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EU-JAPAN AGREEMENT

Preliminary Review on behalf of the Green/EFA Trade Working Group

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1. INTRODUCTION

The negotiations for the **EU-Japan Economic Partnership Agreement**, which were launched in 2013, have reached the final consent procedure phase, accumulating in a vote in the European Parliament scheduled for 11-13 December 2018.

In this context, the Trade Working Group for the Green/EFA Group requested the following internal analysis to detail issues of concern based on information available at the time of writing. The information is to assist MEP's decision-making before the vote.

The analysis is not intended to be a fully comprehensive look at all aspects of the EU-Japan agreement, but rather an insight into the problematic areas that the Greens/EFA Group has consistently raised in previous trade agreements as well as EU trade policy as a whole. Some novelty elements contained for the first time in this agreement are also discussed.

It is clear that from the issues raised the Japan-EU agreement has departed in some ways from previous free trade agreements negotiated by the EU Commission. The inability thus far to agree with Japan on the inclusion of an investor protection mechanism, as one example, is to be welcomed, though negotiations to include ICS are ongoing at the time of writing. However, many of the same concerns that the Group has raised in previous agreements remain, such as the non-enforceable nature of the Trade and Sustainable Development chapter and the restrictions put on governments' regulatory space, be it in services, regulatory cooperation or the exercise of measuring non-tariff barriers.

The EU-Japan deal will be publicly presented as a symbol of an open, liberal trade regime, in contrast with the protectionist measures taking place in the US and elsewhere. The attack on the rules-based international trading system makes it all the more important for the EU to embed its' values and live up to its commitments for sustainability and ecological responsibility in the agreements it signs. Based on the following analysis, we conclude that the EU-Japan agreement is another missed opportunity to fulfil this often-cited mantra.

2. SERVICES

Our analysis has identified several areas of concern here:

i. **Negative list:** like in CETA, services liberalisation in JEFTA is based on a negative list, meaning that trade in services is liberalised by default and that only the limitations that are explicitly listed in the schedules of commitments of the Parties are the only ones applicable. Traditionally, services liberalisation was negotiated on the basis of a positive list (i.e. only the sectors and subsectors that are listed in the schedules are liberalised and all the rest that is not mentioned is excluded from liberalisation). WTO GATS is, for instance, built on a positive list. This practice has changed starting with CETA, the first EU agreement to be negotiated on the basis of a fully negative list¹.

The main issue with negative lists is that they do not allow for the adoption of new regulatory measures that may result in de facto restriction of trade. Moreover, if a service was previously privatised and market access liberalised, it would not be possible to put that services back under public ownership. In fact, by virtue of the **ratchet and standstill clauses** that specifically apply to negative lists, regulatory measures can be changed only in a manner that makes market access more favourable and that reduces discrimination. The issue here is that, as services by nature are heavily

¹ TiSA and TTIP for instance were being negotiated on the basis of a hybrid list (positive list for market access, negative list for national treatment).

regulated and, in many cases, formerly publicly owned - notably in the case of public services - it may be necessary in the future to introduce more restrictive regulation for the sake of public policy objectives. A negative list is therefore something that risks constraining public policy space under the imperative of trade liberalisation.

In order to preserve future policy space in the case of negative lists, and therefore the possibility to adopt regulatory measures which could result in a reduction of the current levels of liberalisation, the Parties usually negotiate the so-called Annex II reservations. These are annexes of measures and sectors where ratchet and standstill clauses do not apply. However, it may be difficult to predict future regulatory needs at the time of negotiating a trade agreement. This is a real issue, as these annexes cannot in principle be modified in order to adapt them to regulatory needs that only have emerged years after the conclusion of an FTA².

It is also worth noting that the negative list would equally apply to **financial services**. However, the **PANA report** adopted by the EP on 13 December 2017³ **recommended that “the investment and financial services chapters of [...] trade or partnership agreements be negotiated on the basis of the positive list principle**, so that only the financial sectors necessary for commercial development, the real economy and households benefit from the facilitation and liberalisation brought about by the agreement between the Union and the third party concerned”⁴.

ii. **Public services**: regarding the issue of fully excluding public services from the scope of the agreement, the EU has opted for the so-called ‘public utility clause’ also in this FTA, which however does not provide for such full exclusion. Experts consider that such clause does not provide sufficient protection to public services and have therefore suggested alternative clauses⁵. This clause also falls short of the recommendations of the EP in the TiSA Resolution of February 2015, which requests that

² A concrete example may be found in the financial services sector. Bank structure is a central issue for financial stability and the 2008 financial crisis was also caused by the extremely complex nature of financial structures. Therefore, the transformation of the banking structure has been one of the pillars of the post-crisis reforms. In JEFTA, there is an in-principle prohibition to require specific legal entities when establishing in the EU. The EU has taken an Annex II reservation on this rule: the EU has the right to adopt any measure to require a financial institution, other than a branch, to adopt a specific legal form when establishing in the EU, on a non-discriminatory basis. Some of the measures adopted in the aftermath of the crisis however could be based on a different treatment of foreign and local investors, which could therefore be considered contrary to the commitments of the EU under JEFTA. (For more detailed analyses, see E. Lébeau, *L’impact du JEFTA sur la stabilité financière*, CNE, October 2017)

³ [http://www.europarl.europa.eu/cmsdata/135340/P8_TA-PROV\(2017\)0491_EN.pdf](http://www.europarl.europa.eu/cmsdata/135340/P8_TA-PROV(2017)0491_EN.pdf) §154

⁴ One critique to this argument is that the PANA report mainly applies to third countries that are considered to be fiscal heavens, which is not the case for Japan. However, the recommendation of the report appears to be a general policy recommendation. Moreover, since JEFTA has the aspiration of setting up new and advanced rules for the global trade, it certainly provided the opportunity to re-write better trade rules. Such opportunity has clearly been missed here.

