Scope and Applicability of Free Data Flow Exceptions in US-Japan Digital Trade Agreement and the CPTPP

By Svetlana Yakovleva, PhD[1]

Executive Summary

When it comes to cross-border transfers of personal data, Japan is in a unique situation for two reasons. First, it is one of the very few countries in the world that managed to secure free flow of personal data from the EU on the basis of an adequacy decision granted by the European Commission. Second, it undertook broad free data flow obligations under several international trade agreements, in particular, the Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP) and US-Japan Digital Trade Agreement (USJDTA) (the primary focus of this report). This may seem contradictory because the adequacy decision requires Japan to maintain certain restrictions on onward transfers of personal data originating from the European Union (hereinafter, for simplicity, "EU personal data") to third countries, such as the parties to the CPTPP or to the United States, which themselves have not yet been afforded an adequacy decision. These restrictions are thus in tension with the free data flow obligations (Free Data Flow Provisions) that Japan must comply with under the above-mentioned trade agreements.

This report analyses whether and to what extent restrictions on onward transfers of EU personal data from Japan to the parties of the CPTPP or to the U.S. could violate the CPTPP or UJSDTA, and if so, whether they can be justified on the basis of the exceptions these agreements contain. The report concludes that restrictions on onward transfers of personal data from Japan are likely to fall into the scope of the Free Data Flow Provisions in both CPTPP and USJDTA and to run afoul of the obligation it contains to ensure free flow of information, including personal data. Violation of these provisions *per se* is not necessarily a problem insofar as it can be justified under the *exception* included in Free Data Flow Provisions in both trade agreements.

In light of their novelty, exceptions from Free Data Flow Provisions in the CPTPP and USJDTA have not yet been interpreted by any dispute-settlement body. For this reason, the impact of the application of these provisions to restrictions on onward transfers of EU personal data from Japan is uncertain. That said, the wording of the exceptions in both agreements is similar to that of the so-called general exceptions in the World Trade Organization (WTO)

[1] Post-doctorate Researcher, Institute for Information Law (IViR), University of Amsterdam; Senior Legal Adviser, De Brauw Blackstone Westbroek. The author would like to thank Moqiu Li for his valuable research assistance in preparation of this report. The author is also grateful to Laura Drechsler, Hiroshi Miyashita, Javier Ruiz and the participants of the online civil society workshop (Europe Asia-Pacific Data Privacy and Trade: focus on Japan) of 21 June 2022 for their helpful input, comments and suggestions.

Agreements, in particular, Article XX of the General Agreement on Tariffs and Trade 1994 (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). The report concludes that the interpretation of the general exceptions in WTO case law is relevant in the context of exceptions of Free Data Flow Provisions. In its analysis of the latter, the report, therefore, relies on that interpretation. It should, however, be emphasized that application of the exceptions, both in the GATT and GATS and CPTPP and USJDTA, remains a case-by-case assessment, a matter in which dispute settlement bodies in charge of such application have a substantial discretion. It is ultimately up to the adjudicators of the CPTPP and, potentially USJDTA,[2] to determine whether and to what extent to rely on WTO case law in a particular dispute. Furthermore, WTO case law on the interpretation of the general exceptions itself has been uneven and inconsistent over time.

Keeping in mind these caveats, on the basis of an in-depth assessment, the report identifies the following key *risks* that restrictions on onward transfers of EU personal data from Japan *cannot be justified* under those exceptions.

First, the fact that in the WTO's more than 26 years of existence, general exceptions in the GATT and GATS were successfully invoked in only two out of 48 cases does not inspire optimism. It is common practice to interpret those exceptions narrowly.

Second, in its representations to the EU, which are reflected in the adequacy decision, Japan committed to a level of personal data protection *higher* than the level of protection that is viewed as sufficient under the CPTPP and USJDTA. The CPTPP and USJDTA contain a number of provisions, discussed in this report, that require Japan to *lower* the level of protection closer to that endorsed in the CPTPP and USJDTA. As a result, restrictions on onward transfers could be viewed by trade adjudicators as disproportionately trade-restrictive and more trade restrictive than is necessary. In particular, the less trade restrictive approach taken in APEC Privacy Framework and APEC Cross-Border Privacy Rules could be viewed as less trade-restrictive alternatives to the restrictions on onward transfers of EU personal data prescribed by the adequacy decision. Importantly, the content of the EU adequacy decision, including its statement that APEC Cross-Border Privacy Rules system are not viewed as sufficiently robust by the EU, will not have any direct legal significance in the trade adjudicator's application of the exceptions from Free Data Flow Provisions. Furthermore, restrictions on onward transfers of EU personal data from Japan are unlikely to meet the additional USJDTA requirement that such restrictions may not discriminate transfers solely for the reason of them being "cross-border" in a way that alters conditions of competition between Japanese and non-Japanese providers to the detriment of the latter.

Third, and finally, the way restrictions on onward transfer of EU personal data are designed and applied could also constitute a means of arbitrary or unjustifiable discrimination

[2] Potentially, because USJDTA currently does not provide for any dispute settlement mechanism.

or a disguised restriction on trade. Restrictions on onward transfers of EU personal data may be viewed as inconsistent as each of them yields a different level of protection. Furthermore, these restrictions apply horizontally to any country outside Japan, unless it has been recognized as equivalent by Japan. Conditions and the levels of personal data protection in those countries are not taken into account (e.g., even if the level of protection Is higher than in Japan restrictions would still apply). The fact that, so far, Japan has only recognized countries of the European Economic Area and the UK, and did not "negotiate in good faith" a similar recognition with any of the CPTPP parties or the U.S., could be viewed as unjustifiable discrimination.

Overall, therefore, this report suggests that there are risks that, in a hypothetical dispute under the CPTPP or USJDTA, restrictions of onward transfer of EU personal data from Japan could be found in violation of Free Data Flow Provisions that cannot be justified under the exceptions from such provisions. Should this situation occur, Japan will have a difficult choice between, on the one hand, bringing restrictions of onward transfers in compliance with the CPTPP or USJDTA requirements, while breaching the conditions for the EU adequacy decision, or, to continue complying with the conditions of the EU adequacy decision while not bringing its restrictions on onward transfers in compliance with the CPTPP or USJDTA. Importantly, however, at the time of writing the USJDTA could not be enforced through a binding dispute settlement mechanism. It cannot be excluded that such mechanism will be created in the future.

