

MAKING SENSE OF JEFTA



An analysis of the draft text of the Japan-European Union free trade agreement and its impact on financial services, environmental and regulatory issues, and on data protection.

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Dear Readers,

With this publication, the Members and staff Members of the GUE/NGL group in the European Parliament's Committee on International Trade would like to bring to your attention analytical views regarding the ongoing negotiation process for a Deep and Comprehensive Free Trade Agreement between the European Union and Japan: JEFTA. Both negotiators, EU Commission on behalf of the EU and the Japanese Government, have stressed their aim to conclude their work by the end of 2017.

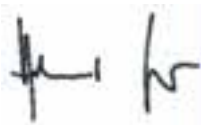
In recent years, millions of citizens in Europe and in many other regions of the world have expressed great concerns about very large and encompassing bilateral or plurilateral Trade agreements like TTIP, CETA, TPP or TiSA. More than 3 million people in our European Union signed a petition to stop the negotiations on TTIP and CETA. Even more: A very broad range of civil society organisations, including trade unions, consumer protection organisations, farmers' associations, journalists, judges, academics, students, and progressive political parties looked into the details of these trade agreements and their complicated chapters going far beyond commercial relations but having an impact on today's and future structures and ways of shaping national and global economies. They expressed clearly that the proposed agreements were going way too far, were increasing the influence of the large corporations at the expense of social, environmental and consumer interests, at putting short time profit gains above macro-economic reflections and diminishing democratic rules setting by the societies themselves.

At the end of 2017, the question has to be answered: did the European Commission and the government representatives of Member States in the EU Council listen? With JEFTA, the Commission wants to rapidly conclude an agreement with a much bigger economic power than Canada. What have they learned? And: what is really put on the negotiating table? The political agreement of June 2017 to conclude negotiations had been declared without a consolidated text available, neither for leaders, nor for parliamentarians, nor journalists and the public. JEFTA claims to contain many CETA-plus provisions. Going beyond CETA, is that for the better or the worse?

GUE/NGL, the left group in the European Parliament, would like to encourage you to check for yourself. With this publication, we give you at hand three studies looking more deeply into specific aspects of JEFTA.

We wish you interesting reading and more insights and, please, come back to us with any questions or comment and additional reflections.

Yours,



Helmut Scholz,
Member of the European Parliament

Coordinator of the GUE/NGL political group in the International Trade Committee (INTA)

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SUMMARIES OF THE FOUR STUDIES

1. What impact can JEFTA have on financial stability in our economies?

Étienne Lebeau, financial markets expert of the Belgian trade union CNE[2], has analysed for us the proposed provisions in JEFTA available.

Although liberalization of the financial sector has led in 18 of 26 cases to a banking crises, JEFTA aims to liberalize this economic area. Hence, unless liberalization is accompanied by stronger regulation and supervision, it would significantly increase the risk of financial instability. Therefore, the corresponding risks of severe adverse economic and social impacts in both short term and long term could considerably outweigh the benefits of any liberalization.

That is why JEFTA poses a threat to financial stability; mainly due to three reasons: First, its scope being very broad, i.e. covers all finance-related positions, all financial products and innovations, particularly toxic assets which were at the centre of the 2008 global financial crisis. Secondly, it gives extensive rights to investors by allowing access to arbitration, which will undermine the ability of the States to draw up rules and take measures to stabilise the financial sector. Thirdly, it is an opaque regulatory cooperation system aiming to reduce the costs for private operators and regulatory burdens, and which will increase the risks of 'regulatory capture' by the financial industry.



Thus, the EU's financial services treatment model in FTAs is too heavily shaped by demands of the financial industry and not enough by the need to improve financial regulations and governments' policy space. Accordingly, it is recommended to carry out systematic studies on the impact of current agreements (including JEFTA) on financial stability, restrict the Treaty's scope, exclusively settle disputes in the financial sector before either common courts or an intergovernmental organisation (e.g. WTO),

remove FET and indirect expropriation standards, revise the direct expropriation standard, remove certain rules associated with market access, align capital flow regulatory provisions with those set by the IMF, consolidate prudential carve-out, revise the Financial Regulatory Forum's targets and procedures.

2. JEFTA and the Protection of the Environment

Ciaran Cross is an independent legal researcher, working for the International Centre for Trade Union Rights and other NGOs on labour rights, trade, investment and environmental law. He has looked for us at what this new agreement may mean for the environment.

JEFTA is to be considered a step back as compared to CETA, or even the TPP (to which Japan is also a party). Several important aspects regarding environmental protection are very weak. Firstly, JEFTA's provisions on environmental protection do not easily translate into binding commitments capable of enforcement since they are neither comprehensive nor specific enough to be effective in practice. The provisions regarding timber and fisheries may lead to an even more critical situation. JEFTA is therefore wholly inadequate to address the need to regulate the trade in illegal timber to Japan, the "largest importer of wood and plywood in the world, the second largest importer of logs and the third-largest importer of lumber" and notorious as a "major market for high-risk timber".

In addition, although Japan represents "almost 90% of the global trade for fresh and frozen Bluefin tuna", a species which is endangered to extinction due to overfishing, JEFTA does not pay any particular attention to those specific and well-documented cases of overfishing. Japan's refusal to cooperate on sustainable consumption of Bluefin tuna has also had a historical impact on stocks in the Mediterranean. Therefore, the high volume of trade to Japan of a fish species, which has been pushed nearly to extinction in the last decades, highlights the need for JEFTA to include robust commitments from the parties to address sustainable fishing.

The Commission has long made clear that it does not consider whaling an issue that should be addressed in JEFTA and that it has no intention to negotiate any provisions on the topic. Perhaps emboldened by this, in June 2017, Japan passed a new law which is seen as a key step towards the resumption of commercial whaling. The legislation describes cetaceans (whales and dolphins) as "an

important food source” and stresses the importance that “Japanese traditional food culture... and dietary habits related to cetaceans be passed on”.

JEFTA's failure to adequately address environmental protection concerns related to the European precautionary principle and the agreement's proposed relationship to multilateral environmental agreements undermines endeavours for strong protection. Accordingly, it is highly questionable how effective the precautionary principle provisions will prove to be since no reference to the principle is included in the Chapters on SPS measures or on TBT; thus, their application is far from certain. In addition, the EU Commission's proposal on Regulatory Cooperation does not provide sufficient assurances that regulatory space to take vital environmental action will not be curbed, nor does it adequately address issues of corporate lobbying or contains measures to ensure transparency, oversight or democratic participation.

Regarding the settlement of investment disputes, the small improvement achieved by introducing the Investment Court System (ICS) in CETA is again under fire; Japan strongly rejects the EU Commission's efforts to establish an investment dispute mechanism modelled on the new ICS but has insisted on maintaining the structure of investor-state dispute settlement (ISDS).

Moreover, JEFTA does not contain any mandatory disclosure obligations, due diligence and benefit sharing provisions regarding key intellectual property issues, including the privatisation of genetic resources and the protection of biodiversity and traditional knowledge. Since the EU and Japan own some 40% of the global market in biotechnology patents, it is inherently important that JEFTA contains provisions requiring that patent applications contain information on the geographical origin of biological material of plant or animal origin.

3. Flows of Personal Data to the Land of the Rising Sun

According to EU Commission chief negotiator Mauro Petriccione, JEFTA's ratification shall be spared from the heated debate over data protection, and a respective chapter shall be negotiated separately and immediately after the rest of the agreement has been successfully concluded. It should then come as an addition at a later point in time. To this end, JEFTA includes a specific Rendezvous Clause. Reason enough for Marija Bartl and Kristina Irion from the University of Amsterdam to analyse for us the impact of JEFTA on data protection implicated by this trade agreement, either through certain sectorial chapters or through regulatory cooperation.

Both the EU and Japan maintain similar data privacy laws offering institutional avenues for bilateral

recognition of each other's privacy regimes, a so called 'adequacy decision'. Currently negotiated, and once adopted, such an adequacy decision would allow unrestricted cross-border flow of personal data between the two trading partners. The question then arises: why is there so much appetite with certain stakeholders and institutions to establish for the first time in an EU trade agreement a commitment on free data trade? The reason for this is a perceived 'golden standard' for digital trade, however, the repercussions for the high-level privacy and data protection standards in the EU have not yet been thoroughly thought through.

When it comes to the data related provisions in sectorial chapters, trade law in the making in the JEFTA negotiations routinely replicates existing WTO law which seems to reflect the state of affairs during the analogue era. The provisions largely fail to recognize the growing importance of personal data in digital trade and data-driven business models, which require broad safeguards for state party's regulatory autonomy in the field of privacy and personal data protection.

To that extent, the incorporated concepts of the (counterbalancing) clause regarding telecommunication services are already outdated by technological developments; e.g. parties' right to regulate is limited to ensuring the security and confidentiality of 'messages'; a term alluring to the content of inter-personal communications. This may present a risk that this first 'line of defence' would not be sufficiently 'digital' to include the extensive rules on electronic privacy in the EU, such as confidentiality of metadata or location data.

When it comes to 'information' in the chapter on financial services, JEFTA would mean a step back compared to the provisions in CETA. Even though the chapter does reserve the right of the parties to protect personal data and personal privacy, the exception fails to lie down an effective division of labour between trade law and domestic data protection laws. Reverting to the language of the 1994 Understanding on Financial Services, or the earlier EU-Singapore FTA,[3] can be seen as a divergence from the established practice of the EU Commission to keep up with the most developed trade agreements – presenting at the same time a regressive development for the safeguards on data privacy.

The Regulatory Cooperation Chapter, as it has been proposed by the EU Commission, is an important intervention into the institutional framework of data protection in the EU. It opens up new institutional spaces where data protection measures can be discursively challenged. Thus, these new institutions created under trade law, where the EU has institutional channels to ensure independent

supervision of the right to the protection of personal data, seem superfluous and may be a potentially dangerous bypass for governing data flows; instead of protecting personal data that would trespass on the independent mandates of data protection authorities in the Member States and the new European Data Protection Board to govern the transfer of personal data to third countries outside of the EU.

4. Summary: Impact on Japanese Agriculture, Food Safety, and Animal Welfare **JEFTA's entry into force would mean severe impacts on Japan's agricultural sector.**

Shoko Uchida is Co-Representative of the Pacific Asia Resource Center (PARC). As civil society activist in Japan she has been very much involved in promoting a public debate in Japan on TPP. She has analysed for us in detail the impact of JEFTA on the fragile agricultural sector of Japan.

The whole Japanese agricultural sector would be endangered as soon as price competition kicks in, because imports of cheaper European products will increase once the current protecting tariffs will be eliminated. Although the Japanese government is arguing that concluding JEFTA means an increase of exports of agricultural products and a growing agricultural, forestry, and fishery industry, the author demonstrates that this is merely an advertisement effort. The reason is simple: The EU's safety requirements and environmental as well as animal welfare standards for food products are so much more advanced than in Japan that exports of pork, chicken, chicken eggs, milk, and other dairy products from Japan to the EU are prevented. For the few processed products which are allowed to be exported to the EU any expectations for an increase is without ground. The Japanese government is misleading the public.

That is particularly true regarding labelling of food products containing GMOs. There is no adequate law or consumer protection regulation. Hence, many products containing GMOs are not labelled properly; even though many Japanese people would like to avoid such food products.

However, it is worth to be mentioned that JEFTA is also a chance for the Japanese government and society to enhance the situation regarding agriculture and food safety as well as animal welfare. So far, Japan does not achieve the level of protection promoted by the EU and in accordance with the World Organisation for Animal Health.

AN OVERVIEW: WHY WE ARE CONCERNED ABOUT JEFTA

The Japan - Eu Free Trade Agreement

by Helmut Scholz, MEP, GUE/NGL

Investor - State Dispute Settlement - ISDS

The Commission has understood that this was probably the most strongly rejected component of TTIP and CETA. Investors are given a special tribunal to sue a government for new legislation or regulations, which would lead to a reduction of expected profits for the investor. Today, the constitutional courts of Austria, France and Germany are still investigating whether the so-called Investment Court System introduced in CETA is compatible with the respective constitutions. Belgium has asked the European Court of Justice to judge on this. Moreover, with the ECJ sentence on the EU-Singapore FTA and its investment protection chapter it was ruled that in future any investment regulation in FTAs belongs to a mixed responsibility of the EU as well as its Member States by ratifying such agreements and setting them into practice.

And therefore, yes: The Commission has learned (from this). There will be no investor tribunal in the JEFTA agreement. Instead, they are putting it into a separate agreement with Japan. With this approach, JEFTA could be ratified without a vote in national parliaments, if the European Council agrees and the European Parliament gives consent. Hence, "only" the investment level remains a mixity of two level ratifications – both the EU and its Member States. The Commission hopes that campaigning against JEFTA would become more difficult this way.

So what is still worrying us in in JEFTA?

Trade in Data

The Commission is also smart enough to understand the EU citizens are concerned about addressing their data privacy in a trade agreement. Having a chapter on digital trade is high on the agenda of Japanese interests, and – worth being



mentioned here - of many of those countries that are also negotiating TiSA (the Trade in Services Agreement). But the Commission wisely decided not to expose JEFTA to a storm of public protest against trading away our data. Therefore, the Commission has informed that the chapter on digital trade has also been separated; hence, will not be included in JEFTA during the ratification process but will come as an addition at a later point in time.

Financial Services

Does anybody remember the melt-down of the financial services market ten years ago? It triggered-off quite a crisis for believers in neoliberal ideology and led to new regulations to tame excessive financial capitalism. A few years later, and already in CETA, there were provisions included to liberalise cross-border financial services again, to give banks a say when a government thinks of proposing possible regulatory changes, and to threaten with challenging these changes in front of the investor tribunal.

With JEFTA, we shall get CETA-plus-more provisions. The only financial services not covered by JEFTA are those supplied in the exercise of governmental authority, e.g. the Central Bank. We are facing a “near total opening up of the European market for Japanese investment”, observes Étienne Lebeau in a study most recently produced for GUE/NGL. An “EU-Japan Financial Regulatory Forum” will be established within the agreement, which shall look into all aspects of future regulatory activities of the partners to make sure that trade and investment are not negatively affected.

Public Services

A major concern with CETA was that it restricts governments’ ability to expand public services in the future. Looking at JEFTA, the General Secretary of the European Public Services Union EPSU, Jan Willem Goudriaan, said “We are worried that JEFTA includes many of the controversial elements of the EU-Canada (CETA) agreement. We rejected in CETA the inclusion of the investor-state dispute settlement mechanism, and opposed the liberalization of public services and extensive regulatory cooperation that would undermine democratic processes.”

Thus, the democratic challenge and the question how public services are organized in future remain to JEFTA; and citizens and regulators have to answer how the access to water, energy, public



transport both in cities and rural areas, health care systems, education as well as culture for every citizen regardless its social and family status will be guaranteed.

Enforceable Labour Rights

When one is a worker or employee in Japan, one is entitled to ten days of leave per year plus one day more for each year of employment until a maximum total of 20. Many people do not take this leave because they are afraid that colleagues



and bosses would look down on them and they could lose job and career easily. This has resulted in a phenomenon called 'karoshi'. The word defines "death caused by overwork or job-related exhaustion" (Oxford dictionary). Police statistics mentioned also more than 2000 suicides related to problems at work in 2015. There is a law defining a 40 hours work week in Japan; anyway, it can be circumvented in a deal with the local labour union in every company. Japanese work on average 300 hours more than German workers, for example, while 200 hours less than workers in South Korea or the USA. In 35 percent of companies, workers clock 80 hours or more of overtime per month. One may bet that people campaigning in Japan against these frequently unpaid and forced long hours would appreciate a labour rights chapter with enforceable provisions. And European trade unions should be eager not to come under pressure when, for instance, French or Italian car companies will have to compete directly with Toyota & Co. This could result in further pressure on jobs in supply industries.

And worth to be mentioned: Of the eight fundamental ILO Conventions, Japan has not ratified two: Convention 105 on Abolition of Forced Labour, and Convention 111 on Discrimination (Employment and Occupation). So a deeper and more detailed look into the whole composition of the Trade agreement's sustainability chapter, including the dispute mechanism and enforceable tools, is more than necessary.

Agriculture

Japan will not flood the EU market, as it is feared, for example, from concluded or currently negotiated agreements with Canada, Brazil, Argentina, Australia and New Zealand or Ukraine. But agriculture products from Europe will flood Japan. While consumers might be happy at first glance about the lower prices in the supermarket, they might better think twice with regard to those preserving landscape and culture in the Japanese countryside. Currently, the island Japan has a closed high-price economic circle from farm to shop to kitchen. When EU products out-compete Japanese domestic production, sustaining a living with non-industrial farming in Japan will become impossible.

Animal Welfare

JEFTA does not include a single line on whaling. While the killing of whales is condemned by almost every country in the world, Japan continues to allow its fishing fleets the cruel hunt of endangered species. The negotiators managed to draft a sustainable development chapter addressing issues of biodiversity and fisheries but turning a blind eye on whaling. Shall Japan feel rewarded for that?



Fisheries and Marine Conservation

Although Japan represents "almost 90% of the global trade for fresh and frozen bluefin tuna", a species which is endangered to extinction due to overfishing, JEFTA does not pay attention to those specific and well-documented cases of overfishing. Japan's refusal to cooperate on sustainable consumption of Bluefin tuna has also had a historical impact on stocks in the Mediterranean. Therefore, the high volume of trade to Japan of a fish species, which has been pushed nearly to extinction in the last decades, highlights the need for JEFTA to include robust commitments from the parties to address sustainable fishing.

Timber

The Parties to JEFTA merely “recognise the importance of ensuring the conservation and sustainable management of forests”; which is wholly inadequate to address the need to regulate the trade in illegal timber to Japan, the “largest importer of wood and plywood in the world, the second largest importer of logs and the third-largest importer of lumber” and notorious as a “major market for high-risk timber”. Moreover, JEFTA’s provisions are also notably weaker than those negotiated for both CETA, and the TPP. There is an attempt to compensate with more ambitious language on cooperation against climate change, a topic not addressed at all in CETA.

Lack of Transparency

On July 6th, 2017, at the EU - Japan Summit, the Presidents Juncker and Tusk and Prime Minister Abe announced: “Today we agreed in principle on a future Economic Partnership Agreement. The depth of this agreement goes beyond free trade. Its impact goes far beyond our shores. It makes a statement about the future of open and fair trade in today’s world. It sets the standards for others.” On that day, but not earlier, the EU Commission has published on a website (http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=127) a number of draft chapters.

Until today, there is no consolidated text available. Chief negotiator Mauro Petriccione declared that texts would be made available for Members of the Trade Committee of the European Parliament once the negotiations are concluded (goal remains December 2017), and that the agreement would be made available for the public once the so-called legal scrubbing is completed (goal would be end of February 2018). The transparency of ongoing



negotiations during TTIP, which had been achieved by great public pressure, has obviously not become the benchmark for JEFTA. Leaders announced political agreement on a text that nobody has ever seen. Given this fact, the statement cited above sounds like a threat.

Too much Transparency?

For big business and for trade negotiators of the EU Commission, the word “transparency” comes with a surprisingly different meaning. It is not about creating an informed public vis-a-vis the negotiations, it is about a chapter obliging governments and regulators to inform business as early as possible about plans to change legislation or regulations. “Japanese companies which are active in the EU market need to ... be actively engaged in the development of regulations from the initial stages”, cites Corporate Europe Observatory (CEO) the Japanese business federation Keidanren. The euphemistic headline for the future direct liaison between civil servants drafting regulatory measures and business interests is “regulatory cooperation”. By the time such a text reaches the desks of lawmakers in Parliament, the draft is likely to show already a distinctive handwriting. The common goal will be to remove or avoid “unnecessary burdens” to trade and investment. CEO found a telling joint statement of European and Japanese business organisations: “Excessive protection measures for food safety should be avoided in order to facilitate international trade”.

Environment and Energy

One legacy of the 2011 Fukushima nuclear disaster is the widespread concern that Japan will increase its future reliance on coal power; in the aftermath over 40 coal power plants were initially planned for development. It has been warned that Japan’s post-Fukushima energy policy has been “hijacked by companies determined to promote fossil fuel-burning technologies at home and abroad”, resulting in an environmentally harmful energy strategy which also threatens to saddle the country with massive over-investment in coal power. Accordingly, the assessment of Japan by Climate Action Tracker (CAT) notes that “coal-fired power plants are set to play an increasingly important role in Japan”.

The EU TSIA report does not propose any measures to positively impact on this issue, and the JEFTA text does not contain any provisions, which convincingly promote positive policy responses to the threat of climate change.

THE IMPACT OF JEFTA ON FINANCIAL STABILITY

Étienne Lebeau

CNE, Studies and Training Department



1. Introduction

The liberalisation of financial services is one of the goals to be achieved by the free trade agreement between the EU and Japan (JEFTA). This is based on the idea that there are barriers between the EU and Japan in the financial sector. Those are said to result in significant costs for financial intermediaries, limiting competition and the efficiency of the financial sector. It is therefore believed that removing those barriers would have a positive effect on growth, in both the EU and Japan. The barriers which JEFTA is intended to eliminate in the financial sector are mainly of a regulatory nature. The European financial sector complains that the number of regulations in Japan is excessive. The financial sector claims that this excess of regulation adversely affects its profitability, and acts as a brake on investment by European financial firms in Japan. One of the main expectations on the part of the European financial sector is that regulatory cooperation between the EU and JEFTA will enable the Japanese regulations to be made less burdensome. There is, however, a significant objection to that line of reasoning, namely the risks posed to financial stability by this approach.

Both Asia and the EU have experienced serious financial crises in recent decades. It has become obvious, particularly since the 2008 global financial crisis (GFC), that there are gaping holes in financial supervision and regulation, and that has led States to carry out a comprehensive review of the way in which supervision and regulation are organised. A wide-ranging project to reform prudential standards and financial regulations has been launched, but is currently far from complete. At the same time, the EU and many other States are embarking upon the negotiation of trade agreements covering financial services. Those agreements may be described as 'WTO +' in the sense that they include liberalisation mechanisms that are more intrusive for States than the WTO mechanisms. A debate has been going on for some years, both in official bodies and among academics, about the risks posed to financial stability by the liberalisation of financial services.

The financial sector is unlike other sectors: it plays a pivotal role in the operation of the economy.

If it is seriously dysfunctional, that has severe consequences in social and macroeconomic terms, and even for political stability. Before negotiating trade agreements on financial services, governments should ensure that those agreements do not jeopardise their capacities to regulate financial operators. In particular, it should be ensured that the legal protections offered to investors do not undermine the rights of States to oversee and regulate the activities of financial operators. Such an examination should be forward-looking; in other words, it should take into account the fact that these activities evolve and that instruments which currently seem 'outdated' could come back into fashion in the future. At present, such an evaluation of agreements in terms of financial stability is almost completely absent. The studies proposed by the European Commission on CETA and then on JEFTA do not include any serious evaluation of the impact of the agreements on financial stability. As far as we are aware, the only study by the European Commission to have looked at that impact is the one carried out within the framework of the 2008 EU-Mercosur negotiations. Some quotes from that study confirm how worthwhile the topic is:

'In a study of 26 banking crises it was found that in 18 cases the financial sector had recently been liberalised.' (p.27)

'Modelling studies have suggested that even if a banking system is well-designed, liberalisation may lead to an initial period of rapid, low-risk growth, followed by a period with an elevated risk of banking crisis.' (p. 27)

'Unless liberalisation is accompanied by stronger regulation and supervision it would significantly increase the risk of financial instability. This would carry corresponding risks of severe adverse economic and social impacts in both the short term and the long term, which could considerably outweigh the benefits of liberalization.' (p. viii)

'An EU-Mercosur agreement on financial services liberalization should not be finalized until a reasonable international consensus has emerged on actions to be taken in response to the current global financial crisis.' (p. viii)

This study attempts to provide an initial response to JEFTA's impact on financial stability. This response is just a first step, particularly since, at this stage, we do not have the final text of the agreement. We are attempting to evaluate whether it restricts governments' policy space with regard to financial regulation. We examine, specifically, possible incompatibilities between the liberalisation arrangements in the free trade agreement and the measures regulating the financial sector, both existing measures and measures that might return to the political agenda in the future. We also examine the protection clauses in the free trade agreement that are intended to protect the policy

space of States, particularly the prudential carve-out. We conclude by identifying the provisions of the free trade agreement which should be revised, as a priority, to make the agreement more compatible with financial stability.

2. JEFTA's approach to financial services

2.1 The agreement's chapter on financial services differs in part from the corresponding chapter in CETA. JEFTA includes a specific chapter on the liberalisation of financial services, but it is currently more limited in extent than the corresponding chapter in CETA. The relevant chapter in JEFTA contains 11 articles, whereas chapter 13 of CETA has 21 articles, plus 3 annexes. The table below illustrates the main differences.

Table 1: comparison between the financial services chapters in CETA and JEFTA

CETA (chapter 13)	JEFTA
Definitions	Definitions
Scope	Scope
National treatment	
Most-favoured-nation treatment	
Recognition of prudential measures	
Market Access	
Cross-border supply of financial services	
Senior management and boards of directors	
Performance requirements	
Reservations and Exceptions	
Effective and transparent regulation	Effective and transparent regulation
Self-regulatory organisations	Self-regulatory organisations
Payment and clearing systems	Payment and clearing systems
New financial services	Financial services new to the territory of a party
Transfer and processing of information	Transfers of information and processing of information
Prudential carve-out	Prudential carve-out
Specific exceptions	
Financial services committee	EU-Japan financial regulatory forum
Consultations	
Dispute settlement	
Investment disputes in financial services	
Annex 13-A: Schedules for cross-border services	
Annex 13-B: Understanding on the application of the prudential carve-out and on investment disputes relating to financial services	
Annex 13-C: Understanding on the Dialogue on the regulation of the Financial services sector	Regulatory cooperation on financial regulation
	Supply of insurance services by Postal insurance entities

The financial services chapter in JEFTA has several of the same articles as chapter 13 of CETA, including those on definitions, scope, prudential carve-out and the establishment of specialised financial services committees. However, there are several significant differences:

the mechanisms for liberalising financial services are not included in the financial services chapter of JEFTA. This absence is doubtless due to the fact that the chapter is currently in draft form only. It is clear that financial services will be subject to liberalisation measures and, moreover, some sections of the current chapter make reference to these. At this stage, the disciplines that have been repatriated in the financial services chapter have not been exactly identified, but it is expected that they will be similar to those contained in chapter 13 of CETA and the 'investment' chapter of JEFTA.

"In a study of 26 banking crises it was found that in 18 cases the financial sector had recently been liberalised."