⁵ Experts convene that the public utility clause of the EU should be modified because, as it is now, it is open to interpretation and create uncertainty in the framework of negotiations. It is suggested that the EU rather uses a “public services” clause explicitly based on the principles of the EU Treaty, where public services are defined as “services subject to specific regulatory regimes or characterised by specific obligations that are imposed on service providers at national, regional or local level in terms of public interest”. This definition defers the determination of a public service to the competent authorities of the MS at all government levels. Moreover, it would indicate that the determination of an activity as a public service requires specific regulations, a specific legal framework or special regime which includes the delivery of the service by a competent authority. This would also entail that public service providers would need to fulfil certain requirements imposed on them in order to meet certain public interest that are pre-determined in the respective MS. (M. Krajewski, *Model clauses for the exclusion of public services from trade and investment agreements*, Study commissioned by the Chamber of Labour Vienna and the European Federation of Public Services Union, February 2016.)

a new 'gold standard' clause be introduced in all FTAs⁶. The public utility clause has several shortcomings. For instance, it only mentions public monopolies and exclusive rights as possible restrictions. However, public services may need to be regulated through additional measures such as quotas or economic needs tests. Given the rules on negative lists, those kinds of regulatory measures would no longer be possible since they have not been explicitly mentioned as reservations under the Annex II of this FTA. CETA however, in its Joint Interpretative Instrument, did include a specific provision on public services, providing a sort of compensation for the weaknesses of the public utility clause⁷. JEFTA is deprived of such an additional guarantee. In conclusion JEFTA falls short of providing adequate protection for the right to regulate in the area of public services.

Regarding the major issue of **water**, in JEFTA, there is the usual horizontal reservation in Annex II, which allows the EU to introduce any measure in the future, pertaining to collection, purification and distribution of water⁸. This is exactly the same reservation the EU has negotiated in CETA, in which one important shortcoming is that waste water management is not included. However, CETA, contrary to JEFTA, went a bit further in providing additional safeguards to public water by including a specific provision in the Joint Interpretative Instrument⁹, as well as a quite strong provision in the first part of the agreement providing for guarantees against the commercial use of water¹⁰. It has also been recently brought to public attention by some German associations representing public utilities that, in JEFTA, Germany has given up its CETA reservation regarding sanitation services (which does cover waste water management), including the reservation to adopt or maintain any measure relating to the operation of monopolies or exclusive services suppliers. According to those associations, this

⁶ "xi. to seek to introduce, without prejudice to the GATS, an unequivocal 'gold standard' clause, which could be included in all trade agreements and would ensure that the public utilities clause applies to all modes of supply and to any services considered to be public services by European, national or regional authorities, in any sector and irrespective of the service's monopoly status;"

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0041+0+DOC+XML+V0//EN>

⁷ 4. Public Services

a) The European Union and its Member States and Canada affirm and recognise the right of governments, at all levels, to provide and support the provision of services that they consider public services including in areas such as public health and education, social services and housing and the collection, purification and distribution of water.

b) CETA does not prevent governments from defining and regulating the provision of these services in the public interest. CETA will not require governments to privatise any service nor prevent governments from expanding the range of services they supply to the public.

c) CETA will not prevent governments from providing public services previously supplied by private service suppliers or from bringing back under public control services that governments had chosen to privatise. CETA does not mean that contracting a public service to private providers makes it irreversibly part of the commercial sector.

<http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf>

⁸ "For activities, including services relating to the collection, purification and distribution of water to household, industrial, commercial or other users, including the supply of drinking water, and water management."

⁹ "CETA does not oblige Canada or the EU and its MS to permit the commercial use of water if they do not wish to do so. CETA fully preserves their ability to decide how to use and protect water sources. Furthermore, CETA will not prevent the reversal of a decision to allow the commercial use of water".