The conclusions of this report are instructive not only for Japan, but also for other countries that may find themselves in a similar situation. In particular, the UK, Canada and New Zealand, which maintain an adequacy decision from the EU and are parties to CPTPP and other trade agreements with free data flow provisions.

To preserve the credibility of its adequacy decisions, the EU should monitor developments on this issue, in particular, as part of periodic review process of the adequacy decisions. It should maintain a credible threat of suspension or revocation of adequacy decisions if compliance with such decisions is endangered by relevant countries' international trade commitments.

Table of Contents

1. Introduction

1.1 Aim of the Research

To ensure that a high level of protection is guaranteed to personal data originating from the European Union (hereinafter, for simplicity, "EU personal data"), the EU General Data Protection Regulation (GDPR)[3] restricts transfers of such data outside the EU (hereinafter, also "third country"). One of the mechanisms under the GDPR that allows EU personal data to flow freely to a third country while ensuring a high level of protection, is the so-called adequacy mechanism.[4] The "adequacy" of a third country's data protection framework--and legal system more generally--is assessed by the European Commission. If that assessment is positive, the European Commission adopts a unilateral "adequacy decision." To ensure continuity of the high level of data protection, the GDPR requires that onward transfers from a third country to another third country (hereinafter, "onward transfers") are also restricted.[5]

Recently, the European Commission linked the adoption of adequacy decisions to the EU's economic interests in cross-border data flows, a position which is often manifest in the negotiation and conclusion of international trade agreements.[6] The adequacy decision for Japan[7] is one of the recent adequacy decisions adopted in such a context. Its adoption coincided with the conclusion of the EU-Japan Economic Partnership Agreement.[8] Restrictions on onward transfers of EU personal data from Japan are reflected in this Decision.

In parallel to obtaining an adequacy decision from the EU, Japan has also concluded the Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP)[9] and the

---

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.
[4] Article 45 GDPR.
[5] Article 44, recital 101 GDPR.
[6] While the EU does not negotiate data protection issues in trade agreements (in EU Commission's own words, "[p]rivacy is not a commodity to be traded"), the first criterion the EU Commission takes in consideration when deciding with which countries to start a dialogue on adequacy is "the extent of the EU's (actual or potential) commercial relations with a given third country, including the existence of a free trade agreement or ongoing negotiations". Communication from the European Commission, Exchanging and Protecting Personal Data in a Globalised World, COM/2017/07 final, 10 January 2017.
[7] Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information, C/2019/304/, OJ L 76, 19.3.2019.
[8] In the announcement of the adequacy decision for Japan, the EU Commission noted: "The adequacy decisions also complement the EU-Japan Economic Partnership Agreement- which will enter into force in February 2019." European Commission, Press Release, European Commission adopts adequacy decision on Japan, creating the world's largest area of safe data flows, 23 January 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_421.
[9] Entered into force on December 30, 2018. Australia, Canada, Japan, Mexico, New Zealand, Singapore, Viet Nam, and Peru have ratified the CPTPP; Brunei Darussalam, Chile, and Malaysia have yet completed their relative domestic procedures of ratification. Text of the TPP incorporated by reference into the CPTPP is available at https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documentshttps://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-

US-Japan Digital Trade Agreement (USJDTA), however[10]. Both of these trade agreements require maintaining free cross-border data flows between the parties to these agreements. These agreements also provide for an exception allowing the parties to these agreements to restrict cross-border data flows under certain conditions. Against this backdrop, the question arises whether there a potential conflict between Japan's commitments to restrict data flows to maintain the EU adequacy decision, on the one hand, and its commitments under the above-mentioned trade agreements.

This research aims to analyze whether and to what extent restrictions on onward transfers of EU personal data from Japan to the parties of the CPTPP (which themselves have not been afforded an adequacy decision by the EU) or to the United States violate the CPTPP or UJSDTA, and if so, whether they can be justified on the basis of the exceptions these agreements contain.

This issue is new and mostly unexplored in the literature, unlike the issue of consistency of the EU's own restrictions on transfers of personal data flows with its obligations under the General Agreement on Trade in Services (GATS) within the framework of World Trade Organization[11] and the EU's proposals for data flow provisions in future trade agreements.[12] Consistency of Japan's own restrictions on transfers of personal data (irrespective of additional limitations imposed by the EU adequacy decisions) have also not been analyzed in detail in any English language literature.

---

associated-documents; text of the CPTPP is available at https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf

[10] Applicable since its entry into force on January 1, 2020. (See U.S.-Japan Trade Negotiations, https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations). The text of the agreement is available at https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf

[11] See, e.g., K. Irion, S. Yakovleva, M. Bartl (2016). Trade and Privacy: Complicated Bedfellows? How to Achieve Data Protection-Proof Free Trade Agreements. *Independent study commissioned by BEUC et al*. Retrieved from https://www.ivir.nl/publicaties/download/trade_and_privacy.pdf; G. Greenleaf, Free Trade Agreements and data privacy: Future perils of Faustian bargains, in Dan Svantesson and Dariusz Kloza, Transatlantic Data Privacy Relationships as a Challenge for Democracy (European Integration and Democracy series) (Intersentia, 2017); S.Yakovleva (2018). Should Fundamental Rights to Privacy and Data Protection be a Part of the EU's International Trade 'Deals'? World Trade Review. 17(3); S. Yakovleva, K. Irion (2016). The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection. European Data Protection Law Review. 2; J. A. Micallef (2019). Digital Trade in EU FTAs: Are EU FTAs Allowing Cross Border Digital Trade to Reach Its Full Potential? *Journal of World Trade*. 53(5); N. Sen (2018). Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path? Journal of International Economic Law. 21(2); F. Velli, (2019) The Issue of Data Protection in EU Trade Commitments: Cross-border Data Transfers in GATS and Bilateral Free Trade Agreements, European Papers - A Journal on Law and Integration, 4(3);

[12] See, e.g., S. Yakovleva, K. Irion, (2020) Pitching trade against privacy: reconciling EU governance of personal data flows with external trade, International Data Privacy Law, 10(3); S. Yakovleva, EU's Trade Policy on Cross-Border Data Flows in the Global Landscape: Navigating the Thin Line between Liberalizing Digital Trade, 'Digital Sovereignty' and Multilateralism, in Elaine Fahey, Isabella Mancini (eds.), Understanding the EU as a Good Global Actor (Edward Elgar 2022).