EU-Mercosur FTA Impact

the financial services chapter of JEFTA does not include any articles on systems for settling disputes, either for disputes between States or for disputes between an investor and a State. Once again, that does not mean that financial services are not covered by such systems, but that disputes concerning financial services will be covered by the general systems described in other chapters of JEFTA (the 'Dispute settlement' and 'Resolution of investment disputes and investment court system' chapters). We should note that, at this stage, it is not clear whether JEFTA will include an ICS system, since the negotiations have not yet resolved that point. However, it will contain a State to State Dispute Settlement body.

while both CETA and JEFTA create specialised technical committees for financial services, there are some differences between the committees. Firstly, there is a difference in name, since the CETA committee is called the 'Financial services committee' (FSC), while the JEFTA committee is named the 'EU-Japan financial regulatory forum' (FRF). These differences denote differing remits. The remit of the FSC is dialogue on financial regulation, like the FRF, but its main role is to take decisions on complaints lodged by investors before an arbitration tribunal that concern financial services. The system represents a device for screening complaints by investors in the

financial sector. It is remarkable that JEFTA does not include such a system, indicating perhaps that the ICS (if its presence in JEFTA is confirmed) could apply to the financial sector in the same way as to other sectors. The FRF, under JEFTA, therefore mainly focuses on a remit of regulatory cooperation on financial services. The annex dealing with it in JEFTA is, in addition, much more developed than the corresponding annex in CETA, bearing witness to the specific role of JEFTA in that area.

JEFTA includes a comprehensive article on the supply of insurance by postal entities. That article implicitly refers to the specific case of the Japanese postal service, which has been one of the sensitive points in the negotiations on financial services between the EU and Japan.

2.2 There are very few financial activities not covered by the provisions of JEFTA

The chapter on financial services in JEFTA 'shall apply to measures by a Party affecting trade in financial services'. That very general definition does not specify which modes of provision of services



are affected. An examination of the JEFTA annexes available, and in particular of the derogations requested, shows that primarily two modes of provision of services are covered: modes 1 (cross-border trade) and 3 (commercial presence). Any measure, therefore, affecting imports of financial services and foreign financial institutions present on the territory of one of the parties is covered by the rules of the financial services chapter. As these two modes are the main two modes of provision of financial services, the scope is very wide.

The scope also depends on the definition of 'financial services'. The definition proposed in JEFTA is a general one: "Financial service" means any service of a financial nature offered by a financial service supplier of a Party. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). It is followed by a list, divided into two sections, the first relating to

insurance services (insurance and insurance-related services) and the second to banks and other financial services (banking and other financial services). The latter category covers traditional banking activities (acceptance of deposits, lending of all types) but also highly diverse trading activities in financial products, both for third parties and on own account, and on regulated markets or over the counter. Among the financial products covered by such trading are derivative financial products' including, but not limited to, futures and options', 'exchange rate and interest rate instruments, including products such as swaps, forward rate agreements' and 'transferable securities'. It may be deduced that the financial instruments that were



at the centre of the global financial crisis (GFC), particularly credit default swaps (CDSs) and asset-backed securities (ABSs) are included in the list, and that financial entities marketing such products will be allowed on the markets of both parties and will benefit from the extended protections offered by JEFTA.

The only financial services which are not covered a priori by the provisions of JEFTA are 'services supplied in the exercise of governmental authority'. Specifically, these are:

(a) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(b) activities forming part of a statutory system of social security or public retirement plans; and

(c) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Party or its public entities.

While exceptions exist in relation to social insurance and public banks, they cease to apply 'if a Party allows any of the activities referred to in [...] (b) or (c) to be conducted by its financial service

suppliers in competition with a public entity or a financial service supplier [...]'. Social insurance covering risks also covered by private insurers would therefore be covered by the obligations/prohibitions set out by JEFTA, and would therefore be liberalised.

2.3 The EU is opening up its financial sector almost completely to Japanese investment

The main method for removing financial services from JEFTA rules is expressly protecting certain sectors, as is done in annexes I and II to the Treaty. The system of 'no' lists assumes that liberalisation applies by default, except where the parties protect a sector by naming it in the annexes. For the EU, such lists have two tiers. They contain the derogations requested by the EU, which therefore cover the whole of EU territory, and derogations applying specifically to certain Member States. An examination of the JEFTA annexes available shows that both the EU and its Member States are opening up the financial sector to a very significant degree. This is not surprising, since the EU had already made considerable moves to open up its financial sector to third countries within the framework of the General Agreement on Trade in Services (GATS). In JEFTA, one of the rare cases of access to the EU market being closed off for Japanese investors is in the insurance sector. The EU is restricting access to the market by Japanese insurers, but only for certain specific forms of insurance, and for mode 1 of the provision of such services. Since 90% of access to the EU's market by insurers from third countries is through method 3, the scope of this derogation is therefore very limited. Other derogations by the EU and its Member States are found in the annexes, but they relate not to access to the market, but to the possibility of imposing specific legal forms on Japanese investors. The main derogation established by the EU covers all financial services and lays down the option 'to require a financial institution, other than a branch, when establishing in a Member State of the EU to adopt a specific legal form, on a non-discriminatory basis'. The annexes also contain derogations concerning the option to impose specific legal forms on Japanese investors, or residence obligations for certain categories of staff. It, therefore, seems that few derogations have been requested by the EU and its Member States, and that JEFTA will result in a near total opening up of the European market to Japanese investments.



2.4 This opening up also relates to new financial services and products.

JEFTA introduces an obligation to open up to new financial services. The endorsement of the assumed benefits of financial innovation is stronger than in GATS or CETA. GATS has nothing to say about new financial services, and therefore does not make it mandatory for States to accept them. CETA contains a rule on opening up to financial innovations, but it is worded in terms that make the obligation less intrusive than the corresponding



one in JEFTA. In Article 13(14), CETA only compels a government to accept the financial innovations of the other party if those are permitted or permissible in its own financial sector, and comply with its own law and the opinion of public regulators: 'Each Party shall permit a financial institution of the other Party to supply any new financial service that the first Party would permit its own financial institutions, in like situations, to supply under its law, on request or notification to the relevant regulator, if required'. Those provisions, more favourable to the States, are not present in JEFTA, which simply states: 'A Party shall permit financial service suppliers of the other Party established in the Area of the former Party to offer in the [Area] [Territory] of the former Party any new financial service'. In addition to that general rule there are two provisions which are traditional in trade agreements: the option for a government 'to determine the juridical form through which the new financial service may be supplied'; and the option to prohibit the entry of a new financial product for prudential reasons. In the absence of adequate case law, it is difficult to predict whether such a prudential clause could actually enable a government to prohibit new financial products. It is expected that if prohibitions are, in the end, permitted, they will be targeted at very specific products, and granted on a temporary basis. JEFTA reverses the burden of proof. The banks do not have to prove that their products are useful and not harmful; rather, it is for governments to provide reasons if they take the decision to prohibit certain products.

3. The 'investment' chapter and the investor protection regime

Having identified the EU's high degree of openness to Japanese financial services, the issue is the extent of the protections offered to investors by JEFTA. Given that access to the financial services market increases to 80-90% by Mode 3, the protections offered are those described in JEFTA's 'investment' chapter. JEFTA, like other new generation EU agreements, offers a level of protection to investors that goes well beyond that provided by the WTO Agreements (GATS, TRIMS). Some GATS protection standards have been incorporated (such as market access rules), but other standards that are not part of GATS have been added. In addition, an arbitration mechanism (Investment Court System – ICS) has been included, which will allow investors to lodge complaints against States that do not comply with the standards, or in any event with some of these standards, especially those known to be the most intrusive. Reviewing these different standards and assessing their potential impact on the States' ability to properly control their financial sectors is imperative. Concern about the effect of



the liberalisation of financial services on financial stability is not new. But it becomes newly relevant when a financial investment protection regime is as extensive as that found in JEFTA.

3.1 JEFTA impedes healthy competition in the financial sector

Re-establishing healthy competition is a key issue in financial sector reform. The liberalisation model, which is also the model that has been adopted by JEFTA, has not achieved this objective. Instead of creating competition, liberalisation has led to increasing concentration in the financial sector. A few key figures to clarify these concepts:

1% of European banks hold 72% of banking assets, and 35 major banks dominate the European landscape. Thirteen banks are classified as systemic banks by the Financial Stability Board (FSB), meaning that their bankruptcy would trigger a severe financial crisis.

The major banks account for 93% of total bank assets invested in derivatives, the same assets that were at the root of the GFC.

During the GFC, two thirds of the world's 100 largest banks had to be rescued by the public authorities, and some of them were placed under public control to avoid a systemic crisis.

“1% of European banks hold 72% of banking assets [...]”

Étienne Lebeau

JEFTA does not provide an adequate response to the problem of excessive concentration in the financial sector. At this stage, it does not even contain a clause similar to CETA Article 8.4.2(c) prescribing ‘a measure restricting the concentration of ownership to ensure fair competition’. Such a clause is likely to be introduced in JEFTA's final version. However, even if it is added, it would be insufficient. Control of capital concentration in the financial sector must be justifiable on competition grounds, but also in terms of transparency and financial stability. The main problem created by bank concentration is that it favours a business model focused on shareholder profitability, achieved through speculation on high-risk financial products. The simplest solution for avoiding these abuses is to limit the size of banks’



balance sheets with a ‘cap rule’. This is advocated by some analysts, but is not currently supported by multilateral bodies or the EU. JEFTA moves us further away from implementing this type of measure, as it prohibits limiting the value of banks’ assets (see below).

Another way to re-establish healthy competition in the financial sector is to diversify banking models by promoting the development of cooperative banks and public banks. Currently, banking regulations place cooperative banks at a disadvantage. JEFTA also impedes this development, as it prohibits governments from using competition regulation instruments concerning monopolies, exclusive rights and economic needs. Governments are forbidden ‘to impose limitations on the number of enterprises, whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test’. (Market access). These restrictions go further than those imposed by the EU Services Directive. It should be noted that financial services do not come within the scope of the Directive (Article 2.1(b)) and that Article 15.2(d) does not categorically prohibit States from putting in place ‘requirements [...] which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity’

3.2 JEFTA reduces the instruments available to combat financial speculation and inflation

Limiting the value of financial transactions is, of necessity, a post-crisis issue. Financial transactions have expanded dramatically in recent decades, creating an imbalance between the financial and economic spheres and leading to the financialisation of the economy:



‘For the WTO, the international transactions on goods and services increased 11 times from 1977 to 2007. During the same years financial transactions in foreign exchange markets grew at a much higher rate than international trade. They increased 175 times if we only include traditional products and 281 times if we add derivative contracts on exchanges and interest rates’[4]

This massive expansion of financial transactions is fuelling financial inflation (the increase in the price of financial assets) and the rapid enrichment of actors who hold financial assets (company shareholders, financial intermediaries, investment funds, wealthy individuals, etc.). It is also fuelling private debt, as the fictitious wealth created by financial inflation also enables these actors to obtain credit. The result is an increasingly fragile financial sector and the outbreak of financial crises. One way to reduce financial inflation is to reduce the number of transactions by 'throwing sand in the wheels' of finance. This idea was proposed in the 1970s by American economist James Tobin. A Financial Transaction Tax (FTT), inspired in part by the Tobin tax, has been under discussion by a group of EU countries for many years, but is proving difficult to achieve given political opposition and resistance from within financial world itself. JEFTA constitutes yet another obstacle to such a tax, as it prohibits the use of measures that limit the 'total value of transactions in the form of numerical quotas or the requirement of an economic needs test' (Market access). This wording only prohibits measures that would take the form of numerical quotas or economic needs tests. But we cannot exclude the possibility that the FTT, which would in practice reduce the number of financial transactions, falls within the scope of this prohibition. Even if it were applied without discrimination with respect to Japanese and local investors, an FTT could be deemed to violate the rule. Furthermore, public



authorities in both the United States and the EU have prohibited certain financial transactions in the past, such as 'naked short selling' transactions. These types of practices could also be challenged under this JEFTA rule.

3.3 JEFTA prevents limitations to the size of banks

De-concentration in the financial sector, especially with respect to banks, is advocated by some analysts. It would make it possible to reduce systemic risks, improve regulators' ability to supervise banks, facilitate rescue operations in the event of a crisis, and promote banking models more closely geared towards the real economy. To limit the risks created by systemic banks, governments and multilateral regulators have promoted a range of measures such as the functional separation of traditional and speculative banking activities and strengthening capitalisation requirements, with specific requirements for large banks. Some analysts, however, believe that these measures are insufficient and propose setting an absolute limit to bank assets. Banks would be required to give up some of their activities when they exceed an authorised ceiling. These measures, although not currently under consideration by the EU, would also conflict with JEFTA's rules. These prohibit limiting the 'total value of assets, in the form of numerical quotas or the requirement of an economic needs test' (Market access).

"Strong regulation and a controlled pace of liberalisation are likely to be key factors in mitigating potential adverse impacts."

Étienne Lebeau

3.4 JEFTA stands in the way of a more internally-focused and strategic financial sector

JEFTA prohibits States from restricting 'the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment'. This is not a new rule for the EU, as European law holds that restricting the acquisition of a company's share capital constitutes an obstacle to the free movement of capital and violates Article 63(1) of the TFEU. This rule prevails whether the investors acquiring the shares come from within or outside of the EU. JEFTA therefore permits Japanese investors to freely acquire companies in the EU, but European law already permits this. However, including such a rule in JEFTA is not without consequences. The question of protecting companies from takeovers by foreign investors is

beginning to arise in the EU, as shown by current discussions on strategic sectors. This question also arises in relation to the financial sector, even though this sector is not generally cited as one of the sectors to be protected. While the current mainstream view posits that the liberalisation of the financial sector increases its efficiency, this is not always true in reality. The impact assessment on the EU-Mercosur trade agreement strongly qualifies these benefits of liberalisation:

'The World Bank's report on Finance for Growth cited Argentina as a prime example of where the entry of foreign financial institutions has improved the efficiency of the domestic financial sector, strengthened its stability, and increased access to lending for small and medium-sized enterprises (SMEs). The report was written in 2001, shortly before the Argentinian economic crisis. It has been argued that domination of Argentina's domestic banking industry by foreign ownership, and its reluctance to lend to SMEs, played a major role in the collapse. Domestic banks may be more sensitive than international ones to local cyclical pressures for credit management, and more likely to address gaps in the credit system for disadvantaged groups and regions. Strong regulation and a controlled pace of liberalisation are likely to be key factors in mitigating potential adverse impacts.'

Following the Asian financial crisis, other analysts have also argued in favour of maintaining public and internally-focused banking sectors:

'However, large state-owned banks provide a layer of reassurance or a safety-net. The state-owned banks may not be as efficient as the private banks and may lag behind in boom times, but their presence becomes crucial during bad times when they act as the main vehicle for maintaining the credit line. [...] Therefore, domestically-owned banks must dominate the financial sector. Foreign banks are likely to be affected by the crisis at their headquarters and hence will be part of the problem rather than solutions.'

JEFTA also limits local anchoring of banks by prohibiting measures that would require an investor 'to achieve a given level or percentage of domestic content' . (Prohibition of performance requirements). This rule runs counter to measures aimed at refocusing a bank's activities on local individuals and businesses and that would, for example, require companies to:

use a certain percentage of local subcontractors;

allocate a certain percentage of loans to local individuals or businesses;

allocate a certain percentage of deposits to local individuals or businesses;

This exclusion of more localised banking models also flies in the face of recent developments. Since the crisis, there has been a strengthening of 'local bias' in banks' credit policies and a de-globalisation of the financial sector. While there are those who are concerned by this development and describe it as 'financial protectionism', it could also be seen as a way of learning from the excesses caused by bank globalisation. JEFTA's ban on local content could therefore embody an increasingly outdated approach.

3.5 JEFTA weakens the use of 'currency-based measures'

The domestic content prohibition (Performance requirements) is extremely vague, which could create a risk with respect to currency-based measures, an important prudential instrument. These measures are designed to limit banking operations denominated in foreign currencies, such as taking out loans or making bank deposits denominated in currencies other than the local currency. In some countries, these foreign currency loans and deposits constitute a dominant share of bank loans and deposits and create significant risks for the financial system. When a country's debt is denominated in foreign currencies, its debt level will expand dramatically in the event



of the collapse of its exchange rate with these foreign currencies. This phenomenon was at the centre of the financial crises that occurred in the 2000s in Asia and South America, and several EU countries have also been hit by this phenomenon more recently. Several years ago, the European Stability Risk Board recommended the use of currency-based measures and several European countries facing this issue have strengthened their regulations in this area (Austria, Poland, Hungary). It should also be noted that the BIS has recently highlighted that Japan is at risk due to the scale of its US dollar debt, which certainly calls for protecting

these measures under JEFTA. Given the support they receive from official bodies, the risk that these regulatory measures will be contested seems low. However, it would be useful to strengthen their legal certainty by making it clear that ‘domestic content’ provisions do not cover currency-based measures.



3.6 JEFTA obstructs banking structure reform

Bank structure is a central issue for financial stability. The 2008 financial crisis was partly caused by the extremely complex nature of financial structures, and in particular the emergence of a shadow banking system. This complexity makes supervisory authorities’ task daunting and increases systemic risk through the interconnections that it creates. This explains why banking structure transformation has been on the post-GFC reform agenda, particularly in the EU in the wake of the Liikanen report and the reforms that this report has triggered. Among the regulations that affect banking structures, the following deserve mention:

- the initiatives regarding the legal separation of banks’ traditional and speculative activities, which have been proposed in various forms in different countries: United States, United Kingdom and EU.

- gathering foreign bank subsidiaries under a locally-registered holding structure. This measure exists in the United States and has been proposed by the EU since late 2016.

- the obligation to negotiate certain financial transactions on regulated markets rather than over-the-counter.

- the obligation for non-resident banks established in some countries to structure their entities as subsidiaries rather than branches.

The common thread among these reforms is that they imply the governments’ ability to prescribe specific legal forms to financial intermediaries. However, JEFTA states that governments cannot ‘restrict or require specific types of legal entity or joint ventures through which an investor of the other party may perform an economic activity’

(Market access). There is, therefore, a contradiction between this JEFTA rule – inherited from GATS, in other words from a time when banking structure was less of an issue than it is today – and the laws recently adopted by the EU and other countries. The EU appears to be partially aware of the risk posed by this rule, given that one of the only derogations that it has introduced concerns precisely this point. This derogation is found in Annex II to JEFTA (Reservation No 16 – Financial Services) and reads as follows:

‘The EU reserves the right to adopt or maintain any measure with respect only to Investment – Market access to require a financial institution, other than a branch, when establishing in a Member State of the EU to adopt a specific legal form, on a non-discriminatory basis’

However, this derogation has two limitations. First, it only provides protection in relation to non-discriminatory measures. However, some of the measures adopted in the wake of the GFC are based on different treatment of foreign and local investors and are therefore discriminatory. Second, the scope of this derogation excludes foreign bank branches. However, the recent proposal to gather entities from foreign groups under an EU holding structure affects both the branches and the subsidiaries of these groups. It could, therefore, fall within the scope of this JEFTA prohibition.

“[...] it is regrettable that the Commission has not assessed the risks to the taxpayer [...]”

Étienne Lebeau

3.7 JEFTA increases the cost of bank nationalisations to the taxpayer

JEFTA’s protection standards include a direct expropriation clause. This prohibits States from nationalising foreign companies unless certain conditions are met, in particular the ‘payment of prompt, adequate and effective compensation’. The indemnity must equal ‘the fair market value of the expropriated investment at the time when the expropriation was publicly announced or when the expropriation took place, whichever is earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier’. JEFTA’s expropriation clause is not legitimate, as it is unnecessary and expensive. The inclusion of expropriation clauses

in an investment agreement is only justified for a country whose judicial system does not adequately protect the investments of foreign companies and where there is a risk of abusive expropriation without compensation. It is not justified for States such as the EU and Japan, which have strong protection standards in domestic law and competent courts to apply them. Inserting an expropriation clause in JEFTA is a step backwards, as it dispossesses the common courts of their jurisdiction in the matter in order to entrust expropriation controls to arbitration tribunals. This is a further step backwards, as the JEFTA standard is based on the Hull model, which fully compensates investors and is very favourable to investors' interests. An expropriation regime such as JEFTA's is based on maximalist standards, and arbitration tribunals could significantly increase the cost of future bank bailouts. However, we know that these nationalisations are essential in times of financial crisis. The 2008 banking crisis required public takeovers of banks and credit institutions in a number of countries. The 1992 Swedish banking crisis also required banking nationalisations. In any case, it is regrettable that the Commission has not assessed the risks to the taxpayer that will be created by these new rules in the event that new banking nationalisations must take place.

3.8 JEFTA adopts the most toxic protection standards

JEFTA contains the most intrusive standards regarding the power to regulate States, the indirect expropriation rule and especially the 'fair and equitable treatment' (FET) standard. The standards' toxicity is due to their broad scope. In contrast to previous standards, these standards do not target specific State regulatory actions, but have an indeterminate scope. The FET standard is based on the vague concept of 'legitimate investor expectations', while the indirect expropriation standard potentially prohibits any measure that would have a negative impact on an investment's value. There are no State decisions or laws that can be considered a priori to be free of the risk of violating such rules. This results in a diffuse and widespread risk, as the arbitration tribunals are themselves the final courts of appeal that decide on what does or does not violate these protection standards. Experience shows that these courts have constantly expanded the scope of these standards, to the degree that they have sanctioned States for laws that the common courts would never have permitted to be challenged. 'Thus, the system involves a shift in sovereign priorities towards the interests of foreign owners of assets and away from those other actors whose direct representation and participation is limited

to other processes and institutions; State officials have initiated the shift but the arbitrators have consolidated and expanded it'[5]. This threat arises not only from arbitration tribunals' institutional flaws and their pro-investor bias; it also arises from the FET and indirect expropriation standards, whose vagueness creates legal uncertainty.



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Government interventions to regulate finance or solve financial crises have borne the brunt of these standards, as has been demonstrated in numerous complaints to arbitration tribunals:

many complaints were lodged by investors against the measures taken by Argentina in 2001 and 2002 to contain its financial crisis;

Belgium was attacked by a Chinese investor in Fortis bank following its decision to put the bank under public control during the 2008 banking crisis.

the Czech Republic was censured before an arbitration tribunal in 2006 after it placed IPB bank under public control. The decision to place the bank under public control was made following IPB's refusal to apply the increased capitalisation requirements prescribed by the Czech government. The complaint was filed by the Saluka Investment Fund, an IPB shareholder.

“Regulations that affect the flow of capital into and out of a country may be among the most important in determining macroeconomic stability and the scope of policy responses in the event of a crisis.”

UN Report of the Commission of Experts

These standards are particularly inadequate when they relate to the financial sector. The emergency measures adopted in times of financial crisis, as well as the regulations adopted during the subsequent period, are often spectacular and constitute a break with the dominant consensus prior to the crisis. Measures such as the Dodd-Frank law in the United States, banking structure reforms, the nationalisation of certain banks, the reintroduction of restrictions on capital movement in some countries, temporary bank closures and unconventional monetary policies were almost unimaginable before 2008. It is particularly inappropriate to put arbitration tribunals in a position to evaluate such public acts, based on standards as meaningless as legitimate investor expectations. To an extent, JEFTA's authors are aware of this, as evidenced by the addition to the Treaty of interpretative provisions meant to limit abuses. The FET standard is supplemented by the following article [currently labelled x13], which states that ‘the mere fact that a party takes or fails to take an action including through a modification of its laws that may negatively affect an investment or an investor's expectations, including expectations of profits, does not amount to a breach of an obligation under this section’. Indirect expropriation is also addressed in an interpretative annex. Above all, these additions demonstrate that the FET and indirect expropriation standards are legally problematic and should not be included in trade agreements, let alone with respect to a sector as sensitive as the financial sector.

“It is particularly inappropriate to put arbitration tribunals in a position to evaluate such public acts, based on standards as meaningless as legitimate investor expectations.”

Étienne Lebeau

4. The liberalisation of capital movements

Since the 2008 crisis, international authorities have adopted more conciliatory language on capital movement restrictions. The IMF considers that capital movements may bring about systemic crises and that certain control measures for these movements are part of the macroprudential measures that government should be able to use. The UN's Report of the Commission of Experts published following the financial crisis is in agreement. ‘Regulations that affect the flow of capital into and out of a country may be among the most important in determining macroeconomic stability and the scope of policy responses in the event of a crisis’[6]. This new international approach takes on board lessons from the handling of financial crises in recent decades. A number of countries affected by these crises have reintroduced controls on capital movements. This was the case at the time of the financial crises in Asia and South America in



the early 2000s. It also happened in the EU with the euro area crisis. For the first time since the EU liberalised its capital movements, Member States reintroduced restrictions. The example, however, has not been followed by JEFTA. It only reaffirms the EU's system of general liberalisation of capital movements. This liberalisation is the subject of two articles in JEFTA. One is in a general section on the problem of capital movements and states that: ‘the parties shall allow, with regard to transactions on the capital and financial account of balance of payments, the free movement of capital [...]’. The other is in the investment chapter and lays down that: ‘Each party shall allow all transfers to a covered investment to be made in freely convertible currency without restriction or delay into and out of its [area] [territory]’. A list of capital movements which should be liberalised is then proposed, which covers a large spectrum and includes transfers of profits, dividends and interest from an investment as well as the transfer of underlying capital. For the EU, the full liberalisation of its capital account is not new. The liberalisation, however, takes on a new dimension when the transfer of capitals is covered by the ICS. The restrictions introduced by certain countries, including Argentina, on capital movements received many complaints from investors in arbitration tribunals.

Like many agreements on investment liberalisation, JEFTA includes a protection clause for capital controls in certain circumstances. It is set out in two parts, one relevant only to the EU, and the other to both the EU and Japan. The EU clause stipulates that the measures are authorised in the event of 'serious difficulties for the operation of the Union's economic and monetary union, or threat thereof'; whereas for the EU and Japan, they are authorised in two specific cases: 'serious balance-of-payments or external financial difficulties or threat thereof' and 'serious macroeconomic difficulties related to monetary and exchange rate policies or threat thereof'. It is also stated that the measures adopted 'shall not exceed those necessary to deal with the circumstances described' and 'shall avoid unnecessary damage to the commercial, economic and financial interests of the other party'. Given the number of conditions, the clause is at risk of being so restrictive that it could become unusable. The conditions also open the door to court battles to determine whether such legislation can be considered necessary and proportionate for the objective being pursued. The interpretation of these measures should be left to the Member States, or potentially to JEFTA's specialist intergovernmental committees, but never to an arbitration tribunal.

5. Prudential carve-out

A Prudential carve-out (PCO) clause has been included in certain trade treaties for a long time, including GATS and NAFTA. This clause is intended to give back to the Member States financial regulation margins, margins reduced by the protection standards in the agreements. The chapter on JEFTA's financial services includes a PCO clause in Article 8, which has the following wording:

'1. Nothing in this Agreement shall prevent a Party from adopting or maintaining measures for prudential reasons, including for:

(a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or

(b) ensuring the integrity and stability of the Party's financial system. '

'2. Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Party's obligations under this Agreement'.

