

# THE ECONOMIC PARTNERSHIP AGREEMENT AND THE STRATEGIC PARTNERSHIP AGREEMENT BETWEEN THE EUROPEAN UNION AND JAPAN FROM A LEGAL PERSPECTIVE

YUMIKO NAKANISHI \*

## Content

- I. Introduction
- II. Competence
- III. Content and the EU's Values
- IV. Implementation of the EPA and the SPA
- V. Concluding Remarks

## I. *Introduction*

The European Union (EU) and Japan signed the Economic Partnership Agreement (EPA) and the Strategic Partnership Agreement (SPA) on 17 July 2018. The EPA is composed of 23 chapters, covering investment liberalisation (Chapter 8), competition policy (Chapter 11), and small and medium-sized enterprises (SMEs) (Chapter 20), which are not subjects covered by the World Trade Organisation (WTO). The chapter on SMEs in the EPA is based on the impact assessments by the Commission.<sup>1</sup> Chapter 14 covers the protection of intellectual property rules including geographical indications (GI). During the negotiations with the EU, Japan enforced new legislation on it.<sup>2</sup> The EPA has about 560 pages not including annexes, and the SPA is composed of 50 articles, in about 50 pages. These agreements are economically and legally important.

The agreements date back to 28 May 2011, about two months after the Great East Earthquake. On that day, the 20<sup>th</sup> EU-Japan Summit was held in Brussel. The Joint Press Statement indicated that Summit leaders agreed to start the process for parallel negotiations for a deep and comprehensive Free Trade Agreement/Economic Partnership Agreement and a binding agreement, covering political, global and other sectoral cooperation in a comprehensive manner.<sup>3</sup> Parallel negotiations were requested by the EU, as part of its external action based on Article 21 (1) TEU after the Treaty of Lisbon.

After a joint press statement, the European Commission started a scoping process to check

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\* Professor of EU Law, Graduate School of Law, Hitotsubashi University, Tokyo, Japan.  
E-Mail: yumiko.nakanishi@r.hit-u.ac.jp

<sup>1</sup> COM (2017) 491, p.7.

<sup>2</sup> As for Japanese GI protection system, see [http://www.maff.go.jp/e/policies/intel/gi\\_act/index.html](http://www.maff.go.jp/e/policies/intel/gi_act/index.html) (last accessed on 24 December 2018).

<sup>3</sup> 20<sup>th</sup> EU-Japan Summit, Brussels, 28 May 2011, Joint Press Statement, see, <https://www.mofa.go.jp/region/europe/eu/joint1105.html> (last accessed on 17 December 2018).

whether an FTA between the EU and Japan would be meaningful. Then, the Commission decided to ask the Council for a negotiating directive (mandate) for the EU-Japan negotiations in July 2012 according to Article 218 (3) Treaty on the Functioning of the EU (TFEU). The first round of negotiations began on 19 April 2013. In total, there were 18 rounds of negotiations with the final round completed in April 2017 and then the EU and Japan concluded negotiations in principle in December 2017. It took about five years to complete the negotiations.

Attaching importance to the World Trade Organisation system, Japan had not concluded FTAs/EPAs with third countries until 2002.<sup>4</sup> Japan's first EPA was concluded with Singapore. Japan began to conclude other FTAs/EPAs after that and currently has in force or signed 18 FTAs/EPAs.<sup>5</sup> Further, Japan began to participate in negotiations regarding the Trans-pacific Partnership Agreement (TPP) on 23 July 2013 and the TPP concluded negotiations in principle on 5 October 2015. Although the USA decided not to join the TPP, 11 other states agreed to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, CPTPP). The CPTPP entered into force on 30 December 2018. The EPA and the TPP are called new generation FTAs because they cover not only custom tariff issues, but also intellectual property rights, labour protection, the environment, investment, government procurement, competition and others. The agreements have something in common.<sup>6</sup> The TPP accelerated the negotiations of the EPA to some extent. Brexit and the conservatism shown by the USA accelerated the ratification process of the EPA, too. Now, Japan can proceed with negotiations regarding the Regional Comprehensive Economic Partnership (RCEP) with ASEAN and China, South Korea, India, Australia and New Zealand with the background of the EPA and the TPP.

This paper analyses the EPA and the SPA between the EU and Japan from a legal perspective. In 2016, I published a paper regarding the EPA between the EU and Japan.<sup>7</sup> At that time, the text, even the draft text of the EPA was not public and the analysis was limited. However, now, we can analyse the text of the EPA and the SPA. First, this paper clarifies the EPA and the SPA from the aspect of competence. Second, the contents of the EPA and SPA are analysed in the context of the EU's values. Third, the implementation of the EPA and the SPA is discussed.

## II. Competence

The EPA and the SPA cannot be fully understood without consideration of competence issues. The Japanese government had difficulties in understanding the competence divisions between the EU and its Member States when they began to negotiate them. The EPA between

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<sup>4</sup> Akira Kodera, "Importance and Problems of Economic Partnership Agreements" (in Japanese), *Horitsujihou*, Vol.77, No.6, 2005, pp.27-28.

<sup>5</sup> Singapore, Mexico, Malaysia, Chile, Thailand, Indonesia, Brunei, ASEAN, Philippines, Switzerland, Vietnam, India, Peru, Australia, Mongolia, TPP12, TPP11, EU; see, <https://www.mofa.go.jp/policy/economy/fta/index.html> (last accessed on 17 December 2018).

