Bilateral Agreements Improve Trade and Economic Relations Between the European Union and Japan

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After several years of mutual negotiations, representatives of the EU and Japan signed the Economic Partnership Agreement (EPA) and the Strategic Partnership Agreement (SPA) in Tōkyō on 17 July 2018. The EPA and the SPA are expected to enter into force in early 2019. The EPA will create one of the largest free trade zones in the world and is intended to shape standards for international trade and economic activity in areas including environmental and climate issues, consumer protection, compliance with social standards and competition law. It will further promote trade and open new opportunities to traders, investors and service providers. The SPA will become the first-ever bilateral framework agreement between the EU, its Member States and Japan, and is intended to reinforce the overall partnership by promoting political and sectoral cooperation and joint actions on issues of common interest, including regional and global challenges.

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To date, the EU and Japan have already concluded several bilateral international agreements, specifically in the areas of mutual recognition of conformity assessments, cooperation against restrictions on competition, nuclear energy, customs and trade facilitations, mutual assistance in criminal matters[1], and scientific and technological cooperation.

This article provides the reader with an overview of the provisions of the EPA and SPA, commentary on them, and an overview of other bilateral international agreements that exist between the EU and Japan in the areas of trade and economic relations.

I. Bilateral International Agreements in Force

1. Mutual recognition of the results of conformity assessments

The technical barriers to trade include conformity assessment procedures. The Agreement on mutual recognition between the European Union and Japan of 4 April 2001[2] (MRA) facilitates market access in certain sectors and promotes trade through Mutual Recognition of the results of conformity assessment procedures required by one party, including certificates and marks of conformity, that are conducted by the registered conformity assessment bodies of the other party. Mutual recognition currently applies to telecommunications terminal equipment and radio equipment, electrical products, the verification of the conformity of test equipment with the principles of Good Laboratory Practice (GLP) for the testing of chemicals, and the confirmation of Good Manufacturing Practices (GMP) for medicinal products. A Joint Committee made up of representatives of both parties has been established as a body responsible for the effective functioning of the MRA.

Products covered by the MRA can be exported to the market of the other party without further testing. Thus, the MRA helps exporters to achieve significant cost savings.

2. Cooperation against restrictions on competition

The Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities of 10 July

1 OJ L 39/20, 12 February 2010, p. 20 – 35; JJapanL, Vol. 16 No. 32 (2011), 265–276.

2 OJ L 284, 29 October 2001, p. 3–32; partly amended by Agreement in the form of an Exchange of Diplomatic Notes with Japan in accordance with Art. 15(3)(b) of the Agreement on Mutual Recognition (MRA) in order to amend Part B of the Sectoral Annex on Good Manufacturing Practice (GMP) for medicinal products of 22 April 2016, OJ L 131, 20 May 2016, p. 34–38.

2003[3] takes account of the fact that restrictive practices (cartel agreements, concerted practices, abuses of dominant positions and market concentrations in the EU) carried out by enterprises in third countries may have an effect on the territory of the EU. Although the European competition rules are applicable pursuant to the effects doctrine, no investigative action can be enforced outside the territory of the EU.

The agreement allows for effective cooperation on matters which have their cause in one contracting party and an effect in the other and matters in which the competition authorities of both contracting parties are required to examine the same facts. The respective competition authorities may also effectively cooperate on the conduct of proceedings and enforcement in the other party.

The EU and Japan are currently reviewing the existing agreement in order to further improve their cooperation in the field of competition. In particular, they wish to improve the exchange of information received by their respective competition authorities in the course of an investigation.

3. Nuclear energy

The European Atomic Energy Community and the Japanese Government have concluded several nuclear cooperation agreements. Under the Agreement for cooperation between the European Atomic Energy Community and the Government of Japan in the field of controlled thermonuclear fusion of 20 January 1988[4], the parties cooperate to develop the scientific understanding and technological capability underlying a fusion power system. Under the Agreement between the Government of Japan and the European Atomic Energy Community for co-operation in the peaceful uses of nuclear energy of 24 February 2006[5], the parties work together to promote and facilitate nuclear trade, research and development and other activities between or in Japan and the Union for peaceful and non-explosive uses of nuclear energy, in the mutual interests of producers, the nuclear fuel cycle industry, utilities, research and development institutes and consumers, while abiding by the principles of non-proliferation. Furthermore, the parties cooperate under the Agreement between the European Atomic Energy Community and the Government of Japan for the Joint Implementation of the Broader Approach Activities in the Field of Fusion Energy Research of 5 February 2007[6].

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3 OJ L 183, 22 July 2003, p. 12–17.

4 OJ L 57, 28 February 1989, p. 63–76.

5 OJ L 32, 6 February 2007, p. 65–75.

6 OJ L 246, 21 September 2007, p. 34–46. Date of entry into force unknown (pending notification) or not yet in force.

4. Customs issues and trade facilitations

Under the Agreement between the European Community and the Government of Japan on cooperation and mutual administrative assistance in customs matters of 30 January 2008 (CMAA)[7], customs authorities of the EU and Japan assist each other in ensuring the correct application of customs legislation and develop customs cooperation and trade facilitation actions in accordance with international standards, particularly by facilitating secure and rapid exchange of information, effective coordination between their customs authorities, and other joint administrative action.

5. Scientific and technological cooperation

The Agreement between the European Union and the Government of Japan on cooperation in science and technology of 30 November 2009[8] establishes a formal framework to strengthen cooperation in science and technology between the parties. In its annex, it contains specific rules on protection of intellectual property rights and undisclosed information (expertise) in cooperation activities.

II. The Economic Partnership Agreement

The EPA provides the legal basis for EU companies and other economic operators to obtain access to the Japanese market under the best possible conditions and vice versa. At the same time, it establishes a legal framework that ensures important economic policy objectives such as legal certainty, transparency and consumer protection, as well as promotion of small and medium-sized enterprises, competitiveness, and economic, social and environmental sustainability. The text of the agreement[9] is around 2,000 pages long and has been translated into the languages of the EU Member States and into Japanese[10].