¹⁰ Rights and obligations relating to water 1. The Parties recognise that water in its natural state, including water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product. Therefore, only Chapters Twenty-Two (Trade and Sustainable Development) and Twenty-Four (Trade and Environment) apply to such water. 2. Each Party has the right to protect and preserve its natural water resources. **Nothing in this Agreement obliges a Party to permit the commercial use of water for any purpose**, including its withdrawal, extraction or diversion for export in bulk. 3. If a Party permits the commercial use of a specific water source, it shall do so in a manner consistent with this Agreement.

means that in Germany this sector is now to be considered liberalised under the JEFTA negative list¹¹. It is also worth noting that in Japan, there is increasing pressure to liberalise the water sector, for instance by means of concessions and PPPs¹².

iii. Provisions on Domestic Regulation - this issue is considered to be very problematic in respect to the right to regulate services and public services. Domestic regulation is national legislation - namely licencing and qualification requirements and procedures - that applies in the same manner to both domestic and foreign economic operators without being discriminatory in nature. Therefore this is an area that in principle does not pertain to trade. However, already GATS started to deal with this matter, where the purpose was to make domestic regulation as trade friendly as possible. The problem with these provisions is that domestic regulation should meet certain requirements that are not precisely defined and that are subject to the interpretation of dispute settlement bodies, thereby adding some degree of uncertainty in respect of the scope of the right to regulate by public authorities. Requirements that regulatory measures need to be *objective and as simple as possible* or that licences or authorisations have to enter into effect without *undue* delay once granted, are included. By getting access to the negotiating history of JEFTA, it could be possible to better understand what these terms mean exactly. This could be clarified by the Commission before the EP gives its consent.

It is worth noting that in some instances, CETA provides better protection for the right to regulate and for public services also in respect to domestic regulation disciplines. Contrary to JEFTA in fact, CETA explicitly excludes health, education, social services, gambling and betting services, the collection, purification and distribution of water from domestic regulation disciplines.

iv. Financial services - following the 2007-2008 financial crisis, the size and expansion of the financial sector has tended to be seen as one of the causes of the crisis, with the liberalisation of financial services , posing risks to financial stability. . Since then however, the policy of the EU to further liberalise financial services through FTAs has not been reversed and no changes have been made in order to eliminate those elements that have appeared to be in contradiction with the post-crisis regulatory tendencies. The EU for instance, continues to include those financial products that were at the origin of the financial crisis into the list of services to be liberalised (i.e. credit-default swaps, asset-backed securities, derivative products such as futures and options). Moreover, the removal of foreign equity caps on the ownership of financial institutions continues to be one of the key offensive interests of the EU, while experts consider that the size of financial institutions should be limited in order to reduce systemic risks.

¹¹ In JEFTA, the reservation of Germany on waste management services is covered by Annex II reservation No. 15 which however only deals with Mode 1 and 2 (cross-border services). In CETA such reservation also covers Mode 3 (investment) which is currently more relevant. The Commission argues that in JEFTA, the Mode 3 part is covered by the public utility clause. It is indeed a bit unclear, why for some public services, the Commission has considered that Mode 3 could be covered by the public utility clause, while for others they have kept the sector-specific reservation also for Mode 3.

¹² Japanese water supply is nearly 100% public historically and currently. However, this situation has been changing rapidly during the last few years. The law on PFI ("Public Finance Initiative", private investment in public infrastructure) was revised a few years ago to open public finance initiative in public infrastructure including water system. Now the Japanese parliament attempts to revise the water law to be coherent with PFI law, meaning to explicitly promote water concessions. One concession agreement was stipulated a few months ago (in Hamamastu city) with Veolia Japan, and two more are in the pipeline (Osaka and Miyagi prefectures). Tokyo sewage system is also considering to enter a concession.

Additionally, JEFTA has very ambitious provisions on new financial services that confirms the bias towards more liberalisation and expansion of the financial sector¹³, but also a contradiction with the post-crisis approach to limit financial innovation in order to put harmful innovation under control.

The financial services chapter also contains a **framework for regulatory cooperation on financial regulation**, like CETA. Regulatory cooperation should, as a general principle, serve to strengthen financial regulation standards upwards. This is why it could be problematic to foresee this kind of tool in the framework of a trade agreement, where the primary purpose is to make regulation as trade-friendly as possible. Moreover, the main benchmark to judge the appropriateness of forthcoming regulatory measures will be the impact on market operators and the jurisdiction of the other Parties or on the ability of market operators to provide financial services (paragraph 11), instead of whether a measure provides for the best level of financial stability or other important public policy purposes. Official bodies, including the IMF, have recognised that these kinds of regulatory frameworks give big financial private actors a great influence over the regulatory process, given their considerable analysis and lobbying resources. Moreover, the legislator is not represented in such regulatory cooperation framework.

3. TRADE AND SUSTAINABLE DEVELOPMENT

The trade and sustainable development (TSD) chapter of JEFTA is not much different from what we have seen in other agreements like CETA. The main issue is still there, namely the lack of enforceability of commitments, since, in the case of violations, a panel of experts may be established as a last resort, which can only issue non-enforceable recommendations on how Parties can put their action back into conformity¹⁴.

i. Novel elements - However, JEFTA does contain two elements of novelty. First of all, a **review clause precisely on the enforceability mechanism**¹⁵. This has only appeared in the final version of the legal text, meaning that it was negotiated during the period between the political conclusion of July 2017 and the overall conclusion of December 2017. This addition is probably due to the ongoing debate on the reform of TSD chapters and the pressure that parts of this EP have exerted on Malmström¹⁶.