Before diving into the details of analysis, it is important to highlight that the risk that restrictions on onward transfers of EU personal data would in practice be found to violate Japan's trade commitments are higher in relation to transfers of the parties to the CPTPP, such as Australia or Singapore, which do not have an EU adequacy decision. First, because unlike the USJDTA, the CPTPP is an international trade agreement with a binding dispute settlement (enforcement) mechanism.[13] In contrast, the USJDTA is, from a U.S. law perspective, an Executive Agreement and is thus not ratified by the US Congress. In Japan, the USJDA was approved by the Japanese parliament (Diet). The USJDTA does not include any dispute settlement mechanism,[14] and, therefore, is not enforceable though binding dispute-settlement.[15] The USJDTA also does not contain any provisions on consultations in case of violation of the agreement,[16] which denotes of any mechanisms of influencing the violating party to amend or abolish measures inconsistent with the USJDTA, such as restrictions on onward transfers of EU personal data. Furthermore, in March 2022, the EU and the U.S. announced a political agreement on a new framework for transatlantic data flows, which may result in an adequacy decision for the U.S. already in 2022,[17] which would then allow unrestricted transfers of EU personal data to U.S. businesses that participate in this framework and reduce the significance of restrictions on onward transfers of EU personal data from Japan to the U.S.

1.2 Scope and Limitations

The scope of this report is limited to onward transfers of EU personal data that fall within the scope of the EU adequacy decision for Japan. The adequacy decision applies to the transmissions of EU personal data from EU data exporters (controllers or processors) to data importers (controllers or processors) that qualify as business operators in Japan and fall under the scope of Japan's data protection law - Act on the Protection of Personal Information (APPI).[18] It does not apply to *direct* transmissions of personal data from individuals in the EU to data importers in Japan.[19] Therefore, onward transfers of EU personal data collected by Japanese business operators directly from individuals in the EU does *not* qualify as an onward transfer, and is outside the scope of this report.

---

[13] Chapter 28 of the CPTPP.
[14] The DTA is labelled as "stage one" of a broader US-Japan trade agreement. See US Congressional Research Service, U.S.-Japan Trade Agreement Negotiations (18 December 2020), https://crsreports.congress.gov/product/pdf/IF/IF11120
[15] N. Cory, U.S. Options to Engage on Digital Trade and Economic Issues in the Asia-Pacific, ITIF, 8 February 2022, https://itif.org/publications/2022/02/08/us-options-engage-digital-trade-and-economic-issues-asia-pacific
[16] Unlike, for example, Article 6 of the sister US-Japan Trade Agreement.
[17] J. Duball, Officials 'thrilled' with EU-US data flows agreement, 'work continues' on finalization, IAPP, 12 April 2022, https://iapp.org/news/a/officials-thrilled-with-eu-us-data-flows-agreement-work-continues-on-finalization/
[18] EDPB draft Guidance on the notion of transfer; Commission Implementing Decision 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan and under the Act on the Protection of personal Information, recitals 3, 5 and 10;
[19] Recital 5 of the Adequacy Decision.

The scope of analysis of relevant provisions in the CPTPP and USJDTA is limited to specific provisions regulating cross-border data flows, entitled "Cross-Border Transfer of Information by Electronic Means" (hereinafter jointly referred to as "Free Data Flow Provisions") and exceptions contained in those provisions (hereinafter "exceptions from Free Data Flow Provision").[20] This research does not analyze the restrictions on onward transfers from the perspective of other Japan's commitments under the CPTPP, such as most-favored-nation treatment and national treatment obligations, which could also be relevant in light of the restrictions on onward transfers of EU personal data from Japan.

This research presumes that the adequacy decision for Japan *itself* is consistent with the requirements applicable to an adequacy decision in Article 45 of the GDPR and the adequacy referential adopted by the European Data Protection Authorities (EDPB)[21], even though some scholars and the EDPB have expressed doubts in this respect.[22]

This report also excludes the analysis of the security exceptions in both CPTPP and USJDA[23] as possible justifications for restrictions on onward transfer of EU personal data from Japan. Although these exceptions are formulated extremely broadly and, in this sense, would present an attractive justification tool, it is unlikely that Japan can invoke essential security to justify restrictions on data flows based on the adequacy decision, the primary motivation of which is the protection of human rights to privacy and the protection of personal data.

1.3. Structure of the Report

This report proceeds in three steps. First, in Section 2, it introduces restrictions on onward transfers of EU personal data from Japan to other third countries, as explained in the EU adequacy decision for Japan and Supplementary Rules to that decision. Second, in Section 3, the report explains the Free Data Flow Provisions in the CPTPP and USJDTA. It then analyses whether restrictions on onward transfers of EU personal data fall under the material scope of these provisions and the tension between those restrictions and provisions. Finally, having concluded that restrictions on onward transfers of EU personal data from Japan violate the Free Data Flow Provisions in both the CPTPP and USJDTA, in Section 4 the report introduces the exceptions from these Provisions and analyses whether these violations can be justified. A brief set of conclusions and recommendations follows.

---

[20] Article 14.11 CPTPP, Article 11 of USJDTA.
[21] Article 29 Working Party, Adequacy Referential, WP 254 rev.01, 6 February 2018.
[22] See, e.g., G. Greenleaf (2018) Japan: EU Adequacy Discounted. Privacy Laws & Business International Report. 155 8-10 https://ssrn.com/abstract=3276016 ; G. Greenleaf (2018). Japan's Proposed EU Adequacy Assessment: Substantive Issues and Procedural Hurdles. Privacy Laws & Business International Report, UNSW Law Research Paper No. 18-53 https://ssrn.com/abstract=3219728 . EDPB Opinion 28/2018 regarding the European Commission Draft Implementing Decision on the adequate protection of personal data in Japan Adopted on 5 December 2018, p.20.
[23] Article 4 of the USJDTA, Article 29.2 CPTPP. For discussion of the breadth of these exceptions compared to the general exception see S. Yakovleva, (n 12).