7 OJ L 62, 6 March 2008, p. 24–29.

8 OJ L 90, 6 April 2011, p. 2.

9 I am referring to the Commission document COM (2018) 193 final, *http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684,* 8 December 2017 – Updated on 18 April 2018 (last accessed 24 July 2018).

10 Ministry of Foreign Affairs of Japan, *https://www.mofa.go.jp/mofaj/ecm/ie/page4_004215.html,* 17 July 2018 (last accessed 24 July 2018).

1. Legal basis

a) EU and Japan

All matters covered by the EPA fall within the exclusive competence of the European Union and, more particularly, within the scope of Artt. 91 (common transport policy), 100(2) (sea and air transport) and 207 (common commercial policy) of the Treaty on the Functioning of the European Union (TFEU). Exclusive competence is the most effective tool to empower the EU to enter into international agreements with third-country states that will eventually become binding for the Union and all of its Member States.

Matters that do not fall under the exclusive competence of the Union include provisions on foreign investment other than direct investment (such as portfolio investment) and investor-state dispute settlement[11]. These provisions are therefore not included in the EPA. Provisions that are necessary for a stable and secure investment environment in the Union and in Japan are still under negotiation and are to be presented in the form of a separate bilateral investment agreement.

On the EU side, the Commission negotiated the EPA on the basis of a mandate from the Council that was signed by the European Union pursuant to a decision of the Council based on Art. 218(5) TFEU. It is to be concluded by the European Union pursuant to a decision of the Council based on Art. 218(6) TFEU, following the European Parliament's consent.[12] No additional approval or ratification by the Member States is necessary.

In Japan, the Cabinet is responsible for the conclusion of intergovernmental treaties, subject to the approval of both chambers of Parliament (Art. 73 No. 3 Constitution). The treaties concluded by Japan and the recognized rules of international law must be faithfully observed (Art. 98 Constitution).

b) International obligations

The EU and Japan are members of the World Trade Organization (WTO). Members of the WTO have generally committed themselves not to favour one trading partner over another. Non-discrimination is a core principle of the WTO, which is reflected in national equal treatment and most-favoured-

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11 Opinion 2/15 of the Court of Justice (Full Court) of 16 May 2017, *http:// curia.europa.eu/juris/document/document.jsf?docid=190727&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=604859*.

12 Proposal EUR-Lex, *https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532395957538&uri=CELEX:52018PC0193,* (last accessed 24 July 2018).

12 Ministry of Foreign Affairs of Japan, *https://www.mofa.go.jp/mofaj/ecm/ie /page4_004215.html,* 17 July 2018 (last accessed 24 July 2018).

nation treatment. Free trade agreements are an exception to this rule. WTO members recognize the legitimate role of free trade agreements, which aim to facilitate trade between their parties but do not create trade barriers to third parties. Free trade agreements are inherently discriminatory, as only their signatories receive more favourable market access conditions. This raises the question of under what conditions the EPA is allowed under WTO law.

WTO members may conclude free trade agreements under certain conditions. These include Art. XXIV of the General Agreement on Tariffs and Trade (GATT) for trade in goods and Art. V of the General Agreement on Trade in Services (GATS) for trade in services. In general, free trade agreements must cover all trade and promote free trade between the countries of the free trade agreement without increasing trade barriers for the outside world. However, there is no commonly held obligation under Art. V GATS to create equal market access conditions for services. Rather, each state can autonomously determine which services it wants to integrate into its own markets.

The EPA follows these requirements and contains numerous references to GATT 1994 and GATS, as well as other multilateral agreements, and makes their provisions part of the EPA.

2. Overview of the legal content of the EPA

The EPA consists of a preamble, the main text of the treaty and a large number of annexes.

a) Annexes

The annexes are an integral part of the entire agreement (Art. 23.6 EPA).

The existing annexes contain provisions regarding the elimination and reduction of customs duties (Annex 2-A), the list of goods subject to import or export restrictions or licenses (Annex 2-B), motor vehicles and parts (Annex 2-C), facilitation of the export of the Japanese brandy "shōchū" in traditional bottles in the sizes four gō (720 ml) and one shō (1.8 l) (Annex 2-D)[13] and of grapevine products (Annex 2-E), introductory notes on the rules of origin specific to products (Annex 3-A), product-specific rules of origin (Annex 3-B), information on the application of the accumulation rules in Art. 3.5 EPA (Annex 3-C), the text of the statement on origin (An-

13 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 110/2008 as regards nominal quantities for placing on the Union market of single distilled shochu produced by pot still and bottled in Japan, COM/2018/199 final – 2018/0097 (COD), URL: *https:// eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018PC0199* (last accessed 30 July 2018).

nex 3-D), special definitions for the Principality of Andorra (Annex 3-E) and the Republic of San Marino (Annex 3-F), food additives (Annex 6), regulatory cooperation on financial regulation (Annex 8-A), lists of reservations for services and investments and e-commerce (Annex 8-B), an understanding on the trans-boundary movement of natural persons for business purposes (Annex 8-C), government procurement (Annex 10), parties' laws and regulations on geographical indications (Appendix 14-A), a list of geographical indications (Annex 14-B), and a joint declaration (Annex 23).

b) The individual chapters

The main text of the EPA comprises a total of twenty-three chapters.

Chapter 1 sets out the objectives of the agreement, namely liberalization and facilitation of trade and investment, and the promotion of close economic relations between the EU and Japan (Art. 1.1). Rights and obligations under tax treaties are to remain unaffected (Art. 1.4). Exceptions to the agreement exist in the areas of security and national defence (Art. 1.5). Existing conventions between the European Union or its Member States and Japan are not to be superseded or terminated by the EPA (Art. 1.9 (1)). No contracting party is required to act in a manner that is inconsistent with its obligations under the WTO Agreement (Art. 1.9 (2)).