The second element of novelty is a specific provision on the Paris Agreement, which reads that the Parties reaffirm their **commitment to effectively implementing the UNFCCC and the Paris Agreement**. This is certainly a welcome addition, which is however more symbolic than of practical added value. In fact, it is unclear what would happen concretely should Japan or the EU violate their

¹³ The EU will have the obligation to let Japanese financial institutions that are established in the EU sell any financial service even if those are new to the EU. Authorization may be required and refused only for prudential reasons (Chapter 8 - sub-section 5 - Article 3). The same obligation applies to Japan. In CETA (Article 13.14) only the financial services that are already allowed in the EU have to be allowed when provided by Japanese operators, this being equivalent rather to a no-discrimination clause.

¹⁴ The US-model, which has been included into the Trans-Pacific Partnership, applies the main dispute settlement mechanism of the agreement also to the environment and labour chapters, meaning that sanctions may be introduced in case of violations. This model is criticised by the European Commission as being unrealistic since one needs to prove that violations of commitments have an effect on the trade between the Parties, which is a very difficult test to satisfy. However, the threat of sanctions may prove much more dissuasive than no enforceability in the form of ex-ante conditionality. Moreover, the US model also allows for public submissions (including from CSOs) on possible violations, which are then formally discussed between the Parties.

¹⁵ The Joint Committee may decide on amending the enforcement mechanisms of the TSD chapter. This is a more flexible mechanism than the general review clause for the whole agreement where 'the Parties' may decide to amend the agreement.

¹⁶ S&D has made the enforceability of TSD chapter a priority during this term.

commitments under the climate agreements since there is no sanction mechanism attached to the TSD chapter¹⁷. Moreover, this provision does not help clarify the traditional legal conundrum¹⁸ on the hierarchy between environmental legislation and trade agreements. The general rule that trade commitments always prevail is indeed still present in this TSD chapter: the Parties can adopt whatever measure in order to implement multilateral environmental agreements provided that those do not constitute arbitrary or unjustifiable discrimination. What can be considered as justified will be decided by panellists and the burden of proving that environmental measures are not in breach of trade commitments will be on the governmental authorities adopting those measures.

ii. Timber - One major flaw concerning the environmental part of the TSD chapter are the provisions on the **sustainable management of forests and trade in timber**. Japan is so far the only G7 member with no prohibition on imports of illegal timber in spite of being the largest world importer of wood and plywood, the second largest importer of logs and the third largest importer of lumber. On the contrary, the EU FLEGT scheme that builds on mandatory certification schemes for imports is a priority policy of the EU. The EU has also its own mandatory due diligence scheme for imports, as well as a general prohibition to place illegal timber on the EU market, under the EU Timber Regulation. Concerns on the lack of mandatory legislation in Japan were even raised in the Sustainability Impact Assessment of the Commission, while the Environmental Investigation Agency expressed concerns about the impact of the indiscriminate sourcing practices of Japanese companies on fuelling illegal logging in Europe's last remaining virgin forests (e.g. Romania)¹⁹. The provisions of the TSD chapter are largely insufficient to tackle this genuinely trade-related issue, since the Parties just commit to 'encourage' the sustainable management of forests or to 'contribute to' combating illegal logging. There is no prohibition to trade in illegal logging, which in our view should be necessary given the size of the Japanese market as a major importer and given the **EU aspiration to set international standards through trade agreements in its priority policies**.

iii. Whaling - One issue that will be raised by campaigners is **whaling**²⁰. Whaling is not a trade-related issue per se, as the import of whale meat is prohibited by the EU. Hence no negative impact is to be expected from the FTA as whale products are fully excluded from the scope of the agreement. However, there have been requests, including in all the Resolutions of the EP either on the FTA with Japan or specifically on the whaling issue, to link the negotiations with the full prohibition of whaling. During the negotiations, Japan has even escalated its whaling programme and challenged its legality under international law. In June last year, a new law allowed for the resumption of commercial whaling by defining cetaceans as an important food source. A positive new element of JEFTA is the creation of an Animal Welfare Working Group (Article 18.17), where the issue of whaling could be dealt with. The Commission should prioritise this issue in that context.

¹⁷ After the Fukushima disaster, Japan has attempted to increase its future reliance on coal. Moreover, the Nationally Determined Contribution submitted to Japan in 2015 were considered as 'inadequate'. Currently, the Climate Action Tracker classifies Japan's climate policies as highly insufficient, right below China <http://climateactiontracker.org/countries/japan.html>

¹⁸ In comparison, the Trans-Pacific Partnership (TPP) has a provision that does not create a presumption of incompatibility of environmental measures with a restrictive effect on trade : « The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restrict on trade » (article 20.2(3)). First, there is just a recognition instead of an obligation. Secondly, the measures are not qualified as potentially arbitrary or unjustifiable. So the test to pass for environmental measures is easier here as compared to the traditional EU provisions based on Article XX GATT (see later in the paragraph on the right to regulate).

