Japanese initiative of 'data free flow with trust' is embedded in the WTO reform proposal. It is true that personal data can be discussed in the economic dimension, however, the EU's rationale for the adequacy decision stemmed from a human rights philosophy, which may be alien to the WTO solution⁸⁶. In this regard, it is too early to evaluate how the EU-Japan mutual adequacy decision will progress the convergence of data protection, whether it is taken as a human rights philosophy or an act of commercial reciprocity.

By nature, adequacy has by nature a narrower meaning in the sense that the EU authorises data transfers to the third country. In reality, the adequacy has bigger impacts in that the third country is expected to meet the 'essentially equivalent' standard to those outlined in the GDPR as an 'instrument of harmonisation'⁸⁷. In fact, the GDPR has double methods of exporting

82 Ministry of Foreign Affairs, Speech by Prime Minister Abe at the World Economic Forum Annual Meeting, 23 January 2019. Available at https://www.mofa.go.jp/ecm/ec/page4e_000973.html See also Ministry of Foreign Affairs, G20 Osaka Summit, 29 June 2019. Available at https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/en/overview/

83 Speech by European Commission Věra Jourová at the 9th Annual European Data Protection and Privacy Conference: What next for European and global data privacy?, 20 March 2019. Available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_1776

84 See Elaine Fahey & Isabella Mancini, The EU as an intentional or accidental convergence actor? Learning from the EU-Japan data adequacy negotiations, *International Trade Law and Regulation* (2020).

85 Paul Roth, Adequate level of data protection' in third countries post-Schrems and under the General Data Protection Regulation, *Journal of Law, Information and Science* vol. 25 no. 1 (2017) p.63.

86 See Yves Poullet, Transborder Data Flows and Extraterritoriality: The Europe's Position, *Journal of International Commercial Law and Technology*, vol. 2 issue 3 (2007) p.153.

87 Colin J. Bennett, The European General Data Protection Regulation: An instrument for the globalization of privacy standards?, *Information Policy* vo.23 (2018) p.243.

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its essence of a fundamental right by adequacy and extraterritorial effect. By adequacy, the EU maintains the essential equivalence to the third countries. By extraterritorial effect, the EU extends its essence of data protection to the third countries. As these two tools are designed to maintain its core value of fundamental rights, the EU strategy for protection of personal data now becomes a firm basis for exporting its philosophy to third countries including Japan⁸⁸. However, adequacy is not the European imperialism in the digital world, rather it is a pragmatic, and quite possibly politically motivated opportunity to establish trust through convergence the different systems of protecting personal data. What is considered sensitive in the EU may not always be sensitive in Japan and vice versa⁸⁹. However, both the EU and Japan streamline the legal frameworks in the face of similar risks posed to personal data protection. For instance, the recent 'Communication on Building Trust in Human Centric Artificial Intelligence' places people at the centre of the development of AI⁹⁰. In Japan, the Cabinet Office publicised the 'Social Principles of Human-centric AI' which mentions use of AI as the human's instruments⁹¹. These two policy papers coincide in their human centric approaches in an age AI, which may create new opportunities to converge the essence of fundamental rights.

In the Japanese Edo-era for over two centuries (1639-1854), the Japanese islands were closed and isolated from foreign policies, which are called 'sakoku' in Japanese⁹². In this regard, the initial Japanese data protection laws and policies may be illustrated as 'sakoku'. Indeed, Japan did not belong to a member of international privacy community, nor did it have an independent supervisory authority. Later on, in 1991, both the European Community and Japan agreed to strengthen their co-operation based on ideals of freedom, democracy, the rule of law, human rights, and market economy⁹³. One may be able to describe that the EU-Japan mutual adequacy decision can serve as a

digital 'kaikoku (opening the country)' for data free flow with trust. In sum, the mutual adequacy decision is a forward-looking political choice that provides mutual benefits while shaping the 'essence' of a data protection philosophy for Japan.

88 See Hiroshi Miyashita, The impact of the GDPR in Japan, in *National Adaptations of the GDPR*, Karen Mc Cullagh, Olivia Tambou & Sam Bourton eds., Collection Open Access Book, 2019 p.122.

89 See Andrew Adams, Kiyoshi Murata, & Yohko Orito, The Japanese sense of information privacy, *AI & Society*, vol. 24 no. 4. (2009) p.327.