<sup>6</sup> Yumiko Nakanishi, "Characteristics of EU Free Trade Agreements in a Legal Context: A Japanese Perspective", *European Yearbook of International Economic Law*, Springer, 2017, pp.457-474.

<sup>7</sup> Yumiko Nakanishi, "Economic Partnership Agreement Between Japan and the European Union and Legal Issues—A Focus on Investment—", *Hitotsubashi Journal of Law and Politics* 44 (2016), pp.19-30.

the EU and Japan is the first “new generation” EPA/FTA that the EU has concluded without the participation of its Member States. This fact enables us to analyse the text of the EPA under the precondition that the EU has exclusive competence for the subject matter.

The EU has exclusive, shared and complementary competence (Article 2 TFEU). In addition, the EU can have exclusive external competence under certain conditions in Article 3 (2) and 216 TFEU. If the EU has exclusive competence for the subject matter of an agreement, it can conclude it by itself. i.e. without the participation of the Member States. The agreement is called an ‘EU-only agreement’. The EPA differs from the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada on this point. The CETA contains subject matter that belongs to the Member States’ competence. Therefore, the CETA is a mixed agreement that the EU concludes with its Member States.

Even at the end of the negotiations between the EU and Japan, it was not clear that the EU had exclusive competence for the EPA. The Commission requested a court opinion in July 2015 because it wanted to know whether the EU had exclusive competence for the FTA between the EU and Singapore. The Court of Justice of the EU (CJEU) answered the question in Court Opinion 2/15 on 16 May 2017 that the FTA fell within the exclusive competence of the EU except for non-direct investment and investor-state dispute settlement (ISDS) issues.<sup>8</sup> The CJEU indicated that the EU had exclusive competence for foreign direct investment but not for non-direct investment. Consequently, it clarified that the EU had exclusive competence for the subject matter of the EPA and on the other hand, the EU had exclusive and partly shared competence for investment protection issues with its Member States. Facing Court Opinion 2/15, the EU and Japan renegotiated the EPA. As a result, investment protection issues were separated from the EPA. The EPA could be an EU-only agreement. The EU and Japan continue to negotiate to conclude an investment protection agreement.

The legal basis of the EPA is Article 91, 100 (2) TFEU and 207 TFEU. Article 91 and 100 (2) TFEU are the legal basis for transport. Article 207 TFEU is that for the Common Commercial Policy (CCP). The EU has shared competence in the field of common transport policy (Article 4 (2) (g) TFEU). However, the CJEU held that although international maritime transport services, rail transport services, road transport services and internal waterways transport services and services inherently linked to those transport services fell within the common transport policy, the EU had exclusive competence according to Article 3 (2) TFEU because an international agreement was likely to affect common rules or alter their scope.<sup>9</sup> The EPA has Chapter 16 Trade and Sustainable Development. The concept of sustainable development includes labour protection and environmental protection. The CJEU held that Chapter 16 belonged to the CCP, relying on objectives in the EU’s external action in Article 21 (2) TEU and horizontal clauses, i.e. Article 9 TFEU for social protection and Article 11 TFEU for the principle of environmental integration.<sup>10</sup> Therefore, the EU has exclusive competence for the EPA and the EPA is an EU-only agreement. It is the first EU-only free trade agreement among the new generation of FTAs after the Treaty of Lisbon.

The legal basis for the SPA is Article 37 TEU and Article 212 (1) TFEU. Article 37 TEU is a general legal basis for concluding agreements under a common foreign and security policy.

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<sup>8</sup> Case Opinion 2/15, Opinion of 16 May 2017, ECLI:EU:C:2017:376.

<sup>9</sup> Case Opinion 2/15, paras. 168-224.

<sup>10</sup> Case Opinion 2/15, paras. 146-147.

Article 212 TFEU is the legal basis for economic, financial and technical cooperation with third countries. The subject matter of the SPA is very comprehensive. It covers matters such as foreign and security issues as well as agriculture, the environment, energy and data protection. Some competences belong to the Member States. Therefore, the SPA is a mixed agreement. The EU and its Member States conclude the SPA with Japan.<sup>11</sup>

On 20 December 2018, the Council decided on the conclusion of the EPA after the EP gave consent to it, while Japan finished ratifying it on 8 December 2018. According to Article 23.3 of the EPA, it entered into force on 1 February 2019. However, as the SPA needs not only a Council decision on the conclusion of the SPA, but also ratification by all Member States of the EU, it applied provisionally from 1 February 2019 according to Article 47 of the SPA.

### III. *Content and the EU's Values*

#### 1. **General**

After the Treaty of Lisbon, the EU set out its values on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights in Article 2 TEU. Cremona considers those values as an integral part of the Union's identity and its constitutional order.<sup>12</sup> Similar wording is laid down as political principles in the Union's external action in Article 21 (1) TEU. Those principles used to be conditionalities when the EU gave support to developing countries. However, with the introduction of Article 21 (1) TEU sharing those principles with third countries is a predetermined strategic policy of the EU. Canada concluded a strategic partnership agreement with the EU as well as the CETA. It was the first case for developed countries. As mentioned above, the EU demanded that Japan negotiate not only an economic agreement, but also a strategic partnership agreement, although Japan wanted to conclude only the former.