¹⁹ <https://eia-global.org/reports/new-legal-risks-for-japanese-timber-sourcing-from-eastern-europe>

²⁰ Commercial whaling is internationally prohibited since 1986. There is only one exception for limited amounts of animals for strictly scientific research purposes. Based on this exception, Japan resumed whaling in 1987 allegedly in violation of such exception.

iv. Labour provisions - the Parties commit to effectively implement the ILO Conventions they have ratified. The problem is, as outlined above, the lack of enforceability of this commitment. Moreover, Japan has not ratified two core ILO Conventions, namely Convention No. 105 on the abolition of forced labour²¹ and Convention No. 111 on discrimination (employment and occupation), allegedly due to incompatibility with the Japanese Constitution. Throughout the negotiation however, the Commission has failed to prioritise this issue in order to at least make progress towards ratification. Another possible solution could have been to take up the rights and standards set up by the international conventions in Japan's domestic legislation, thereby dropping the ratification issue. To support this argument it is worth noting Japan's commitments under TPP in this regard. Since TPP is based on the US template, the commitments of the Parties are based on the ILO Declarations rather than the Conventions. These also include the elimination of discrimination, so Japan has in fact already committed to this obligation even though they haven't ratified the relative ILO convention. In conclusion, JEFTA represents a sort of **missed opportunity** for the EU to obtain more ambitious commitments from Japan as well as to move forward on the issue of enforceability of the chapter, since Japan had already agreed to more stringent commitments under TPP. Like for trade in timber, the Commission has **lacked the political will** to adequately prioritise this issue and to use trade agreements to set higher international standards in an area that should be considered a key priority.

v. The importance of enforceable TSD Chapters - It would also be useful to take a broader approach when discussing TSD chapters and to go back and reflect upon the rationale of having these chapters in trade agreements. The simple fact of having them in FTAs amounts to the recognition that trade cannot be an end in itself and that trade policy has to be embedded into the fundamental principles of the EU's external action (Article 21. TEU). It is also the recognition that for trade to be conducive to sustainable development and not to be in contradiction with it, some elements should accompany the liberalisation of trade flows. Besides ILO Conventions and multilateral environmental agreements, there are other important elements in TSD chapters that are considered to be necessary in order to make trade sustainable. These are **favouring trade in environmental goods and services, climate change mitigation services and technologies, labelling schemes for goods, corporate social responsibility rules based on OECD guidelines, abiding by international conventions on biological diversity, the sustainable management of forests and the sustainable use of fisheries resources**. It is clear that in order to fully achieve the imperative objective of sustainable development it is necessary to make all these elements mandatory under every FTA and to turn all the cooperation-based commitments into strong and enforceable obligations. Without this condition being satisfied, it is fair to presume that FTAs are in contradiction with the goal of achieving sustainable development²².

4. REGULATORY COOPERATION

i. Framework - Like CETA, JEFTA provides for a chapter on regulatory cooperation. First of all, it is important to stress that regulatory cooperation will be **voluntary**. However, this chapter is not deprived of critical elements which need to be carefully considered. On the one hand, it is important to point out that there are provisions which seek to solidly protect the right to regulate for both Parties: the provisions of the chapter would not in fact affect the right of the Parties to define and regulate their own levels of protection in pursuit or furtherance of their public policy objectives (Article 18.1.2). Moreover, the provisions of the chapter would not hinder the Parties to achieve their

²¹ Japan has however ratified the other core convention related to forced labour, the Forced Labour Convention No. 29.

²² See also the conclusions at page 24 of the *Rapport au Premier Ministre - L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada sur l'environnement le climat et la santé*, 7 September 2017.

public policy objectives at a level of protection they deem appropriate (Article 18.1.3). On the other hand, however, Article 18.1.4 sets an obligation that **regulatory measures cannot constitute a disguised barrier to trade**. This is a very important provision because, in order not to be considered as a disguised barrier, measures will have to be necessary and proportionate. This principle is also the one that provides the basis for the mechanism for exchanging information on upcoming and planned regulatory measures.

We know the EU was the proponent of this chapter and the aim is indeed to ensure Japan commits to the 'better law-making' principle together with its main instruments: early information on planned measures, possibility to provide comments and input on draft measures, carrying out impact assessments, carrying out retrospective evaluation of measures in force. Such regulatory practices are not problematic per se²³.

However, what is really relevant is that this mechanism is being set up within the framework of an FTA, which implies that **all regulatory measures will be assessed against the purpose of making them as trade friendly as possible**. This regulatory cooperation framework will therefore institutionalise the tension between defending public policy objectives and eliminating barriers to trade. Regulatory cooperation with third countries has always existed and it was managed mainly by DG Entr/Grow of the Commission, and basically amounted to a dialogue between regulators. However, since CETA, there is a new practice of putting cooperation within the framework of trade agreements, where DG Trade is leading on the EU side, **therefore making the delicate balance between regulating the public interest and eliminating barriers to trade lean towards the latter**²⁴.