Chapter 2 regulates trade in goods. The objective of this chapter is to facilitate trade in goods between the EU and Japan and its gradual liberalization in accordance with the provisions of the EPA (Art. 2.1). The essential instruments for achieving this aim are the obligation of each party to eliminate or reduce its customs duties on imports of products originating in the other country (Art. 2.4 in conjunction with Art. 2.8 and Annex 2-A), national treatment (Art. 2.7) and most-favoured-nation treatment (Art. 2.8 para.2). This chapter also includes the prohibition of imposition of duties on goods exported from one party to the other that are in excess in comparison to similar goods for domestic consumption (Art. 2.12), a standstill on customs duties (Art. 2.13), the utmost restraint in export competition (Art. 2.14), the prohibition of any non-tariff restrictions on imports and exports (Art. 2.15) and the definition of the scope of general exceptions (Art. 2.22).

Chapter 3 contains the rules of origin and procedures of origin that are necessary in relation to trade in goods. Only products originating in one party are to enjoy preferential tariff treatment by the other party. On the basis of an application procedure for preferential tariff treatment by the importer, the importing party is to grant preferential tariff treatment at importation to a product originating in the other party (Art. 3.16).

Chapter 4 deals with customs matters and trade facilitation. Its objectives are to improve customs legislation and to simplify administrative procedures. In particular, the applicant should be able to obtain advance rulings from the respective customs authority (Art. 4.7). Customs controls should be sped up for low-risk consignments (Art. 4.9) and also are possible later by post-clearance audit (Art. 4.10). The existing cooperation of customs authorities on the basis of the CMAA will be intensified and further developed by the provisions of Chapter 4.

Chapter 5 concerns special rules on the admissibility of trade remedies, namely bilateral and global safeguard measures, anti-dumping and countervailing measures to protect domestic industries against serious injury caused by import flooding and dumping. Nothing in this chapter prevents a party from applying safeguard measures to an originating good of the other party in accordance with Art. XIX of GATT 1994 and the Agreement on Safeguards in Annex 1A to the WTO Agreement. The parties maintain their rights and obligations under the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 in Annex 1A to the WTO Agreement (Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures in Annex 1A to the WTO Agreement (SCM Agreement).

Chapter 6 regulates sanitary and phyto-sanitary measures to protect human, animal and plant life and health. It also supports cooperation under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) in Annex 1A to the WTO Agreement.

Chapter 7 is dedicated to technical barriers to trade. Its objective is to facilitate and increase trade in goods between the parties, particularly by ensuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to trade. The parties will implement the Agreement on Technical Barriers to Trade in Annex 1A to the WTO Agreement (TBT Agreement). Furthermore, this chapter refers to the MRA mentioned above.

Chapter 8 deals with trade in services, liberalization of investment and electronic commerce. As with the case of trade in goods, the principles of market access, national treatment, and most-favoured-nation treatment, followed by a number of derogations, can again be found here. The contracting parties retain the right to adopt, within their respective territories, the regulatory measures necessary to achieve legitimate policy objectives such as the protection of public health, safety, the environment and public morals; social and consumer protection; and the promotion and protection of cultural diversity (Art. 8.1 (2)). Access of one party's natural persons to the other party's employment market is excluded (Art. 8.1 (3)). The Japanese employment market in particular is extremely restricted to foreigners

despite pressure in Japan to open the employment markets, which is a result of globalization and the aging population. The entry and temporary stay of natural persons is dealt with in subsection D, which contains rules on the entry and temporary residence of natural persons for business purposes. These provisions have to be read in conjunction with the accompanying annexes 8-B and 8-C. Only in the future are the parties to seek an agreement on the mutual recognition of the authorization, licensing, operation and certification of entrepreneurs and service suppliers, and in particular in the field of professional services (Art. 8.35).

Chapter 9 deals with capital movements, payments and transfers and temporary safeguard measures.

Chapter 10 contains regulations on government procurement. According to the Commission's explanatory memorandum, bidders from the EU will be given new opportunities in tendering procedures as Japan specifically grants them new access to the 48 sub-central "core cities" with more than 300,000 inhabitants where 15% of the Japanese population lives, and is prepared to implement the "operational safety clauses" for EU companies operating on the rail market one year after the entry into force of the EPA. The Agreement on Government Procurement in Annex 4 to the WTO Agreement (GPA), to which EU and Japan are already parties, is incorporated into this chapter and applied *mutatis mutandis* in it (Art. 10.1).

Chapter 11 concerns competition policy. Each party applies its competition law to all private or public enterprises engaged in economic activities. Exemptions from competition law must be transparent and limited to those measures which are strictly necessary for securing the public interest (Art. 11.3 (2)). In the application of competition law, enterprises must not be discriminated against on the basis of nationality or type of ownership (Art. 11.5). Furthermore, the principle of procedural fairness (Art. 11.6) applies regardless of the domicile or ownership of the companies concerned. Art. 11.8 (2) stipulates that the competition authorities of the parties may exchange or transmit information in order to facilitate cooperation and coordination under the Agreement.

Chapter 12 deals with subsidies. The parties acknowledge that a party may grant subsidies if this is necessary for the achievement of public policy objectives. However, certain subsidies can distort the proper functioning of markets and undermine the benefits of trade and investment liberalization. In principle, a party should not grant subsidies if it finds that they have or could have significant negative effects on trade or investment between the parties (Art. 12.1). Rights and obligations of the parties under the SCM Agreement remain unaffected, as do applicable provisions of GATT 1994 and GATS (Art. 12.4).

Chapter 13 contains provisions on state-owned enterprises, companies with special rights or privileges, and declared monopolies engaged in commercial activities. These should not discriminate and, in particular, should also comply with the OECD Guidelines on Corporate Governance of State-owned Enterprises.