The Commission published a Communication Document "Trade for All" in October 2015.<sup>13</sup> The documents says that the EU Treaties demand that the EU promotes its values, high social and environmental standards, and respect of human rights, around the world.<sup>14</sup> It indicates that the aim of the EU's FTAs is to maximise the potential of increased trade and investment for decent working conditions and environmental protection, and engage with partner countries in a cooperative process fostering transparency and civil society.<sup>15</sup> Further, it expresses that the conclusion of the EPA is a strategic priority because it should lead not only to increased bilateral trade, but also to greater economic integration and closer cooperation between the EU and Japan in international regulatory and standardisation bodies.<sup>16</sup> The Commission published a report on the Implementation for Trade Policy Strategy Trade for all in September 2017.<sup>17</sup> Japan is referred to in this report.

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<sup>11</sup> OJ of the EU 2018 L216/1.

<sup>12</sup> Marise Cremona, "Values in EU Foreign Policy", in M. Evans, P. Koutrakos (ed.), *Beyond the Established Legal Orders*, Hart Publishing, Oxford, p.275, p.313.

<sup>13</sup> COM (2015) 497 final, "Trade for All towards a More Responsible Trade and Investment Policy".

<sup>14</sup> *Ibid.*, p.15.

<sup>15</sup> *Ibid.*, p.17.

<sup>16</sup> *Ibid.*, p.23.

## 2. The EPA

The preamble of the EPA states that the EU and Japan are “conscious of their longstanding and strong partnership based on common principles and values”. It goes on to state that “the Union shall seek to develop relations and build partnerships with third countries...which share the principles...” in Article 21 (1) subpara. 2 TEU. The European Parliament (EP) gave consent to the conclusion of the EPA on 12 December 2018 with 474 votes to 152 with 40 abstentions.<sup>18</sup> In the recommendation for the conclusion of the EPA by the EP Rapporteur Pedro Silva Pereira there is an explanatory statement.<sup>19</sup> It explains that the EU and Japan share fundamental values such as human rights, democracy and the rule of law as well as a strong commitment to sustainable development, multilateralism and a rules-based world trade system. It enumerates and comments on 10 issues (trade in goods, non-tariff measures, agriculture and geographical indication, public procurement, trade in services, small and medium sized enterprises, sustainable development, data flows, regulatory cooperation, implementation and civil society). In particular sustainable development, regulatory cooperation, implementation and civil society issues will be discussed in the context of the EU’s values. Those matters are emphasized in the non-legislative resolution on the EPA on 12 December 2018, too.<sup>20</sup> Chapter 16 trade and sustainable development is composed of 19 articles (Article 16.1~16.19). Chapter 18 is related to regulatory cooperation.<sup>21</sup> A study by the European Parliament reports that the EPA is the first EU trade agreement to include a separate chapter on regulatory cooperation.<sup>22</sup> Some important examples in which the EU’s values are reflected are enumerated below.

### (1) Multilateral treaties (Article 16.4)

According to the explanatory statement<sup>23</sup>, the EU and Japan reaffirm their commitment to multilateral agreements in the areas of labour and the environment as well as to the United Nations Agenda 2030 for Sustainable Development through the EPA. Article 16.4 refers to the Paris Agreement and rules that the EU and Japan commit to working together to take action to address climate change towards achieving the ultimate objectives of the United Nations Framework Convention on Climate Change (UNFCCC) and the purpose of the Paris Agreement. Climate change is one of the priorities since the sixth environmental action of 2002 and the Lisbon Treaty added the phrase “in particular combating climate change” in Article 191 (1) fourth indent TFEU. The Commission document explains that the EPA is the first international trade agreement to explicitly support the implementation of the Paris agreement.<sup>24</sup> Additionally, it points out that Japan has not yet ratified two International Labour Organisation (ILO) core

<sup>17</sup> COM (2017) 491 final, “Report on the Implementation of the Trade Policy Strategy Trade for all”.

<sup>18</sup> PB\_TA(2018)0504.

<sup>19</sup> A8-0366/2018.

<sup>20</sup> PB\_TA(2018)0505.

<sup>21</sup> The EU and Japan concluded a mutual recognition agreement (MRA) in 2001. It became a pioneering model for bilateral agreements between Japan and third countries; Cf. Hiroki Harada, “Administrative Law at the Age of the TPP” (in Japanese), *Jurist*, Number 1443, July 2012, p.54, p.59.

<sup>22</sup> European Parliament, “Study: The EU-Japan Economic Partnership Agreement”, EP/EXPO/B/INTA/2018/03, p.20.

<sup>23</sup> A8-0366/2018, pp.7-8/15.

<sup>24</sup> COM (2017) 491, p.7.

conventions (on discrimination and on the abolition of forced labour). According to the non-legislative resolution for the EPA<sup>25</sup>, the EP welcomes the commitment to the effective implementation of the Paris Agreement and of other multilateral agreements. As for the ILO, the EP underlines that Japan has yet to ratify two ILO core conventions and expects concrete progress within a reasonable timeframe.