In practice, the Parties will have the possibility to request information on planned measures. The Party that is considering adopting a new measure will have to provide written comments regarding the concerns raised and will have to explain and justify the policy objectives of the measures and why a less-trade restrictive measure is not available. If the other Party is not satisfied, it can request consultations where both Parties can discuss mutually acceptable solutions (Article 18.16). It is important to notice that in the framework of the WTO, members also have an obligation to notify regulatory measures that go beyond international standards under the TBT and SPS agreements. However, there is no such a mechanism whereby the Parties come together to find mutually acceptable solutions.

ii. A Committee on Regulatory Cooperation will be set up, as in CETA, which will be responsible for discussing possible initiatives on cooperation. Since the committee will meet yearly, there will be a constant pressure to deliver on cooperation initiatives. Moreover, there is no guarantee that legislators will have a stake in the activities of the committee, while 'interested parties' can be invited to the meetings. This raises important questions on how to make sure that: (i) the committee will not get captured by business; (ii) its work will be transparent; (iii) what legislators will be represented? These questions cannot be answered on the basis of the provisions in the FTA. Whether there will be positive solutions to these concerns will very much depend on how the mandate, the procedures and the working plan of the committee will be determined. This is an aspect that should be carefully monitored if the FTA enters into force; but also, what is already happening under CETA could set an important precedent.

²³ Though we may be critical of the heavy burden that has been put on the Commission in order to be able to justify its right of initiative when it comes to legislative measures.

²⁴ See also the concerns expressed on regulatory cooperation in CETA in this report: *Rapport au Premier Ministre - L'impact de l'Accord Économique et Commercial Global entre l'Union européenne et le Canada sur l'environnement le climat et la santé*, 7 September 2017.

One area where Japan could be interested in having cooperation is the use of pesticides, since Japan has a tradition of allowing higher per-hectare levels than the OECD average. European and Japanese lobby groups have already expressed their wish to avoid excessive protection measures for food safety in order to facilitate international trade²⁵.

5. THE PRECAUTIONARY PRINCIPLE

This fundamental principle that is enshrined in EU Treaties is not fully protected in trade agreements, starting with the WTO Agreements. It is therefore a long-standing issue with trade policy in general. The consequences of this have been very tangible since the EU has lost twice in the WTO trying to defend the precautionary principle (hormones and biotech cases). Therefore, in order to fully protect the precautionary principle and the right to regulate in FTAs, the EU should introduce provisions going beyond what is currently under the WTO agreements (SPS, TBT and the General Exceptions). However, the Commission has certainly failed to do so in CETA and has unfortunately failed to negotiate adequate protection in JEFTA. JEFTA can be considered a missed opportunity, since Japan had already invoked the precautionary principle in the WTO and also lost a dispute.

The Commission has tried to convince the public that the precautionary principle is fully protected, but what they claim is simply not true²⁶: they argue that the agreement gives full protection because it is based on the same provisions as the WTO's, so precisely the ones on which basis the EU has lost two disputes.

In the chapter on Regulatory Cooperation, there is a provision that could possibly provide some degree of protection for the precautionary principle, since the Parties shall be allowed to adopt measures in accordance with their legal framework and principles. For the EU it is specified that such principles include those established in the TFEU as well as Regulation and Directives. However, this provision is not sufficient and could only help the EU defend legislation based on the precautionary principle only within the framework of the regulatory cooperation mechanism, without providing any kind of legal protection once the legislation has entered into force. In that case, Japan could still file a complaint under the FTA dispute settlement mechanism and would most probably win the litigation.

The Commission also argues that the EU is in any case bound to respect the precautionary principle because it is enshrined in the EU Treaties. This means that if the EU loses a legal dispute it will be obliged to keep its legislation in breach of the trade agreement and compensate the other party with trade concessions somewhere else. However, this is not a viable solution because since there is no sufficient protection for the precautionary principle in trade agreements, there is a real risk of a chilling effect on future regulatory measures based on the precautionary principle because of the threat of trade disputes.

The precautionary principle, is also referred to in a provision of the TSD chapter (Article 16.9). This may constitute an improvement as compared to CETA - which also contained a similar provision²⁷ -

²⁵ Food Watch & Powershift, *Trade at any Cost?*, 2018

²⁶ http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155718.pdf

²⁷ Article 24.8 - Scientific and technical information

1. When preparing and implementing measures aimed at environmental protection that may affect trade or investment between the Parties, each Party shall take into account relevant scientific and technical information and related international standards, guidelines, or recommendations.
2. The Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

since the parties shall also take into account the 'precautionary approach'²⁸. However, the wording 'where appropriate' adds ambiguity because it depends on how the Parties can agree on what they consider appropriate. Moreover, and more importantly, this provision would only apply to environmental and labour-related measures, hence measures related to health and consumer protection would not be covered.

6. THE RIGHT TO REGULATE

The right to regulate has emerged as one of the key issues in trade agreements since these may constrain the ability of the Parties to adopt regulatory measures. It also very much relates to the general question of what trade agreements are for.

Sometimes it may in fact be the case that Parties infringe on the obligations of an agreement when devising measures to achieve certain public policy objectives. The determination of the right to regulate in the context of trade agreements requires a **delicate weighing and balancing between the risk of using derogations from the rules for protectionist reasons and the achievement of legitimate public policy objectives**. The same delicate balance has been created under EU law in relation to the four freedoms of the internal market and the right of the MS to derogate from the general prohibition to introduce any barriers to intra-EU trade.

Determining the boundaries of the right to regulate has emerged as an issue especially in relation to investment protection and ISDS, as well as to trade in services. However, it is relevant for the whole scope of trade agreements.