Chapter 14 contains extensive regulations on the entire complex of intellectual property. Here, too, national treatment (Art. 14.4) and most-favoured-nation treatment (Art. 14.5) apply. In particular, Japan has accepted the term of protection under European law for the author of a literary or artistic work within the meaning of Art. 2 of the Berne Convention for their lifetime and up to 70 years after their death (Art. 14.13 (1)). Both parties have enhanced the recognition and protection of geographical indications for wines, spirits and other alcoholic beverages as well as agricultural products that originate in the parties (Art. 14.22–14.30).

Chapter 15 contains rules on the management and control of listed companies (corporate governance) for the first time in an international agreement[14]. Both contracting parties already have proven rules and comply with the OECD principles of corporate governance. Investor confidence is to be strengthened and market access for investments is to be made easier. The EPA also emphasizes timely and accurate disclosure, as well as monitoring of the performance, transparency and accountability of management and the board towards shareholders.

Chapter 16 deals with the topic of trade and sustainable development. Parties recognize the importance of promoting the development of international trade in a way that contributes to sustainable development, for the welfare of present and future generations. The objective of this chapter is to strengthen trade relations and cooperation between the parties in ways that promote the sustainable development of the environment and society. Civil society should also be involved. However, the environmental and labour standards of the contracting parties should not be harmonized. For measures to protect the environment and working conditions, Art. 16.9 mentions the precautionary approach. The precautionary principle means that scientifically proven risk relationships do not provide the only basis for defence and prevention measures. Rather, empirical uncertainties about causal processes also justify measures for protecting potentially jeopardized legal interests.

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14 For the purpose of this Chapter, Art. 15.1 b) defines “corporate governance” as the set of relationships between a company's management, its board, its shareholders and other stakeholders; it also provides the structure through which a company is managed and controlled, notably by determining how the objectives of the company are set and what the means of attaining those objectives are, as well as by monitoring performance.

Chapter 17 concerns transparency. Recognizing the impact that the regulatory environment may have on trade and investment between the parties, each party must establish a transparent regulatory environment that is effective and predictable for persons, including economic operators, particularly small and medium-sized enterprises (SMEs) (Art. 17.2).

Chapter 18 is about good regulatory practice and regulatory cooperation with the aim of enhancing bilateral trade and investment. This chapter applies to regulatory measures issued by the regulatory authority of a party in respect of any matter covered by the EPA (Art. 18.3). Good regulatory practice entails early information on planned regulatory measures (Art. 18.6), public consultation (18.7), impact assessment (18.8), retrospective evaluation (18.9) and opportunities for a person to submit comments for regulatory improvement. Section B addresses animal welfare with a focus on farmed animals. Regulatory cooperation on financial regulations (Chapter 8) remains excluded from the application of the provisions in Chapter 18 (Art. 18.18 (1).

Chapter 19 regulates cooperation of the parties in the field of agriculture with the aim at promoting cooperation on sustainable agriculture, including rural development and the exchange of technical information and best practices for providing safe and high-quality foods for consumers in the EU and Japan. The Committee on Cooperation in the Field of Agriculture established pursuant to Art. 22.3 is to be responsible for the effective implementation and operation of this chapter.

Chapter 20 contains rules for cooperation specifically in matters that concern small and medium-sized enterprises. In particular, websites are to provide useful information to SMEs and contact points are to be set up to help them exploit the opportunities offered by the EPA.

Chapter 21 sets out procedures for settling disputes in the interpretation and application of EPA provisions, with the parties essentially seeking to find a solution through discussion and mutual agreement. Parties are first to endeavour to resolve any dispute through consultation (Art. 21.5) and may request a mediation procedure at any time (Art. 21.6). If consultation fails because the other party does not respond, or if the parties agree not to enter into consultations or fail to resolve the dispute through consultation, the party who sought consultation may request the establishment of a panel of arbitrators (Art 21.7). The panel is to make an objective assessment of the matter. It makes decisions and consults regularly with the parties, providing adequate opportunity for achieving a mutually agreed solution (Art. 21.12). The decisions of the panel are final and binding only between the contracting parties and cannot give rise to any rights or obligations of natural or legal persons (Art. 21.15 (8)). Individuals also cannot be party to such a procedure. Natural persons of a contracting party or legal persons estab-

lished in a contracting party may only submit *amicus curiae* written pleadings to an arbitral tribunal in accordance with the rules of procedure (Art. 21.17 (3)). A number of provisions of the EPA are, however, not subject to dispute settlement under Chapter 21[15]. With respect to such provisions, it is not entirely clear how disputes between the parties concerning their interpretation and application are to be handled. The language of the provisions indicates their binding character.

However, differences in the application and interpretation of these provisions by the parties seem possible without sanctions. Therefore, they are soft law provisions.

Chapter 22, titled Institutional Provisions, establishes a Joint Committee comprised of representatives of the EU and Japan. Its responsibility is to ensure that the EPA operates properly and effectively. Where provided for in the EPA, the Joint Committee has the power to take decisions with binding effect on the parties and to make recommendations relevant for the EPA's implementation and operation. In addition to the Joint Committee, specialized committees and working groups are to be established.

Finally, Chapter 23 contains the final provisions. Art. 23.5 clarifies that nothing in this agreement is to be construed as conferring rights or imposing obligations on persons without prejudice to the rights and obligations of persons under other public international law.

III. EPA Provisions on Trade in Goods and Services and Investments

We will now take a closer look at some of the EPA's core provisions regarding free trade in goods and services and investment liberalization.

1. Trade in goods

a) Abolition of customs duties

Each party is to reduce or eliminate any duties or charges of any kind incurred in connection with the importation of goods (Art. 2.4). Safeguard measures for agricultural goods originating in the other party are restricted (Art. 2.5). The classification of goods in trade between the parties is to be in conformity with the Harmonized Commodity Description and Coding System of the World Customs Organization (WCO), abbreviated as HS (Art. 2.6).