2. Overview of Restrictions on Onward Transfers of EU personal data from Japan on the basis of EU Adequacy Decision

Onward transfers of EU personal data from Japan to third countries are regulated in the Adequacy Decision for Japan and 'Supplementary Rules' included in Annex 1 to the adequacy Decision. These rules oblige Japanese businesses 'to ensure (e.g. by technical ("tagging") or organizational means (storing in a dedicated database)) that they can identify personal data transferred from the EEA throughout their "life cycle."'[24] Recital 75 of the Adequacy Decision requires that further recipients of EU personal data outside Japan are subject to rules ensuring a "similar" level of protection to that of the Japanese legal order.[25]

Just like under the EU GDPR, onward transfers of EU personal data from Japan are only possible under certain conditions. The adequacy decision for Japan, including the Supplementary Rules, provides for three principal options for onward transfers of EU personal data from Japan. The first option allows onward transfers based on an individual's consent.[26] Under the APPI, consent to transfer personal data to a third party in a foreign country is different from the consent to transfer personal data to a third party *within Japan*.[27] Supplementary Rule 4 specifies that "consent" means that the individual has been "provided information on the circumstances surrounding the transfer necessary for the principal[28] to make a decision on his/her consent". According to Recital 76 of the adequacy decision, this provision ensures that "such consent will be particularly well informed' and will allow [individuals] to assess the risk for the privacy involved in the transfer."[29] The legal standard of consent for onward transfer of EU personal data is thus higher than the general standard for consent in Japanese law. The second and third options allow an onward transfer of EU personal data from Japan without consent if:

(a) the country of destination of the onward transfer has been recognized by the Japanese data protection authority as providing a level of protection of personal data *equivalent* to that of Japan; or

(b) if the data exporter from Japan and importer in a third country have together implemented binding arrangements that guarantee an *equivalent* level of data protection to that

[24] Recital 15 Adequacy Decision for Japan.
[25] The 'similar' as opposed to 'essentially equivalent' standard suggests that the adequacy decision sets a lower threshold for the legal framework in a country of onward transfer to meet, than that threshold applicable to initial transfers of EU personal data to Japan.
[26] Recital 76 Adequacy Decision for Japan, Supplementary rule 4.
[27] Consent for transfer of personal data to a third party within Japan is regulated in Article 23 APPI, consent for transfer of personal data to a third party in a foreign country is regulated in Article 24 APPI. The lawfulness and information requirements as well as exceptions from the consent requirement in both cases are different. This suggests that a consent obtained under Article 23 APPI could be insufficient for transfer of personal data to a third party in a foreign country.
[28] In terms of the GDPR, 'principal' means 'data subject'.
[29] Greenleaf argues that Japanese consent requirements are lower than those under the GDPR. G. Greenleaf, (2018). Japan: EU Adequacy Discounted. *Privacy Laws & Business International Report*. 155 8-10, p. 8.

in Japan by means of a contract, other forms of binding agreements or binding arrangements within a corporate group.[30]

3. Do Restrictions on Onward Transfers of EU personal data Outside Japan Violate Free Data Flow Provisions in the CPTPP and USJDTA?

To answer this question, this chapter first enquires into the material scope of the Free Data Flow Provisions, which is essential to determine whether these Provisions are applicable to such restrictions in the first place. It then applies Free Data Flow Provisions to the restrictions on onward transfers of EU personal data outside Japan.

3.1 Material Scope of the Free Data Flow Provisions

The Free Data Flow Provisions in the CPTPP and USJDTA have a broad scope. Restrictions on onward transfers of EU personal data from Japan are very likely to fall within this scope. The material scope of the Free Data Flow Provision in the CPTPP coincides with the material scope of the Electronic Commerce Chapter 14 of the CPTPP, where this provision is situated. Chapter 14 of the CPTPP applies to "measures adopted or maintained by a Party that affect trade by electronic means."[31] The CPTPP defines a "measure" broadly as "any law, regulation, procedure, requirement or practice."[32] The material scope of the Free Data Flow Provision in USJDTA coincides with the material scope of the whole agreement, which applies to "measures adopted or maintained by a Party that affect trade by electronic means."[33] A "measure" is broadly defined as "any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."[34]

In sum, to fall under the scope of Free Data Flow Provisions in the CPTPP and USJDTA, restrictions on onward transfer of EU personal data from Japan must meet two conditions. First, they must fall under the definition of a "measure", and, second, they must "affect trade by electronic means."

Restrictions on onward transfers of EU personal data from Japan are likely to qualify as a "measure" under both agreements for the following reasons. These restrictions are imposed by the following legal acts:

- Article 24 of the APPI;
- Article 11 of the Enforcement Rules for the APPI (Rules of the Personal Information Commission No. 3, 2016, hereinafter "Rules");

[30] Recital 79 of the adequacy decision explicitly states that APEC Cross-Border Privacy Rules cannot be used as a mechanism for onward transfers of EEA personal data from Japan.
[31] Article 14.2(2) CPTPP.
[32] Article 1.3 CPTPP.
[33] Article 2(1) USJDTA.
[34] Article 1(aa) USJDTA.

- Decision of the Japanese Personal Information Protection Commission (PPC) adopting the Supplementary Rules under the APPI for the Handling of Personal Data Transferred from the EU based on the adequacy decision (Annex 1 to the Adequacy Decision, hereinafter "Supplementary Rules"). This decision is legally binding on all business operators processing personal data in Japan.

The first two acts apply to any personal data that falls under the APPI and constitute the prerequisites for affording Japan an adequacy decision. The second act is based on the Adequacy decision and applies exclusively to EU personal data. All of these rules are legally binding and enforceable in Japan.[35] Therefore, all of these acts are likely to fall under the definition of a "measure" under both the CPTPP and USJDTA.