JEFTA very much builds upon the exceptions of the WTO agreements, without providing any additional elements of protection for the right to regulate. Public policy objectives such as public morals, public health, the preservation of exhaustible natural resources or consumer protection are considered to be legitimate. However, in order for the derogations from the rules to be considered compatible with the trade agreement, the measures in question have to be **(i) the least-trade restrictive possible and (ii) necessary to achieve a given public policy objective**. An important distinction between trade agreements and EU law is that, in the context of trade agreements, **the burden of proof is on the state that introduces a certain measure**, whereas, **in the case of EU law, the burden of proof is on the court**. This distinction has very important implications and in the case of trade agreements, the burden of proof risks creating a certain degree of **regulatory chill**²⁹.

If compared to CETA, it appears that JEFTA is quite weaker in respect to the right to regulate. CETA provided at least some additional recognition to the right to regulate in its preamble³⁰. Moreover, CETA was complemented by a Joint Interpretative Instrument, where further guarantees to the right

²⁸ Article 16.9 - Scientific information - When preparing and implementing measures with the aim of protecting the environment or labour conditions that may affect trade or investment, the Parties shall take account of available scientific and technical information, and where appropriate, relevant international standards, guidelines or recommendations, and the precautionary approach.

²⁹ This explains why for instance, the Commission is very much reluctant to introduce measures to protect the environment or the climate, which could be supported by Article XX GATT (General Exceptions). See the very recent and relevant example of the revision of the **Renewable Energy Directive (RED2)** where DG Trade has put many obstacle in finding a solution to the issue of palm oil because of WTO compatibility. Even WTO compatible solutions based on high ILUC levels was opposed by TRADE because of their unwillingness to defend measures based on Article XX GATT.

³⁰ 'RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;'. Although it is just a recognition of the right to regulate, this provision could however help in case of very controversial cases.

to regulate were provided³¹. Finally, CETA contains an interesting and innovative provision in its TSD chapter that provides for the possibility of invoking commitments under multilateral environmental agreements as a legitimate justification under the General Exception, hence a legitimate reason to derogate from the obligations of the agreement³². This is a first and welcomed attempt to try and expand the list of policy objectives in order to include the challenges of the 21st century (e.g. climate change) Unfortunately this is not replicated in JEFTA.

7. LOWERING OF STANDARDS THROUGH THE FTA - THE NTMs EXERCISE AND OTHER REGULATORY MEASURES

Before the proper start of FTA negotiations, Japan had to engage in the so-called NTM exercise where they committed to lift a long list of regulatory measures the EU considered to be burdensome and unnecessary non-tariff barriers. Those covered several areas, including aligning Japan to UNECE international standards for the automotive sector, food safety, chemicals or medical devices. A clear and strong commitment from Japan was an important precondition for the Council to approve the mandate to start negotiations, since - due to Japan's consolidated practice of not aligning to international standards - tariff elimination alone was not enough to get real and meaningful market access.

At a first glance, this exercise may look uncontroversial because the EU's general request is that Japan starts recognising international standards and approval procedures, as well as because there is no apparent public policy reason for Japan not to do so. However, in some cases, Japanese legislation may have provided a better and stronger protection than international standards with a view to better pursuing public policy objectives.

It is also important to check this issue against usual practice in the EU, since the EU sometimes sets standards and regulatory requirements at a higher level than international ones, because we consider it adequate to provide higher levels of protection. As a general principle, it would be unacceptable, and a red line for the Greens, if Japan had had to align to international or EU standards whenever its legislation did provide higher levels of protection. This would mean that standards would be lowered because of the FTA.

It appears, for example, that Japan was asked to allow a list of food and feed additives that are internationally recognised and that are usually contained in EU processed food and wines. At the time of writing, no evidence of Japan raising concerns related to health and consumer protection have been found. However, some of the additives on the EU list of NTMs (e.g. E151, E155, E200, E202, E211) appear on a list of additives identified as 'to be monitored' by the Belgian consumers association³³.

³¹ 'CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.' https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:L:2017:011:FULL&uri=uriserv:OJ.L_.2017.011.01.0003.01.ENG

³² Article 24.4.4: "The Parties acknowledge their right to use Article 28.3 (General exceptions) in relation to environmental measures, including those taken pursuant to multilateral environmental agreements to which they are party."

³³ This could be because some studies have raised concerns over their safety, because there is a risk to exceed the Acceptable Daily Intake (at least in some population groups), or because they may trigger an allergic reaction in some consumers.

Additionally, it appears that Japan was asked to align its standards regarding maximum residue levels for pesticides (MRLs) to the levels set by the Codex Alimentarius. Japan had in fact a practice of setting lower MRLs, as well as longer approval procedures. It is worth recalling that, in the context of TTIP negotiations, the EU was also requested to lower its standards down to the level set by the Codex Alimentarius.

There is another example where the FTA was clearly used in a trade-off with lowering safety standards. Last year, in conjunction with the political conclusion of JEFTA in July, the Commission decided to reduce safety checks on maximum limits for radioactive isotopes³⁴. In the public declarations on the political conclusion of the FTA, this modification of safety checks was clearly mentioned as part of a wider package deal.