15 Provisions of Chapter 5 Section C, Section D; Parts of Chapter 6; Chapter 11; Paragraph 5 of Art. 12.6; Art. 14.52; Chapter 15; Chapter 16; Chapter 18; Chapter 19; and Chapter 20 are not subject to dispute settlement under Chapter 21.

b) National treatment

Each party grants to the other party national treatment in accordance with Art. III of GATT 1994. For this purpose, Art. III of GATT 1994 is incorporated into the EPA *mutatis mutandis* and made part of it (Art. 2.7).

c) Most-favoured-nation treatment

Where a party reduces its most-favoured-nation applied rate of customs duty, that duty rate is to apply to a good originating in the other party if and for as long as it is lower than the customs duty rate on the same good as set out in Annex 2-A (Art. 2.8 (2)).

d) Abolition of import and export restrictions, limitation of fees and charges

Other than customs duties, the parties are not to adopt or maintain any prohibition or restriction on the importation of any good of the other party or on the exportation or sale for export of any good destined for the customs territory of the other party which is compatible with Art. XI GATT 1994. For this purpose, Art. XI of GATT 1994 will be incorporated as an integral part of the EPA (Art. 2.15).

Fees and charges related to import or export of whatever character, other than customs duties, export duties and taxes in accordance with Art. III of GATT 1994, are to be limited to the approximate cost of services rendered, which is not to be calculated on an ad valorem basis, and is not to represent an indirect protection to domestic goods or taxation of imports for fiscal purposes (Art. 2.16 (1)). A party is not to require consular transactions, including related fees and charges in connection with importation (Art. 2.16 (2)). The parties reaffirm their existing rights and obligations under the Agreement on Import Licensing Procedures in Annex 1A to the WTO Agreement (Art. 21.1 (1)) and are to adopt or maintain export licensing procedures in accordance with said agreement, unless other appropriate procedures for the achievement of an administrative purpose are reasonably available (Art. 2.17 (4)). Specific commitments relating to non-tariff measures on goods by each party are set out in Annexes 2-C and 2-D (Art. 2.19 (1)).

General exceptions to the free movement of goods are defined in accordance with Art. XX of GATT 1994, which is made a part of the EPA (Art. 2.22 (1)). These are priority interests such as the protection of public morals; the life and health of humans, animals and plants; the import or export of gold or silver; the ensuring of compliance with laws and regulations; the protection of national treasures of artistic, historical or archaeo-

logical value; the conservation of exhaustible natural resources; the securing of the necessary domestic supply of the population and the processing industry with goods and materials; and other similar vital interests.

e) Rules of origin

The rules of origin specify which products originate from the territory of one party and are thus to enjoy preferential tariff treatment in the territory of the other party (Art. 3.2 (1)). RoOs apply irrespective of where the products are located before crossing the border into the other contracting party. The determination of the origin is simple for wholly obtained products (primary production) (Art. 3.2 (1a), Art. 3.3) or where the production takes place exclusively from source materials originating in a party (Art. 3.2 (1b)). The determination of origin for products in which materials of foreign origin are used is much more complicated (Art. 3.2 (1c), Annex 3-B, Art. 3.4). For determination of origin, the country in which the last significant change took place should be the decisive factor.

Originating status is not acquired solely by conducting one or more of the operations referred to in Art. 3.4 on non-originating working materials during the production of the product in one of the parties. These operations include preserving operations such as drying, freezing, keeping in brine; changes of packaging; disassembly or assembly of packages; washing and cleaning; the application of distinguishing marks; simple painting or polishing; simple mixing of products; and simple assembly or assembly of parts into a complete or finished article. Treatment is considered "simple" if neither special skills nor any specially produced or installed machines, apparatus or equipment are needed for carrying out those operations.

The accumulation rules in Art. 3.5 allow a product that qualifies as originating in one party to be considered to originate in the other party if it is used as a material in the production of another product in the other party. In addition, production carried out in one party on a non-originating material may be taken into account for the purpose of determining whether a product originates in the other party. As a result, manufacturing processes within the entire free trade area established by the EPA are understood as a unified whole regardless of where they take place.

From a legal point of view, the following methods of determination of originating status in a party for products in which non-originating materials are used (Art. 3.2 (1c), Annex 3-A, Note 1 (2)) can be identified:

aa) Change in tariff classification

For many products, the acquisition of originating status is linked to the change of their classification within the HS nomenclature. Depending on

the production processes that a product has undergone, its classification is subject to change as well. The country in which a product has undergone the last change in its title classification within the HS nomenclature is considered to be the country of origin. A distinction is made between three classification changes: change in Chapter (CC), change in heading (CTH) and change in sub-heading (CTSH). A problem with the determination of origin may exist where no change of classification occurs despite a substantial change to a product.

bb) Certain production processes

For certain categories of goods, it is determined that originating status in a party is or will not be acquired by certain production processes. Positive examples include biotechnological processing, chemical reactions and other production processes as defined in Note 5 of Annex 3-A. The country where this processing took place is the country of origin. This provision has the advantage that it is tailored to specific product groups and avoids inaccuracies in the determination of value. One drawback could be seen in the fact that production processes which are more favourable from a tariff perspective may be less efficient in terms of production, and may thus hamper technological progress.

cc) Increase in value

Here, the acquisition of originating status in a party is linked to an increase in value through processing. This depends on either the maximum value that may be added to a product through processing in another state or, conversely, the minimum value added by processing that a commodity must have in order to be considered to originate in a state.

The maximum value of non-originating materials is referred to as "MaxNOM" and is expressed as a percentage. For most of the products listed in Annex 3-B, the MaxNOM is 50% (EXW) or less.

The minimum regional value content of a product is referred to as "RVC" and is also expressed as a percentage. This value is usually 55% (FOB) or above.