On the second criterion ("affect trade by electronic means"), neither the CPTPP nor the USJDTA define what "affect" means. This term is, however, used in a number of other trade agreements, such as the WTO Agreements on trade in goods and trade in services.[36] In WTO case law the term "affecting" has been interpreted broadly as having *"an effect on"*, which is wider in scope than such terms as "regulating" or "governing".'[37] If this interpretation is instructive, "affect" in CPTPP and USJDTA should be interpreted equally broadly. Cross-border data flows are the "backbone" of digital commerce: they are essential not only for the provision of digital services, goods and technology 4.0, but also for the functioning of global business processes and value chains. Restrictions on onward transfer of EU personal data from Japan limit such data flows and, therefore, affect trade by electronic means in a number of ways.[38]

Obligations under Chapter 14 CPTPP and USJDTA are general commitments in the sense that they automatically apply to all sectors and do not require additional commitments in the schedules to the agreement. Japan has also not excluded restrictions on transfers of personal data from the scope of the relevant Free Data Flow Provisions by, for example, listing them as non-conforming measures in the CPTPP.

3.2 Free Data Flow Provisions in CPTPP and USJDTA

Free Data Flow Provisions are novel. They have not yet been interpreted in detail in either the literature or case law. This section explains and applies these Provisions on the basis of

[35] Recital 15 of the Adequacy Decision.
[36] See, e.g., Article I(1) of the General Agreement on Trade in Services (GATS) 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); Article III of the General Agreement on Tariffs and Trade (GATT) General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[37] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591 (*EC – Bananas III*), para. 220.
[38] For discussion, see e.g., M. Burri, (2020) Trade in Services Regulation in the Data-Driven Economy 12(1) Trade Law and Development, 208ff.

definitions provided by the relevant trade agreements and in context of other provisions of these agreements.

The Free Data Flow Provisions in both agreements are formulated as follows:

According to 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.

According to 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.

Although the two provisions are formulated slightly differently (the main difference being the modality of an obligation: to "allow" free cross-border transfer of information in the CPTPP, and not to "prohibit or restrict" such transfers in the USJDTA), these differences are likely purely semantic. In essence, the upshot of both provisions is that cross-border transfers of information must be unrestricted.

Both the CPTPP and USJDTA define "personal information" as "any information, including data, about an identified or identifiable natural person".[39] In both agreements, a clarification to the dedicated Article on Personal Information Protection seems to equate the notions of "personal information" and "personal data".[40] Although this definition is somewhat narrower than the definition of "personal data" in the GDPR, meaning some of the data that qualifies as "personal" under the GDPR would not qualify as "personal information" under the CPTPP and USJDTA,[41] this difference has little practical significance. The reason for this is that both Free Data Flow Provisions apply to *any* data, which would also include any data that qualifies as "personal" under the GDPR. Therefore, these Provisions would apply to onward transfers of EU personal data from Japan to third countries.

Both Free Data Flow Provisions require free data flows only in the business context (as opposed to, for example, collection of personal data by governmental agencies). There is, however, no nexus requirement, such as necessity, between the transfer of data and the business purpose of a covered person for these provisions to apply (both provisions state "if this activity is *for the conduct* of the business" as opposed to "*necessary for the conduct* of the business").

[39] Article 14.1 CPTPP, Article 1(dd) USJDTA.
[40] Footnote 12 to Article 125 USJDTA, footnote 5 to Article 14.8 CPTPP.
[41] Article 4(1) GDPR defines "personal data" as "any information relating to an identified or identifiable natural person ('data subject')". Unlike definitions of "personal information", the required nexus between data and individual is more remote ("relating to") than that in CPTPP and USJDTA ("about"), which indicates a broader scope of "personal data" compared to "personal information".

In other words, the scope of cross-border data flows covered by these Provisions is broadly defined.[42] As explained above, EU adequacy decision covers only transfers of EU personal data to Japanese business operators, which indicates that the scope of personal data covered by Free Data Flow Provisions and by the adequacy decision are likely to coincide.

Based on the interpretation above, this report concludes that restrictions on onward transfers of EU personal data outside Japan are likely to violate the Free Data Flow Provisions in both CPTPP and USJDTA.

4. Can Violations of Free Data Flow Provisions be Justified under Relevant Exceptions in CPTPP and USJDTA?

Should restriction on onward transfer of EU personal data from Japan be found in violation of Free Data Flow Provisions, this violation can potentially be justified under the relevant exceptions present in both CPTPP and USJDTA.

According to Article 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; and
>
> (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

According to Article 11(2) USJDTA,

> Nothing in this Article shall prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary 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; and
>
> (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective. [footnote 9: A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of a covered person.]

The interpretation of these exceptions presents a challenge in light of their novel character and the related absence of any relevant case law of the CPTPP dispute settlement mechanism (as mentioned above, USJDTA lacks any dispute settlement mechanism). However, the wording of both exceptions is similar to that of the general exceptions in the GATT 1994 and the GATS. For example, Article XIV(a)-(b) GATS states:

[42] In contrast, the GDPR requires that personal data transferred to a third country is limited to what is necessary for the purpose of transfer. See European Data Protection Board, Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data Version 2.0, 18 June 2021, P. 11.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order; [footnote omitted]
>
> (b) necessary to protect human, animal or plant life or health;
>
> <…>

Unlike exceptions from the Free Data Flow Provisions in the CPTPP and USJDTA, this general exception has been extensively interpreted in WTO case law. This interpretation could shed light on the meaning and interpretation of the exceptions from Free Data Flow Provisions and illuminate the analysis of whether restrictions on onward transfers of EU personal data from Japan could be successfully justified under these exceptions.

This chapter proceeds with a discussion on whether and to what extent WTO case law on the interpretation of the general exceptions could be instructive in the interpretation of exceptions from Free Data Flow Provisions. Having concluded, in section 4.1 that WTO case law *is* instructive in the interpretation of those Provisions, this chapter compares the key elements of CPTPP and USJDTA exceptions with the GATS general exception in section 4.2. After that, the report provides a brief overview of interpretation of the relevant elements of the general exception in WTO case law. This is followed by the application of the exceptions from Free Data Flow Provisions in CPTPP and USJDA (analyzed separately due to variations in their wording) to the restrictions on onward transfers of EU personal data from Japan.

4.1 Relevance of WTO Case Law for the Interpretation of Exceptions from Free Data Flow Provisions in CPTPP and USJDTA

Although WTO agreements, the CPTPP and the USJDTA all form a part of international trade law, WTO law and the law of CPTPP and USJDTA are actually separate legal frameworks co-existing independently of each other. Yet, the same customary rules of interpretation under Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT) typically apply to the interpretation of all international trade agreements.[43] Therefore, it could be anticipated that similarly worded provisions in different trade agreements *could* be interpreted in a similar way.