An initial observation can be made: this PCO is practically identical to the one in GATS. It reflects the approach of prudential policies before the 2008 crisis. It does not reflect the new principles and standards of multilateral bodies, be they the BIS'

Core principles for effective banking supervision or IMF's new approach to capital control measures. No reference is made to the official documents of these bodies. A reference is made in JEFTA to the 'principles and prudential standards agreed at multilateral level', but in terms of regulatory cooperation between the EU and Japan. It is not clear whether arbitration tribunals that have to rule on the scope of PCO feel bound to comply with these multilateral principles. If JEFTA has an arbitration tribunal, it will have the final say to determine the exact scope of the PCO clause, with the risk of severely limiting it, such as stopping restrictions on capital movements from being considered as prudential. There is at least one example in case law of an arbitration tribunal on a PCO clause: the case of the Fireman's Fund Insurance Company v. The United Mexican States, which ruled in favour of Mexico, who cited the clause to justify a regulatory measure. Consistent conclusions cannot be drawn, however, from a single judgment, nor can they from the recent ruling made to the WTO in the 2006 Panama vs Argentina case. The PCO clause does not provide enough protection for the right of States to regulate their financial sector. It does not make up for JEFTA's highly intrusive rules which leave investors open to little regulation in the Member States.



It should be pointed out that JEFTA's PCO has a third paragraph which introduces a confidentiality clause for bank details. 'Nothing in [this Title] shall be construed to require a Party to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.' The inclusion of this third paragraph in the PCO seems rather incongruous, given that it concerns the privacy of individuals and not protection measures for the financial system.

6. Regulatory cooperation in the financial sector

A crucial aspect of JEFTA is the way it organises regulatory cooperation between the EU and Japan in the financial services sector. Regulatory cooperation serves a purpose if it is intended to strengthen financial regulation, level standards upwards between the EU and Japan and uphold democratic transparency. The annex on regulatory cooperation in the chapter on JEFTA's financial services is in conflict with this virtuous model. Firstly, the EU and Japan are not intending to base their regulatory cooperation on standards higher than 'internationally agreed standards' drawn up at multilateral level. There is a smaller common denominator between the EU and Japan, which probably means that the financial regulations considered to be higher than those required internationally will come under scrutiny. It appears that Japan is at greater risk of this than the EU, given the perception conveyed by the financial industry of an excess of regulation in its financial sector. Moreover, the principle aim of the regulatory cooperation is not to improve the quality of financial regulations, but to allow legislation to be criticised from the very first stages of its development.

JEFTA provides that each party should 'make its best endeavours to offer the other party the opportunity to be informed at an early stage and to provide comments on its forthcoming regulatory initiatives'. This right to provide early comments on legislation carries a significant risk of 'regulatory capture' by the financial sector. Indeed, the criterion on which draft legislation is to be assessed is its impact 'on private operators'. If private operators manage to convince their government that legislation from an 'opposing' party significantly threatens their profits, the government could demand new studies on the impact and, where appropriate, legislative changes. The talks will take place within the EU-Japan financial regulatory forum, which will consist of representatives from the European Commission, the Japanese Government and possibly other supervisory and financial regulation authorities. If differences of opinion subsist, they should be settled in a 'technical mediation' working group, made up of representatives from the two parties and a neutral mediator chosen by the two parties.

This process is not very democratically transparent. It takes place even before the parliaments are made aware that an initiative is underway. It involves talks between small circles of recognised experts. It is now well known that this type of institutional configuration gives the big banks greater influence over the legal process, given their considerable

analysis and lobbying resources, the technicality of the debates and the limited financial means of the authorised regulators. The official bodies themselves, including the IMF, recognise this excessive influence. The financial sector employs 1 700 lobbyists to influence EU legislation and spends USD 120 million each year on lobbying in the European institutions. Since the first few years following the GFC, pressure from the financial sector has allowed financial legislation adopted in the US and the EU to be partly stripped of its substance. JEFTA's Regulatory Cooperation Forum consolidates this anti-democratic model, which excludes small financial institutions (often the most useful) and organisations representing citizens, such as trade unions and NGOs, from the debate.

"This process is not very democratically transparent."

Étienne Lebeau

7. Conclusion

At the end of this study, it can be concluded that JEFTA poses a threat to financial stability. This threat comes from three factors:

The Treaty's scope being very broad, which covers all finance-related positions, all financial products and innovations, particularly



toxic assets which were at the centre of the global financial crisis.

the extensive rights given to investors, through the Treaty's protection regulations and to the probable access to arbitration, which will undermine the ability of the States to draw up rules and take measures to stabilise the financial sector.

an opaque regulatory cooperation system, whose objective is to reduce the costs for private operators and regulatory burdens, and

which will increase the risks of 'regulatory capture' by the financial industry.

The EU must thus readjust its financial services treatment model in free trade agreements. Its current model is too heavily shaped by demands



from the financial industry and not enough by the need to improve financial regulations and governments' policy space. This readjustment requires the following actions:

carrying out systematic studies on the impact of current agreements (including JEFTA) on financial stability. These studies should focus on determining whether the liberalisation rules are compatible with the governments' broader monitoring, regulation and intervention instruments in the financial sector. This assessment should be comprehensive, in other words it should take into account not only the regulations currently in place but also those which could be introduced as a result of international consensus or academic debate.

restricting the Treaty's scope, particularly by stipulating that the most problematic financial products and activities (over-the-counter derivatives trading, toxic securitisation, etc.) are excluded from the definition of financial services included in the Treaty.

exclusively settling disputes in the financial sector being before either common courts or an intergovernmental organisation, such as the WTO. In the light of the absurd complaints lodged before investor-state tribunals (Argentina, Belgium, etc.) and the increasingly frequent recourse to arbitration tribunals by the financial sector, these tribunals must be stopped from operating in relation to financial services.

-removing TEF and indirect expropriation standards, given their vagueness and the absurd complaints that they give rise to before arbitration tribunals.

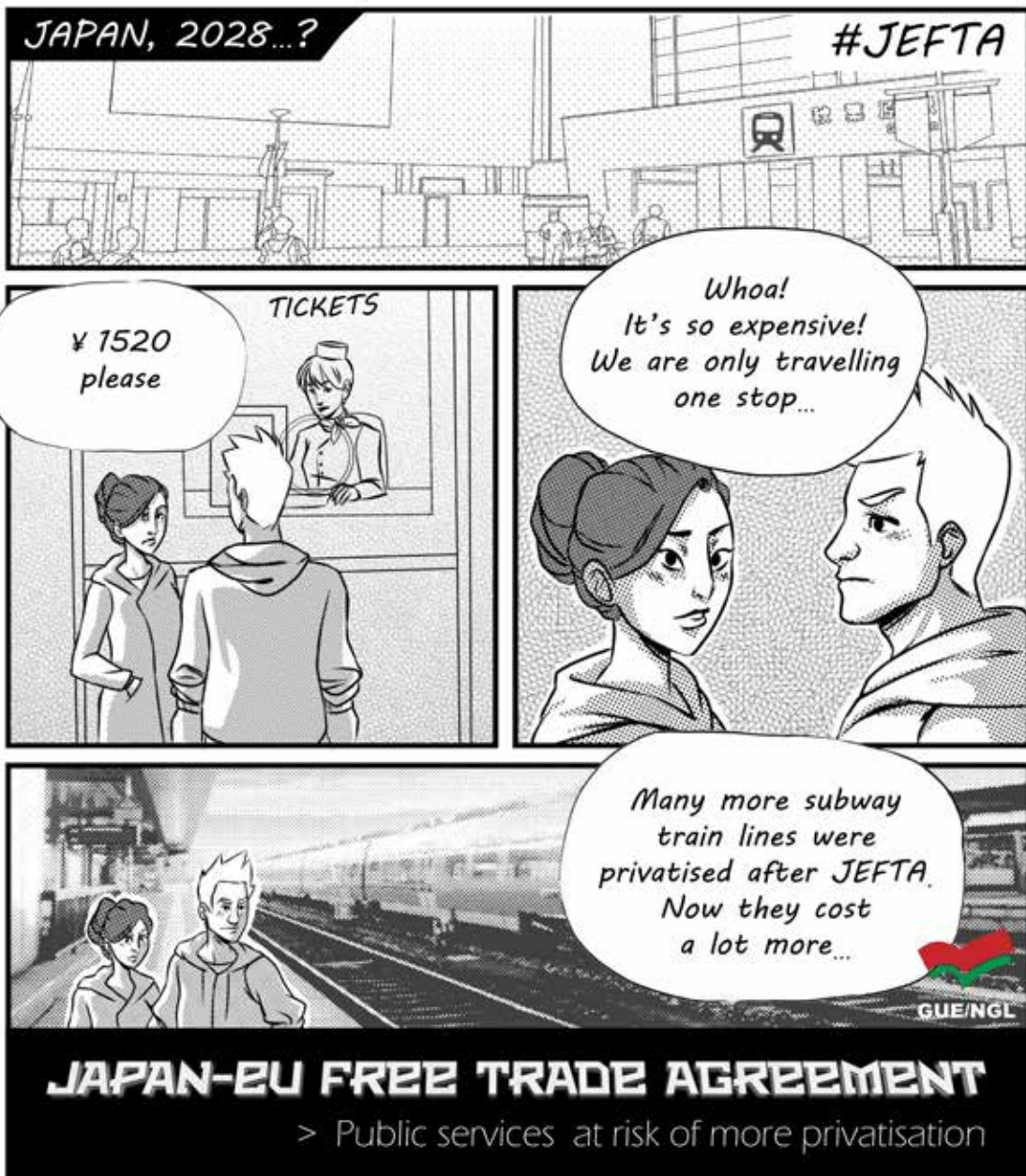
revising the direct expropriation standard, to protect the right of States to nationalise their banks without incurring heavy financial charges for the taxpayer.

removing certain rules associated with market access: a ban on limiting the value of bank assets and financial transactions, a ban on prescribing or banning financial operators from specific legal forms. As the GATS also includes these rules, their removal should be proposed by the EU within the WTO.

aligning capital flow regulatory provisions with those set by the IMF. The proposal takes into account the fact that the IMF's articles are less binding for the States than free trade agreements and EU law on capital flow restrictions.

consolidating prudential carve-out, particularly by explicitly acknowledging the prudential character of the capital restrictions – regardless of whether they are implemented to prevent a crisis or contain it, or whether they concern inbound or outbound movements – and by stopping the use of the clause from being contested before an investor-state tribunal.

revising the Financial Regulatory Forum's (FRF) targets and procedures. The primary objective of regulatory cooperation should be to improve financial stability and not to reduce costs for private operators. The FRF's working procedures should be designed to give parliaments (European and of the Member States), and all components of civil society, effective control.



ENVIRONMENTAL PROTECTION IN THE EU-JAPAN FREE TRADE AGREEMENT

Ciaran Cross⁶

I. Introduction

The EU Council-issued negotiating mandate for JEFTA – drafted in November 2012 and published in September 2017 – states that the “Agreement will recognise that sustainable development is an overarching objective of the parties”[8] and makes reference to core concerns such as climate change, forest and fishery resources, investment and corporate social responsibility.[9]

In the words of the EU Commission, JEFTA “will be the most important bilateral trade agreement ever concluded by the EU”. [10] In August 2016, the Commission described its approach to environmental protection in the JEFTA negotiations as follows:

“The EU intends to negotiate with Japan an ambitious chapter on Trade and Sustainable development, including commitments to high levels of environmental protection in domestic law and effective implementation of multilateral environmental agreements. Particular emphasis should be put on the conservation of biological diversity, fisheries resources and timber, with reference to the Convention on Biological Diversity, the Convention on International Trade in Endangered Species, and Food and Agriculture Organisation instruments. The EU seeks comprehensive commitments which allow the parties to address a broad range of topics in the implementation phase. For this reason, the EU does not foresee provisions on specific issues such as whaling, which was also not part of the scoping exercise that preceded the launch of the negotiations. Import of whale meat also remains prohibited in the EU.” [11]

Following a leak of the negotiating documents earlier this year,[12] the Commission published a number of chapters from JEFTA “in view of the growing public interest in the negotiations”, “for information purposes” and “without prejudice to the final outcome of the agreement between the EU and Japan.”[13]

What these texts reveal is a far cry from the Commission’s prior claims of “ambitious” and “comprehensive” commitments to high levels of environmental protection, effective implementation of multilateral environmental agreements, and

conservation of biological diversity, fisheries resources and timber. Practically the only part of the above 2016 statement that still rings true is on the issue of whaling. As promised, the Commission has not delivered on any commitments from Japan to suspend its whaling activities, which are in breach of international law.

“[JEFTA] will be the most important bilateral trade agreement ever concluded by the EU.”

EU Commission

In its webpages on JEFTA, the Commission states that “Both the EU and Japan have strong environmental laws” and “have agreed that the trade deal between them must support existing rights and not lower or dilute them” through derogations or failures to enforce existing environmental laws.[14] There is a significant gap however between the “overarching objective” of sustainable development mandated by the EU Council and the promise that JEFTA will not harm the status quo of environmental protection. Individually, the EU’s failure to negotiate provisions which guarantee stronger environmental protection in specific areas may be regarded as a series of missed opportunities in the context of bilateral trade relations with Japan. Cumulatively however, such oversights point to the wilful neglect of the core objective of sustainable development with which the Commission was mandated.

In a number of areas, the JEFTA texts simply reproduce provisions negotiated in Comprehensive Economic and Trade Agreement (CETA). While the Commission has long touted CETA as a “Gold Standard” FTA, it has been widely criticized.[15] Nevertheless even the CETA “standard” has been significantly diluted in JEFTA in important respects. As discussed below, in areas such as fisheries, timber and intellectual property rights, there is a compelling case for provisions on these issues in an agreement with Japan to be much more robust. As the following analysis of the JEFTA texts refers

to findings from the EU's Sustainability Impact Assessment on JEFTA, some initial general observations concerning the assessment are worth noting.

1.1 The Sustainability Impact Assessment

The Mandate stipulates that the “economic, social and environmental impacts will be examined by means of an independent Sustainability Impact Assessment (SIA) that the Commission should undertake in parallel with the negotiations”; the TSIA should seek to identify potential impacts on sustainable development, and “to propose measures (in trade or non-trade areas) to maximise the benefits of the agreement to prevent or minimise potential negative impacts”.[16]

The Final Report of the Trade Sustainability Impact Assessment of the Free Trade Agreement between the European Union and Japan (hereinafter the TSIA) was published in May 2016.[17] In relation to the purpose of the TSIA, its final assessment and proposals, a number of issues arise.

Firstly, not only are key issues wholly omitted from the assessment, but its authors have put a positive spin on the study's conclusions. In a preliminary conclusion on the environmental impacts of JEFTA, it is claimed that these will be “negligible or non-measurable”.[18] Of course, any precise measurement of the environmental impacts of a trade agreement between countries that account for a quarter of the world's GDP[19] is likely to prove elusive. But in the study's final conclusions, the authors assert that the impacts will be “negligible or positive”.[20] There is no reason given for equating “non-measurable” impacts with “positive” impacts. Secondly, the study – which was commissioned by the EU Commission – seems to have neglected a core part of its mandate. While the TSIA does point to certain aspects where a negative impact could be expected, it largely avoids proposing measures which could be taken to effectively promote positive impacts through – for example – the adoption of stricter environmental policies by the parties to JEFTA. For instance, two “potential

risk factors” (agricultural subsidies and fisheries) are identified,[21] but little is given in the way of recommendations to address the issues.

In this respect the TSIA neglects one of its most significant and central objectives as mandated by the Council – which explicitly called for proposals on measures which promote sustainable development in both trade and non-trade areas. In

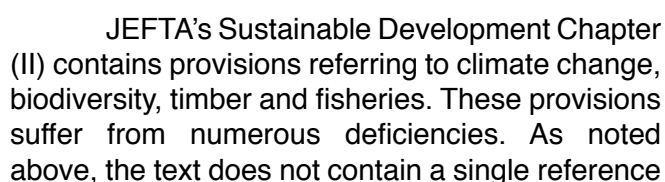


relation to whaling, the Commission's position also ignores this dimension. Pointing to the fact that the import of whale meat into the EU is prohibited and making reassurances that this will not change under JEFTA[22] hardly fulfils the mandate; the mere fact that whale meat is not imported into the EU is not a factor which justifies the exclusion of any measures related to whaling from the remit of the agreement.

Thirdly, the TSIA report assesses environmental regulation in Japan as generally performing at a similar level to the European average.[23] The authors therefore assert that, since “environmental regulation in some European countries is stricter than Japanese regulation”, the FTA is “likely to encourage the adoption of environmental management practices among Japanese firms engaged in the EU export market.”[24]

Finally, it is alarming that the JEFTA negotiators themselves seem to have ignored concerns raised in the TSIA. Where the TSIA does make recommendations – in the case of timber, for example – these have had no impact on the agreement itself.

Both in what it contains and what it omits, the JEFTA texts raise a number of significant environmental concerns. Each of the following is discussed in detail below:



The Chapter on Intellectual Property (VII) fails to address a number of key issues – particularly in relation to the privatisation of genetic resources, the protection of biodiversity and traditional knowledge.

For this “discussion” to occur would require the Commission to initiate consultations with Japan over an issue on non-compliance. But the Commission has to date been reticent to activate consultative proceedings with partners under similar provisions even when provided with compelling evidence of a breach of the provisions.[26] On the surface, this limitation makes all of the commitments of parties to abide by the sustainable development provisions very weak, and the likelihood of any meaningful consequence from non-compliance very slim in practice.

This exclusion of dispute settlement or any possibility of sanctions for non-compliance with sustainable development provisions is ubiquitous in the EU's FTAs to date.[27] Lately, this policy approach has come under fire in the EU, prompting the Commission to issue a non-paper on enforcement of sustainable development provisions in the EU's FTAs, discussing the appropriateness and efficacy of sanctions-based provisions. However, following the CJEU reasoning in the Court's recent Opinion 2/15 on the EU-Singapore FTA,[28] it has been argued that a breach of the environmental and labour provisions undertaken in the EU's FTAs are (in theory) already sanctionable, as the EU is entitled to suspend trade liberalisation commitments on the basis of customary international law.[29]

The barriers to enforceability of these provisions is therefore likely to remain the focus of debate for some time – both in respect of JEFTA and EU trade policy more generally.

Whatever the outcome, it is nonetheless clear that the vague content of JEFTA's provisions on environmental protection does not easily translate into binding commitments capable of enforcement. These provisions are – by and large – neither comprehensive nor specific enough to be effective in practice. Indeed, far from being “ambitious”, JEFTA's Trade and Sustainable Development provisions are arguably weaker than those in CETA, or even the TPP – both of which were deeply flawed.

In light of the Commission's talk of “ambitious cooperation” with Japan, even the word “cooperation” is avoided in a number of key areas (Biological Diversity and Timber, for example). The Article on Cooperation provides only that the parties “may” cooperate on a list of sustainable development concerns – as if the absence of a FTA was hindering them from already cooperating freely on these issues.[30]

2.1 Climate Change

The Commission has proudly announced that JEFTA is the first of the EU's bilateral trade agreements to “include a specific commitment to the Paris climate agreement”.[31]

JEFTA's Article on “Multilateral Environmental Agreements” includes a reaffirmation of Parties' commitments to “achieving the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC)” and “to work together to take actions to address climate change towards achieving the purpose of the Paris Agreement

adopted by the Conference of the Parties to the UNFCCC at its 21 session”.[32] The Article on “Trade and investment favouring sustainable development” further provides that parties “shall strive to facilitate trade and investment in goods and services of particular relevance for climate change mitigation, such as sustainable renewable energy and energy efficient goods and services, in a manner consistent with other provisions of this agreement”.[33] The Article on “Cooperation” stipulates that parties “may” cooperate on “trade-related aspects of the international climate change regime, including means to promote low-carbon technologies, other climate-friendly technologies and energy efficiency”.[34]



By employing terms such as “work together to take actions”, “shall strive”, and “may cooperate”, none of these provisions can be considered adequate to even achieve the limited objectives they articulate, much less to address the many potential and complex interactions between international trade rules and evolving strategies to tackle climate change. Much needed guarantees that specific commitments undertaken by Japan and the EU in JEFTA will not undermine current and future efforts to tackle climate change – in areas such as – are wholly lacking.

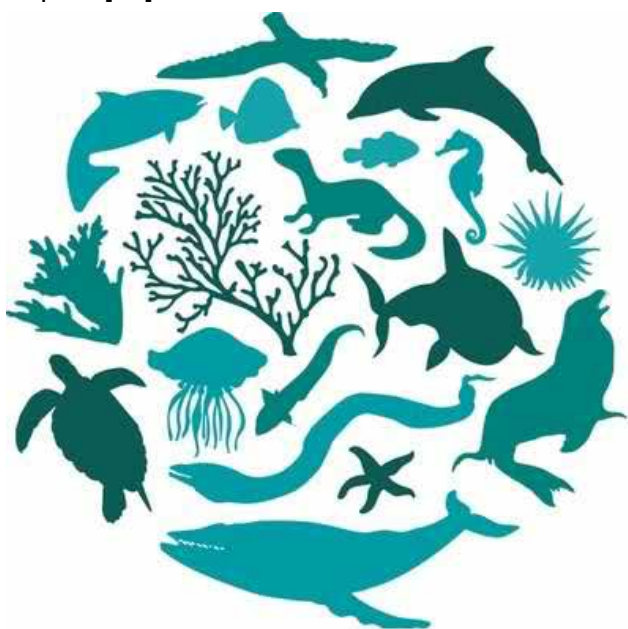
“[JEFTA's] provisions are – by and large – neither comprehensive nor specific enough to be effective in practice.”

Ciaran Cross

This failure to include more robust commitments is particularly notable in light of Japan's record on climate change action. One legacy of the 2011 Fukushima nuclear disaster is the widespread concern that Japan will increase its future reliance on coal power; in the aftermath over 40 coal power

plants were initially planned for development.[35] Critics have warned that Japan's post-Fukushima energy policy has been "hijacked by companies determined to promote fossil fuel-burning technologies at home and abroad", resulting in an environmentally harmful energy strategy which also threatens to saddle the country with massive over-investment in coal power.[36] A milestone was reached in January 2017 when plans to convert one power plant to coal were cancelled – the first restriction on the development of coal power capacity in Japan for many years.[37] However, the assessment of Japan by Climate Action Tracker (CAT) notes that "coal-fired power plants are set to play an increasingly important role in Japan".[38]

Moreover, it was noted in the TSIA that the Nationally Determined Contribution (NDC) submitted by Japan to the UNFCCC Secretariat on 17 July 2015 was rated by CAT as "inadequate" and that Japan's current regulatory environment makes even this target unlikely to be achieved. [39] Currently CAT ranks Japan's climate policies as "highly insufficient", noting that "if all countries were to adopt this level of ambition, global warming would likely exceed 3–4°C in the 21st century" and that "Japan's NDC is based on a problematic accounting method". By comparison, Canada is currently ranked as "inadequate" by the CAT – as is the EU itself, hardly a model example in this respect.[40]



The EU TSIA report does not propose any measures to positively impact on this issue, and the JEFTA text does not contain any provisions, which convincingly promote positive policy responses to the threat of climate change.

2.2 Biological Diversity and Agriculture

The Article on Biological Diversity[41] provides somewhat stronger commitments, which require the parties to:

implement effective measures to combat illegal trade in endangered species of wild fauna and flora as covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and as appropriate in other endangered species, such as monitoring and enforcement measures, and awareness-raising actions

implement, as appropriate, the decisions which were adopted under all relevant international agreements to which the Party is a party, notably the Convention on Biological Diversity (CBD) and its protocols and CITES, including through laws, strategies, plans and programmes.

Other provisions require the parties to exchange information and encourage use of sustainably sourced products. It remains to be seen what these short provisions can achieve, in particular in relation to complex challenges relating to biological diversity and intellectual property rights, timber, fisheries and whaling as discussed further below. It is also notable that the TSIA makes the following assessment on biodiversity and agriculture:

"Japan's support to the highly protected agricultural sector... remains among the highest in OECD. The vast majority of agricultural subsidies are linked to production levels, with greater negative consequences for the environment. Agriculture is also a major source of pressure on biodiversity. Japan's use of fertilisers and pesticides per square kilometer of agricultural land remains well above OECD averages."[42]

The 2010 OECD report from which the TSIA draws this evidence goes further in its assessment, stating that "Japan has a relatively high share of endemic species", of which a high proportion by OECD standards face extinction: "nearly a quarter of mammal species and more than a third of freshwater species." [43] The OECD Environmental Performance Review undertaken in 2010 assessed developments since its previous 2002 Review, concluding that despite some positive efforts, "greenhouse gas emissions and generation of non-municipal waste have grown, pressures on nature and biodiversity have intensified, and air and water pollution remain of concern in some areas." [44]

The EU's previous 2012 Impact Assessment for JEFTA predicted "a decline of the Japanese food sector due to the elimination of bilateral tariff barriers" which would "ultimately lead to a decrease

in agricultural output.” The 2106 TSIA concludes that this anticipated reduction is small (ca. 1%) and “not sufficient to release the pressure that the agricultural sector imposed on biodiversity and the environment”. The issue of agricultural subsidies and biodiversity therefore “remains a concern in the future.”[45] But no measures are proposed in the TSIA to address this.

2.3 Timber

The Commission’s 2012 risk assessment on JEFTA noted the following:

“The EU has invited Japan, as a major timber consuming country, to join it and other major timber consuming countries in intensifying policy measures against the import of illegally harvested timber. A deeper trade agreement with Japan could provide further opportunities to develop a closer and more ambitious cooperation on illegal timber trade between the two partners.”[46]

According to an October 2016 Briefing Paper, the JEFTA Article on timber is now “closed” (i.e. completed).[47]

Under JEFTA’s provisions on “Sustainable management of forests and trade in timber and timber products”, the Parties “recognise the importance of ensuring the conservation and sustainable management of forests”[48], and undertake three commitments to:

- encourage conservation and sustainable management of forests, and trade in timber and timber products harvested in accordance with the laws and regulations of the country of harvest
- contribute to combating illegal logging and related trade, including as appropriate with respect to the trade with third countries, and



exchange information and share experiences at bilateral and global levels[49]

These provisions are wholly inadequate to address the need to regulate the trade in illegal timber to Japan, the “largest importer of wood and plywood in the world, the second largest importer of logs and the third-largest importer of lumber”[50] and

notorious as a “major market for high-risk timber”. [51] JEFTA’s provisions are also notably weaker than those negotiated for both CETA,[52] and the TPP.[53] While those agreements were far from optimal, the provisions they contain on sustainable development in relation to timber and forest management are significantly more specific and ambitious than those in JEFTA.