Although this method uses relatively simple calculation formulas, it also has disadvantages. Proof of which state a certain part of a good comes from can require considerable organizational expense for the manufacturer, such that even the payment of a tariff could be cheaper. Furthermore, currency fluctuations or surcharges of transportation costs in determining the value of a commodity may result in inaccuracies. Efficient or cheap production tends to adversely affect the manufacturer's value share.

In addition to the methods stated above, other requirements for a product to be considered to originate in a party may be specified in Annexes 3-A and 3-B.

f) Claim for preferential tariff treatment, declaration of origin

On importation, the importing party is to grant preferential tariff treatment to a product originating in the other party on the basis of a claim for preferential tariff treatment by the importer. The importer has a claim if the conditions are met. The importer is to be responsible for the correctness of the claim for preferential tariff treatment and compliance with the requirements provided for in Chapter 3 (Art. 3.16 (1)). The claim for preferential tariff treatment is based on

(1) a statement on origin stating that the product is originating in a party, made out by the exporter; or alternatively
(2) the importer's knowledge that the product is originating in a party (Art. 3.16 (2)).

A statement on origin may be made out by an exporter of a product on the basis of information demonstrating that the product originates in a party, including information on the originating status of the materials used in the production of the product. The exporter is responsible for the correctness of the statement on origin and of the information provided (Art. 3.17 (1)).

A statement on origin is to be made out using one of the linguistic versions of the text set out in Annex 3-D on an invoice or on any other commercial document that describes the originating product in sufficient detail to enable its identification (Art. 3.17 (2)).

2. Investment liberalization

The provision of market access (Art. 8.7) prohibits one party from maintaining or adopting measures restricting the private sector activity of entrepreneurs of the other party. "Entrepreneur of a Party" means a natural or legal person of a party that seeks to establish, is establishing or has established a business in the territory of the other party. The enterprise established by these entrepreneurs of a party in the territory of the other is referred to as a "covered enterprise" (Art. 8.2 lit. c and h).

In principle, all measures with regard to market access through establishment or operation by an entrepreneur of the other party or by a covered enterprise that impose limitations on the number of enterprises, the total value of transactions or assets, the total number of operations or the total quantity of output, the participation of foreign capital, or the total number of natural persons employed in a particular sector; or provisions requiring

specific types of legal entity or joint ventures by which an entrepreneur of the other party may exercise an economic activity are prohibited (Art. 8.7).

As an expression of non-discrimination against entrepreneurs of a party and covered enterprises with respect to establishment and operation in the territory of a receiving party, Art. 8.8 contains the principle of national treatment and Art. 8.9 the most-favoured-nation principle. Art. 8.10 prohibits provisions according to which a covered enterprise must appoint individuals of a particular nationality as executives, managers or members of a board of directors.

Art. 8.11 (1) prohibits a party from imposing or enforcing certain performance requirements in connection with the establishment or operation of any enterprise in its territory. These include certain provisions to export a given level or percentage of goods or services; to achieve a given amount of domestic content; to deal preferentially with goods or services from its own territory; to relate the volume or value of imports to an enterprise's volume or value of exports; to impose certain sales restrictions; to impose export restrictions; to force the transfer of technology; to coerce enterprises to locate international headquarters in its territory; to coerce enterprises to hire local workers; to require the achievement of a certain level of research and development; to require supplying of goods or services from exclusively within its territory; and to limit licensing fees or the duration of a license agreement.

Some of these prohibitions are also to apply if a party, rather than direct imposition or enforcement, links a performance requirement to the receipt or continued receipt of an advantage, in connection with the establishment or operation of an enterprise in its territory (Art. 8.11 (2)).

However, a party is not prevented from conditioning the receipt or continued receipt of an advantage, in connection with the establishment or operation of any enterprise in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory (Art. 8.11 (3)). According to a standard negative list approach, all sectors and measures affecting investment must be liberalized, unless otherwise stated in annexes containing reservations or a list of non-conforming measures.

3. Cross-border trade in services

As with investment liberalization, trade in services is not concerned with reducing tariffs, because, of course, services are not tangible as physical objects, unlike goods, and therefore it would be difficult to impose tariffs on them. In the field of electronic commerce, it has been expressly stipulat-

ed that no customs duties are to be imposed on electronic transmissions (Art. 8.72). Rather, markets are to be opened and discrimination reduced, so that service providers can gain access to the market in the other contracting state and provide their services as residents. The freedom to provide services has its necessary counterpart in the freedom to receive services.

Cross-border trade in services includes the production, distribution, marketing, sale or delivery of a service; the purchase or use of, or payment for, a service; and the access to and use of services offered to the public generally in connection with the supply of a service (Art. 8.14).

To grant market access, in principle, a contracting party is not to maintain or adopt, either on the basis of a territorial subdivision or on the basis of its entire territory, measures that impose limitations on the number of service suppliers; the total value of service transactions or assets; or the total number of service operations or the total quantity of service output. Furthermore, no specific types of legal entities or joint ventures through which a service provider may supply a service may be required (Art. 8.15).

Art. 8.16 contains national treatment. That is, each party is to accord to services and service suppliers of the other party treatment no less favourable than that which it accords to its own like services and service suppliers.

The most-favoured-nation clause requires each party to accord to services and service suppliers of the other party treatment no less favourable than that which it accords to like services and service suppliers of a third country (Art. 8.17).

4. Negative list

Under a negative list approach, all sectors and measures covering trade in services or investment must be liberalized unless otherwise specified in annexes containing reservations or a list of non-conforming measures. A non-conforming measure is any law, regulation, procedure, requirement or practice which violates certain articles of the related investment agreement. For example, a law prohibiting an investor of another member country from owning a factory does not conform to the article on national treatment.