## (2) The right to regulate (Article 16.2)

The right to regulate is a new “rule” in trade. The EU’s FTAs lay down the right to regulate. The right to regulate means the right of a state to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify its relevant laws. This right is introduced in the EU’s FTAs because NGOs in Europe were concerned about lowering the high European standards by concluding FTAs with third countries and then demanded such a guarantee of the right. The Commission proposed such an introduction in the context of negotiations regarding the Transatlantic Trade and Investment Partnership (TTIP) with the USA.<sup>26</sup> The explanatory statement comments that the chapter recognises the right to regulate and includes a specific review clause that can and should be used to strengthen the enforceability and effectiveness of labour and environmental provisions.<sup>27</sup> The right to regulate was also used to persuade the citizens and the NGOs in Belgium when the EU and its Member States and Canada signed the CETA. A joint interpretative instrument<sup>28</sup> was adopted when CETA was signed. The instrument clarifies how the parties want to interpret the rules in accordance with the intent of the treaty drafters, and states that the preamble of the CETA provides that the EU, its Member States, and Canada recognise the right to regulate in the public interest and have reflected it in CETA.

The European Commission explains in the proposal of the conclusion of the Japan-EU EPA: ‘like all other free trade agreements the Commission has negotiated, the EU-Japan EPA fully safeguards public services and ensures that governments’ right to regulate in the public interest is fully preserved by the Agreement’.<sup>29</sup> The EPA lays down the right to regulate in Article 16.2. Article 16.2 (1) provides the definition of the right to regulate and Article 16.2 (2) warns against relaxing and lowering the level of protection. Article 16.2 (3) prohibits abuse of the right.

The CPTPP recognises the idea of the right to regulate environmental standards, although the phrase ‘the right to regulate’ is not directly used in its provisions. In the CPTPP’s preamble, the Parties recognise their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities and to protect the environment. Article 9.16 of the CPTPP provides that nothing in the chapter on investment shall be construed to prevent a Party from adopting, maintaining, or enforcing any measures, otherwise consistent with that chapter, that it considers appropriate to ensure that investment activity in its territory is

<sup>25</sup> A8-0367/2018, paras. 10 and 11.

<sup>26</sup> Marise Cremona, “Negotiating the Transatlantic Trade and Investment Partnership (TTIP)”, *Common Market Law Review*, 52, 2015, p.351, p.355

<sup>27</sup> A8-0366/2018, p.8.

<sup>28</sup> Council of the EU, 13541/16, 27 October 2016; <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> (last accessed on 21 December 2018).

<sup>29</sup> European Commission, Proposal for a Council Decision on the Conclusion of the Economic Partnership Agreement between the European Union and Japan, COM (2018) 192 final.



undertaken in a manner sensitive to environmental, health, or other regulatory objectives. Junji Nakagawa commented about the right to regulate that the TPP would limit the right to regulate except on the environment and labour because the Parties were obliged to adapt and harmonise national measures with international commitments under the TPP.<sup>30</sup> The balance between the right to regulate and commitments under international agreements is important in the future.

### (3) Precautionary principle (Article 16.9)

The precautionary principle is one of the most important principles in the field of the Union's environmental policy<sup>31</sup> and regulated explicitly in Article 191 (2) TFEU. The principle has been applied in EU measures such as the REACH regulation. Recently, the CJEU held that genome editing (organisms obtained by means of techniques/methods of mutagenesis) constituted genetically modified organism (GMO), referring to the precautionary principle.<sup>32</sup> On the other hand, Japanese Basic Environmental Law refers explicitly to the principle of prevention, but not the precautionary principle (Article 4 and 21). It is still uncertain whether the Japanese Basic Environmental Law contains the precautionary principle.<sup>33</sup> On 17 December 2018, the Ministry of Health, Labour and Welfare published a report on genome editing.<sup>34</sup> According to the report, foods produced from genome editing are not considered as GMO.

Article 16.9 lays down that the Parties shall take account of available scientific and technical information, and where appropriate, relevant international standards, guidelines or recommendations, and the precautionary approach. The insertion of the words “precautionary approach” reflects the EU's values, although the word “approach” is not a strict legal term in comparison with the word “principle” as a legal term and it is often used in international instruments such as principle 15 in the Rio declaration. Article 16.9 does not oblige Japan to do something. However, the explicit reference to the precautionary principle should be noted.

### (4) Dialogue with Civil society (Article 16.16)

The Council adopts a negotiating directive (mandate) and then the Commission begins to negotiate with third countries (Article 218 (2) and (3) TFEU). In the past, the mandate document was not in the public domain. The Communication Document “Trade for All” was published in 2015, as mentioned above. After the document, the mandate became public to ensure transparency. The negotiations between the EU and Japan began in July 2013 before the document. Therefore, the mandate document had not been in the public domain. Commissioner Malmström decided to publish it in May 2017 and the Council agreed with this opinion. The mandate document<sup>35</sup> states that “the agreement will foresee the monitoring of the implementation of these commitments and of the social and environmental impacts of the agreement through a mechanism involving civil society”. This indicates that the EU thought about the

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<sup>30</sup> Junji Nakagawa, “The Background and the Significance of the TPP” (in Japanese), *International Economic Law*, No.23, 2014, p.4, pp.12-13 and pp.18-19.

<sup>31</sup> For example, Alexander Proelss, “Principles of EU Environmental Law: An Appraisal”, in Yumiko Nakanishi (ed.), *Contemporary Issues in Environmental Law, the EU and Japan*, Springer, 2016, p.29, pp.35-44.

<sup>32</sup> Case C-528/16 Confédération paysanne and Others, Judgement of 25 July 2018, ECLI:EU:C:2018:583.

<sup>33</sup> Tadashi Otsuka, *Environmental Law* (in Japanese), 3<sup>rd</sup> edition, 2010, p.55.

<sup>34</sup> Report on Research Commission regarding GMO Foods, <https://www.mhlw.go.jp/content/11121000/000459131.pdf> (last accessed on 21 December 2018).