This is particularly alarming given that many of the key issues regarding Japan’s timber imports are identified in the assessment of the TSIA. The Final Report paints a quite damning portrait of Japan’s failures to contribute to or participate in international efforts to combat illegal logging. It notes with concern that Japan has “no formal regulation on controlling imports of illegal wood and wood-based



products.”[54] Previous attempts at cooperation with Japan on the issues have had “little effect.” In contrast to the EU’s own efforts under the Forest Law Enforcement, Governance and Trade (FLEGT) scheme, Japan has pursued a national verification system (the goho-wood system) which is “only voluntary and suffers from serious design weaknesses” including a loose definition of “legal” and the absence of any independent monitoring. [55] A policy on public procurement initiated in 2006 makes the criteria of “sustainability” only preferable, but not mandatory, and only applies to central government. Even with these limitations, one 2012 report cited by the TSIA report found that a quarter of the entities bound by this policy failed to even check the legality of their supply.[56]

The TSIA further suggests that Japan’s inaction on illegal logging has weakened the EU’s own attempts to tackle the issue through international cooperation:

“Japan’s failure so far to effectively control its imports of illegal timber has arguably had an inhibiting effect on the negotiations between the EU and Malaysia on a VPA (FLEGT Voluntary Partnership Agreement)... any expansion of Japan’s timber imports consequent upon the FTA could serve to exacerbate this situation.”[57]

According to the TSIA, the potential impact of JEFTA on trade in illegal timber means that “this should be a high priority for further collaborative action.”[58] The TSIA anticipates that the “general expansion in economic activity consequent on the FTA” – as well as direct impacts on the construction sector – will have an environmental impact on forests. The impact will depend upon the “the forest from which the products are sourced, in terms of carbon stocks, biodiversity and the health of the remaining forest; there may also be social impacts on forest communities.”[59]

Clearly the EU’s own attempts to regulate timber and prohibit imports of illegal timber go significantly further than those taken by Japan – although even the EU’s efforts have received harsh criticism. [60] Nevertheless, the TSIA recommends that encouraging Japan to adopt legislation similar to the EU Timber Regulation would mean Japan “could explicitly recognise FLEGT-licensed timber exported from VPA countries as legal... building on a system developed by the EU and its partners.”[61] This may be possible, according to the TSIA, if Japan implements new legislation under development.

In the Article on timber, there is no evidence that negotiators have taken such steps to encourage Japan to recognise the FLEGT-licensing system through domestic legislation – nor does the Article oblige them to do so. Since the TSIA was published, Japan has indeed enacted a new law,[62] which however suffers from many of the existing regulatory deficiencies, with many of the details as yet undetermined: it remains based on a voluntary registration system and there is no prohibition of illegally sourced timber. Moreover both the definition of “legal” timber and the standards required for due diligence (which is only required to be carried out by companies registered under the scheme) are not yet clear.[63] Global Witness asserted that Japan’s new law lacks meaningful deterrent and “threatens to undermine the regulatory standards” adopted by other G7 countries, all of which – except Japan – have prohibited imports of illegal timber, and imposed mandatory regulations.[64]

One month after the TSIA Final Report was published, the Environmental Investigation Agency (EIA) released a study showing that “the indiscriminate sourcing practices of Japanese companies are fuelling illegal logging in Europe’s last remaining virgin forests”:

“Since arriving in Romania in 2002, Holzindustrie Schweighofer, an Austrian owned timber and wood processing company, has incentivized illegal logging through its sourcing policies... New evidence uncovered by EIA indicates that nearly 50% of the company’s exports of sawn lumber and laminated timber are destined for Japanese buyers, including many of Japan’s largest and most prominent trading companies... Sales to Japan totaled nearly ¥20 billion in 2015... The Romanian government itself has conservatively estimated that nearly half of all timber cut in the country is done so illegally.”[65]



The EIA report points specifically to failings in the Japanese regulation of timber imports (as identified in the TSIA):

“Under current Japanese law, most Japanese companies are not required to avoid sourcing illegal timber when buying overseas. All other major developed markets and all other G7 countries, including the US, EU, Australia and Canada, have established a prohibition on the import of illegal timber. Most of these nations now require their companies to perform mandatory due diligence when sourcing wood products overseas.”[66]

Given that the illegal export of natural resources from the EU is a relatively rare phenomenon, the issue of timber presents a compelling case in favour of the EU re-examining options for the application of more effective enforcement mechanisms (including dispute settlement and sanctions) for a breach of commitments on the timber trade under JEFTA. The EIA report concludes that “the case of Romania shows that a trade flow that may be relatively small for Japan can still have a disproportionate negative impact on countries around the world.”[67]

These regulatory failures in Japan create a market for illegal timber which has the effect of encouraging the destruction of forests in producer countries. This is acknowledged in the TSIA, but the approach adopted is to look only at the countries with the largest volume of timber-exports to Japan, thereby omitting any trade from the EU.[68] Moreover, the

TSIA confidently asserts that “European forests are in general well managed”, and while “negative impacts” may occur in “some areas”, the primary environmental impacts of JEFTA lie with trade from third countries.[69] The TSIA report identifies China and Vietnam as the two main exporters of timber to Japan, but notes that neither country is a “primary producer” of timber, but rather “import raw timber from other countries and process it for exports... Both countries are known to import significant volumes of high-risk timber from countries in Africa and South East Asia, among other places.” The TSIA however goes on: “The rise in imports to the EU and Japan from countries with problems with forest governance and law enforcement therefore clearly poses a risk in terms of increasing incentives for illegal or unsustainable practices in the countries of origin.”[70]

The Article on timber in JEFTA is therefore hardly adequate to address such complex issues, along global supply chains which exploit resources from third countries. It is insufficient even with regard to addressing potential trade of illegal timber between the parties themselves (i.e. from Romania to Japan). It commits the parties to take non-specified “action”, without consequences for failing to do so. To date, Japan has taken action in response to criticisms regarding illegal timber imports, but its action has been widely criticized as deficient. The lack of any explicit requirement in JEFTA for a prohibition on imports of illegal timber, mandatory due diligence or the implementation of other specific measures equivalent to efforts underway in the EU or other regions, would appear to be a significant failing. In the context of an agreement with the world’s largest importer of wood and plywood, a country which is demonstrably an importer of illegal timber from an EU member state, and which lacks an effective system to regulate imports or monitor compliance, even in public procurement – it is clear that these commitments on timber need to go much further.

2.4 Fisheries and Marine Conservation

JEFTA’s Article on “Trade and sustainable use of fisheries resources and sustainable aquaculture”[71] contains commitments to comply with the following international standards:

UN Convention on the Law of the Sea of 1982

FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

Parties shall also “take measures to achieve the objectives and principles of the FAO Code of Conduct for Responsible Fisheries of 1995”, “promote conservation and sustainable use of fisheries resources”, “adopt and implement effective tools for combating illegal, unreported and unregulated (IUU) fishing” and “promote the development of sustainable and responsible aquaculture”.



These provisions do not address several areas of concerns regarding Japan’s fisheries sector hinted at in the TSIA, which notes that “Japan’s pressure on biodiversity is rising”; “only a few marine areas are protected and consumption of fish per capita is one of the highest among OECD countries.”[72] This summary assessment is based on the OECD’s 2010 Environmental Performance Review of Japan, which goes into more detail on marine conservation:

“...further efforts are needed to implement some marine conventions, including the London Dumping Convention and the Ballast Water Convention [the latter first ratified by Japan in 2014]. Monitoring of off-shore marine areas has revealed high concentrations of heavy metals and persistent organic pollutants. Illegal discharge of waste oil by ships is a continuing problem. Overfishing of some fish stocks (e.g. in the Northwest Pacific region, tuna fish

stocks) is still a concern and requires more sustainable management of fish stocks, as well as improved preservation of marine ecosystems through regional and bilateral co-operation.”[73]

JEFTA’s Article on fisheries does not make any reference to these Conventions.

More striking however is the fact that neither the JEFTA text nor the TSIA pay attention to specific and well-documented cases of overfishing, such as of Bluefin tuna. The TSIA does note that tunas are among the EU’s exports to Japan and that “tuna is a prioritised species”, which has “been targeted by the IUU fleets”. The TSIA then cites two “measures for the international trade of tunas against the IUU” that have been implemented by Japan’s “Fishery Product Trade Office”; namely, “the embargo of tunas on all the tunas from the flag state of the IUU fishing boats” and “conservation measures in trade through a catch certification program.”

This rather confused text says little about the reality of Bluefin tuna. According to the FAO, Japan represents “almost 90% of the global trade for fresh and frozen bluefin tuna”.[74] Of the €106 million Bluefin tuna exports from the EU in 2015, €94 million was destined for Japan.[75]

The International Union for Conservation of Nature has included three species of Bluefin Tuna on its Red List of Threatened Species: Pacific Bluefin is classified as “Vulnerable” to extinction,[76] Atlantic and Mediterranean Bluefin as “Endangered”,[77] and Southern Bluefin as “Critically Endangered”. [78]

According to experts, “illegal fishing and trade in Pacific bluefin is rampant.”[79] Earlier this year, Japan exceeded its annual quota for Pacific Bluefin two months early.[80] In light of the scale of illegal fishing it is suspected that the actual catch was much higher.[81] In September 2017, Japan reversed its long held opposition to international cooperation to rebuild the Pacific Bluefin population and signed an agreement with South Korea, Taiwan, Mexico, and the United States. However, due to pressures of overfishing, the Pacific Bluefin population has already sunk to a critical low, estimated at just 2.6 per cent of pre-fishing levels; the agreement pledges to raise that status to 20 per cent by 2034. [82]

Japan’s refusal to cooperate on sustainable consumption of Bluefin tuna has also had a historical impact on stocks in the Mediterranean. For some two decades, “fleets from Spain, France, Italy, Japan, Libya, and other nations used spotter planes and sonar to net spawning Atlantic

bluefin tuna”.[83] As a result of over-exploitation, the Mediterranean Bluefin tuna population sank dramatically by 75 per cent between 1957 and 2007, 60 per cent occurring in the final 10 year period, leading to a high risk of extinction.[84]

“[...] illegal fishing and trade in Pacific bluefin is rampant.”

J. Barrat



The role of the Japanese market in this depletion of Atlantic Bluefin tuna from the Mediterranean is notable. In 2009, the Japanese Mitsubishi Corporation was revealed to be stockpiling and freezing large quantities of Bluefin tuna imported from the Mediterranean (handling some 35-40 per cent of Atlantic and Mediterranean Bluefin tuna imported to Japan), even while the species was “plummeting towards extinction”. [85] One president of a Japanese tuna fishing company (Katsukura Gyogyo Co.) argued in 2010 that Japan’s “slipshod import control mechanism” was contributing to overfishing of Bluefin tuna in the Mediterranean:

“Annual data compiled and published by the Japan Tuna Fisheries Cooperative Association (Nikkatsu Gyokyo)... shows that, for the last four years, Japan’s imports from Mediterranean nations have been way over the fishing quotas set for the nations by the ICCAT....

Conservation groups point out that overfishing will not stop so long as Japan keeps importing bluefin tuna, and they are right... bluefin tuna are being farmed at Japan’s request... almost all the farmed stock is shipped to Japan. This means that Japan can help end the current overfishing by strictly limiting its imports to within the prescribed quotas on exporters.”[86]

In March 2010, a proposal by Monaco to have Atlantic Bluefin tuna added to the CITES list of endangered species (and therefore ban its trade), was voted down by a majority CITES member

governments. The Monaco proposal was prompted by widespread concern that the crisis in Bluefin tuna stocks in the eastern Atlantic Ocean and Mediterranean were due “years of mismanagement by ICCAT [the International Commission for the Conservation of Atlantic Tunas]”,[87] whose members ignored the recommendations of ICCAT’s scientific committee and set quotas at double the levels recommended, which were then often further exceeded in practice.[88] The EU (and the US) had looked to support the measure; Japan voted against the ban.[89]

A 15-year plan adopted by ICCAT in 2006 has resulted in a tentative recovery of the population in the East Atlantic and Mediterranean.[90] By 2014, ICCAT agreed to increase the Total Allowable Catch (TAC) by 60% of over three years (2015, 2016 and 2017); the quota is shared between eight EU (Spain, France, Italy, Croatia, Greece, Portugal, Malta, and Cyprus). Critics expressed concern that such a large increase would mean that “the huge conservation efforts of the last years might quickly fade away.”[91] Moreover, small-scale fishers in the Mediterranean have complained that the quota effectively excludes them, as prohibitive regulations ensure that allocation is dominated by large-scale fishing companies. Moreover, these companies catch tuna alive for farming in Southern Europe – a much more lucrative export operation which nevertheless creates knock-on effects due to the volume of fish feed needed (around 15.8 kg of fish feed per kg of Bluefin tuna).[92]

Although stocks in the Mediterranean are ostensibly in recovery, the high volume of trade to Japan of a fish species which has been pushed nearly to extinction in the last decades highlights the need for JEFTA to include robust commitments from the parties to address sustainable fishing. The negotiated text does not come close to achieving this.

While the TSIA alludes to issues of traceability which could help in restricting illegal trade,[93] it plays down any possible negative impact of the FTA. It concludes that since Japan’s “expected economic growth in the coming years is likely to have a negligible impact on fish consumption... the same therefore can be said of the small impact on economic growth caused by the FTA.”[94] Neither claims regarding growth and consumption is however referenced.

Moreover the TSIA is satisfied that “with regard to prevention of IUU fishing and protection of threatened species, Japan seems to have fully executed its responsibilities.” In a footnote it is clarified that this assessment applies “to all products traded” but not to “Japan’s fishing of

marine mammals which are not traded”.[95] On this basis, the TSIA does not address the issue of whaling.

2.5 Whaling

The Commission has long made clear that it does not consider whaling an issue that should be addressed in JEFTA and that it has no intention to negotiate any provisions on the topic. The Commission states that the EU “already has regular talks with Japan on environment-related issues, including whaling” and implies that JEFTA’s chapter on sustainable development will provide a sufficient platform for “dialogue and joint work between the EU and Japan on environmental issues of relevance in a trade context.”[96] It is



therefore little surprise that the JEFTA texts make no reference to whaling.[97]

The exclusion of whaling on the grounds that the import of whale meat into the EU is already prohibited, is not necessarily supported by the objectives articulated in the JEFTA negotiating mandate (see above). Those objectives rather suggest that the environmental impact assessment should include consideration of measures to maximize benefits of the agreement for the objective of sustainable development, including in non-trade areas. The purpose of the TSIA proposing such promotional measures on non-trade areas relevant to sustainable development would be wholly meaningless if it were not also considered that the agreement may also actually contain such measures.

The justifications for addressing the issue of whaling

in JEFTA are on the other hand compelling. The International Whaling Commission (IWC) has put in place a moratorium on all commercial whaling, in force since 1986. All species of great whales are listed in Appendix I to the CITES. The International Convention for the Regulation of Whaling includes provisions permitting whaling of limited amounts of animals for strictly scientific research purposes. Using this exception, Japan resumed whaling in 1987. It is estimated that since then around 45,168 whales have been killed worldwide, of which 19,167 were killed by Japanese fleets.[98]

"It is therefore little surprise that the JEFTA texts make no reference to whaling."

Ciaran Cross

In October 2012, the EU Parliament Resolution on trade negotiations with Japan states that the EU supports "the maintenance of the global moratorium on commercial whaling and a ban on international commercial trade in whale products" and seeks "to end so-called scientific whaling and support the designation of substantial regions of ocean and seas as sanctuaries in which all whaling is indefinitely prohibited." [99] The Resolution called for "broader discussions on the matter of the abolition of whale hunting and of trade in whale products" in relation to "serious divergences"



between the EU and Japan "on issues related to the management of fisheries and whaling, notably Japan's whaling under the guise of scientific whaling." [100]

In the period during JEFTA negotiations, Japan has however escalated its whaling programme and flaunted attempts to challenge its legality under international law. On 31 March 2014, the International Court of Justice (ICJ) ordered Japan to halt its annual hunt of whales in the Antarctic, because there was a 'lack of scientific merit' to the activities. In response to the ICJ ruling, Japan deposited a declaration with the UN in October 2015 denying the ICJ jurisdiction over any future dispute "arising out of, concerning, or relating to research on, or conservation, management or

exploitation of, living resources of the sea". [101]

Japan's whale hunt was suspended for one season after the ICJ decision. In November 2015 the Japanese Fisheries Agency notified the IWC that it would resume whaling; the expert panel of scientists of the IWC reviewed Japan's new proposal and concluded that it did not demonstrate the need for lethal sampling to achieve the stated objectives. A European Parliament Resolution of 6 July 2016 on Japan's decision to resume whaling noted that "the EU is currently engaged in negotiations with Japan for a Strategic Partnership Agreement and a free trade agreement" and called on Japan to cease its whaling activities and comply with the IWC. [102] Japan then resumed whaling in the 2015-2016 season, killing 333 minke whales in the Antarctic.

During the 2016-2017 hunt, Japan's fleet killed a further 43 minke whales and 134 sei whales. [103] In May 2017, the Japanese Fisheries Agency submitted its proposals to the IWC on whaling activity for the next ten years, with plans to capture a total of 304 whales annually.

As this antagonistic situation develops, Japan has apparently lost interest in maintaining the façade of "scientific whaling". In June 2017, a new law was passed which is seen as a key step towards the resumption of commercial whaling. The legislation describes cetaceans (whales and dolphins) as "an important food source" and stresses the importance that "Japanese traditional food culture...and dietary habits related to cetaceans be passed on". [104] Kiyoshi Ejima, a member of the upper house of parliament and one of the lawmakers behind the bill, announced that whales could contribute to Japan's self-sufficiency, stating that "they are a great source of food and my position is that we should harness this." [105] The new law guarantees future funding of Japan's whaling programme, already highly subsidized at 5 billion yen (\$44.7 million US) annually due to poor sales of whale meat. Shigeki Takaya, director of the Fisheries Agency's Whaling Affairs Office, told the press that the law would turn whaling into a "national responsibility". [106]

A statement opposing the legislation was undersigned by fourteen Japanese environmental organizations, attacked the wasteful use of tax revenues on the whaling budget, which exceeds the subsidy allocation for Japan's entire coastal fisheries (4.6 billion yen). [107]

In the context of these developments, the

Commission's failure to propose any provision covering whaling in JEFTA is both negligent and alarming. The issue was even excised from the TSIA Final Report, which cites extensively from the 2010 OECD Environmental Performance Review of Japan, but omits that same Review's identification of Japan's policy on whaling as a concern which "continues to generate widespread international criticism." [108] The TSIA clearly documents that the issue was raised at a civil society dialogue in June 2015. The response given by the EU's speaker at that consultation was simply that "whaling is not addressed in the FTA negotiations". [109] Despite the fact that the TSIA process continued for a further six months after that dialogue, still no further mention of whaling is made in the final TSIA report. Indeed, the Report implicitly criticizes the environmental organisations that participated in the civil society dialogue for failing to identify environmental concerns, claiming that JEFTA negotiations are evidently "not a major concern for environmental stakeholders." [110] The fact that one of the major concerns raised in the dialogue was simply ignored should raise serious questions about the very purpose of public engagement in the TSIA consultation process.

III. Regulatory Cooperation

The EU Commission has proposed a Chapter on Regulatory Cooperation for inclusion in JEFTA, which obliges parties to involve the vaguely defined category of "interested persons" in the planning stages of regulations. Such "interested persons" may be invited to participate in meetings of the Regulatory Cooperation Committee – just one of an array of bodies to be established under JEFTA and for which there is no planned mechanism to ensure transparency, oversight or democratic participation.

Generally, the Chapter is not to "be construed as obliging the Parties to achieve any particular regulatory outcome" [111] and cooperation under the Chapter is to be undertaken largely voluntarily. [112] Provisions have been included, ostensibly to protect the Parties' right to regulate. [113] While these appear to be somewhat more thorough than the equivalent provisions in the Investment Chapter (see below VI), they apply only to the provisions on Regulatory Cooperation. All of the objectives in the Chapter on Regulatory Cooperation relate to promoting "good regulatory practices and regulatory cooperation between the Parties with the aim to enhance bilateral trade and investment." [114] In contrast, CETA's equivalent Chapter lists as its first objective "to contribute to the protection of human life, health or safety, animal or plant life or health

and the environment" through research and risk analysis resources. [115]

In accordance with the negotiating mandate, JEFTA will establish a wide range of institutional bodies and arrangements to enhance cooperation under the auspices of the over-arching "Joint Committee". [116] The negotiating mandate further states that JEFTA "should support the widespread use of impact assessment and public consultations..." [117]

The Committees to be established under JEFTA include a Specialised Committee on Technical Barriers to Trade, [118] a Specialized Committee on Customs-related Matters and Rules of Origin, [119] a Specialised Committee on Sanitary and Phytosanitary (SPS) Measures, [120] a Specialised Committee on Trade and Sustainable



Development, [121] as well as the Regulatory Cooperation Committee.

The mandates of the Committees are rather nebulous and contain no measures to ensure transparency, oversight or democratic participation. Only the last two - on Trade and Sustainable Development and Regulatory Cooperation – have any specific provision for the participation of civil society.

The Regulatory Cooperation Chapter affirms parties "intention to carry out" impact assessments, and to publish their findings. [122] Under the Trade and Sustainable Development Chapter, the parties "may" cooperate "on evaluating the mutual impact between trade and environment and labour as well as on ways to enhance, prevent or mitigate such impacts taking into account the monitoring and assessment carried out by the parties, for instance sustainability impact assessments as far as the EU is concerned". [123]

The Regulatory Cooperation Committee (RCC) is given a mandate to "to enhance and promote good regulatory practices and regulatory cooperation." [124] It may also "promote bilateral regulatory cooperation activities... in areas where

no regulatory measures exist or where their development is at an initial stage” and establish ad-hoc working groups.[125] These provisions also permit the Parties, by mutual consent, to “invite interested persons to participate in the meetings of the Committee”. [126]

Under the TBT provisions, Parties similarly commit to encourage the participation of “interested persons” of both Parties in consultations on the development of standards, technical regulations and conformity assessment procedures, on a non-discriminatory basis.[127] In a footnote within the provision, it is drafted: “(legal scrubbing) “interested persons” as defined in Transparency Chapter” but the Transparency Chapter has not been made public and remains apparently undefined. In comparison, the WTO’s TBT Agreement only requires that Parties ensure that all relevant information concerning regulations and standards is made publically available to interested parties, but does not oblige Parties to invite such parties to meetings.

Given the concerns regarding corporate lobbying and regulatory cooperation, and in the absence of any definition of “interested persons”, [128] the possibility that the Parties may provide unfettered access to interested persons to the Committee raises concerns about abuse of such access and corporate influence. No limitations, or mechanisms for public and democratic oversight and participation of public interest groups have been included.

The Chapter on Regulatory Cooperation contains other commitments to publish information on public consultation procedures and “planned major regulatory measures” – whereby the regulating authorities may themselves define what constitutes “major”. [129] In preparation for “major regulatory measures”, authorities should “offer reasonable opportunities for any person, on a non-discriminatory basis, to provide input” and to “consider the input received”. There is no obligation to respond to input, or justify a decision not to follow input from third parties.[130] Authorities are also to provide a mechanism for “retrospective” review of regulations after they are adopted. This should “provide the opportunity for any person to submit input on improvements to regulatory measures put into effect, including suggestions for simplification or for reduction of unnecessary burdens, while continuing to achieve the Party’s public policy objectives”. [131] In a footnote, it is vaguely stated that “No class of persons should be accorded privileged [sic] treatment. Particular effort should be made to seek input from small and medium sized enterprises and public interest groups.” No clarification is made regarding effort or privilege,

and there is little assurance that well-resourced industry groups and corporations would not be able to dominate such consultative processes.

IV. Precautionary Principle

The JEFTA texts contain two references to the precautionary principle. The Chapter on Trade and Sustainable Development provides that: “When preparing and implementing measures aimed at 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.” [132] The reference in the proposal on Regulatory Cooperation applies only to that Chapter. [133]

Despite these references, it is highly questionable how effective either provision will prove to be. Firstly, no reference to the precautionary principle is included in the Chapters on SPS measures or on TBT. Therefore, the application of these provisions to the relevant TBT and SPS Chapters is far from certain. Secondly, the intensification of commitments in JEFTA – on regulatory cooperation, recognition of equivalence measures, and mutual recognition of standards – make effective recognition of the precautionary principle significantly more important. Such activities increase the potential for conflicts regarding the methodologies used by Parties to carry out risk assessment and to justify measures of protecting the environment and human health.

The precautionary principle guarantees that the EU or its member states may take actions against risks, even in cases where the risk has not yet been scientifically proven or there is scientific uncertainty. The principle is enshrined in EU law, which stipulates that EU environmental policy “shall be based on the precautionary principle”. [134] This policy aims at:

preserving, protecting and improving the quality of the environment

protecting human health

prudent and rational utilisation of natural resources

promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change

Whether states can rely on the precautionary

principle has been the subject of numerous WTO disputes. Uncertainty persists due to “the absence of explicit provisions on regulatory methodology” in WTO agreements on SPS as well as on TBT.[135] The EU has twice unsuccessfully attempted to rely



on the precautionary principle to justify measures concerning environmental protection and human health. The decisions in the EC – Hormones[136] and EC – Biotech[137] cases clearly demonstrated the difficulties in ensuring that the precautionary principle is taken into consideration in the interpretation of the WTO agreement on Sanitary and Phytosanitary (SPS) measures. The SPS agreement demands that WTO Members only adopt measures based on scientific principles and that they do not maintain measures without adequate scientific evidence. Under Article 5 of the SPS Agreement, measures must be based on a risk assessment, and “provisional” measures may be adopted only where no sufficient scientific evidence is available. This provision potentially allows for the temporary implementation of precautionary measures. Any application of the precautionary principle is however limited and will apply only to interpretation of “particular treaty terms” and cannot “override any part of the SPS agreement”. [138]

A 2016 analysis on the CETA and TTIP agreements remarked on the complete absence of any reference to the precautionary principle in either text: “the pure reinstatement of (SPS) rules... under which the EU has lost two disputes brought by Canada and the US... must appear as full EU endorsement of affairs as they stand.”[139] By failing to include any express reference to the principle in these two treaty texts, the EU is therefore endorsing the status quo, i.e. the decisions taken in the EC – Hormones and EC – Biotech cases which the EU lost.