Under Article 31 VCLT, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In WTO case law, "ordinary meaning" is typically established on the basis of definitions provided in the relevant agreement as well as on the definitions of the terms in dictionaries. The "object and purpose" is often interpreted on the basis of the goals of the

[43] This is explicitly mentioned in Dispute Settlement Understanding in relation to the interpretation of the WTO Agreements, including the GATT and the GATS, and in Article 29.12(3) CPTPP. USJDTA does not have any provisions on its interpretation, but it could be assumed that VCLT also applies to their interpretation.

relevant agreement itself, expressed, in particular in its provisions and preamble. Difference in the object and purpose of each agreement, can therefore, lead to variations in the interpretation even of the terms that are similarly formulated and defined.

Based on the above, one could argue that the interpretation of the general exceptions is instructive for the interpretation of the exceptions from the Free Data Flow provisions contained in the CPTPP and USJDTA for at least four reasons. First, both CPTPP and USJDTA incorporate by reference the general exceptions of GATS Article XIV(a)-(c).[44] These general exceptions apply to the Article 14.11(2) CPTPP and Article 11(1) USJDTA, which contain both the Free Data Flow Provision and the exception from it.[45] Second, provisions on the interpretation of the CPTPP require that when interpreting the general exception, the CPTPP dispute settlement panel must consider any relevant interpretation of the WTO panels and Appellate Body.[46] Third, under Article 1.2 (Relation to Other Agreements), the CPTPP recognizes the parties' intentions to coexist with their existing international agreements, including the WTO Agreement. A similar link between the GATS and USJDTA is harder to establish because it does not contain provisions on its interpretation similar to those of the CPTPP (or any other general provisions not specifically related to digital trade). Fourth, and finally, exceptions from the Free Data Flow Provisions, as this report discusses in more detail below, contain the key elements of the WTO general exception. It would thus be logical to interpret the elements that are the same in both general exception and in the exception from Free Data Flow Provision in the same way.[47] Reliance on the WTO case law in the interpretation of similar provisions was documented in the interpretation of other agreements, such as NAFTA.[48]

A different view is possible, however. There is also a possibility that the WTO interpretation can change because CPTPP and USJDTA have a different *object and purpose*, a

[44] Article 3(1) USJDTA, Article 29.1(3) CPTPP.
[45] Article 3 USJDTA expressly states that the Article XIV (a)-(c) applies to "all provisions other than Article 21," which includes Article 11. Article 29.1(3) CPTPP states that Article XIV(a)-(c) GATS applies to the whole of chapter 14 Electronic Commerce.
[46] Article 28.12(3) CPTPP.
[47] This logic, however, has not always been followed by the WTO adjudicators. On the one hand, in some instances the adjudicators interpreted the same term differently in different agreements. For example, in *Australia — Tobacco Plain Packaging (Honduras)*, Appellate Body held that 'arbitrary or unjustifiable discrimination' in the chapeau of Article XX of the GATT 1994 'does not imply that the meaning imparted to this term in other contexts can be easily transplanted to the interpretation of Article 20 of the TRIPS Agreement'. WTO, Appellate Body Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/AB/R, WT/DS441/AB/R and Add.1, adopted 29 June 2020, paras. 6.646, 6.627. On the one hand, in other instances WTO adjudicators interpreted the same term, such as "likeness" or "no less favourable" in non-discrimination commitments in the GATS and the GATS similarly, despite differences between these agreements. See e.g., M. Cossy (2006). Determining 'likeness' under the GATS: Squaring the circle? World Trade Organization Economic Research and Statistics Division. WTO Staff Working Paper ERSD-2006-08, p. 4. https://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf
[48] Hsu mentions, for example, that "standards and reasoning used in the WTO" are applied "in effect" by NAFTA panels. L. Hsu, (2006) Applicability of WTO law in RTAs, in (L. Bartels, F. Ortino eds.), Regional Trade Agreements and the WTO Legal System, 525, 545.

cardinal part of article 31 VCLT. For example, the preamble of the CPTPP arguably affords less importance to the right of the parties to the agreement to regulate to pursue domestic policy objectives.[49] This could indicate that interpretation of the exception could be stricter than in the GATS. At the same time, paragraph 1 of Article 14.11 CPTPP states that "the Parties recognize that each Party may have its own regulatory requirements concerning the transfer of information by electronic means" and a separate Article 14.8 on the Personal Information Protection. Neither of these provisions are present in the GATS, which could, instead, weigh into a more lenient interpretation of the exceptions from Free Data Flow Provision in the CTPTPP compared to that of the GATS when applied to the tension between free cross-border data flows and data protection. The same analysis is only partially relevant to USJDTA, which does not contain a preamble and an analogue of paragraph 1 of Article 14.11 CPTPP. Furthermore, footnote 9 to Free Data Flow Provision in USJDTA contains an additional clarification of the meaning of the "necessity test" (discussed in more detail below), which may require deviation from WTO interpretation of "necessity" in case application of this clarification leads to a different outcome.

On balance, this report suggests reliance on the interpretation of the key elements of the GATS general exception as a useful baseline for the interpretation of exceptions from the Free Data Flow Provisions in the CPTPP and USJDA. In doing so, however, one must bear in mind the differences between the respective exceptions and the general exception and the ways in which such differences, including object and purpose, may justify deviations in the interpretation. Based on the proposed approach, the next section compares exceptions from the Free Data Flow Provisions in the CPTPP and USJDTA with the GATS general exception and explains relevant similarities and differences.

4.2 Comparison of Key Elements of Exceptions from Free Data Flow Provisions in CPTPP and USJDTA and GATS General Exception

WTO adjudicators apply the general exception of GATS Article XIV in two steps. In the first step it has to be established whether the contested measure meets one of the substantive requirements, such as of paragraphs (a)-(c) and, most importantly, the "necessity" requirement or "*necessity test*". The necessity test is the core of the first stage of the assessment. In the second step, WTO adjudicators examine whether the contested measure satisfies the requirements of the *chapeau* of the exception that requires that a trade-inconsistent measure must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable

[49] Compare the relevant part of the preamble to the GATS and CPTPP. GATS: "Desiring the early achievement of progressively higher levels of liberalization of trade in services …, while *giving due respect to national policy objectives*; *Recognizing the right* of Members to regulate, and *to introduce new regulations*, on the supply of services within their territories *in order to meet national policy objectives* …;" CPTPP: "The Parties to this Agreement … *Reaffirm* the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as *the importance of preserving their right to regulate in the public interest*." (emphasis added)

discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".[50]

Juxtaposing this logic with the text of the general exception quoted above, it is apparent that the requirements of the exception are considered in the reversed order of their appearance in the text. By analogy with the general exception, this report applies the same inverted logic in the consideration of the requirements of the exceptions from the Free Data Flow Provisions.