90 European Commission, Building Trust in Human-Centric Artificial Intelligence, 8 April 2019. See also European Commission, White Paper on Artificial Intelligence- A European approach to Excellence and Trust, 19 February 2020.

91 Cabinet Office, Social Principles of Human-centric AI, 29 March 2019, Available at <https://www8.cao.go.jp/cstp/stmain/aisocialprinciples.pdf>

92 See Engelbert Kaempfer, *The History of Japan volume II* (English translation) London, 1727 Appendix to the History of Japan, p.52.

93 Joint Declaration on Relations between the European Community and its Member States and Japan, 18 July 1991.

SOME BRIEF CONCLUSIONS AT THE TIME OF THE ECONOMIC OPENING BETWEEN THE LEVANT AND THE COUCHANT*



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The initiative of our colleagues Professor Olivia Tambou and Yumiko Nakanishi is remarkable for two reasons.

On the one hand, she has been able to bring one of the world's most important trade agreements to light after its entry into force. However, in 2019, the Economic Partnership Agreement between the European Union and Japan went relatively unnoticed in the mainstream media and the public opinion. The agreement with Canada and, more recently, Mercosur or Mexico have received a lot of attention and protestations from them. A return to this agreement between East and West — *Levant* and *Couchant* — therefore seemed most opportune.

On the other hand, she was able to gather around her and for the occasion great specialists on this topic, notably Japanese colleagues whom we are pleased to read, in an original and high quality format on her blog dedicated to European law. We would like to take advantage of these few lines of conclusions to thank our colleague Olivia very warmly and sincerely.

Conclude this series of excellent contributions is not an easy task. It is important to avoid repetition and to try to propose some timely avenues of analysis for further “brain storming”.

This Economic Partnership Agreement (EPA) raises a number of questions which, from the point of view of the law of the European Union's external agreements or the general problem of its external competences, illustrate this new bilateral trend which the EU now

*Japan is the land of the rising sun, so the East. In French we say le Levant. Europe means in ancient Greek the West, the Setting of the sun. In French it's say Le Couchant. In Arabic, West is called Maghreb.

** Network of French and Japanese researchers. See our site: <http://nihoneuropa.univ-tours.fr>

*** Institut de Recherche Juridique Interdisciplinaire de Tours (Interdisciplinary Legal Research Institute of Tours) <https://irji.univ-tours.fr>

favours in its trade policy. What is at issue here, as we know, is the question - not to say the concept - of new generation agreements, which deserve special attention and of which the EPA is a perfect example. In any event, the links now established between the European Union and Japan will have the virtue, beyond the purely commercial aspects, of bringing our two “worlds” closer together, which undoubtedly have a great deal in common and which deserve to be deepened. Thus, we will affirm or recall, through a historical mirror game, that if Nintendo owes its worldwide success to two Europeans (I), it is because the mother of Europe is undoubtedly Japanese (II).

I-NINTENDO OWES ITS SUCCESS TO TWO EUROPEANS

In the closing statement on 6 July 2018 in Brussels, Cécilia Malmström, Commissioner for Trade, as the political agreement between Shinzo ABÉ and Jean-Claude Juncker on the signing of the future Economic Partnership Agreement between the European Union and Japan had just been reached, stated that “Nintendo owes its global success to two Europeans: Mario and Luigi !”

This statement is interesting to analyse. On a symbolic level, it basically expresses the crucial idea that the European Union and Japan, lands of culture and civilisation thousands of years old in time and space, have come closer together commercially, economically speaking and, in this globalised context, these cultures have now become highly interdependent. What we are talking about here is cultural property, the very strong Japanese predominance of which is to be noted. To put it plainly, if we have Luigi and Mario, Japan has Nintendo...!

However, on closer inspection, we are not entirely sure that this reference to the famous Japanese firm was in the best taste of the Union's partners. The Japanese delegation could also understand in this communication, which was meant to be a form of provocation or a well-understood reminder that

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Nintendo is also a European legal “saga” for which the Japanese company had to bear the costs.

Indeed, without citing all the judgments in question, it will be recalled that in Cases T-12/03, T-13/03, T-18/03, C-260/09P, the famous Japanese firm was heavily ordered to pay several hundred million euros in fines imposed by the Commission under Article 81(1) EC (101 TFEU) and Article 53(1) of the EEA Agreement. Nintendo or its wholly owned subsidiaries were accused (Case T-12/03) of participating in a complex of agreements and concerted practices in the markets for specialized game consoles and game cartridges compatible with those consoles which had the object and effect of restricting parallel exports of Nintendo game consoles and game cartridges.