Japan has also unsuccessfully sought to invoke the precautionary principle in WTO dispute proceedings concerning the risk assessment provisions of the SPS agreement (Japan – Apples). [140] This fact makes it more surprising that JEFTA

does not refer to the principle in the SPS Chapter at least. Its absence from the CETA and TTIP texts was somewhat expected since the US and Canada were respectively claimant and third party in the EC – Hormones and EC – Biotech cases. But in an agreement with a country that has also sought recognition of this principle in WTO proceedings, the failure to ensure that the precautionary principle is admissible in cases concerning all the provisions of the SPS and TBT Chapters is a missed opportunity.

This is particularly so given the level of legal uncertainty surrounding this issue in international law. This uncertainty is glossed over in the TSIA,



which refers to the absence of any reference to “precaution” in the TPP Agreement as follows: the reaffirmation of the SPS agreement means that precaution can still be applied depending on one’s interpretation of Art. 5 of the SPS Agreement.”[141] This analysis is naïve, at best. Clearly, the application of “precaution” very much depends on one’s interpretation of the said Article; the problem is that the two cases against the EU under the WTO were lost on precisely this point. In no way can the mere “reaffirmation of the SPS Agreement” be considered sufficient to ensure that the principle – by which the EU is bound under Art. 191 of TFEU – is respected.

Indeed, issues of food safety standards and consumer safety are brushed aside in the TSIA. The Final Report states that “any real detrimental consumer aspects of the EU-Japan trade in the current baseline is difficult to identify given the quality of the products involved – especially taking into account the environmental and food safety safeguards in place.”[142] What the TSIA Report does not mention is that special measures have been imposed on the import into the EU of feed or food originating in or consigned from Japan following the accident at the Fukushima Nuclear Power station.[143] The only references to Fukushima in the TSIA are to the FTA’s potential impacts on Japan’s energy generation,[144] and

to how the FTA may promote cooperation “to help the Japanese economy in the consequences of the disaster”.[145]

Nor is any mention made in the TSIA report to Japan’s request (made on 21 August 2015) to the WTO to establish a dispute panel with respect to certain measures taken by the Republic of Korea, in the aftermath of the Fukushima disaster, in the form of import bans and additional testing and additional certification requirements for radionuclides. In its request, Japan is claiming that Korea has adopted such measures in a manner inconsistent with its obligations under the SPS agreement. A final report from the WTO Panel is due in October 2017.

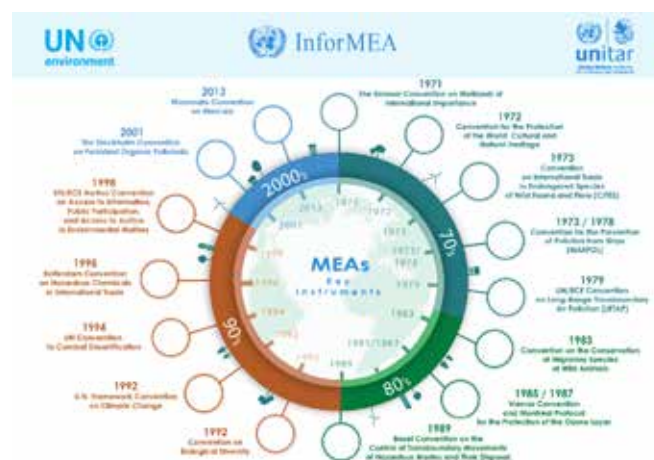
Although some reference to the principle in JEFTA may be regarded as an improvement on CETA, it is wholly uncertain how effective this will be in practice. In the SPS Chapter, parties have attempted to prevent application of the Dispute Settlement mechanism to certain provisions, including those on Risk Assessment.[146] That Article however only requires parties to “ensure that their SPS measures are based on risk assessment in accordance with relevant provisions, including Article 5, of the SPS Agreement”.[147] It remains to be seen in practice how the relevant Article can be disconnected from the Chapter’s other obligations. The carve-out further states that in a dispute involving “scientific or technical issues, unless the Parties decide otherwise, a panel shall seek advice from experts chosen by the panel in consultation with the parties to the dispute”.[148] These provisions seem to attempt to address the application of the precautionary principle. But a less uncertain method would have been to simply ensure the EU’s right to apply the precautionary principle in the development and implementation of its environmental policy by explicit reference to the principle in the SPS and TBT Chapters.

V. Multilateral Environmental Agreements (MEAs)

The TSIA claims that “the overall interaction of the EU-Japan FTA with MEAs can be considered to be negligible.”[149] The basis for this assessment is wholly unclear.

The interaction of MEAs and WTO law has been a source of significant legal debate, not least with regard to the interpretation of the GATT Article XX provisions relating to exceptions for measures taken for environmental protection. A good deal of speculation has been made about how a potential dispute would be resolved in case a measure challenged under the WTO was taken pursuant to an MEA. Nevertheless, the WTO Committee on

Trade and Environment considers that most – but not all – agree on the principle that “actions taken under an environmental agreement are unlikely to become a problem in the WTO if the countries concerned have signed the environmental agreement...”[150]



In 2016, India unsuccessfully attempted to invoke the GATT Art. XX exceptions with reference to its international legal obligations on climate change, including under the UNFCCC.[151] The precise reasons for its failure are very case specific.

Notably, JEFTA’s provision on MEAs diverges from the approach adopted in CETA, which expressly acknowledges that Parties have the “right to use Article 28.3 (general exceptions) in relation to environmental measures, including those taken pursuant to MEAs to which they are a party”.[152] This clarification on the application of the exceptions provisions is clearly intended to provide a level of legal certainty regarding the interaction of CETA with MEAs, and as such may prove potentially critical in case of a dispute. Whether that will prove effective enough remains to be seen in practice.

In contrast, the JEFTA text provides that:

“Nothing in this Agreement prevents a Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is a party provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade.”[153]

Rather than achieve a level of much needed legal certainty in this area, the provision seems to invite confusion, and can be regarded as deeply unhelpful in respect of environmental protection. The provision adopts the language of the so-called “Chapeau” which appears in Exceptions provisions in the GATT (Art. XX) and GATS (Art.

XIV). Such an incorporation of WTO language into JEFTA is unsurprising. Indeed, the “chapeau” is further duplicated in the “Exceptions” provisions which apply to the Chapters on Investment and on Cross-Border Trade in Services.[154] But framing “measures to implement MEAs” in this fashion appears to sow the seeds for future confusion.

The wording of the GATT “Chapeau” has resulted in some circuitous and – to some observers – not altogether satisfying reasoning in WTO decisions, as well as encyclopaedic and labyrinthine academic comment. As one leading scholar on international trade law recently put it, while the “the conditions in the chapeau have proved decisive in a number of disputes... it is still not clear what it requires.”[155] Duplicating the chapeau in the article on MEAs without further clarification simply muddies the waters in an already murky stream of trade law legalese.

VI. Investment Protection and Dispute Settlement

The Commission has not published JEFTA’s investment protection and dispute settlement chapters. It is quite possible – even likely – that JEFTA will be finalized without any such provisions. In the aftermath of the CJEU’s Opinion 2/15 on the FTA with Singapore, the Commission has mooted the splitting of the EU’s FTAs into separate trade and investment agreements.

Disagreement over the Chapter’s procedural design has also left the parties deadlocked. In the JEFTA negotiations, the EU has long made clear that it is committed to establishing an investment dispute mechanism modelled on the new Investment Court System (ICS) included in CETA. Japan has insisted on maintaining the structure of investor-state dispute settlement (ISDS) common to most international investment agreements.

The controversy over ISDS has been well documented elsewhere. The potential of foreign investors initiating ISDS cases against states as a result of the adoption of environmental policies is epitomized in Europe in Swedish energy company Vattenfall’s claim against Germany in the wake of its decision to close all its nuclear power plants by 2022. The company is claiming 4.7 billion EUR from Germany in compensation. The award in that case is still pending.

It is worth noting that the JEFTA negotiating Mandate was written before the EU Commission embarked on its investment policy reform efforts in response to widespread public protest over ISDS provisions in CETA and TTIP. Therefore such developments

are not reflected in the Mandate. Nevertheless, the mandate does provide that the respective provisions of JEFTA “should be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner”.[156] While the EU’s reform efforts to date have focused on judicial standards (notably in the ICS model), clarification of protection standards (such as the FET clause), and the right to regulate, those efforts have been strongly criticized as inadequate. To the extent that those “improvements” are incorporated in the EU’s proposal for JEFTA, this dimension of the mandate cannot be considered fulfilled.

“[...] many important provisions of the so-called ‘gold standard’ achieved in CETA have been watered down [...]”

Ciaran Cross

The texts leaked by Greenpeace in June also reveal that many important provisions of the so-called “gold standard” achieved in CETA have been watered down, in particular the right to regulate, the standards of protection and the ICS model.[157]

The Chapter’s objectives provide that the parties “reaffirm their right to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.”[158] In CETA, a provision was also included to explicitly disallow claims which arise merely from an investor’s expected or actual loss of profits due to a party’s modification of laws or regulations:

“The mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.”[159]

The provision is reproduced in the EU's JEFTA proposal with the word "may" inserted:

"The mere fact that a Party takes or fails to take an action including through a modification to its laws that may negatively affect an investment or an investor's expectations, including expectations of profits, does not amount to a breach of an obligation under this Section."[160]

The effect of that one word – "may" – is to limit this clause in JEFTA to only disallowing claims where the negative affect of action or inaction is potential. In CETA, the clause was worded to explicitly exclude claims even where a negative affect had in fact occurred. The whole point was seemingly to prevent any claims based only on an expected or



actual loss suffered by the investor where that loss results from an otherwise non-discriminatory and compliant regulation. The provision in JEFTA would appear to only stop claims which are based merely on the potential loss to the investor arising from a regulation; but it still leaves open the possibility that the mere fact of an otherwise non-discriminatory and compliant regulation which actually negatively affects an investment could be found to be a breach of an obligation in the investment chapter.

JEFTA's proposed definition of "investment"[161] is also much broader than that included in CETA.[162] Short-term, speculative or portfolio investments are not expressly excluded by either agreement. But new forms of investment have been added to the already comprehensive list included in CETA (i.e. futures, options, derivatives, goodwill, licenses, authorisations, permits and concessions). The limited definition of "claims to money" present in CETA has been omitted. Comparable to the definitions included in both CETA and the TPP,[163] JEFTA's proposed definition is very wide, and promotes an expansive approach to the types of investment protected under the agreement, increasing the potential for claims to be brought.

The fair and equitable treatment standard in JEFTA[164] similarly departs from that established in CETA.[165] While the amendments may produce equivalent outcomes, certain terms have been replaced with weaker language; for instance, "fundamental breach" has been substituted with "disregard" and "lack" – making it arguably easier to claim a breach of the standard. The provision on "legitimate expectations" permits a tribunal to consider "expectations" which arise from a "specific representation" made by a "Party".[166] Once again, the Commission has wholly ignored experts' recommendations that caution should be exercised in this regard. A 2015 analysis commissioned by DG Trade states:

"... one should be mindful not to construe each and any statement or act attributed to the government as a specific representation in the context of an investment treaty. Otherwise, this would turn the FET standard into a disguised umbrella clause covering any 'commitment' outside the investment treaty."[167]

Such recommendations have been wholly ignored. [168]

Provisions on expropriation are largely the same as CETA, but that agreement's attempt to delimit claims of "indirect expropriation" has been inexplicably amended. CETA provided that non-discriminatory measures taken pursuant to "legitimate public welfare objectives, such as health, safety and the environment do not constitute indirect expropriation." [169] This was however only applicable with the proviso that the "impact" of the measure was not "so severe in light of its purpose that it appears manifestly excessive." The proposed wording in JEFTA provides that indirect expropriation is limited to non-discriminatory measures pursuant to these objectives where the measures are not "manifestly excessive in the light of their purpose". [170] In the place of CETA's vague terms ("so severe", "impact" and "appears"), the JEFTA proposal includes a new condition: that the measure must not be based on "bad faith".[171] Not only is it wholly unclear what the basis for an assessment of "faith" will be, this condition is in stark contrast to the complete lack of any such corresponding obligation on the part of investors protected under the treaty. As noted above, the scope of the protection offered under JEFTA gives an extremely broad definition to the term "investment". No obligations are proposed for investors claiming protection to conduct their operations in "good faith" or even to contribute to the economic development of the host state. Nor do the provisions in JEFTA adequately ensure that investors would be prevented from initiating costly dispute settlement proceedings in "bad faith".[172]

Some minor amendments to the ICS model are also proposed for JEFTA. Provisions on third party interventions in investment disputes oblige the Tribunal to “permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party”.[173] Permission will be granted by the Tribunal “after giving the disputing parties an opportunity to submit their observations.” If granted access the intervener has the right to make written and oral submissions, access case documents (subject to confidentiality requirements), and attend first instance and appeal hearings.[174]

It is not clear on what basis – if any – the tribunal might reject such an application, or what necessarily constitutes “a direct and present interest in the result of the dispute”. Moreover, any such intervention is “limited to supporting, in whole or in part, the award sought by one of the disputing parties”- a condition which may prove severely limiting, taking into account experiences under the ICSID system for amicus participation.[175] Nevertheless, these provisions go beyond the UNCITRAL Rules on Transparency, which are also incorporated and allow for amicus curiae to apply to submit arguments in the proceedings. Insofar as the provisions constitute a potential improvement to the ICS model, it is wholly unclear why such provisions were not included in CETA – the so-called “gold standard” – in the first place.

While the likelihood that JEFTA’s investment protection and dispute settlement provisions will be abandoned appears to be quite high, the approach demonstrated by the Commission should be a cause for concern. Having ostensibly established a “gold standard” (albeit one which was deficient in many respects) in CETA, the Commission has apparently conceded to diluting this standard at the first opportunity.

Notably the TSIA plays down any risk posed by investment disputes under JEFTA stating that “there is little evidence that Japanese business make use

of the ISDS mechanism in any notable extent, and especially not in sectors that are particularly affected by social regulation, health or any public service sectors.”[176] The report draws the conclusion that in JEFTA “the issue of dispute settlement is unlikely to create any real difficulties with Japan as it makes very little use of ISDS, Japanese companies preferring to negotiate solutions rather than go to court.”[177]

This is rather misleading. Two ICSID claims from Japanese investors are now pending against Spain. [178] And as UNCTAD data clearly shows, the “real difficulty” with investment disputes brought under JEFTA is not limited to “Japanese” companies, but any investor able to claim protection under JEFTA:

“About one third of ISDS claims are filed by claimant entities that are ultimately owned by a parent in a third country (not party to the treaty on which the claim is based). More than a quarter of these claimants do not have substantial operations in the treaty country – this share can increase to up to 75 per cent when considering claims based on treaties concluded by major ownership hub locations.”[179]

VII. Intellectual Property

The negotiated text of JEFTA’s Intellectual Property (IP) Chapter has not been published by the Commission, but a version of the text has been leaked by Greenpeace.[180] In its Report of the 18th Round of Negotiations, the Commission stated that “some issues remain to be discussed regarding IPR border measures and protection of plant variety rights” and that the “discussion remains more difficult on patent and certain copyright provisions.”[181]

There are good reasons for subjecting the relevant provisions to close scrutiny. Respectively the EU and Japan have the second and third largest shares in biotechnology patents worldwide – 28.1% and 11.9% (2010-2013).[182] Additionally both Japan and the EU are parties to the Convention



on Biological Diversity (CBD) and its Nagoya Protocol. Actions taken by EU and Japan with regard to IP protection and biodiversity are therefore highly significant. JEFTA will cover the world's largest market for genetic resources falling under the scope of the CBD and related Protocols.[183] The leaked JEFTA text shows that these provisions do not effectively promote either legal certainty in this area, or much needed progress on the protection of biodiversity. Indeed, no reference whatsoever is made to this issue in the leaked IP Chapter.[184]

The patenting of genetic resources has been subject to extended debate in trade law. In particular the potential conflict between WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and CBD obligations has produced a degree of legal uncertainty, and preventing action against the appropriation of genetic resources and traditional knowledge originating in developing countries by large corporations in developed countries. A large number of developing countries – led primarily by India and Brazil – have long argued for stricter measures to combat “biopiracy”, a practice whereby corporations claim IP rights over biological resources which incorporate traditional knowledge without consent. Several high-profile examples have come to light, famously neem[185] and stevia,[186] and less well known cases such as “brazzein” berries.[187] Two suspected cases of biopiracy involve patents registered to large Japanese corporations – one involving the camu camu plant originating in Peru,[188] the other involving Ballia barley cultivated in India. [189] Such cases involve both environmental and economic harms.[190]

In 1999 a review of relevant TRIPS provisions[191] was initiated; with the Doha Declaration it was established that this review should also look at the relationship between TRIPS and the CBD, in view of the potential impacts of IP protection on biodiversity.[192] The issue continues to prove divisive today. Under the auspices of the World Intellectual Property Organization (WIPO), an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been trying since then “to find answers to the problem of misappropriation of genetic resources (GRs), traditional knowledge (TK), and traditional cultural expressions (TCEs), or folklore within the intellectual property system”.[193]

With the sole exception of the US, all member states of the UN are parties to the CBD. The Convention's objectives promote the

conservation and sustainable use of biodiversity and emphasise the importance of traditional knowledge systems and practices to this end. The CBD also reaffirms “the sovereign rights of States over their natural resources”, including genetic resources, by providing “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”; access to genetic resources is to be “on mutually agreed terms” and “subject to prior informed consent” (CBD Article 15).

In 2014, the Nagoya Protocol to the CBD was adopted, which aims to ensure biodiversity protection through the sharing of benefits derived from the use of biological genetic resources.



[194] The Protocol has been strongly criticized by some as a “masterpiece of ambiguity”, with particular concerns around compliance.[195] The EU adopted an “ABS Regulation” in 2014, which stipulates compliance measures derived from the Nagoya Protocol.[196] Japan ratified the Protocol in May 2017, following several years of delays due to opposition by domestic business groups.

The UN Sustainable Development Goals have introduced a similar obligation on states to “Promote fair and equitable sharing of the benefits arising from the utilization of genetic resources and promote appropriate access to such resources, as internationally agreed.”[197] However, little that is “internationally agreed” at present gives a concrete basis for tackling the issue.

One of the primary areas of contention revolves around whether proposals for mandatory disclosure obligations are appropriate. Developing countries (predominantly Brazil, China, India, South Africa and countries of the Andean Community) and some NGOs have long advocated that the international intellectual property regime needs to adopt such obligations for patents and plant variety protection in order to tackle large-scale appropriation without benefit-sharing.[198] Disclosure obligations were mooted by Parties to the CBD in 2002 as an effective way to tackle the

issue of genetic resources, but the resulting Bonn Guidelines only “encourage” disclosure.[199] Neither the CBD itself nor the Nagoya Protocol contains provisions for mandatory disclosure obligations.

European Union Directive 98/44/EC encourages patent applicants to voluntarily disclose of the “geographical origin” of “biological material of plant or animal origin” where an invention is based on or uses such material.[200] The EU has also expressed support in principle open to the adoption of a mechanism requiring mandatory disclosure within IGC discussions, provided it does not affect the validity of a granted patent.[201] National legislation including some form of disclosure requirement has also been adopted by numerous states, including many EU members.[202] Bolivia, Brazil, Colombia, Cuba, India, and Pakistan have submitted a joint document to the TRIPS Council, stating that disclosure might “prevent the grant of bad patents and promote greater legal certainty.”[203]

The Japanese government[204] and Japanese industry[205] have however strongly opposed disclosure measures, largely on the basis that such regulations would impose legal expense, cause delays and stifle innovation. Across negotiations in different fora – the WTO, WIPO and CBD – Japan has along with the US “consistently maintained” that such issues “belong outside the IP field and any perceived problems can be addressed without requiring any changes to the IP system”. [206] One scholar has however recently argued that these requirements – if adopted – would have led to “disclosure of the origins of the resources and the enactment of benefit-sharing agreements among the providers and users of biological resources” in the two cases cited above (camu camu and Ballia barley) involving Japanese firms.[207]

Therefore from a biodiversity perspective, the significance of including an obligation in JEFTA committing parties to adopt mandatory disclosure obligations, due diligence and benefit sharing would be very great indeed. A provision in the agreement requiring that patent applications contain information on the geographical origin of biological material of plant or animal origin (where an invention is based on or uses such material) would potentially cover some 40% of the global market in biotechnology patents. While developing countries have long argued for such a requirement, effectively addressing the issue of genetic resources, biodiversity and benefit-sharing clearly needs the support of countries in which these patents are being registered. The EU and Japan collectively represent a huge share of

such patent registration. Notably, the TSIA states simply “There are very few issues on intellectual property (IP)”, [208] and does not touch upon this issue at all.

JEFTA’s proposed Chapter on Trade and Sustainable Development does refer fleetingly to the CBD. But these provisions do not create any concrete obligations, and only require parties to “exchange information and consult with the other Party at bilateral and global level on the matters of this Article, including... the access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation.” [209]



THE JAPAN-EU ECONOMIC PARTNERSHIP AGREEMENT: FLOWS OF PERSONAL DATA TO THE LAND OF THE RISING SUN

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Amsterdam, 25 October 2017"

1. Introduction

At the EU-Japan Summit in July this year the European Union (EU) and Japan have achieved a political agreement in principle on the content of the Japan-EU Economic Partnership Agreement (JEFTA).[210] Both, Japan and the EU intend to build their partnership on the many shared values and structural similarities in some key areas underpinning the digital economy.

In a joint declaration, Mr. Shinzo Abe, Prime Minister of Japan, and Mr. Jean-Claude Juncker, President of the European Commission, "stress the importance of ensuring a high level of privacy and security of personal data as a fundamental right and as a central factor of consumer trust in the digital economy, which also further facilitate mutual data flows, leading to the development of digital economy." [211]

"Japan would like to work together [with the EU] to establish a state of the art digital economy which can be a model for the rest of the world."

Japanese government spokesperson

Converging rules on the protection of data privacy could become the basis for a future 'regulatory handshake' between the EU and Japan that allows personal data to flow either way. For Japan, however, including data flows in the trade deal with the EU has been an important political goal besides mutual recognition of their privacy laws. [212] The EU is currently not favorably disposed to allow data flows provisions into trade deals.

The issue of global data flows is certainly a trending topic in trade diplomacy. The reason why Japan pushes for the inclusion of data flows into

its trade deal with the EU is, however, far from evident. Building a 'state of the art' digital economy between Japan and the EU is certainly possible in conformity with their data privacy laws and the classical trade law disciplines.

Our brief unpacks how flows of personal data will be governed in the relationship between Japan and the EU. As a point of departure we look at the extent to which the prospective trade deal between the two economies would already cover data flows, including personal data. Next, we will take a look at the prospects for a regulatory handshake between Japan and EU providing for mutual recognition of data privacy and flows of personal data. The brief concludes with findings and recommendations on the future directions of JEFTA.

2. The European Union

The EU has the exclusive competence over its common commercial policy including all aspects of trade in services and goods.[213] The EU holds also the exclusive competence to lay down rules relating to the protection of personal data and the free movement thereof, which is the legal basis for the new General Data Protection Regulation.[214]

The contemporary ubiquity of personal data in cross-border transactions, complemented with the regulation of the transfer of personal data under EU data protection law, brings trade and data protection ever closer to each other.

In its 2015 'Trade for All' strategy, the European Commission resolved that it will seek to use free trade agreements (FTAs) to "set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism, in full compliance with and without prejudice to the EU's data protection and data privacy rules." [215]

"Human Rights are not to be negotiated in trade agreements; that doesn't mean they don't need protection in trade agreements"

Jan Philip Albrecht, Member of the European Parliament

So far it has not been clarified how this can be achieved and if the EU will pull its weight for additional safeguards of its autonomy to regulate in trade deals.

3. The Japan-EU Economic Partnership Agreement

Pursuant According to the negotiation mandate from the Council,[216] the European Commission has been negotiating an ambitious FTA with Japan. As a “new generation” agreement it does not only cater for the classical provisions to liberalize trade in goods and services but would cover also rules on trade-related aspects, such as regulatory cooperation, mutual recognition, investment and competition. Back in 2012, there was no mentioning of the protection of privacy or personal data or the free movement thereof.

When five years later, on July 6, 2017, the political ‘Agreement in Principle’ between Japan and the EU was reached, a major step was made towards concluding the first mega-regional FTA with the participation of Japan. Before, the Trans-Pacific Partnership (TPP) Agreement[217] included already new provisions on free data flows which could explain Japan’s motivation to seek similar commitments with the EU, but the newly elected U.S. President Donald Trump withdrew the U.S. signature, which stopped the ratifying TPP altogether.[218]



3.1 Cross-border data flow and data privacy

The following assessment is based on the textual proposals released together with the Agreement in Principle in July 2017. JEFTA is not yet finalized and negotiations for the precise text of the FTA have yet to be concluded.[219] The Agreement in Principle which summarizes the negotiating results so far claims:

The agreement in principle does not include any substantive provisions on flows of personal data. [220]

That this is a placeholder is clear from the subsequent “rendez-vous clause” according to which “both sides undertook to look again at the issue after three years”. This is confirmed by the consolidated text of the Electronic Commerce

Chapter providing that “parties shall reassess the need for inclusion of an article on free flow of data within three years”. [221]

“In line with our commitment to transparency, we have published the bulk of the text, where agreed. I hope the rest can follow soon.”

-Cecilia Malmström, EU Trade Commissioner

The statement that the agreement in principle has no substantive provisions on flow of data is, however, not fully accurate. The Sections on Financial Services and Telecommunications Services carry substantive language on the transfer of information (in other words data flows), amongst which also personal data. These provisions mainly replicate existing language in WTO law; however, the relevance of personal data inside digital trade and data-driven business models has changed and the robustness of existing safeguards would need to be newly evaluated.

3.1.1 Financial Services

The draft Section on Financial Services holds a provision on Transfers of Information, which, in substance, would also cover the flow of personal data in the context of banking and insurances, including, for example, also new and innovative FinTech services.

(draft) Article 6

Transfers of Information and Processing of Information

1. Each Party shall allow a financial service supplier of the other Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the financial service supplier’s ordinary course of business. Nothing in this paragraph restricts the right of a Party to adopt or maintain measures to protect personal data, personal privacy and the confidentiality of individual records and accounts, so long as such measures are not used to circumvent the provisions of this Article. [222]

This provision also reserves the right of the parties to protect personal data and personal privacy points to the fact that “information in electronic or other form” mentioned therein can include “personal data” in the meaning of EU law. The second sentence formulates a counter-balancing provision that is modeled after the formulation used in the 1994 Understanding on Commitments in Financial Services.[223] This Understanding is one of the first recognitions of a potential conflict between trade law commitments on information transfers (or flows of data) and contemporary rules protecting privacy and personal data.