The reserved non-conforming measures are exemptions from market access, national treatment and most-favoured-nation treatment for investment and cross-border trade in services set out in Art. 8.18 and Annex 8-B1 for current reservations and Annex 8-B2 for future reservations. The Japanese reservations can be found in Annex 8-B1 on pages 228 et seq. and in Annex 8B-2 on pages 167 et seq. (English versions). These measures are mainly regulatory requirements for foreign service providers and investors such as pre-information duties and screening procedures; requirements for obtaining permits, authorizations and licenses; requirements for the establishment

of a company or office; requirements for the establishment of legal entities; and requirements for registration. Access to the professions of notary and pilot is linked to Japanese citizenship. Future reservations relate to state measures restricting financial services, participation in state-owned enterprises, supply of telegraphic services, betting and gambling services, manufacture of tobacco products, production of Bank of Japan banknotes, coinage and postal services in Japan, and technically novel services, as well as other measures in specific sectors mentioned therein.

5. Entry and temporary stay of natural persons

Closely related to the liberalization of trade and investment is the mutual facilitation of entry and temporary stay of natural persons for business purposes (Chapter 8 Section D). This Section D applies to measures by a party affecting the entry into that party by natural persons of the other party who are business visitors for establishment purposes, intra-corporate transferees, investors, contractual service suppliers, independent professionals and short-term business visitors. It also applies to measures affecting their business activities during their temporary stay in the former party (Art. 8.20 (2)). There are different definitions of "contractual service suppliers" and "independent professionals" in the EU and in Japan (Art. 8.21 (b) and (c)).

A party is to make information relating to entry and temporary stay by natural persons of the other party publicly available (Art. 8.23 (1)). While entry and temporary stay have to be granted, a party is not to be prevented from requiring natural persons to hold the qualification or professional experience required in the area in which the service is provided for the sector in question.

The Japanese reservations can be found in pages 15 et seq. of Annex III to Annex 8-B and on pages 48-58 in Annex IV to Annex 8-B (English version).

6. Electronic commerce

Electronic commerce contributes to economic growth and opens up new trade opportunities in many sectors. It is therefore important to the parties to facilitate the use and development of electronic commerce. The aim of the section on electronic commerce is to contribute to creating an environment of trust and confidence in the use of electronic commerce and to promote electronic commerce between the parties (Art. 8.70 (1), (2)). This Section F also includes a consumer protection clause in Art. 8.78.

IV. Strategic Partnership Agreement

The Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part[16] (SPA) is a framework agreement. The SPA is legally linked to the EPA, and together they form parts of one negotiating context. The SPA is to provide a legal foundation for improving bilateral cooperation and cooperation in international and regional organizations and forums.

The substantial and procedural legal basis of the SPA is different from that of the EPA. The SPA is based on Art. 37 of the Treaty on European Union (TEU) (International agreements on common foreign and security policy (CFSP) issues) and Art. 212 TFEU (international agreements on economic, financial and technical cooperation with third countries) in conjunction with Art. 218(5) TFEU (council decision on signing of the agreement) and the second subparagraph of Art. 218(8) (unanimity requirement in the Council for Art. 212 agreements) TFEU.

The SPA was negotiated on the Union side by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy on the basis of a decision adopted by the Council. The Working Party on Asia and the Pacific (COASI) was appointed as the consultative committee and the European Parliament was kept regularly informed throughout the negotiations. The SPA will only enter into force once it has been approved and ratified by all governments of the 28 Member States and Japan (Art. 47 (1)). However, in view of the importance of implementing the SPA as soon as possible after signature, parts of the agreement are to be applied "pending its entry into force", which has the same effect as if the agreement were in force between the parties (Art. 47(2) and (3))[17] on the day of commencement[18].

The areas of cooperation covered by the SPA include the following: (provisions marked with an asterisk (*) indicate a provision applicable pending its entry into force): democracy, the rule of law, human rights and

16 Eur-Lex, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN:2018:10:FIN*. The SPA is legally based on Artt. 37 TEU (international agreements on CFSP issues) and 212 TFEU (principles of cooperation with third countries), in conjunction with Art. 218(5) TFEU and the second subparagraph of Art. 218(8) TFEU.

17 Due to legal constraints on the Japanese side, it was not possible to use the EU standard language on provisional application. Consistent with Art. 25 'Provisional application' of the Vienna Convention on the Law of Treaties.

18 Such application is to commence on the first day of the second month following the date on which Japan has notified the Union of the completion of ratification by Japan, or the date on which the Union has notified Japan of the completion of the applicable legal procedure necessary for that purpose, whichever is later. The notifications are to be made by diplomatic notes (Art. 47 (2) sent. 2).

fundamental freedoms (Art. 2*); promotion of peace and security (Art. 3*); crisis management (Art. 4*); weapons of mass destruction (Art. 5 (1*)); conventional arms, including small arms and light weapons (Art. 6); serious crimes of international concern and the International Criminal Court (Art. 7); counter-terrorism (Art. 8); chemical, biological, radiological and nuclear risk mitigation (Art. 9); international and regional cooperation and reform of the United Nations (Art. 10); development policy (Art. 11*); disaster management and humanitarian action (Art. 12*); economic and financial policies (Art. 13*); science, technology and innovation (Art. 14*); transport (Art. 15*); outer space (Art. 16*); industrial cooperation (Art. 17*); customs (Art. 18*); taxation (Art. 19); tourism (Art. 20*); the information society (Art. 21*); consumer policy (Art. 22*); the environment (Art. 23*); climate change (Art. 24*); urban policy (Art. 25*); energy (Art. 26*); agriculture (Art. 27*); fisheries (Art. 28*); maritime affairs (Art. 29*); employment and social affairs (Art. 30*); health (Art. 31*); judicial cooperation (Art. 32); combating corruption and organized crime (Art. 33); combating money laundering and the financing of terrorism (Art. 34); combating illicit drugs (Art. 35); cooperation on cyber issues (Art. 36); passenger name records (Art. 37*); migration (Art. 38 (1*)); personal data protection (Art. 39*); education, youth and sport (Art. 40*); and culture (Art. 41*).