<sup>35</sup> Council Document 15864/12.

involvement of civil society from the beginning.

According to the document “Trade for All”, the Commission will promote a deeper dialogue with civil society so that this could be an opportunity to raise people’s awareness about ongoing and planned trade negotiations and to get feedback on issues from the stakeholders concerned.<sup>36</sup> The EP recommendation paper explains about civil society in the following way<sup>37</sup>: The agreement foresees a joint dialogue with civil society and the sectoral committee where the participation of civil society is also possible. Further, it comments that the EPA will create a domestic advisory group, ensuring the involvement of civil society in the implementation and monitoring of a sustainable development chapter.

Article 16.15 lays down the requirement for the establishment of a domestic advisory group (DAG). The EU and Japan have to ensure a balanced representation of independent economic, social and environmental stakeholders, including employers’ and workers’ organisations and environmental groups, in the advisory group or groups. They are obliged to convene meetings of their own new or existing domestic advisory group or groups on economic, social and environmental issues and to consult with them. Further, Article 16.16 regulates joint dialogue with civil society. The EU and Japan have obligations to convene Joint Dialogue with civil society. It reflects Articles 10 and 11 TEU, which regulate democratic life. Article 16.16 (3) of the EPA determines the date of the Joint Dialogue, laying down “no later than one year after the date of entry into force of” the EPA. This means they will convene the Joint Dialogue by 1 February 2020. In addition, the Joint Dialogue must be convened regularly, and the EU and Japan are obliged to agree on the operation of the Dialogue. Further, DAG and civil society are involved in the implementation of the chapter on trade and sustainable development (Article 16.18 (6)). The EP non-legislative resolution says that the EP “urges both partners to ensure the active involvement of social partners and civil society” and “commits to monitoring the implementation of the agreement closely, in close cooperation with the Commission, the stakeholders and Japanese partners”.<sup>38</sup> NGOs and civil society in Japan are not so strong in comparison with those in Europe. The relevant provisions have the possibility of promoting the participation of these institutions in democratic life.

#### (5) Animal welfare (Article 18.17)

According to Article 13 TFEU, animals are considered as sentient beings and the EU and its Member States shall pay full regard to animal welfare. The regulations on the trade in seal products is one example of EU measures that pay attention to animal welfare.<sup>39</sup> The regulations on banning testing of cosmetic products<sup>40</sup> on animals influenced Japanese companies’ attitudes and led them to stop such forms of animal testing.<sup>41</sup> In Japan, the concept of animal welfare is still insufficiently developed.

The mandate document for negotiations refers to animal welfare, saying that the Agreement should also explore the possibilities of establishing appropriate conditions for co-

<sup>36</sup> COM (2015)497, p.12.

<sup>37</sup> A8-0366/2018, p.8.

<sup>38</sup> A8-0367/2018, paras. 26 and 29.

<sup>39</sup> Regulation 1007/2009 on trade in seal products, OJ of the EU 2009 L286/36.

<sup>40</sup> Regulation 1223/2009 on cosmetic products, OJ of the EU 2009 L342/59.

<sup>41</sup> Yumiko Nakanishi, “The Principle of Animal Welfare in the EU and Its Influence in Japan and the World”, in Y. Nakanishi (ed.), *Contemporary Issues in Environmental Law, the EU and Japan*, Springer, 2016, p.87, pp.101-109.



operation on animal welfare between the two sides.<sup>42</sup> Animal welfare is set out in concrete terms in Article 18.17:

“1. The Parties will cooperate for their mutual benefit on matters of animal welfare with a focus on farmed animals with a view to improving the mutual understanding of their respective laws and regulations.

2. For that purpose, the Parties may adopt by mutual consent a working plan defining the priorities and categories of animals to be dealt with under this Article, and establish an Animal Welfare Technical Working Group to exchange information, expertise and experiences in the field of animal welfare and to explore the possibility of promoting further cooperation.”

It does not lay down strict obligations, but does make reference to the importance of animal welfare. Other provisions aim to prevent lower standards of animal welfare in the EU. For example, Article 4.2 (4) rules that Chapter 4 applies without prejudice to the fulfilment of each Party’s legitimate policy objectives and its obligations under international agreements to which it is a party, regarding the protection of: (a) public morals; (b) human, animal or plant life or health. Animal welfare as an aspect of public morality is accepted to legitimize EU regulations on banning the trade in seal products at the Appellate Body of the WTO.<sup>43</sup> Further, Articles 6.1, 6.12, 8.3 and 18.1 (2) refer to animal welfare.

Although neither the EPA nor the SPA explicitly refer to whales, which are intelligent creatures, the introduction to the EPA by the Commission explains, “The EU is committed to conserving whales, dolphins and other cetaceans. Whaling and trade in whale meat are banned in the EU so the issue does not fall under EU trade policy. EU trade agreements cannot refer to activities that are prohibited in the EU and the EU does not negotiate trade concessions for these products. The EU addresses whaling by third countries – including Japan – both internationally and bilaterally. The EU works closely with likeminded partners in the International Whaling Commission, the most effective body for addressing whaling, which has imposed a moratorium on whaling.” A study by the EP comments that whaling remains an outstanding issue with Japan as the EU has banned trade in whale products and the EU intends to use the agreement as an additional platform to foster dialogue with Japan on this subject.<sup>44</sup> Further, non-legislative resolution of the SPA says that the EP “regrets Japan’s attempt to secure an end to the moratorium on commercial whaling at the September 2018 meetings of the International Whaling Commission (IWC), and calls for the suspension of whaling for scientific purposes”.<sup>45</sup> Now, it has been reported that the Japanese government decided to withdraw from the International Whaling Commission. It is uncertain whether the EPA could hinder Japan from returning to commercial whaling.