In its decision C-335/12 of 24 January 2014, we are not sure that the Japanese company will have fully appreciated the Court’s solution, which is no doubt very pragmatic but which refers back to national courts the task of resolving disputes on copyright protection. In this important case, the ECJ initially held that, as a “complex” intellectual creation⁴ peculiar to its author, original computer programs (video games) are protected by copyright under the 2001 Directive⁵. Thus, the TPMs implemented by Nintendo and incorporated in the physical media of video games and in consoles are effective technical measures within the meaning of the Directive. However, secondly, the Court considers that such legal protection against acts not authorised by the copyright holder must necessarily comply with the principle of proportionality. TPMs⁶ must therefore not prohibit devices which have a commercial purpose or use other than to facilitate the making of infringements by means of circumvention of technological protection.

On the other hand, in a judgment of 27 September 2017, the Court will have answered a question referred by the Düsseldorf District Court for a preliminary ruling against Nintendo by a German undertaking operating in Germany and France and providing Nintendo with protection for its Community designs of which it was

the holder under the 2001 Regulation⁷. The main issue was to determine which court had jurisdiction in this infringement case.

The Economic Partnership Agreement, which will be ratified by Japan on 8 December 2018, entered into force on 1 February 2019. It obviously takes us away both from the Poitiers blockade against Japanese VCRs and television sets in the early 1980s and, hopefully, from those cases that we have just briefly recalled⁸. This agreement is therefore a huge step forward for both partners. On the European side alone at the moment, on a strictly legal level, we feel that the agreement in question is interesting in that it illustrates what are known as new generation agreements.

The EPA is part of a bilateral conventional policy of the Union that has been completely rethought since the mid-2000s. The transition from strategy to concrete implementation will take place at the beginning of the decade 2010. The EU-Japan agreement is part of this dynamic. It is useful to come back to this “Global EU” strategy which will have important legal consequences on the content of the agreements concluded by the Union and the exercise of the Union’s external competences (A). Still on a legal level, the notion of a new generation agreement is not without real difficulties of identification (B).

A- THE GLOBAL EU STRATEGY AND THE EPA

Political and trade relations between the European Union and Japan took a decisive turn in 2001 at their tenth bilateral Summit in Brussels, where they signed the Action Plan Shaping our common future⁹. Although negotiated in a complex international context¹⁰, this Action Plan has been the lever for consolidating the economic and strategic partnership between the

7 Council Regulation (EC) No 6/2002 of 12 December 2001.

8 On 22 October 1982, the French Budget Minister, Laurent Fabius, signed a decree forcing importers to stop clearing their video recorders through customs in the ports but in the “center” of France, in Poitiers. A fee similar to that applied to television was subsequently levied on VCRs. These two measures, aimed at limiting the influx of Japanese products and protecting the French consumer electronics industry, have had a huge impact. The press will refer to a new “Battle of Poitiers”, in reference to that of 732, when the Franks and Aquitanian had arrested the Saracens from Spain. A debate on French-style “neo-protectionism” will be launched a few months before the left gives up its social policy and two years before the major negotiations on the Single European Act establishing the internal market.

9 https://www.mofa.go.jp/mofaj/area/eu/kodo_k_e.html

10 The European Union was ready to take action against Japan in the WTO over competition disputes. P.-Y. Monjal, “The European Union and Japan or double economic openness. General considerations on economic relations between East and West”, RDUE, 2015/4, pp. 561 ff.

4 This is the first case, to our knowledge, in which the notion of “complex material” is recognized.

5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

6 These are technical protection measures (TPMs) that prevent counterfeit games from being released on any Nintendo system. PC Box, in this case, is a reseller of Nintendo consoles in which various additional software is installed that circumvents and disables the technical protection measures on the consoles.

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EU and Japan to the point where, on 25 March 2013, negotiations will be launched - by telephone - on the agreement that holds us back. It has taken the two players just five years to draft the 1864 pages of the treaty¹¹ and bring it into force¹².

The EU-Japan Partnership Agreement is not in itself a surprise. It is in fact part of the very important overhaul of the Union's international action that the Commission presented in 2006 entitled "Global Europe: Competing in the world. A Contribution to the EU's Growth and Jobs Strategy"¹³. The logic of this strategy is twofold: to strengthen the Union's economic power both internally and externally; and to rethink the Union's external action through "new generation" FTAs. Indeed, it is considered that the above-mentioned expression has been used since 2006; the agreements in question are in fact second generation agreements, as we shall see below.