By contrast, in the preceding EU-Canada Comprehensive Economic and Trade Agreement (CETA) a different technique has been used to preserve the link to the law of the place where personal data originates from:

If the transfer of financial information involves personal information, such transfers should be in accordance with the legislation governing the protection of personal information of the territory of the Party where the transfer has originated.[224]

The formulation used in CETA is likely more prudent compared to the language proposed in JEFTA. From the outset, it lays down a better division of labour between trade law and domestic data protection law. Given that the EU trade negotiators tend to work on blueprints of their earlier agreements, reverting to the language of the 1994 Understanding on Financial Services and the text of the earlier EU-Singapore FTA[225] would mean a regressive development for the safeguards on data privacy.

3.1.2 Telecommunications Services

In a similar vein, the Section on Telecommunications Services addresses the flow of data between the participating economies in a particular way:



(draft) Article [X] 4 Access and Use

3. Each Party shall ensure that service suppliers of the other Party may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in databases or otherwise stored in machine-readable form in either Party or in any other member of the WTO.

4. Notwithstanding the provisions of paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of messages subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. [226]

The purpose of this provision is to ensure that service suppliers have access to and can use the transport layer in electronic communication, either connecting it with their own infrastructure or through leasing network components or as virtual service suppliers. The provision is technology neutral and benefits providers of public and non-public communications services that are for example necessary to access remote computing, such as cloud services. In spite of being in the section on telecommunication, as was observed by Mira Buri, these rules benefit mostly non-telecommunication services, such as banking, insurance or cloud computing for that matter, which require access to and use of electronic communications infrastructure and services.[227]

The second part of the draft article states that when service suppliers move information within and across borders there can be legal requirements on security and confidentiality of communication content, if they are “necessary” and “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.” This counterbalancing clause is modelled after the 1994 GATS Annex on Telecommunications[228] which incorporates concepts that are already outdated by technological developments. For example, parties’ right to regulate is limited to ensuring the security and confidentiality of “messages”; a term alluring to the content of inter-personal communications. There is a risk that this ‘first line of defence’ may not be sufficiently “digital” to fall under the extensive rules on electronic privacy in the EU. Whether ePrivacy rules protecting metadata, location data of connected mobile devices or the consumption of online content can be exempted under this provision for “messages” is quite unclear. In this aspect the reproduction of accepted GATS language in telecommunications chapters is stuck in the analogue era, even though, and as a second line of defence, it can be relied on the more flexible General Exceptions provision (see below).

3.1.3 Cross-border Trade in Services

The impact of classical trade law disciplines (i.e. market access, national treatment, domestic regulation and most-favoured nation treatment) on a party’s regulatory autonomy should not be underestimated either. Being inherently flexible, these disciplines would apply to situations of cross-border service provided via electronic means.[229] Those classical trade law disciplines enshrine powerful principles, such as the principle of non-discrimination, which require a high level of

consistency in the regulatory treatment of service suppliers, be they local or belong to different third countries.

Our comprehensive study on the interface between international trade law and EU data protection law concluded that it is by no means certain that there is not already a conflict between these rules.[230] Insofar it should be mentioned that the appraisal of a possibly trade law inconsistent measure would not take into account the aim and effect of a piece of national regulation. Every instance of a trade law inconsistent measure would instead need justification under one of the exceptions provided for in the free trade agreement at hand.

Moreover, in May 2018 the EU's brand-new General Data Protection Regulation (GDPR) will enter into force and apply to the processing of personal data of individuals who are in the EU by an organization not established in the Union in certain circumstances.[231] Such external effect is expected to have a profound impact on suppliers of goods and services from outside the EU who will be expected to observe the GDPR in its entirety. This will doubtless raise formerly unknown questions about regulating foreign suppliers of goods and services who operate across borders in the interest of privacy and data protection versus digital trade.

3.1.4 General Exceptions

"The Parliament urged the Commission that raising the stakes on cross-border data flows means raising the bar on data protection."

Viviane Reding and Jan Philipp Albrecht, Members of European Parliament

The general exceptions in the Chapter on Cross-Border Trade in Services are the central bulwark to justify a measure inconsistent with JEFTA. The general exceptions clause replicates those of GATS Article XIV.[232] Reliance on the general exceptions is subject to a number of trade conforming conditions, some of which can be hard to satisfy; e.g. a measure "necessary to secure compliance" with laws or regulations "not inconsistent with the provisions of this agreement".[233]

Against the backdrop of this critique the European Parliament has called for:

a comprehensive, unambiguous, horizontal, self-standing and legally binding provision based on GATS Article XIV which fully exempts the existing and future EU legal framework for the protection of personal data from the scope of this agreement, without any conditions that it must be consistent with other parts of the [agreement];[234]

The high level of regulatory convergence between data privacy laws in Japan and the EU likely mitigate the risk of a trade law dispute over data privacy measures more effectively than the general exceptions clause would be capable of.

3.2 Regulatory Cooperation

Unlike regulatory cooperation in particular chapters (such as Financial Services Committee[235]), the EU proposal for a general Chapter on Good Regulatory Practices and Regulatory Cooperation[236] still does not form a part of the political agreement in principle. Yet it remains crucial to discuss this relatively new institutional risk for data protection insofar as it threatens to substitute the avenues of cross-border cooperation under the EU's data privacy laws with new exchanges and institutions formed under trade law.

3.2.1 Scope of Regulatory Cooperation



Regulatory cooperation aims to address old and new "behind the border barriers to trade", i.e. barriers to trade which result from differences in regulation between various countries. It aims to do so by creating institutional channels for the exchange of information, methodologies and knowledge between regulators in the belief that this mutual engagement would align the ways regulators "think", and consequently act. Thus, regulatory cooperation does not, on its own, lead to decisions with formal legal and binding power.[237] Rather, through the exchange with Japanese regulators, and abetted by stakeholders and "interested parties", EU regulators may come up with more trade-friendly solutions.

The Chapter on Regulatory Cooperation in JEFTA is very broad in scope. It applies "to regulatory measures issued by regulatory authorities in respect to any matter that may affect trade or investment." [238] While the Regulatory

Cooperation Chapter explicitly states not to interfere with the parties' autonomy to regulate in pursuit or furtherance of its public policy objectives, among others in personal data,[239] the provisions in question do not exclude data flows from the scope of activities. Therefore, data privacy issues could be tabled as part of the regulatory cooperation mechanisms.

3.2.2 Good Regulatory Practices

The EU proposal for a Chapter on Good Regulatory Practices and Regulatory Cooperation, similar to other EU Free Trade Agreements, has two major elements. The first element are the so-called "regulatory practices", i.e. the obligation to adjust internal regulatory processes to a particular format. The mechanisms envisaged include an internal coordination mechanism to foster good regulatory practices,[240] early stakeholder participation in the regulatory process,[241] impact assessment,[242] or retrospective evaluations.[243] While not all aspects of regulatory practices are of concern, submitting data privacy to an economic benchmarking, which is not very attuned to internalising normative values, certainly does raise concerns. Furthermore, an important consequence of these rules is that they legally bind parties to open up their domestic regulatory processes to lobbying. A greater influence of domestic and international stakeholders has generally served better larger corporations and industry.[244]

3.2.3 Institutions of Regulatory Cooperation

The second element of the EU proposal are the new institutions of regulatory cooperation, and most importantly the "Regulatory Cooperation Council" (RCC), which is a main agenda setting and controlling body.[245] This body will further be complemented by various "sectorial committees". The Financial Services Committee is, for instance, relevant for data protection.[246] These bodies will be adjoined by ad hoc working groups on particular topics.[247] Finally, parties may also engage in a simple bilateral exchange between regulators.[248] While the RCC will be the body to coordinate the substance of the exchanges, including the collection and evaluation of proposals for regulatory cooperation from "interested parties", the technical aspect of cooperation activities will fall on the designated "contact points" in each party.[249]

Preserving a party's 'right to regulate' within these chapters would not capture several points of pressure that may come about in the context of regulatory cooperation. Firstly, the obligation of

parties to observe certain "regulatory practices" will increase the influence of powerful stakeholders on domestic regulatory processes,[250] while at the same time the regulatory space is constrained by demanding particular methodological processes (e.g. quantification).[251] Secondly, as we develop in more detail below, very little thus far seems to prevent "diagonal" encroachment on data protection through regulatory cooperation in various sectors, such as electronic commerce, telecommunications or financial services.

3.2.4 Institutional Design and the Risks for Data Protection



"Of course they say that, they are trade ministers."

*attributed to Martin Selmayr, Jean-Claude Juncker's
Chief of Cabinet*

The right to the protection of personal data in the EU enjoys constitutional status (Charter of Fundamental Rights), is subject to institutional guarantees (the right to independent supervision at the EU and national level), governed by a brand-new regulatory framework (the General Data Protection Regulation) and is supported by powerful actors in the EU, such as the European Court of Justice or the European Parliament,[252] as well as the Justice Directorate-General of the European Commission. The Regulatory Cooperation Chapter in JEFTA may be seen as an institutional intervention into this landscape: It opens up new institutional spaces, where data protection can be challenged – either directly by blaming it to be a protectionist measure, or through the interpretation of provisions of other chapters[253]. This strengthens forces in opposition to this fundamental right which are perceiving it as putting burdens on digital trade. Four elements of the institutional design of the Chapter on Regulatory Cooperation suggest this will be the case:

1. The first problem relates to the representation of data protection actors in the institutions of regulatory cooperation. There is generally very little clarity as to who the officials sitting in the aforementioned institutions of regulatory cooperation would be, or how those 'officials concerned' should be identified. In fact, after receiving a considerable amount of criticism for the over-representation of trade officials and regulatory affairs officials in its TTIP proposal,[254] the European Commission has missed an opportunity to address those diversity issues in the institutional design and opted instead for not mentioning the question of participation any further. In this constellation, one has little reason to believe that the membership in regulatory cooperation bodies would not continue to be dominated by the aforementioned trade and regulatory affairs officials. So far, those have proven to be rather supportive of re-framing data concerns as an issue of how to achieve unhindered data flows,[255] with a consequent down-scaling of the rights dimension of personal data protection. Moreover, in the European Union the right to independent supervision is guaranteed at constitutional level, which is performed by independent data protection authorities in the Member States and at EU level. The EU Commission has no mandate to form new regulatory cooperation institutions in a trade agreement that would trespass on the existing authorities' independent mandate to implement and enforce EU data protection law. The new European Data Protection Board, which will become operational in May 2018, would be the only legitimized body at EU level to turn to for matters of regulatory practice.

2. Secondly, even if the representation in the bodies of regulatory cooperation were more balanced, placing the discussion within the framework of a trade agreement will have important consequences. The Regulatory Cooperation Chapter opens up with "the objectives of this Chapter are to promote good regulatory practices and regulatory cooperation between the Parties with the aim to enhance bilateral trade and investment." [256] Framing the purpose in this way will have two major effects: first, the institutions will have an understanding of their role as to promote trade and investment (supported by the fact that their most stable constituency will be trade officials), called to intervene on non-trade barriers to prevent them from hindering trade. Consequently, re-interpreting data questions as those of providing for data flows, or furthering data protection insensitive interpretation of provisions in various chapters, is not all that unlikely. A second consequence of the aforementioned aim relates to incentivizing a particular group of stakeholders to reach out to these bodies by "proposals for

regulatory cooperation activities submitted by persons of either Party which are duly justified and accompanied by supporting evidence".[257] If the aim is to liberalize trade and investment flows, the "friends" of personal data protection will have no incentive to approach these new institutions instead of, for instance, parliaments or independent data protection authorities on national or European level. The stakeholders who will approach the regulatory cooperation institutions will do so with an intention to lower the impact of data protection rules on their business operation. This incentive structure further strengthens the historical experience suggesting that opening up regulatory processes to stakeholders has usually meant to amplify the voice for larger businesses as those stakeholders with focused interest and large resources (including knowledge).[258]

3. The third element relates to democratic oversight. Even if the regulatory cooperation would not lead to direct decisions with formal legal or binding power,



the lack of democratic oversight is a considerable danger to data protection. This problem will shine through in two ways. Firstly, when it comes to the legally entrenched obligation to engage in "regulatory practices", we will face a number of concerns regarding the impact of the "better regulation" agenda on non-economic normative concerns,[259] of which personal data protection is an excellent example. Secondly, exchanges that pertain to the realm of regulatory cooperation will take place at early stages of law-making, before the legislative process even commenced. When handled mainly at the level of the executive, in the phase of preparation of new or amended rules and regulations, we may expect little parliamentary oversight of the processes. The lack of such oversight will eventually further strengthen the risks to personal data protection posed by concerns mentioned above (dominant expertise and the purpose of the agreement), especially when considering the important role that the European Parliament has played in safeguarding this fundamental right.

4. The fourth, and perhaps the most serious threat to personal data protection will come from the change of the internal balance of powers in the EU. The new institutions of regulatory cooperation will give an important institutional entrenchment to those forces that see the EU as a global leader in setting rules for “data flows”[260] instead of a global leadership in “personal data protection” (as was the case so far).[261] Shall regulatory cooperation end up in the hands of trade officials and regulatory affairs officials, combined with higher incentives to corporate interests to propose issues of concern to these institutions? Moreover, the RCC and sectorial committees are also likely to become an important “lobby” in promoting the discourse of data flows - also in the framework of the Rendezvous Clause in the Chapter on Electronic Commerce.[262]

4. The Regulatory Handshake with Japan’s Data Protection Rules

Both, the EU and Japan have a variety of mechanisms in their regulatory systems to authorize the cross-border transfer of personal data that would preserve the substantial protections afforded to individuals. Both, the EU and Japan aim for the mutual recognition of their data protection laws in early 2018, which have been already substantively aligned.

“Dialogues on data protection and trade negotiations with third countries follow separate tracks”

Mina Andreeva, Commission Spokesperson

At the time of writing, the European Commission’ Justice and Consumers Directorate-General is occupied with assessing Japan’s law and practice with a view to granting a so called ‘adequacy decision’, which would become the basis for the cross-border flow of personal data originating from the EU to Japan.[263] Likewise, the Japanese competent authority, the Personal Information Protection Commission (PPC), is preparing its own regulatory handshake with the EU that would recognize the EU as a foreign designation for personal data transfers originating from Japan.[264] For this to become a workable proposition Japan and the EU have to maintain a high level of policy consistency in its international arrangements on personal data flow. Japan, for that matter, has been entering a number of international commitments in a variety of fora involving cross-border personal data transfers. Japan, being a member of the Asia-Pacific Economic Cooperation (APEC), participates in the 2015 APEC Privacy Framework. In 2014, Japan has joined the APEC Cross-border Privacy Rules

System (CBPR) which facilitates moving personal data based on contractual accountability by the involved organizations.[265] However, according to Graham Greenleaf, at present this system is of little practical relevance at present since it only facilitates data exports to a handful of US businesses.[266]

Yet, the CBPR system has been criticized for having no effective limitations on the onward transfer of personal data to destinations where



data protection laws are weaker. This may raise issues of interoperability with the EU’s General Data Protection Regulation, which will govern adequacy decisions as of May 2018, and insists on such rules being in place in order for a third country to provide for an adequate level of protection by EU standards.[267] In principle, this could be resolved by exempting transfers pursuant to the CBPR system from the scope of the EU adequacy decision for Japan.

In a similar fashion, free trade agreements could upset the mechanism of bilateral recognition in cross-border data protection. As was mentioned earlier, Japan is still planning to ratify the Trans-Pacific Partnership Agreement, which has a horizontal provision on data flows in its Chapter on Electronic Commerce requiring that:

each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.[268]

There is a separate provision on personal information protection, as it is called here, and a specific exception to the ‘free flow’ rule providing for restrictions on transfers of information that are not greater than required to achieve the objective.[269] Small details as these can change the course of regulatory protection away from seeking bilateral recognition of data protection regimes to prioritizing unhindered data flows. Japan’s insisting in its handling of cross-border transfers of personal data should become a matter of concern. From a human rights point of view potentially their approach is false and can absolutely not become the “golden standard” in digital trade.

5. Conclusions

In this brief analysis we assessed the state of affairs of the Japan and EU economic relations, with a view to the exchange of personal data. We have followed parallel tracks of the discussion between the two partners: the first track concerned the EU's and Japan's respective personal data protection laws, while the second track, in the envisaged Free Trade Agreement, aims to introduce a new language on data flows.

No compelling argument has been made why JEFTA needs to engage with regulating data flows. Both parties maintain similar data privacy laws, which offer institutional avenues for bilateral recognition of each other's privacy regimes, and create conditions for the cross-border flow of personal data – while at the same time ensuring adequate safeguards for individuals' personal data. Both the EU and Japan have initiated the necessary steps to achieve this 'regulatory handshake' between their respective personal data protection laws in early 2018. This would certainly not be a step back, and even less a preference for 'analogue' as opposed to 'digital' trade. Rather, this would be a recognition that the EU and Japan regulate data flows in their distinctive way.

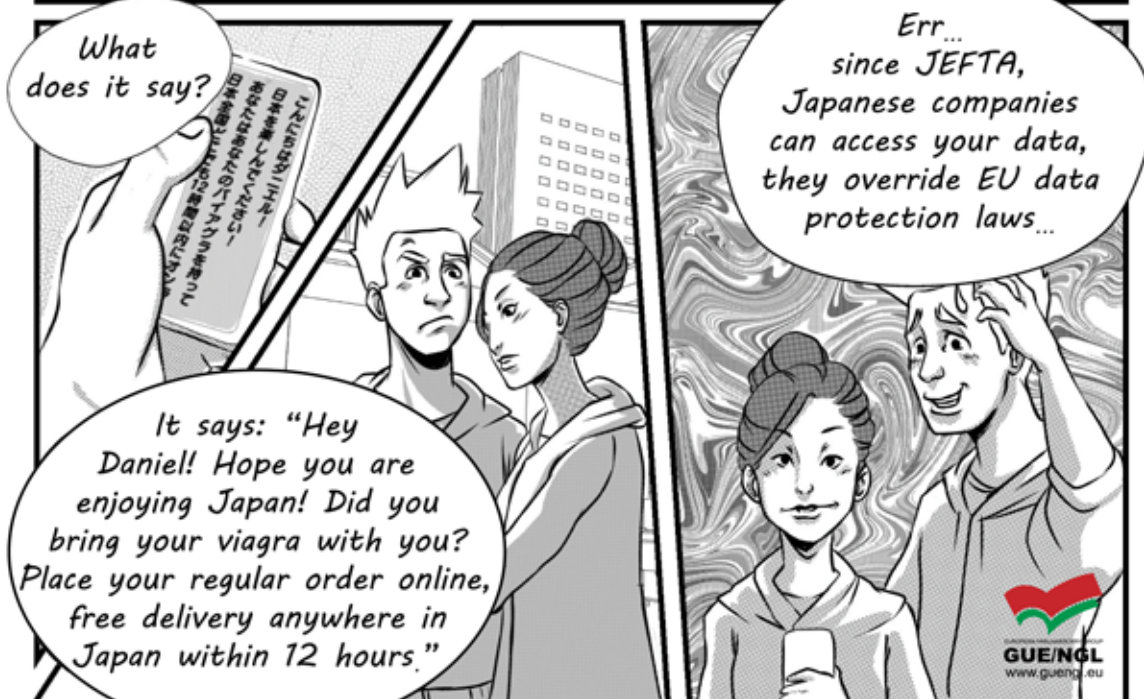
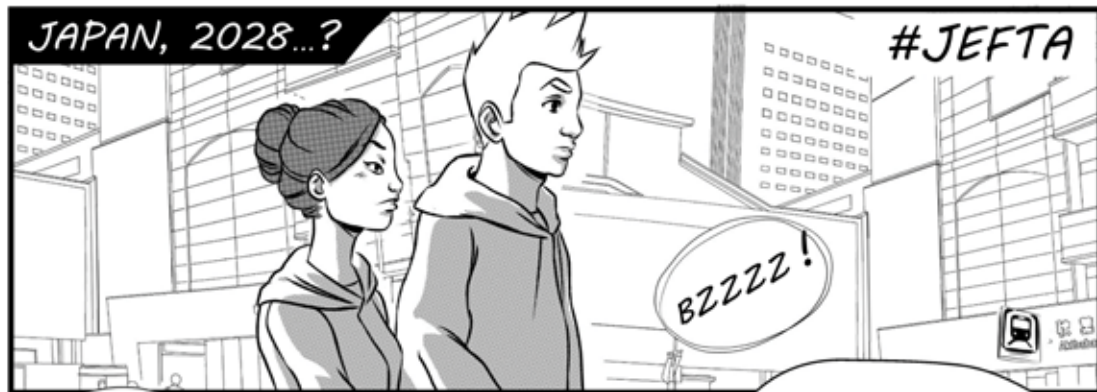
“Member states are divided, Parliament is worried and Japan doesn't really need it”

Anon., Commission Official

In contrast, trade law in the making as proposed in the JEFTA negotiations follows a rather simplistic trajectory: accepting GATS-plus liberalization and selling the result as “golden standard” of digital trade, while failing to see that much of its classical substance reflects in fact the state of affairs in the analogue era. The routine replication of existing WTO law provisions largely fails to recognize the growing importance of personal data in digital trade and data-driven business models, which require broad safeguards for state party's regulatory autonomy in the field of privacy and personal data protection. Such recognition would be grist to the mill of the European Parliament calling for a “comprehensive, unambiguous, horizontal, self-standing and legally binding” exception for the autonomy to regulate privacy and personal data protection in the Japan-EU Economic Partnership Agreement.

A caveat for the end: even if we leave free data flow provisions “outside” of FTAs, as it is the case

with JEFTA for the moment, this seemingly does not remove personal data from the emergent trade law institutions. There are very few institutional safeguards preventing biting on data protection laws from the side through regulatory cooperation – either by directly challenging certain provisions in the regulatory cooperation institutions, or through interpretation of provisions in chapters on electronic commerce, financial services, or telecommunications. This is made particularly salient in an institutional context where it is unclear when the participation of data protection supervisors can be called for, while those deciding on the involvement, have very little interest to recognize such need. Regulatory cooperation as envisaged by the European Commission will run into the same impasse as investment courts have been earlier: creating new institutions under the trade law where the EU has institutional channels for governing personal data protection. The question that we need to pose yet again is why this is the case.



JAPAN-EU FREE TRADE AGREEMENT

> Less data privacy

IMPACT ON JAPANESE AGRICULTURE, FOOD SAFETY, AND ANIMAL WELFARE

Shoko Uchida
Co-Representative, Pacific Asia Resource Center (PARC)

Free Trade Agreements involving Japan

Japan is currently negotiating four “mega FTAs”: TPP became “CPTPP” after the withdrawal of the United States, while four issues are still being negotiated before signature can take place. On November 11, 2017, at the occasion of the APEC Ministerial Meeting in Da Nang in Vietnam, 11 TPP signatory States[277] announced that “they have agreed on the core elements of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Ministers agreed to Annex I and II, which incorporate provisions of the TPP, with the exception of a limited set of provisions, which will be suspended. The annexes also incorporate a list of four specific items on which substantial progress was made but consensus must be achieved prior to signing”. [278] Among the 20 suspended provisions are notably[279]:



the ISDS provisions in Chapter 9 relating to Investment Agreements and Investment Authorisation

the Commitments relating to labour rights in conditions for participation in CPTPP

the provisions related to the Protection of Undisclosed Test or other Data, and a few more patent relevant provisions

the Protection of Biologics

the Term of Protection for Copyright and Related Rights, and the provisions on Technological Protection Measures

Agreement still needs to be achieved on the issues of State Owned Enterprises (Malaysia), Services

and Investment Non-Conforming Measures related to coal (Brunei), the application of trade sanctions in Dispute Settlement (Vietnam), and the Cultural Exception clause (Canada).

The RCEP (Regional Comprehensive Economic Partnership) is a free trade agreement between 16 countries in total, including ten ASEAN Member States, as well as Japan, India, Australia, China and New Zealand.



Japan is also among the 23 WTO Member States which are currently negotiating the Trade in Services Agreement (TiSA). At the moment, negotiations are stalled due to the new U.S. administration silence on whether they want to stay in the negotiations or not, and due to the inability of the European Union to deliver a commitment on a trade in digital services chapter.

Furthermore, Japan is negotiating the bilateral free trade agreement JEFTA with the EU.

These mega FTAs are perceived by many as the next world trade regime after the time of the WTO. In Japan, the free trade agenda is at the centre of “Abenomics”, the economic policy by Prime Minister Abe, pursued since his re-election in December 2012. We, Japanese civil society groups, are criticizing those FTAs for being advantageous only to global enterprises and investors. The FTAs in question will weaken regulations that protect people’s lives and livelihoods, increase poverty and inequality, as well as they will be a major obstacle to environmental and sustainable development. In other words, these FTAs bring rules for the benefit of 1% of all people, which have been written by this 1% of the people. That awareness is spreading internationally. A number of mega-FTAs which appeared after 2000, have been confronted with difficulties. Rather few of them have been concluded, and that took a considerable amount of time. Why is that so? The common point can be said as follows.

(1) The scope of negotiations has been broadened by shifting from “tariff-centred” trade towards rules emphasizing liberalization of services, finance, investment and global supply chain formation.

(2) Developing countries cannot agree on “strong rules” demanded by developed countries and multinational large enterprises. In this context, especially public health (including intellectual property rights and access to affordable medicine), state-owned enterprises, government procurement, and e-commerce are controversial issues.

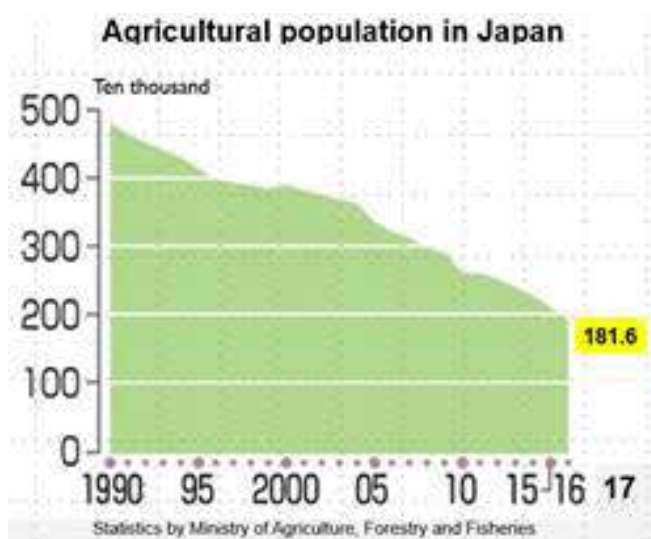
(3) The gap between rich and poor is getting bigger even in developed countries, and criticism on free trade is occurring.

(4) Criticism on Investor-to-State Dispute Settlement (ISDS)

(5) Trade and investment are obstacles to solving problems such as human rights, environmental protection (including climate change), workers’ rights, and poverty reduction.

(6) Criticism on secret negotiations against democracy.