### 3. The SPA

The SPA is a binding agreement that covers political, global and other sectoral cooperation

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<sup>42</sup> Council Document 15864/12, para. 15.

<sup>43</sup> WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014).

<sup>44</sup> The EP, “Study”, note (22), p.26.

<sup>45</sup> A8-0385/2018, para. 22.

in a comprehensive manner. According to a briefing by the EP the negotiation of the SPA was aimed at upgrading political relations between the EU and Japan, and giving a boost to their strategic partnership and the goal was to adopt an ‘umbrella agreement’ encompassing existing cooperation and developing it, as well as coordinating and enhancing the consistency of its sectoral aspects.<sup>46</sup> The EP non-legislative resolution on the SPA says that the EP welcomes the conclusion of the SPA, “which provides a legally binding framework, strengthens EU-Japan bilateral relations and increases in more than 40 areas”.<sup>47</sup> The SPA is composed of 50 articles. Security issues are for example related to the promotion of peace and security (Article 3), crisis management (Article 4), weapons of mass destruction (Article 5), conventional arms (Article 6), serious crimes of international concern and the international criminal court (Article 7), counter-terrorism (Article 8) and chemical, biological and nuclear risk mitigation (Article 9). The SPA covers environmental and nature issues on the environment (Article 23), climate change (Article 24), urban policy (Article 25), energy (Article 26), agriculture (Article 27), fisheries (Article 28) and maritime affairs (Article 29). Other issues are covered by development policy (Article 11), disaster management and humanitarian action (Article 12), economic and financial policy (Article 13), science, technology and innovation (Article 14), transport (Article 15), employment and social affairs (Article 30), judicial cooperation (Article 32) and so forth. In fact, almost all the activities of the EU are covered by the SPA. Recent issues such as cooperation on cyber issues (Article 36), passenger name records (Article 37) and personal data protection (Article 39)<sup>48</sup> are also included in the SPA.

The beginning of the preamble of the SPA lays down that the Parties reaffirm “their commitment to common values and principles, in particular democracy, the rule of law, human rights and fundamental freedoms, which constitute a basis for their deep and long-lasting cooperation as strategic partners”. Article 1, which is titled Purpose and General Principles, states that the purpose of the SPA is “to contribute jointly to the promotion of shared values and principles, in particular democracy, the rule of law, human rights and fundamental freedoms” (Article 1 (d)). As mentioned above, the EU wanted to conclude the SPA, while Japan requested only the EPA. At that time, it was discussed in Japan whether the conclusion of the SPA demanded the abolition of the death penalty. In fact, Japan still implements the death penalty and just before the signature of the EPA and the SPA death penalties were carried out for several prisoners who were Aum Shinrikyo members. “Human dignity” is one of the EU’s values and political principles in Article 2 and 21 (1) TEU. The Charter of the EU fundamental rights lays down “human dignity” in Article 1 and the abolition of the death penalty in Article 2 (2). However, the word “human dignity” does not appear in the SPA. Democracy, the rule of law, human rights and fundamental rights are universally accepted. Currently, “Human dignity” is specific to the EU and its Member States (in particular

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<sup>46</sup> Enrico D’Ambrogio, the EP, “Briefing: The EU-Japan Strategic Partnership Agreement (SPA)”, December 2018, p.4.

<sup>47</sup> A8-0385/2018, para. 1.

<sup>48</sup> The EU’s General Data Protection Regulation (GDPR) has influenced Japan, too. Japanese companies and others are obliged to respond to it. Japan amended legislation regarding personal information. The amended Act on the Protection of Personal Information was put into full effect on 30 May 2017, see [https://www.ppc.go.jp/files/pdf/Act\\_on\\_the\\_Protection\\_of\\_Personal\\_Information.pdf](https://www.ppc.go.jp/files/pdf/Act_on_the_Protection_of_Personal_Information.pdf) (last accessed on 24 December 2018); As for final agreement on building the framework for mutual and smooth transfer of personal data between the EU and Japan, see <https://www.ppc.go.jp/en/aboutus/roles/international/cooperation/20180717/> (last accessed on 24 December 2018).

Germany<sup>49</sup>). The EP non-legislative resolution on the SPA refers to the death penalty, saying that the EP “condemns the fact that capital punishment is still a legal penalty in Japan, and that executions are carried out without inmates being given any advance warning” and “calls for the EU to enter into dialogue with the Japanese Government on a moratorium on capital punishment with a view to its eventual abolition”.<sup>50</sup>