8. INTELLECTUAL PROPERTY

IPR is an area where, more and more, the trade agenda influences the internal policy of the EU. The recent Directive on Trade Secrets was a clear example of one legislative initiative that was very much pushed in the context of the TTIP negotiations. Now that **Trade Secrets** are enshrined in EU law as a new IPR, the EU has put forward this element in the context of the JEFTA negotiations. That Directive was problematic for our group, because the definition of trade secrets was too large and too vague. The same applies to the definition that is provided in the IPR chapter of JEFTA. The exception for whistle-blowers that is provided by the EU Directive is also included in JEFTA (Article 14.50); this is certainly welcome, although such exception has been considered too weak since the obligation to protect trade secrets prevails.

Another relevant element of the IPR chapter is the **extension of the period of protection for patents relative to pharmaceutical and agricultural chemical products** (Article 14.35), whereby the protection can be extended up to five years. This also reflects recent developments in EU legislation as the Commission recently tabled a proposal to amend the Regulation on **Supplementary Protection Certificates**. One of the purposes here is to extend the protection of patents by introducing a new instrument for guaranteeing such protection. This is very relevant for the pharmaceutical industry and could have critical implications for access to medicines.

9. E-COMMERCE AND DATA PROTECTION

The key issue here is to make sure that the EU data protection regulatory framework (GDPR) is not endangered when establishing rules for cross-border data flows. Like in CETA, JEFTA does not contain provisions on data flows. There is however a review clause saying that the Parties will reassess the issue after three years the agreement enters into force.

³⁴ The Commission had to modify its Implementing Regulation (EU) 2016/6 as regards feed and food subjected to special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station. The Commission reduced the number of food groups which would require documentation from the Japanese authorities attesting to the fact that they do not exceed maximum limits for radioactive isotopes Cesium-134 (Cs-134) and Cesium-137 (Cs-137). The same groups would also no longer be subject to any tests/sampling at EU borders. Rice from Fukushima prefecture would now be allowed into the EU without any of these controls. Many fisheries and seafood products would also no longer be subject to such checks on import into the EU. Furthermore, the proposal no longer requires that Member States inform the Commission every three months through the Rapid Alert System for Food and Feed of all analytical results. In spite of the overwhelming majority of the EP objecting to the Commission proposal for a new implementing decision, the Commission decided to go ahead.

Since then, in January 2018 the Commission adopted a position on a standard provision to be included in trade agreements, which could be tabled, for the first time, for the Indonesia and Chile FTA negotiations³⁵. Greens have contributed to the process of formulating and making this provision the official position of the EU. However, what it still an open issue to be carefully monitored is to ensure that this provision is considered to be non-negotiable. In this respect, it is worth noting that Japan has already agreed to a different provision in TPP, which does not provide adequate protection to personal data³⁶.

As Greens, we believe that adequacy decisions are the right means to ensure cross-border data flows in full compliance with GDPR. After the one with the US, the Commission is negotiating an adequacy decision with Japan. Negotiations are very advanced and the Commission aims announce a successful conclusion in late 2018. That would be therefore part of the same package as the FTA. Our line should be that with an adequacy decision being in place, there is no need to have data flows provision in the FTA. The review clause therein should therefore not apply.

Unfortunately, there is one problematic element that is not covered by the main framework for data flows discussed above. That is a provision on **data flows in the area of financial services**, which is to be found in the financial services chapter. It provides, as a general rule, for freedom of cross-border information and data in the framework of financial service activities. The exception to the rule provides that nothing in these provisions restricts the right of the Parties to protect personal data, personal privacy and confidentiality of individual records and accounts, so long as such a right is not used to circumvent the provisions of the Agreement³⁷. However, this provision is weak because the burden to prove that there is no incompatibility with the general rule of providing free data flows is with the Party that applies the exception. If GDPR were to be used in this area, the EU would need to prove that there is no other less trade-restrictive measure to properly protect personal data. We know that the US considers GDPR a barrier to trade and, as such, Japan has already agreed to a US-based provision in TPP on data flows.

Another element of the e-commerce chapter that is worth flagging is the general prohibition for the Parties to request the access or transfer of source codes. The only exceptions that are applicable to this general rule are the general (public order, public moral, protection of health etc. in Article 8.3) security (Article 1.5) exceptions or under the prudential carve out (Article 8.65). However, some concern is being expressed that this can be an issue in the case of artificial intelligence systems, which have the ability to take certain decisions autonomously through algorithms. If public authorities are prevented from knowing how they operate and how they are programmed, it will hardly be possible to demand accountability for wrong decisions or ensure that they do not have an inbuilt bias. For now it is still unclear whether the exceptions mentioned above could justify requests for access to source codes in this respect.

³⁵ “[...] 1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
2. Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties’ respective safeguards.[...]”

³⁶ Such provisions would be problematic because the parties would be allowed to adopt measures limiting the cross-border transfer of data for the sake of protecting personal data only if those measures would pursue legitimate public policy objectives, without constituting a means of arbitrary and unjustifiable discrimination and are without being greater than what is required to achieve the objective (proportionality test).

³⁷ Article 8.63(2).

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