

# Can Japan Have the “Best of Both Worlds”?

## EU adequacy vs CPTPP & USJDTA

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# Outline

The cause



The essence



Implications

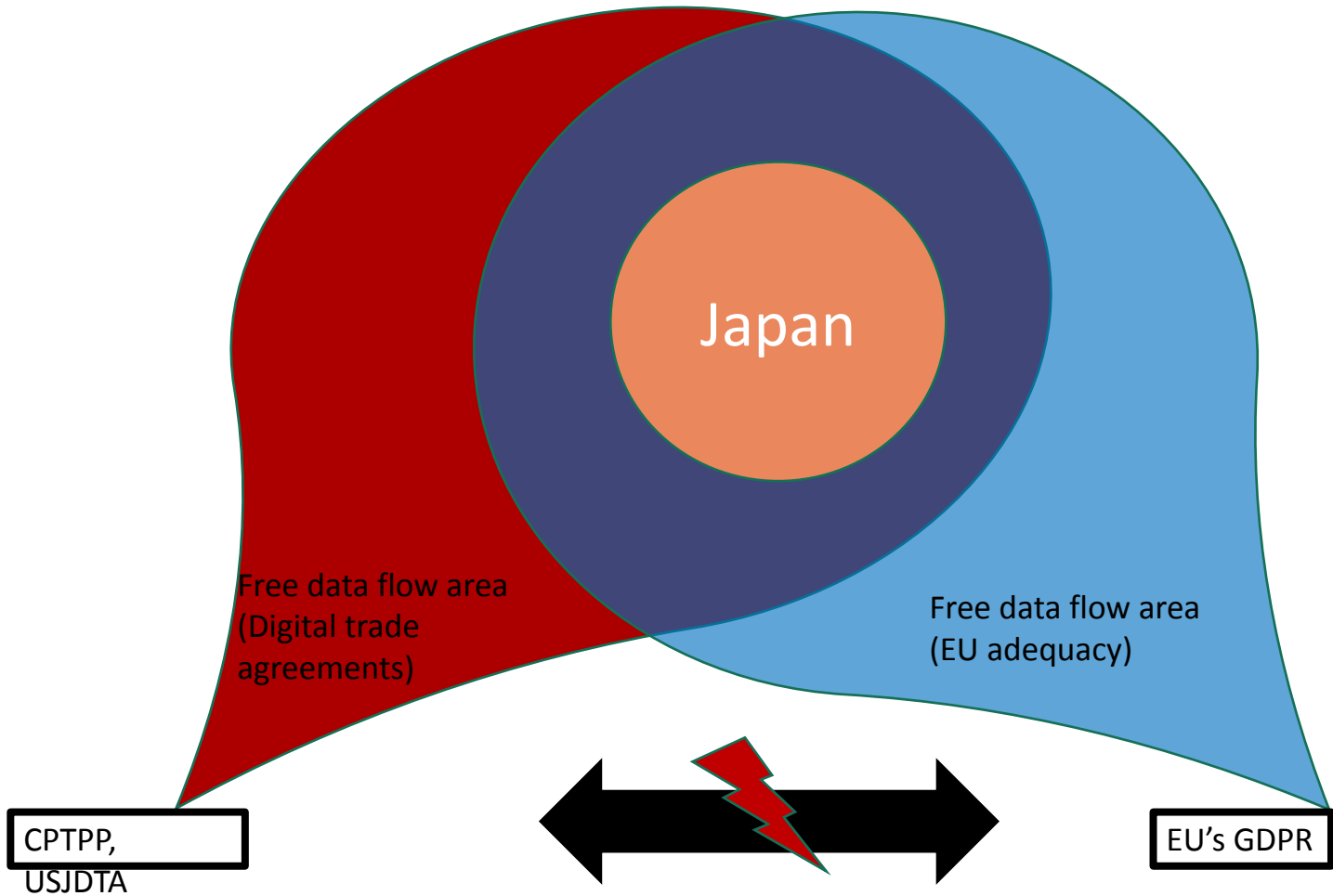
# The cause: two data areas

## EU Adequacy decision for Japan

- Free flow of data from the EU  Restriction on onward transfers of EU data

## Digital Trade Agreements joined by Japan

- Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP) & US-Japan Digital Trade Agreement (USJDTA)
- Obligations to maintain free data flows from Japan to the US, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Viet Nam, Peru, Brunei Darussalam, Chile, and Malaysia



# Restrictions on Onward Transfers of EU Data from Japan

Consent

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graph TD; A[Consent] --> B[Equivalency assessment by the Japanese data protection authority]; B --> C[Binding arrangements between data exporter and importer that guarantee equivalent level of protection];
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Equivalency assessment by the Japanese data protection authority

Binding arrangements between data exporter and importer that guarantee equivalent level of protection

# A Clear-Cut Case of Violation

## Article 14.11(2) CPTPP

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

## Article 11(1) USJDTA

- Neither Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means, if this activity is for the conduct of the business of a covered person.

# Can Violation Be Justified? (example of Art. 14.11(3) CPTPP)

Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 [the Free Data Flow Provision discussed above] to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade (aka “**chapeau**”); and
- (b) does not impose restrictions on transfers of information **greater than are required** to achieve the objective. (aka “**necessity test**”)

- Article 14.8 Personal Information Protection
  - Sets a low level of data privacy protection; relevant for interpretation

# The “Necessity Test”

## Key question: Is a Less Trade-Restrictive Measure Reasonably Available to ensure the same level of protection?

- Adequacy requires ensuring a higher *level* of protection than endorsed by CPTPP
- Footnote 6 to Article 14.8: equivalency of different ways to protect privacy (omnibus rules and self-regulation)
- Requirement to take into account international standards
- Example of potentially relevant standards: 2015 APEC Privacy Framework (all CPTPP are members)
  - No specific requirements on transfers of data; one consent for internal/international data flows
  - Specifically endorsed by Japan in the guidance on cross-border data flows (on file with DTA)
- Inconsistency of the level of protection yielded by different onward transfer mechanisms □ consent - equivalency – contracts
  - Are restrictions effective in achieving their goals?
- Necessity to comply with EU’s adequacy is irrelevant



# “Chapeau”

Is the contested measure a ‘rigid and unbending requirement’ in that it required other countries to adopt a regulatory programme that is ‘*essentially the same*’ as opposed to ‘*comparable in effectiveness*’;

- Equivalency assessment is rigid but not the other onward transfer mechanisms: viewed together as a “toolbox”

Did the contested measure consider different circumstances that may occur in territories of other parties; and

- Same restrictions apply irrespective of destination and level of data protection there

Did the defending party negotiate seriously with all WTO members, as opposed to doing so with some but not with others

- Restrictions on onward transfers adopted unilaterally and *not* negotiated with CPTPP parties

# Implications

There is a real risk that violations will not be justified under the exceptions

Japan may have to choose between complying with adequacy or with CPTPP/USJDTA

Legal effects of breach of trade agreement not automatic

Problem of Japan's domestic law

Not a problem for the EU, if withdrawing adequacy remains a credible threat

A point of concern for other countries in the same situation: Canada, New Zealand and the UK

# Constraints

USJDTA: no enforcement mechanism

Uncertainty regarding interpretation

- Unpredictable interpretation by CPTPP dispute settlement mechanism
- WTO case law instructive but uneven

Politics

- Not all cases of violation end up in dispute settlement
- But: preventive effect of the very risk of violation and/or dispute