Point 4-2 of its communication sets out both the Union's strategy for positioning itself in world trade, and in particular with regard to the WTO, and the backbone of the new agreements that the Union is prepared to propose to these partners.

On the first point, the Commission recalls that Europe will not withdraw from multilateralism. It remains committed to the WTO and is working tirelessly to ensure that negotiations resume as soon as the situation in other countries allows. It is the most effective instrument for expanding and steering trade for the benefit of all and the best framework for settling disputes. However, while sparing the WTO, it makes clear that free trade agreements (FTAs) can, if used carefully, promote faster and wider opening and integration, addressing issues that are not yet ripe for multilateral discussion and paving the way for a further level of multilateral liberalisation. Many key issues can be addressed in FTAs that are not allowed under WTO rules. In its Concept Paper of 18 September 2018¹⁴ the Commission will be much less conciliatory with the WTO. The reason for this is that the deployment of the Union's new agreements now constitutes a high-quality European standard which the Commission would like to impose from within the WTO in order to reform it¹⁵.

11 The agreement itself is 562 pages long. The annexes are over 1,300 pages long.

12 Mention should also be made of the Strategic Partnership Agreement concluded in parallel (see below).

13 COM(2006) 567 final.

14 The European Commission presents a comprehensive approach to the modernization of the World Trade Organization, Concept C (https://trade.ec.europa.eu/doclib/docs/2018/september/tra-doc_157331.pdf).

15 "The European Council of 28-29 June 2018 gave the Commission

On the second point, the Commission gives a presentation of the free trade agreements which should constitute the future of the Union's trade relations. The Commission thus recalls that FTAs are not new for Europe:

"They play, for example, a key role in the European Neighborhood Policy by strengthening economic and regulatory links with the EU. They are also part of the negotiations for Economic Partnership Agreements with the African, Caribbean and Pacific States as well as in the future Association Agreements with Central America and the Andean Community". This is 2006. But while the bilateral agreements support well the objectives of neighborhood policy and development, the Commission continues, "they serve our main trade interests, including in Asia, less well".

What remains striking in the Commission's analysis are the following three points: Japan is not among the priority target states or partners; new generation FTAs are defined according to economic criteria; new legal considerations.

On the first point, the Union's priorities were Africa, ASEAN, South Korea and Mercosur. India, Russia and the Gulf States were potentially interesting partners.

On the second point, these agreements will be designed on the basis of purely economic criteria: the potential of the markets, its size, its growth, the level of protection measures targeting EU exports such as tariffs and non-tariff barriers, the impact of the competitive shock between the Union and the partner...

On the last point, this is obviously the most innovative and "ambitious" aspect on the part of the Commission. In terms of content, it points out, these agreements must be based on new legal bases, extend trade liberalisation including in the field of services and investment, quantitative restrictions on imports and all forms of duties, taxes, charges and restrictions on exports must be eliminated. FTAs should also address non-tariff barriers through regulatory convergence, where possible, and include strong trade facilitation provisions. FTAs should include stronger provisions in favour of intellectual property rights (IPR) and competition, including, for example, provisions on IPR enforcement in line with the relevant IPR Directive.

a mandate to pursue WTO modernization in pursuit of the objectives of making the WTO more relevant and adaptive to a changing world, and strengthening the WTO's effectiveness".

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This retrospective review allows us to have a better understanding of the EPA in the Union's global trade strategy launched and conceived in the mid-2000s, when the Union was only betting on multilateralism.

B- THE LEGAL IDENTIFICATION OF THE EPA

Legally speaking, under European Union law, there are no so-called "new generation" agreements. This is a purely institutional creation, a practical classification referring to all trade agreements adopted by the European Union after 2006 following the Commission Communication presented earlier. To be even more precise, what are referred to as new generation agreements are in fact second generation agreements, as we shall see. The EU-Japan agreement is, of course, part of this latter classification.