Secret Negotiations and Information Disclosure by the Japanese Government

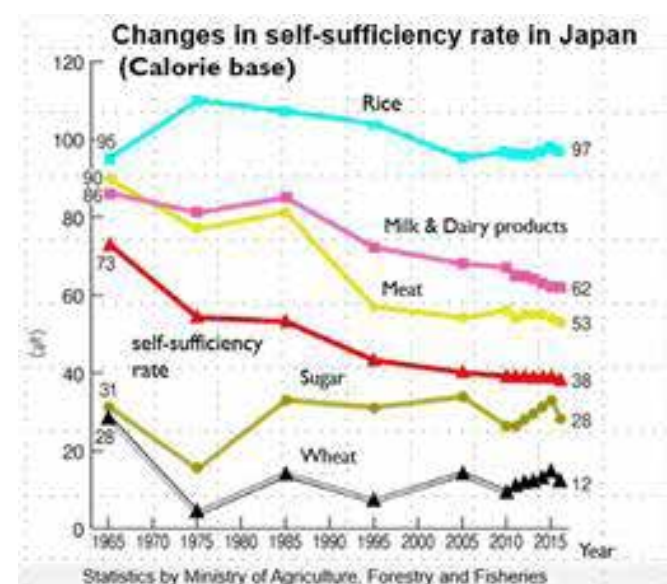


As it has been the case in other trade negotiations before, JEFTA has been negotiated in secret. However, the gap between Japan and the EU concerning the disclosure of information to citizens is quite big. Until today, the European Commission has heard opinions from citizens, gave out an impact assessment, and published parts of the agreement’s text before the “Agreement in Principle” was published in July 2017. Right after its publication, the EC released a certain amount of texts and fact sheets. The negotiating mandate

of the EU Commission was also released in September 2017. While this is still not sufficient information for EU citizens, as for instance no consolidated text has been published, the situation in Japan is even worse. From the start of the negotiations until today, there have not been any public consultations in Japan. There is almost no information on the government’s website, and only after the “Agreement in Principle” in July 2017, the document “Fact Sheet” (only 15 pages)[280] was released. No other text has been published so far. Neither parliamentarians nor the Japanese people were allowed to read the JEFTA text. It can be concluded that the secrecy surrounding JEFTA is worse than TPP.

Impact on Japanese Agriculture and Forestry

First of all, here are some general facts about the situation of agriculture in Japan. The population working in agriculture in Japan continues to decrease, counting 1,816 million in 2017, which is 25% less than in 2010. Many people must give up due to aging, with half of the farmers being already older than 70 years. The average age has increased to 66.3 years. The self-sufficiency rate on a calorie basis is only 38 percent, which is a very low level among developed countries. Under these circumstances, the Japanese agricultural sector will come increasingly under pressure as soon as cheap agricultural products are imported, tariffs are eliminated, and price competition is forced.



Results of JEFTA Negotiations

With regard to tariffs on agricultural products, except for rice, JEFTA is comparable to TPP or goes even further. Particularly affected are dairy, pork and wheat products.

Influence on Pork

In JEFTA as well as in TPP, the weight tariff of 482 yen per kilogram of current low-price meat will be lowered to 50 yen and 3.4 percent added-value tax in the high-price zone will be abolished after ten years. EU producers offer a number of agricultural products of high quality, often preferred by Japanese consumers, such as Iberian ham from Spain. Since those products have export capacity, exports to Japan will increase. The impact on Japanese animal husbandry farmers would be higher than through TPP.

Elimination of Wheat Pasta Tariff

For pasta, tariffs of currently 30 yen per kilogram are gradually reduced and will be abolished in the eleventh year. Prices for Italian pasta average currently at 170 yen, the same level as domestic pasta. Rather than manufacturing domestically, the elimination of tariffs leads to more products being imported from overseas since they become cheaper; hence, most Japanese industries may switch to imported products. The blow to domestic wheat production and to the local industry far outstrips TPP. Tariffs between 13 to 20 percent for biscuits will be eliminated between the sixth and eleventh year after JEFTA has entered into force. A similar situation is assumed.

Concessions beyond TPP in Dairy Farming

In the TPP Agreement, it was decided to gradually reduce the current 29.8 percent tariff for hard cheese such as Gouda cheese and to abolish it in 16 years. However, tariffs on soft type cheeses such as mozzarella, which are preferred by Japanese people, are maintained.

In addition, JEFTA not only eliminates tariffs on hard cheeses but also increases the low tariff import quota of soft cheese by annually three percent or 20,000 tons, on the basis of the current import volume. That frame will expand to 310,000 tons in the 16th year. Moreover, the tariff rate will be eliminated in the 16th year. As domestic demand growth is only 0.3%, it is clear that an increase of imports will put pressure on domestic production. The number of breeding cows among Japanese dairy cows has decreased from a peak of 2.11 million in 1985 to 1.35 million. Likewise, the number

of dairy farmers decreased from 8.22 million in 1985 to 1.7 million in 2016. JEFTA's agricultural agreement will further hurt Japanese weak dairy farmers.

In recent years, small cheese factories in Hokkaido and elsewhere have utilized local milk to develop their own cheese making. Those factories are also tourism resources. To Japan's disadvantage, many cheese factories are modelled in Europe and competition with European cheese is inevitable.

Processed Items

Several processed foods' tariffs, such as those on ham, sausage, wine, processed tomato products, and orange as well as apple juice are to be eliminated. The European Commission has announced calculations that exports of processed foods to Japan will increase by 170-180 percent and up to ten billion Euro (about 1.3 trillion yen).

Most recently, on November 2, the Ministry of Agriculture and Fisheries of Japan announced the estimated impact of JEFTA; accordingly, dairy products, beef, pork, and wood are pointed out as items subject to long-term influence. That is why the government itself is "affected". The government states that it will calculate countermeasure expenses in the budget, but structural problems will not be solved even if a budget for compensation payments is made available in the short term.

Liberalization Domino

JEFTA may also affect other trade agreements. One could call it a "liberalization domino". The Japan-Australia EPA that came into force in 2015, includes with the Most Favoured Nation clause a provision that if Japan allows other trade partners a tariff liberalization beyond the figures agreed in the Japan-Australia EPA, it will automatically be applied to Australia as well.

Even in the ongoing CPTPP negotiations, there is a danger that participating countries such as Australia and New Zealand could demand concessions beyond TPP.

The U.S. pig farming industry expressed a strong discontent with being preceded by the JEFTA on TPP. They are strengthening the pressure to start the Japan-U.S. FTA, in order to achieve further liberalization in Japan for U.S. products with TPP and the JEFTA as benchmarks.

Will Export of Agricultural Products from Japan to the EU increased?

The Japanese government is appealing the illusion that exports from Japan to the EU will increase, stating "the tariffs on most agricultural, forestry

and fishery products exported to the EU will be immediately reduced”, and “a new 500 million people market will open”. But exporting agricultural products to the EU is not easy.

Currently, exports from Japan to the EU are prohibited among others for pork, chicken, chicken eggs, milk, and dairy products because of strict safety standards, environmental as well as animal welfare standards (SPS).

Most agricultural products exported from Japan to the EU are processed products such as alcoholic beverages (5.3 billion), scallop shells (3.5 billion), source mixed seasoning (2.5 billion), green tea (2.3 billion) etc. There is no expectation that these export items will increase sharply by JEFTA. It is misleading by the Japanese government that JEFTA leads to improved farmers' income.



Animal Welfare in Japan

JEFTA will affect Japanese farmers as much as CPTPP. At the same time, however, it is also an opportunity for us in Japan to be aware of the problems of Japanese agriculture and food safety. Animal welfare is very important in the EU. Animal welfare is not only based on ethics for animals, but also has various purposes such as criticizing industrialized and intensive livestock, food safety, and environmental protection.

In contrast, Japanese animal husbandry has not achieved the animal welfare standard of the World Organisation for Animal Health (OIE) promoted by the EU, and the international reputation is lower than that of China. Most Japanese people do not even know the word “animal welfare”. The government has not announced that discussions on animal welfare are also part of the JEFTA negotiations. It is only mentioned briefly in the fact sheet published after the “Agreement in Principle”. The criteria for animal welfare demanded by the EU are far beyond from the Japanese level and cannot be achieved under the current situation in Japan.

It is misleading by the Japanese government to assert that “the strong agricultural sector will expand exports” without honouring the current situation and discussing how to improve in line with the actual conditions at the production sites.

Battery Cage

Rear of a cage surrounded by metal wire mesh

The breeding space per chicken is about 20 cm × 20 cm

Chickens cannot move free due to the wire mesh scaffolding

Breeding by battery cage at over 92 percent in Japan

January 2012, the EU bans battery cages, flatbed and enriched cages are mandatory

Pregnancy Box

Farming method to make female pigs more manageable

More than 88.6 percent of Japanese animal husbandry farmers answered they are using pregnancy boxes

The largest boxes used are 60 cm wide, with a length of 200 cm.

Abnormal behaviour such as biting the box or continuous drinking can be seen among pregnant pigs

Food Safety

It has been stated that the precautionary principle could be secured in the chapter on “food safety (SPS)”. However, there is no wording about the precautionary principle in the negotiated text. It is questionable whether JEFTA accepts the precautionary principle accepted by the WTO / SPS agreement.

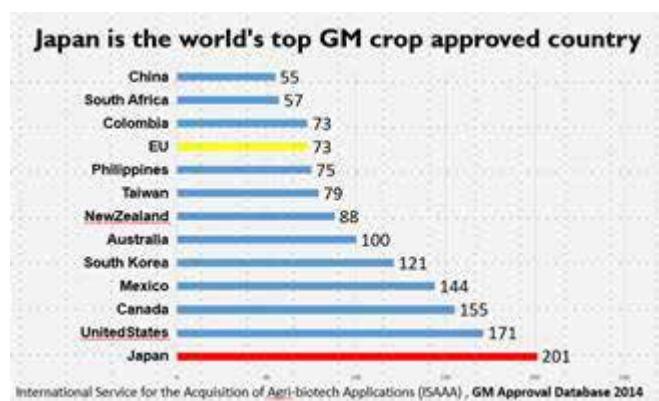


What we are worried about now is “regulatory cooperation”. There is concern that this will weaken regulations on the safety of food traded between Japan and the EU in order “to facilitate trade”.

For example, the “EU-Japan Business Round Table”, which has been promoting JEFTA, proposed “the significance of GMO (genetically modified organism) and to promote it to society” in their recommendation paper. Deregulation of pesticide standards is also proposed. The same is true for environmental hormones and chemical substances. These regulations are much stronger in the EU than in Japan. If they are going to be tackled as “bad” according to Japanese standards under the mechanism of “regulatory cooperation”, it would be a big threat for European citizens. Under the “regulatory cooperation” mechanism, which continues even after the entry into force of this agreement, there is a danger that regulations and standards on food safety will gradually be relaxed. Of course, food safety is a very important issue for the EU and it will not decrease easily. However, it is necessary to monitor closely in order to keep the standards of both parties high.

Is Japanese Food really safe?

Currently, deregulation of food safety is steadily progressing in Japan. In 2016, BSE inspections were abolished due to pressure by the United States. The Cabinet Office Food Safety Committee clearly promotes the GMO, and approval of genetically modified crops is increasing in numbers. Japan's number of approved GMOs ranks top in the world, surpassing even the USA. In 2017, the extension of the market authorisation of glyphosate, which is the main ingredient of the “Round-Up”, was provided without much debate. Furthermore, the main crop seed law was abolished in April 2017; hence, there is now concern that big companies will enter into the seed business more than ever before. This is a remodelling pursuant to the UPOV 1991 Convention to protect the intellectual property of large enterprises' seeds.



Current Situation of GMO in Japan

Commercial cultivation of GMO crops is not done in Japan but there is no law to ban it. However, there are many genetically modified experimental farms. Not only do genetically modified enterprises of multinational companies have experimental places, but Japanese biotech companies are also developing their own genetic modifications.

Japan already imports large amounts of GMOs mainly from the U.S. and Latin America. It is said that most imported soybean, corn and rapeseeds are genetically modified (75% of soybeans, 80% of maize and 77% of rapeseed in 2010 data). We in Japan also import cattle and pigs who ate GM feed. Furthermore, processed food made from GMOs is also imported. Most Japanese people are eating GMO-derived food in large quantities without even knowing it.

However, most of us Japanese consumers do not want to eat food derived from GMOs. But why are we eating GMO then? It is mainly because the label system of GMO foods is extremely inadequate. Japan's GMO food label is mandatory only for eight types of agricultural products such as soybean, corn, potatoes, rapeseed, cottonseed, alfalfa, sugar beet and papaya and 33 kinds of processed foods using these products as raw materials. Soy sauce, soybean oil, cornflakes, starch syrup, isomerized liquid sugar, dextrin, corn oil, rapeseed oil, cottonseed oil and sugar are not mandatory labelled even if they are made from GMO crops. Many of the processed products made from imported corn and soybeans seem to contain genetic modification, but there is no obligation to display that on the packaging.

The “unintentional contamination” of genetically modified crops of less than 5% by weight is permitted to be labelled “not genetically modified”. In the EU, the percentage of permitting “unintentional contamination” is less than 0.9%, and the Japanese standards are very loose. Food additives made from genetic modification also have no labelling obligation.

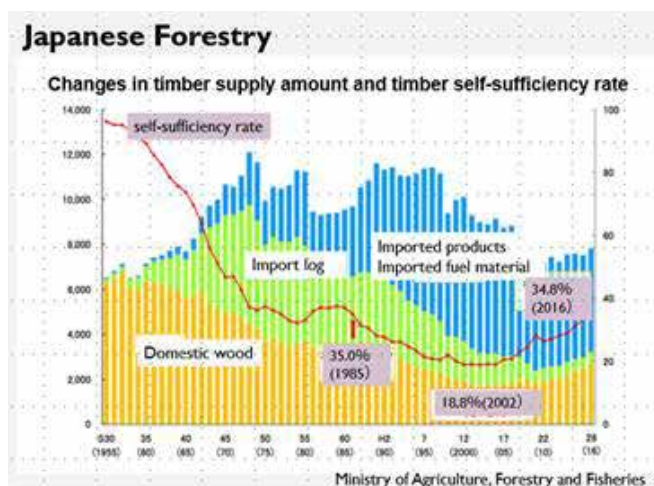
Why is Japan's genetic recombinant food labelling so weak? Obviously, the Japanese government attempts to hide the reality that Japan has one of the largest GMO importing food industries in the world. If strict food labelling was to be done, many products would display to contain genetically modified ingredients, which would likely result in consumer opposition.

The approval of genetically modified crops in Japan and the weak labelling system impair consumers' right-to-know and violate the precautionary principle. Moreover, even if Japan would not domestically produce GMO, it is promoting the production of genetically modified crops abroad. This behaviour is harmful for sustainable agriculture.

The Elimination of Forest Product Tariffs is a Major Threat

As a result of JEFTA, Japan's forestry industry will come under pressure. In Japan, the self-sufficiency rate of wood fell to 18.8 percent in 2002, gradually recovered by the efforts of foresters and governments, and has risen again to 34.8 percent. This is a very good trend for us in Japan.

Almost all tariffs on forest products in Japan have already been abolished. Additionally, JEFTA eliminates the tariffs of ten items of SPF (Ezomatsu - pine - fir) lumber in the eighth year after gradual reduction. This is a period shorter than the maximum of 16 years in TPP, and there is no safeguard (emergency import restriction) established. 90% of structural laminated timber imported to Japan, 50% of SPF (Ezomatsu - pine - fir) lumber is produced in the EU. EU production is based upon price competitiveness and high quality. In the JEFTA negotiations, the EU strongly insisted on the elimination of tariffs on timber by placing emphasis on forest products exporting to Japan of 100 billion yen along with pork, dairy products, and wine. Japan's wood self-sufficiency rate, just recovered to a great extent, will decline again.



Illegal Logging

Another important point is that Japan imports huge amounts of timber from illegal logging sources. In the report of the Federation of International Forest Research Organizations, the total amount of timber (2014) of suspected illegal logging was

worldwide \$ 6.3 billion annually. Some point out that these sources are funds for international terrorist organizations. It is estimated that an amount of wood of at least \$ 15 million went from Southeast Asia mainly to Japan.

Japan imports large quantities of timber from Indonesia, Malaysia, Russia and others, and it is said that a huge amount comes from illegal logging sources. The import of illegally logged wood hinders Japanese self-sufficiency in timber. Moreover, it has caused great damage to Asian forests and the environment. Our Japanese civil society, especially environmental NGOs, have asked the Japanese government to strictly crack down on illegal logging. In 2017 the "Clean Wood Act" was finally enacted but it is very inadequate. Certification of business (company) is voluntary, there is no penalty in case of violation.

The text on illegal logging in JEFTA's "Sustainable Development" chapter is also inadequate. There is no provision that obliges Japan to strengthen its regulation due to an abstract wording, i.e. "to strive", "to contribute" and "to exchange information". EU Trade Commissioner Cecilia Malmström said, that the trade and sustainable development provision which has been set up in the text of the JEFTA, includes countermeasures against illegal logging including transactions via third countries. But it cannot work to reduce illegal logging imports by Japan.

In fact, regulations on the supply chain of goods are still weak in Japan, and there are many issues with respect to ethical consumption and sustainable consumption. For example, preparations for the Tokyo Olympic Games in 2020 are currently under way in Tokyo. At the new National Stadium under construction, an investigation by an environmental NGO has found out that wood from illegal logging may have been used. 'Shinyang' is one of the six largest logging companies in Sarawak, in Malaysia, where illegal logging is rampant. The region is among the most seriously affected by deforestation in the world. It is said that the company is extensively cutting logs of virgin forests including conservation areas that span borders. Environmental NGOs are requesting formal investigation from the government and the Japanese Olympic Committee.

Conclusion

Since the TPP negotiations begun, the Abe administration promised "to make Japanese agricultural sector a growing industry". That is why the Japanese government has recommended expanding the scale of agriculture and export.

However, JEFTA, like other FTAs, will seriously hurt Japanese agriculture and forestry.

At the same time, we must recognize the problems of Japan regarding animal welfare, food safety, illegal logging etc.

Although Japan and the EU are developed countries, responsible policies for environmental protection, sustainable agriculture and development are required. The importance of small scale agriculture has been re-examined to the extent that the United Nations declared 2014 as the International Family Agriculture Year. While the world population is expected to be 11.2 billion in 2100, overcoming hunger is a challenge facing humanity. The UN's sustainable development objective (SDGs) name sustainable agriculture as a means to end hunger. Imported foods need a massive amount of fossil fuels for transport, for cooling during the entire transport time, for washing off post-harvest pesticides etc. As environmental destruction and global warming become more serious, the way to advance food exports and corporatization is unsustainable.

It is necessary for Japan's and Europe's civil society, parliamentarians, consumers, farmers and others to work together on these issues.

Now, the Japanese government is promoting to conclude JEFTA by the end of this year. There seems to be a proposal to apply the agreement provisionally, after separating the chapter on ISDS from the rest of JEFTA. It is also a matter of neglect of parliament and insufficient disclosure of information to citizens. Broad agreement in civil society movements on their criticism of the contents of the agreement should prevent rapid conclusion of JEFTA and its entry into force.

Footnotes

- [1] TTIP stands for Transatlantic Trade and Investment Partnership, a free trade agreement being negotiated between the European Union and the United States of America. Negotiations are currently suspended. CETA stands for Canada - EU Trade Agreement. The agreement has provisionally entered into force in September 2017, while the ratification process is still ongoing in almost every EU Member State. TPP stands for the Transpacific Partnership Agreement concluded between the USA, Japan and other states in the region. U.S. President Trump has withdrawn signature, the agreement's future is yet unclear. TiSA stands for Trade in Services Agreement between a number of interested governments under the roof of the WTO in Geneva. Negotiations are currently on hold due to the new U.S. Administration outstanding decision on whether or not to stay in the process, and due to the European Union's difficulties to deliver a commitment for a chapter on data trade.
- [2] Centrale Nationale des Employés
- [3] EU - Singapore Free Trade Agreement (Authentic text as of May 2015). Chapter 8 Services, Establishment and Electronic Commerce. Sub-Section 6 Financial Services. Article 8.54(2) <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151743.pdf>.
- [4] Cited in Mastromatteo and L. Esposito, op. cit., p. 4.
- [5] G. Van Harten, *Sovereign choices and sovereign constraints*, Oxford UP, p.164.
- [6] UN, Report of the commission of experts of the president of the United Nations general assembly on reforms of the international monetary and financial system, 2009, p. 81.
- [7] Contact: ciarancross@gmail.com
- [8] Council of the European Union, Directives for the negotiation of a Free Trade Agreement with Japan. 15864/12. Brussels, 29 November 2012. para 7
- [9] Ibid. para 40
- [10] European Commission, Press release - EU and Japan reach agreement in principle on Economic Partnership Agreement. Brussels, 6 July 2017. http://europa.eu/rapid/press-release_IP-17-1902_en.htm
- [11] European Parliament, Parliamentary questions. EU Trade Commissioner Cecilia Malmström in response to a Parliamentary question. 24 August 2016 See: E-004424/2016, Available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-004424&language=EN> (my emphasis)
- [12] "JEFTA LEAKS" homepage: <https://trade-leaks.org/jefta-leaks/>
- [13] European Commission, EU-Japan trade agreement: texts of the agreement in principle. Brussels, 6 July 2017. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>. Large parts of the negotiated text have not been disclosed, for example the Chapters on Procurement, Investment and Intellectual Property. The "Agreement in Principle" published on 6 July 2017 states that the Procurement Chapter "builds on the existing mutual obligations deriving from the WTO Government Procurement Agreement, and adds a new set of disciplines" including "the possibility of using environment standards as selection criteria". The efficacy of this "possibility" cannot be assessed until the Commission releases the negotiating text. The Chapter on Investment was leaked by Greenpeace in June 2017 and it is to the leaked text which the analysis below refers. The area of Intellectual Property raises several specific issues in relation to trade relations with Japan. These issues are highlighted in the analysis, although, in the absence of the negotiating text, one can only speculate as to whether the Commission has sought to address them.
- [14] European Commission, "What about the agreement's impact on the environment?", The EU-Japan agreement explained. <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/agreement-explained/>
- [15] Comprehensive Economic and Trade Agreement (CETA) and the environment: A gold standard for the planet or for big business? Brussels, November 2016. Transport & Environment and ClientEarth. <https://www.transportenvironment.org/publications/ceta-and-environment-gold-standard-planet-or-big-business>
- [16] Directives for the negotiation of a Free Trade Agreement with Japan. para 7
- [17] European Union Directorate-General for Trade, Trade Sustainability Impact Assessment of the Free Trade Agreement between the European Union and Japan: Final Report. May 2016. http://www.tsia-eujapantrade.com/uploads/4/0/4/6/40469485/tsia_final_report.pdf (Hereinafter 'TSIA Final Report')
- [18] TSIA Final Report, p 245
- [19] European Commission, Trade Policy - Countries and regions: Japan. <http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/>
- [20] TSIA Final Report, p 250
- [21] TSIA Final Report, p 227
- [22] See European Commission, "How will the EU tackle the issue of Japanese whaling?", The EU-Japan agreement explained. <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/agreement-explained/>; Also EU Trade Commissioner Cecilia Malmström in response to a Parliamentary question, 24 August 2016
- [23] Measures are based on the Environmental Regulatory Regime Index (ERRI), the Climate Laws, Institutions and Measures Index (CLIMI), and the OECD Stringency of Environmental Policies Index (2014). See TSIA Final Report, p 218-9
- [24] TSIA Final Report, p 231
- [25] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art 17
- [26] See letter from the European Domestic Advisory Group to Trade Commissioner Malmström (dated 16 December 2016) on serious and widespread violations of the right to freedom of association and collective bargaining in South Korea. Available from European Public Service Union website: www.epsu.org
- [27] cf. CETA Chapters on Trade and Sustainable Development, Trade and Environment and Trade and Labour
- [28] Opinion 2/15, EU-Singapore Free Trade Agreement, para. 161: "Finally, the link which the provisions of Chapter 13 of the envisaged agreement display with trade between the European Union and the Republic of Singapore is also specific in nature because a breach of the provisions concerning social protection of workers and environmental protection, set out in that chapter, authorises the other Party — in

accordance with the rule of customary international law codified in Article 60(1) of the Convention on the law of treaties, [...] — to terminate or suspend the liberalisation, provided for in the other provisions of the envisaged agreement, of that trade.”

[29] See discussion in Nesbit, Ankersmit, Friel and Colsa, Ensuring compliance with environmental obligations through a future UK-EU relationship, (IEEP), October 2017. The authors concede that “it is hard to imagine the EU doing so. First of all, it would require a Commission proposal and a Council decision by qualified majority to resort to such a suspension, an endeavour the EU has only resorted to once in relation to non-economic aspects of a trade agreement [citing the suspension of the operation of the EU trade agreement with Syria]. Second, the Commission itself has never even commenced consultations under sustainable development chapters in free trade agreements even in situations where breaches of these chapters were evident.” p 27-8

[30] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 12

[31] European Commission, Press release - EU and Japan reach agreement in principle on Economic Partnership Agreement. Brussels, 6 July 2017. http://europa.eu/rapid/press-release_IP-17-1902_en.htm

[32] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 4.4

[33] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 5(c)

[34] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 12(j)

[35] See Shearer, Ghio, Myllyvirta, Yu, and Nace. Boom and Bust 2017, Tracking The Global Coal Plant Pipeline. p 14 (<https://endcoal.org/wp-content/uploads/2017/03/BoomBust2017-English-Final.pdf>): “Among OECD countries, Japan is an exception to the general shift away from coal power, with numerous coal plants under development. While the country has only built 1,950 MW of coal in the past five years, 4,256 MW is currently under construction and 17,343 MW is in pre-construction planning.”

[36] Financial Times. Japan warned of flaw in coal-fired power plants project. 11 May 2016 (<https://www.ft.com/content/a7f90364-1770-11e6-b197-a4af20d5575e>); Caldecott, Dericks, Tulloch, Kruitwagen, Kok. Stranded Assets and Thermal Coal in Japan: An analysis of environment-related risk exposure. Working Paper, 12 May 2016. Oxford University Smith School of Enterprise and the Environment. www.smithschool.ox.ac.uk/research-programmes/stranded-assets/satc-japan.pdf

[37] Shearer et al. Boom and Bust 2017, Tracking The Global Coal Plant Pipeline, p 14

[38] See www.climateactiontracker.org.