#### 4. Investment Protection Agreement

Investment liberalisation is regulated in Chapter 8 of the EPA, but it does not include investment protection. As investment protection is one of the most important issues, and is not a subject of the WTO, a bilateral agreement regarding investment is meaningful. In addition, the EU accounts for the second largest share of outward foreign direct investment (FDI) stocks in Japan and the EU has the largest share of FDI stocks in Japan. Chapter 9 of the CPTPP covers investment protection including Investor-State Dispute Settlement (ISDS). In Japan, there was discussion regarding the introduction of ISDS<sup>51</sup>, but now Japan can accept ISDS, while Japan is hesitating to agree on the establishment of an investment court, which the EU has requested. The CETA contains provisions regarding an investment court in Article 8.27. Singapore and Vietnam are ready to conclude an investment protection agreement including an investment court. The EU and Japan decided to continue negotiations to conclude an investment protection agreement, and held a meeting for negotiations in July 2018 in Brussels.<sup>52</sup> Japan is considering the results of Case C-284/16 Achmea<sup>53</sup> and is waiting for the Court Opinion 1/17 regarding the CETA and will have to tackle this issue sooner or later. Further, the EU is considering the establishment of a multilateral investment court, by reforming the ISDS system.<sup>54</sup>

### IV. Implementation of the EPA and the SPA

The EPA entered into force on 1 February 2018. Some provisions of the SPA began to apply provisionally even before it enters into force according to Article 47. The entry into force or provisional application is a start, not an aim. Implementation of the EPA and SPA is important.

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<sup>49</sup> Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Judgment of 14 October 2004, ECLI:EU:C:2004:614.

<sup>50</sup> A8-0385/2018, para. 9.

<sup>51</sup> Akira Kodera (ed.), “Round-table Talk: TPP from a Legal Viewpoint” (in Japanese), *Jurist*, Number 1443, July 2012, p.12, pp.16-19; Dai Tamada, “Investment Protection and Investment Liberalization under the TPP” (in Japanese), *Jurist*, Number 1443, July 2012, p.48, p.50.

<sup>52</sup> [https://www.mofa.go.jp/mofaj/ecm/ie/page4\\_003962.html](https://www.mofa.go.jp/mofaj/ecm/ie/page4_003962.html) (last accessed on 21 December 2018).

<sup>53</sup> Case C-284/16 Achmea, Judgment of 6 March 2018, ECLI:EU:C:2018:158.

<sup>54</sup> Speech by Commissioner Malmström on 22 November 2018.

## 1. The EPA

### (1) WTO Agreement

The WTO does not function well except for its dispute settlement mechanism. Therefore, the number of bilateral or multilateral trade agreements has increased. As the EU and Japan are members of the WTO, the EPA has to guarantee coherence with the WTO. The preamble of the EPA indicates that both parties will build “on their respective rights and obligations under the WTO. Article 1.9 (2) and (3) provides that nothing in the EPA shall require either Party to act in a manner inconsistent with its obligations under the WTO Agreement and in the case of any inconsistency, the Parties shall consult with each other. Article 6.4 (sanitary and phytosanitary measures) of the EPA regulates the relationship with the WTO, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). According to Article 7.3 (technical barriers to trade) of the EPA, the EU and Japan affirm their rights and obligations under the Agreement on Technical Barriers to Trade (TBT Agreement) and the Parties shall select the dispute settlement mechanism under the WTO Agreement in the case of a breach of the provisions of the TBT Agreement. The EU and Japan affirm their respective commitments under the WTO in Article 8.1 (trade in services, investment liberalisation and electronic commerce) of the EPA. Article 12.4 also provides that Chapter 12 Subsidies shall not affect the rights and obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Similar matters are regulated in Article 13.3 (state-owned enterprises). Where a dispute arises with regard to the inconsistency of a particular measure with an obligation under the EPA and an equivalent obligation under the WTO, the complaining party may select the forum of the WTO (Article 21.27 of the EPA). Yoichi Suzuki explained that both the dispute settlement mechanism under FTAs and that under the WTO were important and FTAs are appropriate for investment rules, but subsidies and anti-dumping rules could be treated only under the WTO.<sup>55</sup> The EPA took into consideration the appropriateness of both.

### (2) Implementation of the EPA

Chapter 22 Institutional Provisions lays down the necessary institutional provisions to implement and monitor the progress of implementation of the wide range of commitments under the EPA.<sup>56</sup> In particular, the Joint Committee and specialized committee are relevant for the implementation of the EPA. The Panel should be referred to in the context of dispute settlement regarding the interpretation and application of the EPA.

A Joint Committee that comprises representatives of the EU and Japan will be established (Article 22.1). The EPA is an EU-only agreement because the EU has exclusive competence for concluding it. As a result, the representatives are not those of the Member States, but those of the EU. The Joint Committee shall review and monitor the implementation and operation of the EPA and, if necessary, make appropriate recommendations to the Parties (Article 22.1 (4) (a)). The Joint Committee may take decisions where provided for the EPA (Article 22.2 (1)). Those decisions shall be binding on the Parties and each Party shall take measures necessary to

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<sup>55</sup> Yoichi Suzuki and others, “Round-table Talk: International Trade Law at Reform Term and Japan” (in Japanese), *Horitsujiho*, Vol.77, No.6, 2005, p.4, pp.18-19.

<sup>56</sup> The EP, “Study”, note (22), p.42.

implement the decisions. The Joint Committee may make recommendations relevant for the implementation and operation of the EPA (Article 22.2 (2)). Decisions and recommendations of the Joint Committee shall be made by consensus (Article 22.2 (3)).

The Joint Committee may establish specialized committees (Article 22.1 (5) (a)). There are 10 specialized committees including the Committee on Trade in Goods and the Committee on Trade and Sustainable Development (Article 22.3 (1)). They are responsible for the implementation and operations within the scope of the chapters (Article 22.3 (2)). They are composed of representatives of the Parties (Article 22.3 (2) (b)), and take all decisions and make recommendations by consensus (Article 22.3 (2) (f)).