Strictly speaking, the European Union adopts what are known as international agreements under Title V of the Treaty (Articles 216 et seq.). Doctrine also refers to them as "agreements external to the European Union". These international agreements, again under the Treaty, may be concluded with a State, a group of States (a regional economic integration area such as ASEAN) or an intergovernmental organization. Depending on the degree of economic proximity that the Union wishes to develop, these external agreements will either deal with purely commercial issues or, in addition to commercial issues, will include highly developed political considerations. They are then called association agreements (which very often prepare for EU membership). As can be seen, still in strict law, the category of international agreements that the Union can sign is very limited in formal terms. In material terms, without going into detail, it is the trade agreements responsible for implementing the Union's common commercial policy¹⁶ that have gradually become the most important in terms of economic and political stakes.

In this way, and still in law, the new generation of agreements are bilateral trade and investment agreements that express the Union's objective of acting

as a global player on the international stage. Aligned with the values governing its external action, these agreements express the Union's desire to assert itself as a global player in international relations. They include provisions not only on trade in goods, services and the abolition of customs duties, but also on the protection of investments, intellectual property, protection of the environment and social rights, and dispute settlement. The list is not exhaustive. In addition, and most importantly, these agreements also aim to regulate trade "behind the border", i.e. to provide for regulatory harmonization measures based on common international standards. There is also the issue of opening up government procurement markets¹⁷.

On this basis, the negotiators of bilateral agreements are free to call it whatever they wish. On 29 November 2012, the Council therefore authorised the Commission to open negotiations for a free trade agreement (FTA) with Japan. The FTA with Japan was renamed the "Economic Partnership Agreement" (EPA) following a political agreement in principle reached on 6 July 2017.

In its Opinion 2/15 of 16 May 2017¹⁸, the Court of Justice of the European Union confirmed the exclusive jurisdiction of the European Court of Justice in respect of all aspects covered by the agreement negotiated with Singapore, with the exception of non-direct investment and the settlement of disputes between investors and States in which Member States are involved, which the Court considered to fall within the shared competence of the European Union and the Member States. These new-generation bilateral agreements also led the Council to adopt conclusions on the negotiation and conclusion of EU trade agreements on 28 May 2018.¹⁹ The conclusions set out the key principles underlying the approach which the Council intends to take in the negotiations from now on commercial. This new approach stems mainly from the opinion of the Court of Justice on the allocation of the competence between the EU and its Member States for the conclusion of the EU-Singapore Free Trade Agreement. In this opinion, the Court considers that only the provisions relating to foreign investments other than direct investments and those relating to the settlement of investor-State disputes is a matter of "shared jurisdiction".

¹⁶This is an exclusive competence of the European Union (Article 3(1)(e) TFEU). The scope of the common commercial policy is broad according to Article 207 TFEU: The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

¹⁷ Koutaro Matsuzawa, Development of the governmental procurement scheme through the Japan-EU economic partnership agreement (JEUEPA). This Blog - <https://blogdroiteuropeen.com/2020/06/18/development-of-the-governmental-procurement-scheme-through-the-japan-eu-economic-partnership-agreement-jeuepa-by-koutaro-matsuzawa/>

¹⁸ Opinion of the Court (Full Court) of 16 May 2017, Opinion (C-2/15).

¹⁹ <http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf>

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As far as the EU-Japan EPA is concerned, this falls within the exclusive competence of the European Union as its content is in line with the framework set out by the Court in its Opinion 2/15. The legal basis for the EPA is Article 207(1) on the common commercial policy and Article 3(2) TFEU (on the fact that existing common rules contained in secondary legislation are affected by the EU-Japan Treaty). In addition, Articles 91 and 100(2) (transport), 218(6)(a)(v) and 218(7) TFEU (procedure for the conclusion of the agreement). In its simplest terms, the EPA is an international agreement concluded by the European Union under its common commercial and transport policies. However, in terms of its name, which is purely formal, the classification of the EPA remains more subtle. We can make the following remarks.

First of all, the EPA²⁰ is certainly a new generation free trade agreement (FTA) by the official name, but it is again not legal. Already at this stage, complications arise since the EU has long since concluded EPAs with African, Caribbean and Pacific countries²¹. If we retain that the agreement with Japan is an FTA, then it will have to be distinguished from the deep and comprehensive FTAs (CAFTAs) which concern here the Ukraine, and the first generation FTAs (which concern Switzerland, Norway, the Mediterranean countries, Mexico, Chile, Turkey and the Balkans) prior to 2006. Since then, all trade agreements with the European Union are considered as new generation FTAs. This concerns agreements with Vietnam, New Zealand, Australia, Singapore, Mexico, Mercosur, Canada and of course Japan. Eventually, the United Kingdom in its relations with the Union may well fall into this category of partners²². In this vast panorama, the EPA with Japan nevertheless has a special significance.