Table 1 compares the elements of the exceptions from Free Data Flow Provisions in the CPTPP and USJDTA, which break them down into elements to facilitate comparison with the GATS general exception.

Table 1. Comparison of exceptions from Free Data Flow Provisions in CPTPP and USJDTA (in bold, relevant differences between the exceptions)

Type of element	**Article 14.11(3) CPTPP**	**Article 11(2) USJDTA**
Introductory clause	Nothing in this Article	Nothing in this Article
	shall prevent a Party from adopting or maintaining measures inconsistent with [the Free Data Flow Provision]	shall prevent a Party from adopting or maintaining a measure inconsistent with [the Free Data Flow Provision]
	to achieve a legitimate public policy objective,	**that is necessary** to achieve a legitimate public policy objective,
	provided that the measure:	provided that the measure:
Chapeau	(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and	(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
"Necessity test"	(b) does not impose restrictions on transfers of information **greater than are required** to achieve the objective.	(b) does not impose restrictions on transfers of information **greater than are necessary** to achieve the objective.
Additional clarification		**A measure does not meet the conditions of this paragraph [(b)] if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of a covered person. (footnote 9)**

The comparison above demonstrates, that both exceptions from Free Data Flow

[50] WTO, Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 43 (hereinafter, Appellate Body Report, *Argentina – Financial Services*), para. 6.161; WTO, Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475) (hereinafter, Appellate Body Report, *US-Gambling*), para. 292.

Provisions considered in this report contain two key elements:

1. The "necessity test": subparagraph (b) of Article 14.11(3) CPTPP; introductory clause and subparagraph (b) of Article 11(2) USJDTA, and
2. "Chapeau" requirement: subparagraph (a) of Article 14.11(3) CPTPP; subparagraph (a) of Article 11(2) USJDTA.

The "necessity test" is formulated differently from the general exception in both CPTPP and USJDTA. In the CPTPP, subparagraph (b) of Article 14.11(3) uses the term "required" instead of "necessary." This difference seems, however, purely semantic and not legally significant. "Required" is a synonym of "necessary"[51] and, according to the WTO Secretariat is yet another way to convey the concept of "necessity."[52] Therefore, to simplify, the discussion below will refer to both tests as "necessity tests." There is another notable difference in the wording. Unlike the exception from the Free Data Flow Provision in the CPTPP, the same exception in USJDTA mentions "necessity" twice: first in the introductory clause, and second, in the conditions that a measure restricting data flows must meet. Whether and to what extent this difference is significant is discussed in more detail below).

In both the CPTPP and USJDTA, the wording of the "necessity test", as shown in Table 1, is different from that of the GATS general exception. While in subparagraph (a) of Article XIV of the GATS general exception the requirement is that a trade-inconsistent measure is "*necessary to* protect public morals or to maintain public order" both CPTPP and USJDTA require that the trade-inconsistent measure "does not impose restrictions on transfers of information *greater than are necessary to achieve the objective*" (emphases added). That being said, this difference can also be viewed as merely semantic, as a *prohibition* to impose restrictions *greater than are necessary* is essentially the same as a *requirement* that they should be "necessary", whereas restrictions that are beyond "necessary" are not allowed. In other words, the meaning of "necessary" does not fundamentally change.

Both "chapeau" requirements in the exceptions from the Free Data Flow Provisions in the CPTPP and USJDTA repeat almost verbatim the chapeau of the GATS general exception, which reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination **between countries where like conditions prevail,** or a disguised restriction on trade in services… (emphasis added)

Interestingly, the phrase highlighted in bold, is absent from the chapeau requirement in both of the exceptions from the Free Data Flow Provisions. The absence of this phrase suggests

[51] Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/necessary (last accessed 1 July 2022).
[52] WTO, Note by the Secretariat, '"Necessity" in the WTO', S/WPDR/W/27, 2 December 2003, para. I.A.5.

that unlike the general exception, in the CPTPP and USJDTA exceptions the assessment of whether restrictions on the flow of information constitute arbitrary or unjustifiable discrimination would *not* take into account the difference in conditions in the countries that are being discriminated. *As a result, different treatment due to different conditions in the two countries may with a higher degree of probability be viewed as arbitrary or unjustifiable discrimination.* Yet, footnote 9 in the USJDTA exception to some extent compensates for the difference in the wording of the chapeau requirement compared to the general exception. The report returns to this issue in more detail below when it pulls the various threads together. For now, let us analyze whether the Free Data Flow Provisions would allow Japan to justify restrictions on onward transfers.

4.3 Assessment of Possible Justification of Restrictions on Onward Transfers of EU personal data from Japan under Exceptions from Free Data Flow Provisions

By analogy with the WTO general exceptions, the exceptions from the Free Data Flow Provisions constitute an *affirmative defense* that, in a hypothetical case brought against it, Japan would raise if restrictions on onward transfers of EU personal data from Japan are found in violation of a Free Data Flow Provision. Therefore, Japan would bear the burden of proof in showing that the exception applies. The following sections analyze whether and to what extent Japan could succeed in doing so, by tackling the questions whether restrictions on onward transfers of EU personal data from Japan:

- pursue a legitimate policy objective;
- are greater than is necessary/required to achieve that objective; and
- are applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

Although the requirement of arbitrary and unjustifiable discrimination goes before the necessity requirement, this report discusses them in a reverse order. First, because the "necessity" requirement is addressed at the measure itself, while the chapeau requirement is addressed to the application of the measure. Second, this logic is also followed by the interpretation of the GATS general exception, which contains the same essential elements as the CPTPP and USJDTA exceptions.