[39] TSIA Final Report, p 219

[40] The Climate Action Tracker assessment asserts: “...in the wake of the Paris Agreement's entry into force, the EU's climate policy effort appears to be slowing” See: <http://climateactiontracker.org/countries/eu.html>

[41] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT, Art. 6

[42] TSIA Final Report, p 228

[43] OECD Environmental Performance Reviews: Japan – Assessment and Recommendations. OECD, May 2010. p 15

[44] Main Issues: Developments since the 2002 Review, OECD Environmental Performance Reviews: Japan 2010. <http://www.oecd.org/japan/japan2010.htm>

[45] TSIA Final Report, p 229

[46] European Commission, Impact Assessment Report on EU-Japan Trade Relations – Recommendation for a Council Decision authorising the opening of negotiations on a Free Trade Agreement between the EU and Japan, 18 July 2012. p 47 cited in TSIA Report, p 236

[47] K. Binder, ‘Prospective EU-Japan free trade agreement’, October 2016 Briefing - International Agreements in Progress. European Parliamentary Research Service, Members’ Research Service. p 8

[48] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 7.1

[49] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 7.2

[50] TSIA Final Report, p 223

[51] Environmental Investigation Agency website - Japan profile. www.eia-global.org/subinitiatives/japan-forests

[52] The provisions on “Trade in forest products” in CETA are similar in many respects, but on the whole more specific. Parties undertake a commitment to cooperate – where appropriate - “on initiatives to promote sustainable forest management, including initiatives designed to combat illegal logging and related trade” as well as “in international fora that deal with the conservation and sustainable management of forests” (Art. 24.10.2 (b) and (d)). CETA also obliges the parties to “promote the effective use of the CITES... with regard to timber species considered at risk,” (Art. 24.10.2 (c)) and to discuss all of the obligations listed in the provisions in bilateral fora established under CETA to promote cooperation. The Article on “Cooperation on environment issues” commits CETA parties to “cooperate on trade-related environmental issues of common interest”, including “conservation and sustainable use of biological diversity” (Art. 24.12.1 and (g)), and the provisions on Bilateral Dialogue include a section on Forest Products, detailing a range of cooperation activities and stipulating a deadline (one year after entry into force) for at least a first meeting for such dialogue to begin (Art. 25.3).

In contrast, JEFTA's Article on Cooperation provides only that the parties “may” cooperate to “promote the conservation and sustainable use of biological diversity, including combatting illegal trade in endangered species of wild fauna and flora” and to “promote the conservation and sustainable management of forests and trade in legally harvested timber and timber products, as well as to combat illegal logging.”

[53] TPP's Environment Chapter includes obligations for each party to TPP to “adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under CITES” (including “existing and future amendments”), as well as to undertake a extensive range of activities in order to tackle the illegal trade in wild flora and fauna, illegal logging and associated illegal trade. Beyond the sorts of obligations contained in CETA, the commitments in the TPP include that each party shall “promote the legal trade in associated products”, undertake “joint activities... through relevant regional and international fora”, endeavour to “implement as appropriate CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade”, take “appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory.” (Art. 20.17)

[54] TSIA Final Report, p 223

[55] TSIA Final Report, p 235

[56] M. Momii. Trade in Illegal Timber: The Response in Japan. Chatham House, November 2014

[57] TSIA Final Report, p 234

- [58] TSIA Final Report, p 237
- [59] TSIA Final Report, p 240
- [60] A . Nelson. "No evidence" that EU's illegal timber policy is working. Guardian, 10 Feb 2016
- [61] TSIA Final Report, p 237
- [62] Law Concerning the Promotion of Distribution and Use of Legally-Harvested Timber. May 2016
- [63] M. Momii. Japan's New Timber Law. 12 May 2016. Forest Legality Initiative. Available at: www.forestlegality.org
- [64] Press release. G7 host Japan poised to pass a new law that would undermine the Group's efforts to combat the global illegal timber trade. Global Witness, 21 April 2016. Available at: www.globalwitness.org
- [65] Environmental Investigation Agency. Built on Lies: New Homes in Japan Destroy Old Forests in Europe. Washington DC, 2016. p 3. As a result of the allegations concerning Schweighofer's operations in Romania, the Forest Stewardship Council in February 2017 revoked the Schweighofer Group's probation status and disassociated from the Group (see FSC website www.ic.fsc.org)
- [66] EIA, Built on Lies. p 13
- [67] EIA, Built on Lies. p 13
- [68] For example China, Malaysia, Indonesia, the Philippines and Vietnam
- [69] TSIA Final Report. p 240
- [70] TSIA Final Report. p 242
- [71] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 8
- [72] TSIA Final Report, p 228
- [73] OECD Environmental Performance Reviews: Japan – Assessment and Recommendations (OECD, May 2010) p.10
- [74] Food and Agriculture Organization of the United Nations (FAO). An overview of the global tuna market. 11 April 2017. <http://www.fao.org/in-action/globefish/fishery-information/resource-detail/en/c/880744/>
- [75] Centre for the Promotion of Imports from developing countries (CBI). Market Information: Exporting fresh tuna to Europe <https://www.cbi.eu/market-information/fish-seafood/fresh-tuna/>
- [76] IUCN Red List of Threatened Species: *Thunnus orientalis* (Pacific Bluefin Tuna) <http://www.iucnredlist.org/details/170341/0>
- [77] IUCN Red List of Threatened Species: *Thunnus thynnus* (Atlantic Bluefin Tuna) <http://www.iucnredlist.org/details/21860/0>
- [78] IUCN Red List of Threatened Species: *Thunnus maccoyii* (Southern Bluefin Tuna) <http://www.iucnredlist.org/details/21858/0>
- [79] J. Barrat, Desire for Pacific bluefin puts fish on red list of threatened species. Smithsonian Insider, 9 January 2015 <http://insider.si.edu/2015/01/desire-pacific-bluefin-puts-fish-red-list-threatened-species/>
- [80] J. McCurry, Japan to exceed bluefin tuna quota amid warnings of commercial extinction. Guardian, 24 April 2017 <https://www.theguardian.com/world/2017/apr/24/japan-criticised-exceed-bluefin-tuna-fishing-quota>
- [81] A. Nickson, New Agreement Offers Brighter Future for Pacific Bluefin Tuna. Pew Charitable Trusts, 18 September 2017 <http://www.pewtrusts.org/en/research-and-analysis/blogs/compass-points/2017/09/18/new-agreement-offers-brighter-future-for-pacific-bluefin-tuna>
- [82] Ibid.
- [83] Winifred Bird. In Japan, a David vs Goliath Battle to Preserve Bluefin Tuna. Yale Environment 360, Yale School of Forestry & Environmental Studies, 21 January 2016 http://e360.yale.edu/features/in_japan_a_david_versus_goliath_battle_to_preserve_bluefin_tuna
- [84] L. Abend. Why a Proposed Ban on Bluefin Tuna Fishing Failed. Time, 18 March 2010. <http://content.time.com/time/health/article/0,8599,1973374,00.html>
- [85] M. Hickman, Revealed: the bid to corner world's bluefin tuna market. Independent, 2 June 2009 <http://www.independent.co.uk/environment/nature/revealed-the-bid-to-corner-worlds-bluefin-tuna-market-1695479.html>
- [86] Commentary by Hiroaki Katsukura. Japan has a responsibility to save the bluefin tuna. Sea Shepherd Italia Onlus, 14 June 2010 <http://www.seashepherd.it/news-and-media/editorial-100614-1.html>
- [87] Ibid.
- [88] N. Gronewold, Is the Bluefin Tuna an Endangered Species? Scientific American, 14 October 2009 <https://www.scientificamerican.com/article/bluefin-tuna-stocks-threatened-cites-japan-monaco/>
- [89] L. Abend. Why a Proposed Ban on Bluefin Tuna Fishing Failed
- [90] European Commission. Start of the Bluefin tuna fishing season 2016: the EU maintains high control levels and adds a new electronic traceability tool. 27 May 2016 https://ec.europa.eu/fisheries/start-bluefin-tuna-fishing-season-2016-eu-maintains-high-control-levels-and-adds-new-electronic_en
- [91] Mediterranean bluefin tuna: quota increase too much too soon. World Wide Fund For Nature, European Policy Office, 17 November 2014 <http://www.wwf.eu/?uNewsID=233280>
- [92] CBI. Market Information: Exporting fresh tuna to Europe
- [93] TSIA Final Report, p 244
- [94] TSIA Final Report, p 229
- [95] TSIA Final Report, p 244
- [96] See European Commission, "How will the EU tackle the issue of Japanese whaling?" <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/agreement-explained/>
- [97] There is a proposal from the EU for a Chapter on Animal Welfare but this consists of just two short articles, containing vague commitments to "cooperate" on "animal welfare matters with focus on farmed animals with a view to improving understanding on their respective laws and regulations." This is not released by the Commission but available of the JEFTA LEAKS website: <https://trade-leaks.org/jefta-leaks/>
- [98] M. J. Palmer. Japan's Bizarre and Sad New Whaling Laws. Huffington Post, 17 July 2017. https://www.huffingtonpost.com/entry/japans-bizarre-and-sad-new-whaling-laws_us_596cf1cde4b07f87578e6ac8
- [99] EU Parliament resolution of 25 October 2012 on EU trade negotiations with Japan, para H. 2012/2711(RSP) (P7_TA(2012)0398)
- [100] EU Parliament resolution of 25 October 2012, para 16
- [101] International Court of Justice, Declarations recognizing the jurisdiction of the Court as compulsory: Japan. 6 October 2015 <http://www.>

- [102] European Parliament resolution of 6 July 2016 on Japan's decision to resume whaling in the 2015-2016 season, paras O and 1 (2016/2600(RSP)). (P8_TA(2016)0313)
- [103] Japan's fiscal 2017 'research whaling' nets 177 whales in northwest Pacific. Japan Times, 26 Sep 2017 <https://www.japantimes.co.jp/news/2017/09/26/national/japans-fiscal-2017-research-whaling-nets-177-whales-northwest-pacific/#.WeX6k4UzLRY>
- [104] N. Beynon, Japan passes law locking in its commercial whaling ambitions. Humane Society International, 13 July 2017 <https://hsi.org.au/blog/2017/07/13/japan-passes-law-locking-in-its-commercial-whaling-ambitions/>
- [105] E. Lies, New Japan law a big step toward commercial whaling, officials say. Reuters, 6 July 2017 <https://www.reuters.com/article/us-environment-japan/new-japan-law-a-big-step-toward-commercial-whaling-officials-say-idUSKBN19R11J>
- [106] Japan's fiscal 2017 'research whaling' nets 177 whales in northwest Pacific. Japan Times, 26 Sep 2017
- [107] M. J. Palmer. Japan's Bizarre and Sad New Whaling Laws. Huffington Post, 17 July 2017.
- [108] OECD Environmental Performance Reviews: Japan – Assessment and Recommendations. OECD, May 2010. p 10
- [109] Comment from Antonio Parenti, Deputy Head of Unit, Far East, Directorate-General for Trade, TSIA Final Report, p 284
- [110] TSIA Final Report, p 245
- [111] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art. 1(5)
- [112] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art. 11(6): "The Parties may undertake regulatory cooperation activities on a voluntary basis... and may refuse to cooperate or may withdraw from cooperation". Under Art. 17 the provisions in the Chapter cannot be made subject to dispute settlement proceedings
- [113] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art. 2.: "Nothing in this Chapter shall affect the right of either Party to define or regulate its own levels of protection in pursuit or furtherance of its public policy objectives in areas such as (a) public health; human, animal and plant life and health; health and safety; labour conditions; animal welfare; (b) the environment; (c) consumers; (d) social protection and social security; (e) personal data and cybersecurity; (f) cultural diversity; (g) financial stability"; and Art. 3: "Nothing in this Chapter shall be construed as to hinder a Party to: a) adopt, maintain and apply regulatory measures in accordance with its legal framework, principles, in particular the precautionary principle, and deadlines, to achieve its public policy objectives at the level of protection it deems appropriate; b) provide or support services of general interest, including those related to water, health, education or social services."
- [114] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art.1.1
- [115] CETA, Art. 21.3(a)
- [116] Council of the European Union, Directives for the negotiation of a Free Trade Agreement with Japan, para 45
- [117] Ibid. para 41
- [118] JEFTA, TECHNICAL BARRIERS TO TRADE. Art. 13
- [119] JEFTA, Customs Matters and Trade Facilitation. Art. 14
- [120] JEFTA, Sanitary and phytosanitary (SPS) measures. Art. 15
- [121] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 13
- [122] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art 8. Assessments should consider the "need" for the regulatory measure, possible "alternatives" to the measure which would achieve the public policy objective, as well as the "potential social, economic and environmental impact of those alternatives"
- [123] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 12.b
- [124] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art. 13(1)
- [125] Ibid. Art. 13(3)(d) and (j)
- [126] Ibid. Art. 13(2)
- [127] JEFTA, TECHNICAL BARRIERS TO TRADE. Art 7.3
- [128] cf. The same term is used in this context in CETA, Art. 21.6(3), which also does not define the term or the purpose of the provision
- [129] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art 5 and Art 6.1.
- [130] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art 7(2)(b-c))
- [131] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art 9(3) and footnote 2
- [132] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 9
- [133] JEFTA, EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU-Japan FTA, Art. 3(a): "Nothing in this Chapter shall be construed as to hinder a Party to: a) adopt, maintain and apply regulatory measures in accordance with its legal framework, principles, in particular the precautionary principle, and deadlines, to achieve its public policy objectives at the level of protection it deems appropriate..."
- [134] Treaty on the Functioning of the European Union 2007, Art. 191, para. 2
- [135] Stoll et al. CETA, TTIP and the EU Precautionary Principle: Legal Analysis of selected parts of the draft CETA agreement and the EU TTIP proposals. Foodwatch, June 2016. p 11
- [136] EC – Hormones, DS26
- [137] EC – Biotech, DS291
- [138] EC – Biotech, DS291, para. 4.540
- [139] Stoll et al. CETA, TTIP and the EU Precautionary Principle. p 12
- [140] Japan – Apples, DS245
- [141] TSIA Final Report, p 66
- [142] TSIA Final Report, p 201
- [143] Commission Implementing Regulation 2016/6 of 5 January 2016
- [144] TSIA Final Report, p 221 and 223
- [145] TSIA Final Report, p 311

[146] JEFTA, Sanitary and phytosanitary (SPS) measures. Art. 16.1

[147] JEFTA, Sanitary and phytosanitary (SPS) measures. Art 6

[148] JEFTA, Sanitary and phytosanitary (SPS) measures. Art. 16.2

[149] TSIA Final Report, p 233

[150] www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.html / https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm: "No formal dispute involving a measure under a multilateral environmental agreement has so far been brought to the WTO. However, the complexity of the relationship between environmental and trade rules was highlighted in the "Chile — Swordfish" case."

[151] India – Certain Measures Relating to Solar Cells and Solar Modules (Case no. DS456)

[152] CETA, Art. 24.4.4

[153] JEFTA, TRADE AND SUSTAINABLE DEVELOPMENT. Art. 4.5

[154] JEFTA, TRADE IN SERVICES, INVESTMENT AND E-COMMERCE, CHAPTER VII - EXCEPTIONS, Art. 1

[155] L. Bartels. The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction. *American Journal of International Law*, Vol. 109:95. p 96

[156] Directives for the negotiation of a Free Trade Agreement with Japan. para 24

[157] References to the two documents available on the JEFTA LEAKS website (<https://trade-leaks.org/jefta-leaks/>) on JEFTA Investment Protection and Dispute Settlement provisions are cited in following analysis as: "Leaked CHAPTER [X] INVESTMENT" and "Leaked Section X - Resolution of Investment Disputes and Investment Court System"

[158] Leaked CHAPTER [X] INVESTMENT, Art. 13.1

[159] CETA, Art.8.9(2), A similar clause was included in the negotiated text for TTIP, which concludes with the words: "...even if there is loss or damage to the covered investment as a result." TPP, Art 9.6(4)

[160] Leaked CHAPTER [X] INVESTMENT, Art. 13.2

[161] JEFTA, TRADE IN SERVICES, INVESTMENT AND E-COMMERCE, CHAPTER I GENERAL PROVISIONS, Art. 1.5 para. (m)

[162] CETA, Art. 8.1

[163] In footnotes, TPP's definition (in Art. 9.1) at least provides some guidance on whether some forms of debt and particular types of "licence, authorisation, permit or similar instrument... has the characteristics of an investment" and imposes several criteria.

[164] Leaked CHAPTER [X] INVESTMENT, Art. 14.2

[165] CETA, Art. 8.10(2)

[166] Leaked CHAPTER [X] INVESTMENT, Art. 14.4; cf. CETA, Art. 8.10(4)

[167] Steffen HINDELANG and Carl-Philipp SASSENATH. The Investment Chapters of the EU's International Trade and Investment Agreements: In a Comparative Perspective. Directorate General for External Policies, Policy Department. EP/EXPO/B/INTA/2015/01, September 2015. p 139

[168] See also recommendation of German Model-BIT, BMWI, 2015: Art. 5.4, p 12.: "When applying the fair and equitable treatment obligation, a tribunal may only consider a frustration of the expectations of an investor by a Contracting Party with regard to its covered investment if these expectations were based on a specific legally binding promise to induce the covered investment by the investor made by an authority competent to make such a promise and in accordance with the laws of the Contracting Party. Such a promise cannot waive any binding obligations of the investor contrary to national law and cannot limit the right of a Contracting Party to adopt, maintain or repeal any laws or regulations in accordance with domestic law."

[169] CETA, Annex 8-A, para. 3

[170] Leaked CHAPTER [X] INVESTMENT, Annex []: Expropriation, Para. 3

[171] Ibid. footnote to Para. 3

[172] Although JEFTA's draft text includes an article (Leaked Section X - Resolution of Investment Disputes and Investment Court System, Art. 1 Anti-Circumvention) which aims to prevent claims where the investor's ownership or control has been acquired for the "main purpose" of making the claim, this does not seem to address the broader issue of "shell companies", nor necessarily rule out abuse of process through last minute corporate restructuring, nor require that the investor operate its investments in good faith.

[173] Leaked Section X - Resolution of Investment Disputes and Investment Court System, Art. 11 ter, para. 1

[174] Leaked Section X - Resolution of Investment Disputes and Investment Court System, Art. 11 ter, para. 3 and 4

[175] For example: *Border Timbers/Pezold v Zimbabwe*, ICSID Case Nos. ARB/10/25 and ARB/10/15. See 'Human Rights inapplicable in International Investment Arbitration?' European Center for Constitutional and Human Rights (July 2012), at: https://www.ecchr.eu/en/our_work/business-and-human-rights/worldbank.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable_A%20Commentary.pdf

[176] TSIA Final Report, p 204

[177] TSIA Final Report, p 74

[178] Both claims arise out of a series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers: *JGC v. Spain* *JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27); *Eurus Energy v. Spain* *Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain* (ICSID Case No. ARB/16/4)

[179] UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, p 171

[180] Available on the JEFTA LEAKS website: <https://trade-leaks.org/jefta-leaks/>

[181] European Commission. Report of the 18th EU-Japan FTA/EPA negotiating round Tokyo, Week of 3 April 2017

[182] By comparison, Canada accounts for just 2.6%. See OECD Key Biotechnology Indicators: www.oecd.org/sti/inno/keybiologicalindicators.htm

[183] The US has the single largest share in biotechnology patents worldwide (37.2%), but has not ratified the CBD.

[184] By way of comparison, the TPP – to which Japan has agreed in principle – contains an article (Art. 18.16(3b)) on cooperation between the parties on the issues of traditional knowledge and intellectual property systems which, inter alia encourages parties to allow "prior art

disclosures related to traditional knowledge associated with genetic resources" in their patent examinations. The TPP's "soft" approach to this issue has been strongly criticized.

[185] For more information, see the Neem Foundation: <http://www.neemfoundation.org/about-neem/patent-on-neem/>

[186] Appropriated from the Guarani people of Paraguay and Brazil. "At the end of 2014, more than 1000 patent requests associated with stevia had already been registered, 450 of which were specifically for steviol glycosides. From the latter, 46% were deposited by just eight companies. The companies registering the most patent requests were the multinationals Cargill and Coca-Cola." See *The Bitter Sweet Taste of Stevia*. Public Eye, November 2015: <https://www.publiceye.ch/en/topics-background/agriculture-and-biodiversity/biodiversity/biopiracy/stevia/>

[187] "Brazzein" is derived from the Oubli berry, a West African fruit originally discovered in Gabon and patented by University of Wisconsin: "A researcher from the (UW) observed people and animals eating the berries in West Africa and brought them to the attention of the University... UW maintains that Brazzein is 'an invention of a UW-Madison researcher' and offers no recognition or benefit-sharing to the people of Gabon". See World Intellectual Property Organization. Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge. WIPO, 2017. p 10

[188] W. Feng, (2017) "Appropriation without Benefit-Sharing: Origin-of-Resource Disclosure Requirements and Enforcement under TRIPS and the Nagoya Protocol," *Chicago Journal of International Law*: Vol. 18: No. 1. p 280-1: "In the mid-1990s, companies in Japan became interested in camu camu's high vitamin C content and they began patenting many products based on this fruit. In January 2000, the Japanese cosmetics company Kose Corporation patented a skin lotion in the Japan Patent Office (JPO), and camu camu was an ingredient in the lotion. Kose's patent application for the skin lotion JP2001031558A did not reveal the geographical origin of the camu camu. However, because Japan was importing the fruit from Peru around this time, there is a high likelihood that Kose's camu camu originated from Peru. In 2005, Peru announced to the WTO that it had been investigating this patent application for possible violations of patentability, but its preliminary analysis did not find a specific violation. Still, due to the adverse action that Peru had taken toward the patent, it is unlikely that Kose had enacted a benefit-sharing agreement with the Peruvian government for the skin lotion."

[189] E. Hammond, "Better Beer Biopiracy: Indian Farmers' Barley Patented by Japanese Brewer", Briefing Paper 2, February 2014, Third World Network. Hammond accuses the Japanese brewery Sapporo of appropriating a variety of barley - which improves the malting quality of beer - from farmers in Uttar Pradesh, India, and patenting the gene. See also W. Feng, (2017) "Appropriation without Benefit-Sharing", p 282-3,

[190] On economic harms, see W. Feng, *Appropriation Without Benefit-Sharing*, p 251-2, fn 42: "By patenting biological resources or drugs derived from them, companies may prevent those in countries where the resources were found from selling these resources." Plao noi is a case in point: "a trademarked and patented Japanese product... developed from Thai traditional knowledge and sold back to the Thai market in direct competition with herbal remedies that use plao noi as a peptic ulcer treatment."

[191] TRIPS Art. 27.3(b) permits the exclusion from patentability of certain "inventions" in order to protect "ordre public or health of to avoid serious prejudice to the environment", as well as of "plant and animal varieties other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes"

[192] DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION. WT/MIN(01)/DEC/1. Adopted on 14 November 2001, para 19: "We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."

[193] Catherine Saez, WIPO Members Debate Disclosure Of Origin For Genetic Resources In Patents. IP-Watch, 17/02/2016. <https://www.ip-watch.org/2016/02/17/wipo-members-debate-disclosure-of-origin-for-genetic-resources-in-patents>

[194] Art. 6 of the Nagoya Protocol requires that the user of biological resources obtain "prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention." See discussion in F. Rabitz, 'Biopiracy after the Nagoya Protocol: Problem Structure, Regime Design and Implementation Challenges'. *Brazilian Political Science Review* Vol. 9 No. 2, Sao Paulo, May/Aug 2015

[195] International Centre for Trade and Sustainable Development, CBD Clinches ABS Protocol in Nagoya. 8 November 2010. <https://www.ictsd.org/bridges-news/biores/news/cbd-clinches-abs-protocol-in-nago>

[196] Chief among these are "due diligence" obligations on users of genetic resources to ascertain that the resources have been accessed in compliance with access and benefit-sharing legislation of provider countries. See EU Regulation 511/2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, 16 April 2014

[197] UN Sustainable Development Goals, Target 15.6: <https://sustainabledevelopment.un.org/sdg15>

[198] Catherine Saez. Genetics Disclosure Requirement In IP Applications Necessary To Comply With Obligations, Speakers Say, IP-Watch, 19/02/2016.

<https://www.ip-watch.org/2016/02/19/disclosure-requirement-in-ip-applications-necessary-to-comply-with-obligations-speakers-say/>

[199] See Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilisation (6th Conference of Parties to the Convention on Biological Diversity) para. 16(d), which provides Members should consider "taking measures to encourage disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities..."

[200] European Union Directive 98/44/EC on the Legal Protection of Biotechnological Inventions of July 6, 1998: "(26) Whereas if an invention is based on biological material of human origin or if it uses such material, where a patent application is filed, the person from whose body the material is taken must have had an opportunity of expressing free and informed consent thereto, in accordance with national law; (27) Whereas if an invention is based on biological material of plant or animal origin or if it uses such material, the patent

application should, where appropriate, include information on the geographical origin of such material, if known; whereas this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents.” See also Article 50.1 of the Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights states:

“The application for a Community plant variety right must contain at least the following: [...] (g) the geo- graphic origin of the variety [...]” This requirement has been interpreted as referring to “the place where the variety has been developed by the breeder rather than the country of origin of the initial breeding materials used during the breeding process” (WIPO, Key Questions on Patent Disclosure Requirements, 2017). [201] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Report of the Twenty-Eighth Session Geneva, July 7 to 9, 2014 (WIPO/GRTKF/IC/28/11, 15 Feb 2016), para 55: “[The EU delegation] had proposed a mechanism under which it could contemplate agreeing to a requirement to disclose the origin, or source, of GRs in patent applications. That did not mean that it could accept any form of disclosure requirement. To be acceptable, the disclosure requirement would have to contain safeguards as part of an overall agreement to ensure legal certainty, clarity and appropriate flexibility. If that question was resolved, and in accordance with its position expressed in document WIPO/GRTKF/IC/8/11, it could eventually consider a mandatory requirement in that regard.”

[202] The Andean Community, Belgium, Brazil, China, Costa Rica, Cuba, Denmark, Ecuador, Egypt, Ethiopia, France, Germany, India, Indonesia, Italy, Kyrgyzstan, Norway, Peru, Philippines, Romania, Samoa, South Africa, Sweden, Switzerland, Vanuatu and Viet Nam. Data from WIPO, Key Questions on Patent Disclosure Requirements, Annex: Disclosure Requirements Table (updated May 2017), p 62-91

[203] W. Feng, (2017) “Appropriation without Benefit-Sharing”. p 259

[204] IGC, Report of the Twenty-Eighth Session Geneva, July 7 to 9, 2014 (WIPO/GRTKF/IC/28/11, 15 Feb 2016), para 71: “Regarding the issue of compliance with ABS requirements, the [Japanese] Delegation strongly believed that the existing IP system should not be used as a means of enforcement of provisions under the CBD and the Nagoya Protocol. In addition, it strongly felt that the effectiveness of a mandatory disclosure requirement for this issue had not been fully demonstrated.”

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MAKING SENSE OF JEFTA



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