II- THE MOTHER OF EUROPE IS JAPANESE

The Declaration of 9 May 1950, a highly symbolic date, is regarded as the founding act of European integration. We need to be more specific. It is the founding act of Community Europe. We should not forget that the Council of Europe was established by the Treaty of London on 5 May 1949 and that its Committee of Ministers decided in 1964 to make 5 May Europe Day under this intergovernmental organisation. However, it was at the Milan European Council of 28 and 29 June 1985 that the Heads of State or Government of the Ten decided that, from then on, 9 May of each year

²⁰ The media and for convenience we also use the acronym JEFTA (Japan-European Free Trade agreement).

²¹ Cotonou Agreement of 2000.

²² Report from the European Commission, 31. 10. 2018 COM(2018) 728 final.

would also be Europe Day or Europe Day, but this time, it will have been understood, it will be a Europe of the Community!

European state and people are facing unprecedented economic difficulties linked to VIDOC as well as an equally unprecedented rise in nationalist populism. The 70th anniversary of the Schuman Declaration could have marked the time of European unity, it may well mark the bad times of its division. The year 2020, if we continue with the subject, will remain a very strange year to think about, because as the United Kingdom, whose future relationship with the European Union remains to be defined but could take the form of a new generation FTA, leaves the European Union, we are at the same time celebrating the first anniversary of the trade agreement between the European Union and Japan. So would one FTA replace the other? Would not the internal divisions of the Union be offset by the unity of its conventional trade network? Would not a new generation of players, the Union's trading partners, replace the old generation, the historical European partners?

This analysis would be excessive. However, because there are symbols to be remembered, the very special relationship between Japan and the European Union cannot be ignored. We will allow ourselves an anecdote which arose from an exchange we had with a Japanese diplomat who asked us the following question: "Do you know the Father of Europe and even its Fathers? But do you know the Mother? ». To our silence reflecting our ignorance, the answer was given by our interlocutor: "it is 青山みつ (Mitsuko AOYAMA²³) who was the mother of the famous author of *Pan-europa* in 1923²⁴".

Indeed, it is generally considered that if the Fathers of Europe are Jean Monnet and Robert Schuman, it should be remembered that Richard Coudenhove-Kalergi was one of the most important thinkers of European federalism. Let it be said that Europe is Japanese; first from the heart and now from legal reason. With this in mind, one will wonder what the stated ambition of the EPA is (A) and whether it does not require consolidation measures (B).

A- THE AMBITION OF THE EPA

In its proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan of 18 April 2018, the

²³ Aoyama means blue mountain in Japan.

²⁴ Pan-Europa, R. N. Coudenhove-Kalergi, preface by M. Barnier, translation and critical apparatus by V. Klostius and J. Spiri, Paris, Cent Mille Milliards, 2019, 309 p.

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Commission has made clear the ambition followed by the European Union and Japan. The EPA sets out the conditions under which EU economic operators can fully exploit the opportunities offered by the third largest domestic market in the world²⁵.

As President Juncker and Prime Minister Abe announced when the negotiations were finalised:

“The EU-Japan EPA is one of the most important and far-reaching economic agreements ever concluded by either the EU or Japan. The EPA will create a large economic area of some 600 million people, representing around 30% of world GDP, and will also open up huge trade and investment opportunities and help strengthen our economies and societies. The EPA will also enhance economic cooperation between Japan and the EU and strengthen our competitiveness as advanced, yet innovative economies”.

Furthermore, the EPA - consisting of twenty-three chapters divided into sections and subsections, 23 articles and 22 annexes - is fully consistent with the policies of the European Union as it will never oblige the EU to change its rules, regulations or standards in any area already regulated such as technical rules and product standards, health rules, food safety regulations, health and safety standards, rules on GMOs, environmental protection or consumer protection.

One exception is the bottle size regulated in the 2008 Spirit Drinks Regulations to facilitate Japanese exports of Shochu, which is a traditional alcohol that Japan exports in traditional four-bottle bottles *go*(合)ou from a *sho*(升)²⁶. In addition, the EPA protects public services and guarantees the right of states to regulate in the public interest.