The SPA establishes a Joint Committee made up of representatives of the parties with the objective of coordinating the overall partnership which is built upon this agreement (Art. 41*).

In the same context of strategic cooperation, there is also a Memorandum of Cooperation to promote and create a liquid, flexible and transparent global liquefied natural gas (LNG) market, which was agreed by the EU and Japan in early July 2017. Under the Memorandum, the EU and Japan will exchange experiences and joint activities to disseminate best practices to improve the functioning of the global LNG market. Above all, this cooperation is to serve to ensure energy security, as together the EU and Japan make up nearly 50% of global demand for natural gas.[19]

V. FINAL REMARKS

The overview of all the provisions of the EPA shows that, beyond the content of a preferential trade agreement, the contracting parties have agreed to numerous other economic integration arrangements. For this reason, the

19 Ministry of Trade and Industry, News Release, 11 July 2018 *http://www. meti. go. jp/english/press/2017/0712_001.html,* (last accessed 25 July 2018).

term "Economic Partnership Agreement", which goes back to a renaming of the original working title "Free Trade Agreement", is appropriate.

The EPA does not include a specific section on consumer protection. However, it aims to contribute to the enhancement of consumer welfare (preamble) and has a consumer clause for electronic commerce. On consumer policy, the SPA provides that the EU, its Member States and Japan are to promote dialogues and exchange of views on policies and legislation aiming at a high level of consumer protection and enhance cooperation in key areas, including product safety, enforcement of consumer legislation, and consumer education, empowerment and redress.

The EU and Japan have advanced their cooperation in the area of data protection[20].

Considering the existing differences between the EU and Japan in the negotiation of an investment protection agreement, the intention to conclude the talks swiftly seems ambitious.

The entry into force of the EPA and SPA is eagerly awaited, and in the years to come we will see whether these high expectations will be met and how the economic and strategic partnership will develop.

SUMMARY

On 17 July 2018, the Economic Partnership Agreement and the Strategic Partnership Agreement were signed by representatives of the EU and Japan. Both agreements are expected to enter into force in 2019. The EPA provides the legal basis for allowing companies from Japan to access the EU's internal market on the most favourable terms and vice versa. At the same time, it establishes a legal framework that ensures important economic policy objectives such as legal certainty, transparency, consumer protection, promotion of small and medium-sized enterprises, competition and economic, social and environmental sustainability. The EPA is therefore much more than a free trade agreement, as it provides for a much wider integration of markets beyond the reduction and elimination of tariffs and the removal of trade barriers. Based on the same negotiation context and legally linked with the EPA, the SPA covers a number of areas, including political dialogue, energy, transport, human rights, education, science and technology, justice, asylum and migration.

To date, the EU and Japan have already concluded several other bilateral agreements in a number of areas, including the mutual recognition of the re-

20 European Commission – Press release, European Union and Japan agreed to create the world's largest area of safe data flows, Tōkyō 17 July 2018, *http://europa.eu/rapid/press-release_IP-18-4501_en.htm* (last accessed 30 July 2018).

sults of conformity assessments for various products and manufacturing processes (2002), anti-competitive activities (2003), the peaceful uses of nuclear energy (Euratom 1998, 2006, 2007), mutual administrative assistance in customs matters (2008), mutual assistance in criminal matters (2010) and cooperation in science and technology (2011).

This paper provides an overview, with comments, of the EU's existing bilateral international agreements with Japan, and reveals their importance for the Union's trade and economic relations with Japan.

ZUSAMMENFASSUNG

Am 17. Juli 2018 wurden das Wirtschaftspartnerschaftsabkommen und das Strategiepartnerschaftabkommen von Vertretern der EU und Japans unterzeichnet. Beide Abkommen sollen voraussichtlich 2019 in Kraft treten. Das WPA schafft die rechtlichen Grundlagen damit Unternehmen aus Japan zu möglichst günstigen Bedingungen Zugang zum Gemeinsamen Markt der EU erhalten und umgekehrt. Gleichzeitig schafft es einen Rechtsrahmen, der wichtige wirtschaftspolitische Ziele wie Rechtssicherheit, Transparenz, Verbraucherschutz, Förderung von kleinen und mittleren Unternehmen, Wettbewerbsfähigkeit und wirtschaftliche, soziale und umweltverträgliche Nachhaltigkeit gewährleistet. Das WPA geht also über ein Freihandelsabkommen wesentlich hinaus, da es über die Reduzierung und Abschaffung von Zöllen und Abbau von Handelshemmnissen hinaus, eine viel weitergehende Integration der Märkte vorsieht. Auf demselben Verhandlungshintergrund beruhend und rechtlich verbunden ist das SPA, welches eine Reihe von Bereichen, darunter politischer Dialog, Energie, Transport, Menschenrechte, Bildung und Erziehung, Wissenschaft und Technologie, Justiz, Asyl und Migration betrifft.

Zuvor hatten die EU und Japan bereits mehrere bilaterale Verträge in verschiedenen Bereichen abgeschlossen, namentlich über die gegenseitige Anerkennung der Ergebnisse von Konformitätsbewertungen für verschiedene Produkte und Herstellungsverfahren (2002), die Kooperation gegen wettbewerbswidrige Aktivitäten (2003), die friedliche Nutzung der Kernenergie (mit Euratom 1998, 2006, 2007), die gegenseitige Amtshilfe im Zollbereich (2008), die Rechtshilfe in Strafsachen (2010) und die Zusammenarbeit in Wissenschaft und Technologie (2011).

Der Beitrag bietet einen kommentierten Überblick über die bestehenden bilateralen Abkommen der EU mit Japan, und zeigt deren Bedeutung für die beiderseitigen Handels- und Wirtschaftsbeziehungen auf.