If disputes occur between the Parties concerning the interpretation and application of the provisions of the EPA, Chapter 21 Dispute Settlement is applied in principle. A panel will be established upon the request of a Party (Article 21.7). The Panel is composed of three arbitrators (Article 21.8 (1)). The Panel shall make an objective assessment of the matter and set out, in its decisions, the findings of fact and law and the rationale behind any findings and conclusions (Article 21.12). The decisions of the panel shall be final and binding on the Parties (Article 21.15 (8)). The Parties shall take any measures necessary to comply promptly and in good faith with the final report of the Panel (Article 21.20).

The Parties shall undertake a general review of the implementation and operations of the EAP in the 10<sup>th</sup> year following the date of entry into force of the EPA (Article 23.1).

### (3) Implementation of Chapter 16

Chapter 21 lays down dispute settlement. It is applied in principle. However, global safeguard measures (Article 5.9 (2)) and anti-dumping and countervailing measures (Article 5.11 (2)) under Chapter 5 Trade Remedies, some provisions under Chapter 6 Sanitary and Phytosanitary Measures (Article 6.16), Chapter 11 Competition Policy (Article 11.9), Chapter 12 Subsidies (Article 12.10), Chapter 15 Corporate Governance (Article 15.7), Chapter 16 Trade and Sustainable Development (Article 16.17), Chapter 18 Good Regulatory Practices and Regulatory Cooperation (Article 18.19), Chapter 19 Cooperation in the Field of Agriculture (Article 19.8) and SMEs (Article 20.4) shall not be subject to dispute settlement under Chapter 21.

Chapter 21 will not be applied for Chapter 16 Trade and Sustainable Development (Article 16.17(1)). Further, Chapter 16 provides a specific dispute settlement mechanism (government consultations and Panel of experts) (Article 16.17 and 16.18). The Panel of experts shall issue an interim and a final report to the Parties. The report is not legally binding, which differs from the report by the Panel under Chapter 21. The Committee on Trade and Sustainable Development shall be responsible for the effective implementation and operation of Chapter 16 (Article 16.13). Civil society is involved in this implementation mechanism under Chapter 16 (Article 16.18 (6)).

## 2. The SPA

The Joint Committee will be made of representatives of the Parties (Article 42 of the SPA). It ensures the proper functioning and the effective implementation of the SPA (Article 42 (2) (d)). It makes recommendations and adopts decisions, where appropriate (Article 42 (2) (g)). The Joint Committee shall take decisions by consensus (Article 42 (3)). If a dispute arises

concerning the interpretation, application or implementation of the SPA, either Party may request that the dispute be referred to the Joint Committee for discussion and study. However, there is no establishment of the Panel (Article 42 (3)).

### 3. Linkage between the EPA and the SPA?

The EU has a strategic policy to conclude not only EPA/FTAs, but also legally binding political agreements such as the SPA and Partnership Cooperation Agreement (PCA).<sup>57</sup> There are usually linkages between economic agreements and political values. It means that if a serious violation of human rights or other essential elements in political agreements or conditionalities of the economic agreements occurs, economic agreements will be suspended or terminated. For example, in Article 28 (7) of the SPA between the EU and Canada, the Parties recognise that a particularly serious and substantial violation of human rights or non-proliferation, as defined in paragraph 3, could also serve as grounds for the termination of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in accordance with Article 30.9 of that Agreement. However, there is no linkage between the EPA and the SPA between the EU and Japan. Article 43 (4) provides that the Parties consider that a particularly serious and substantial violation of the obligations described in paragraph 1 of Article 2 and paragraph 1 of Article 5, which respectively constitutes an essential element of the basis of the cooperation under this Agreement, with its gravity and nature being of an exceptional sort that threatens peace and security and has international repercussions, may be addressed as a case of special urgency. However, Article 43 (6) lays down, “in a case of special urgency where no mutually acceptable solution has been found at ministerial level, the Party which made the request referred to in paragraph 5 may decide to suspend the provisions of this Agreement in accordance with international law.” It means that the SPA might be suspended, but not the EPA.

## V. Concluding Remarks

The EPA between the EU and Japan is the first of a new generation of FTAs, which is an EU-only agreement. The EPA is comprehensive and contains not only custom issues, but also sustainable development (labour protection and environmental protection), investment liberalization, intellectual property rights including the GI, government procurement, and SMEs. The EU has exclusive competence for the subject matter of the EPA.

The EU's values are reflected in the EPA, in particular in Chapter 16 on trade and sustainable development. The right to regulate, the precautionary principle, animal welfare and more are examples. The conclusion of not only the EPA, but also the SPA reflects the EU's political strategy. Notably, the EPA obliges the EU and Japan to be involved in civil society even in the implementation of Chapter 16.

The Joint Committee and specialized committees have been established to implement the EPA. As for dispute settlement the Panel under Chapter 21 and a Panel of Experts under

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<sup>57</sup> Yumiko Nakanishi, “Political Principles in Article 21 TEU and Constitutionalism”, *Hitotsubashi Journal of Law and Politics*, Vol.42, 2014, pp.11-23.



Chapter 16 will be set up. The EPA enables the relationship between the EU and Japan to be institutionalized.

With the implementation of the EPA and the SPA, it will be interesting to see how the EU's exclusive competence will be reflected under the institutionalized system.