In economic terms (*largo sensu*), again in the light of the Commission's analysis, the following is provided for:

- Japan will liberalize 91% of its imports from the EU upon entry into force of the agreement. At the end of the tariff dismantling period, 99% of its imports from the EU will be liberalised, while the remaining 1% will be partially liberalized through

quotas and tariff reductions (in agriculture). In terms of tariff lines, Japan fully liberalizes 86% of its tariff lines upon entry into force, rising to 97% after 15 years;

- New opportunities for EU bidders to participate in tenders is foreseen. In particular, Japan will give us new access to the 48 sub-central “major cities” with more than 300,000 inhabitants, i.e. about 15% of the Japanese population, and will agree to abolish, one year after the entry into force of the agreement, the “operational safety clause” for EU companies active in the rail market;

- The removal of technical and regulatory barriers to trade in goods such as duplicative testing, in particular by promoting the use of technical and regulatory standards used in the EU in the areas of motor vehicles, electronics, pharmaceuticals and medical devices, as well as green technologies is enshrined in the Agreement;

- The EPA contains a chapter on trade in services, investment liberalization and electronic commerce, as well as related schedules of commitments, which go far beyond both parties' WTO commitments;

- a high level of protection of the rights of intellectual property;

- a high level of protection of EU geographical indications, in accordance with Article 23 of the TRIPS Agreement, for more than 200 EU food and wine and spirits GIs to be protected under the EPA;

- a comprehensive chapter on trade and sustainable development, which aims to ensure that trade supports social development and environmental protection and promotes sustainable forest and fisheries management. This chapter also sets out how civil society will be involved in its implementation and monitoring.

- a new and comprehensive chapter dedicated to SMEs, to ensure that they benefit fully from the opportunities offered by the EPA;

- a comprehensive section on the mutual facilitation of wine exports with the authorization of different oenological practices, including the priority additives of each Party.

²⁵ See the European Commission's website for economic figures (https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/index_en.htm). In the case of the EU, the long-term increase in GDP is estimated at +0.76% for the most appropriate scenario of full tariff liberalisation and symmetrical reduction of non-tariff measures (NTMs). Bilateral exports can be expected to increase by 34%, while the increase in total world exports would be 4% for the EU.

²⁶ Sho (升) is equal to 1800 ml and 1 go (合) is equal to 180 ml.

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At the institutional level, the EPA establishes a Joint Committee to oversee the supervision and implementation of the agreement. This Joint Committee is composed of representatives of the European Union and Japan and will meet once a year or, in case of emergency, at the request of either Party. The Joint Committee will be co-chaired by a representative of Japan at ministerial level and the relevant Member of the European Commission, or their respective delegates. The Joint Committee will be responsible for overseeing the work of all specialized committees and working groups established under the Agreement²⁷.

Ambitions are displayed and implemented. But efforts must be made to consolidate the agreement.

B- THE CONSOLIDATION OF THE EPA

In absolute terms, a comparative study of the new generation of EPAs should be carried out in order to measure both their commonalities in the economic areas concerned and, of course, their differences. However, to be completely objective, even if this agreement with Japan is the most important one that the Union has been able to sign in economic terms (30% of world trade) and is very ambitious as we have pointed out, with regard to the agreement with Canada, for example, it remains below that level.

First of all, negotiations continue separately for an Investment Protection Agreement (IPA) with Japan. While the substantive provisions have been agreed, the procedural ones (ICS) are still not accepted by Japan. The last discussions on the IPA took place on 20-22 March 2019 in Tokyo. For the time being, no further discussions are foreseen. The firm commitment of both sides is to complete the investment protection negotiations as soon as possible, in view of their mutual commitment to a stable and secure investment environment in the Union and Japan. Once the parties have reached agreement, investment protection will therefore be the subject of a separate bilateral investment agreement.

Secondly, and this obviously remains an important point, it is indisputable that the EPA cannot in itself provide all the guarantees of satisfaction. The

²⁷ Committee on Trade in Goods, Committee on Trade in Services, Liberalization of Investment and Electronic Commerce, Committee on Government Procurement, Committee on Trade and Sustainable Development, Committee on Sanitary and Phytosanitary Measures, Committee on Rules of Origin and Customs Matters, Committee on Intellectual Property, Committee on Regulatory Cooperation, Committee on Technical Barriers to Trade and Committee on Cooperation in Agriculture.

question of the binding nature of the agreement, with regard to some of its provisions, particularly in the social, environmental, competition and sustainable development fields, seems to us to be rather weak in terms of legislation. It is also true that the EPAs have never gone beyond the point of direct effect. The invocability of the agreement will therefore arise and we know that the Commission has always played strategically on the drafting of the articles of the Union's external agreements in order to neutralize their prevalence over secondary legislation. This is a perfect example of this²⁸.

Moreover, contrary to EU law, under Article 16.9 of the EPA, precaution is not defined as a principle but rather as an approach, an orientation, a state of mind²⁹. In terms of legislation, legal provisions and constraints on the actors, this name constitutes a clear difference with the precautionary principle as understood in EU law. That said, the parties to the EPA cannot be asked to implement integrated policies as the precautionary principle would imply. While this remains possible in Europe, in the international context the difficulties are much greater to overcome. However, and the step has been taken, the "precautionary approach" expresses an awareness of the limits of scientific knowledge and the need to take measures to prevent a risk.

The consolidation of the EPA is also all the means that the partners will use to adapt their legislation to the EPA. This is particularly the case for intellectual property, as Professor Lenz has shown³⁰. Even before the entry into force of the EPA, in the area of intellectual property, Japan made every effort to 'transpose' the rules of the agreement into its law. The same was true of the General Data Protection Regulation of 2016, which required the government and businesses to comply with this regulation. The Commission's adequacy decision of 23 January 2019³¹ attests to this major effort to adapt Japan and also to consolidate the EPA³².

²⁸ There are, however, exceptions, ECJ, 8; 06. 1991, Nakajima All Precision Co, ECLI:EU:C:1989:235.

²⁹ A. Donati, The precautionary approach in the economic partnership agreement between EU and Japan: a threat to the European precautionary principle? This Blog - <https://blogdroiteuropeen.com/2020/06/11/4ansbde/>

³⁰ K.-F. Lenz, Intellectual Property. This Blog - <https://blogdroiteuropeen.com/2020/06/04/intellectual-property-in-the-context-of-the-economic-partnership-agreement-between-the-eu-and-japan-dr-karl-friedrich-lenz/>

³¹ Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information.

³² Hiroshi Miyashita, EU-Japan Mutual Adequacy Decision. This Blog - <https://blogdroiteuropeen.com/2020/07/03/eu-japan-mutual->

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Finally, to conclude, it should be recalled that among the EPA consolidation tools is the Strategic Partnership Agreement (SPA), which considerably strengthens the political dimension of relations between the Union and Japan. This practice of backing the economic agreement with a political agreement is not specific to relations with Japan. It is now found in most FTAs. On 26 June 2018, the Council authorized the signing, on behalf of the European Union, of the strategic partnership agreement. The SPA was signed by the EU and Japan on the occasion of the 25th EU-Japan summit in Tokyo on 17 July 2018. The EU-Japan Economic Partnership Agreement was also signed in Tokyo on 17 July 2018.

The SPA must comfort the promotion of peace and security, democracy, the rule of law, human rights, fundamental freedoms, regional and international cooperation and UN reform. Furthermore, it must also make it possible to ensure the fight against weapons of mass destruction, serious international crimes, terrorism, cybercrime, and so on³³. Perhaps the most sensitive issue for Japan is the question of cooperation in the field of international security at a time when the question of the revision of Article 9 of the Japanese Constitution on the prohibition of the use of force arises³⁴.

It should be noted that the issue of human rights is not at all the same as it was in the 2000s. The human rights clause is now seen in a positive, cooperative rather than punitive way. In legal terms, this translates into the signing of a SPA which is backed by the EPA. The separation of economic and political issues is clearly separated. Moreover, one wonders whether the “moralization” of EPAs does not now include the introduction of the essential elements of sustainable development and the precautionary principle. On this point, the EPA with Japan is a good example.

This agreement, which now binds us together, is absolutely unique in itself, both in terms of its scope and the players involved. But perhaps most exciting is that the bridge Victor Hugo dreamed of building between the Union and the United States will be the bridge between Europe and Japan. A bridge like the one in Edo, where merchants, artists, poets, lawyers, students, professors... will cross it with happiness.

[adequacy-decision-by-hiroshi-miyashita/](#)

³³http://publications.europa.eu/resource/cellar/c212d326-a761-11e8-99ee-01aa75ed71a1.0009.03/DOC_1

³⁴ Fumi Yoshimoto, EU-Japan cooperation in the security field from the perspective of Japan's legal framework. This Blog - <https://blogdroiteuropeen.com/2020/05/28/eu-japan-cooperation-in-the-security-field-from-the-perspective-of-japans-legal-framework-fumi-yoshimoto/>