4.3.1 Do Restrictions on Onward Transfers of EU personal data from Japan Pursue a Legitimate Policy Objective?

Exceptions from the Free Data Flow Provisions in both the USJDTA and CPTPP allow the parties to adopt or maintain measures inconsistent with the Free Data Flow Provision -- in other words, to restrict data flows -- to achieve a *legitimate public policy objective*. Both exceptions do not specify or provide for any example of such legitimate policy objectives, which means that *any* policy objective can be invoked to justify a measure restricting data flows as long as it is legitimate.

By restricting onward transfers of EU personal data from Japan, Japan arguably pursues two objectives: First, maintaining the adequacy decision that it has obtained from the EU, as such restrictions are a prerequisite of adequacy as discussed above; second, protecting privacy and personal data, which are recognized as constitutional rights in Japan's legal system.[53] Additional protection for EU personal data (higher consent requirements under Supplementary Rules) is motivated by a high level of protection of these rights in the EU as fundamental rights.[54]

The goal of maintaining the EU adequacy decision as a justification for restrictions on onward transfers of EU personal data is unlikely to be viewed as legitimate public policy objectives. As discussed above, these restrictions are introduced by Japan's domestic law: the APPI and Supplementary Rules, which qualify as domestic "measures" under both CPTPP and USJDTA. Obtaining adequacy from the EU is best viewed as a right or an option, not an obligation on Japan's part.

In contrast, the objective to protect privacy and personal data as constitutional or fundamental rights is very likely to qualify as a legitimate public policy objective under both agreements. First of all, these objectives are widely recognized as important in academic and policy literature on cross-border data flows.[55] Furthermore, both the CPTPP and USJDTA contain specific articles on the protection of personal information (similar, as explained above, to personal data), which recognize the economic and societal benefits of the protection of personal information.[56]

4.3.2 Are Restrictions on Onward Transfers of EU personal data from Japan Greater than is Necessary/Required to Protect Privacy and Personal Data?

To answer this question, this section first explains how the "necessity" requirement is interpreted in WTO case law. Then, building on this interpretation, this section applies the "necessity" requirement of exceptions from Free Data Flow Provisions in the CPTPP and USJDTA to restrictions on onward transfers of EU personal data from Japan.

A) Interpretation of "Necessity" in WTO Case Law on General Exceptions

The method used to interpret 'necessity' applied by WTO adjudicating bodies has been fairly consistent irrespective of the specific public interest invoked to justify the measure, be it the protection of public morals, public health, or securing compliance with a WTO-consistent

[53] Recital 8 of the Adequacy Decision for Japan. Unlike the EU Charter of Fundamental Rights, there is no explicit provision of right to privacy or data protection under the Constitution of Japan. The Supreme Court of Japan, however, interprets the right to privacy from Article 13 of the Constitution of Japan.
[54] Articles 7 and 8 of the EU Charter of Fundamental Rights.
[55] For a recent discussion, see e.g., A. Chander, P. M. Schwartz, Berkeley Law Privacy and/or Trade, University Chicago Law Review, Vol. 90, forthcoming 2023. https://dx.doi.org/10.2139/ssrn.4038531
[56] Article 14.8 CPTPP, Article 15 USJDTA.

law.[57] Existing WTO case law has established a high threshold for meeting the necessity test, which in some cases has been almost impossible to meet.[58]

The assessment of the necessity of a GATS-inconsistent measure applied by the WTO adjudicating bodies requires 'weighing and balancing' of the following factors:[59]

> Step 1: The relative importance of the protected public interest(s) pursued by such contested measure,
> Step 2: The contested measure's contribution to the achievement of objective pursued, manifested in the existence of a 'genuine relationship of ends and means between the objective pursued and the measure at issue',[60] (hereinafter, "proportionality test") and
> Step 3: The trade restrictiveness of the measure,[61] followed by an assessment of whether, in the light of importance of the interests at issue, a less trade restrictive alternative is

[57] The WTO adjudicating bodies apply the same interpretation of 'necessity' as pronounced in WTO, Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5 (hereinafter, Appellate Body Report, *Korea – Various Measures on Beef*), paras 160-164 irrespective of the specific paragraph of Art. XIV GATS or Art. XX GATT 1994. See, e.g., in relation to Art. XX(b) GATT - WTO, Appellate Body Report, *European Communities –Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243 (hereinafter, Appellate Body Report, *EC – Asbestos*), paras. 171-175; in relation to Art. XIV(a) GATS - WTO, Appellate Body Report, *US-Gambling*, paras. 291, 305-308; in relation to Art. XIV(c) GATS - WTO, Appellate Body Report, *Argentina – Financial Services*, paras. 6.202-205, 6.227ff. See also P. Delimatsis. (2011) Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US – Gambling and China – Publications and Audiovisual Products. Journal of International Economic Law. 14(2), 262.

[58] Delimatsis (n 57), p. 266; I. Venzke (2011). Making General Exceptions: The Spell of Precedents in Developing Art XX GATT into Standards for Domestic Regulatory Policy. German Law Journal. 12(5), 1118-1119; Daniel Rangel, WTO General Exceptions: Trade Law's Faulty Ivory Tower, Public Citizen, 4 February 2022, https://www.citizen.org/article/wto-general-exceptions-trade-laws-faulty-ivory-tower/.

[59] WTO, Panel Report, *Argentina – Financial Services*, para. 7.661; WTO, Appellate Body Report, *US-Gambling*, paras. 304-307; WTO, Appellate Body Reports, *European Communities –Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7 (hereinafter, Appellate Body Reports, *EC – Seal Products*), paras. 5.169, 5.214; WTO, Panel Report, *United States - Tariff Measures on certain Goods from China*, WT/DS543/R and Add. 1, circulated to WTO Members 15 September 2020 (under appeal) (hereinafter, Panel Report, *US – Tariff Measures*), para. 7.158.

[60] WTO, Panel Report, *US – Tariff Measures*, para. 7.158; WTO, Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R and Add.1, adopted 9 May 2016, as modified by Appellate Body Report WT/DS453/AB/R, DSR 2016:II, p. 599 (Panel Report, *Argentina – Financial Services*), para. 7.688; WTO, Appellate Body Report, *US-Gambling*, para. 306; WTO, Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527 (hereinafter, Appellate Body Report, *Brazil – Retreaded Tyres*), para. 145; WTO, Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R (hereinafter, Panel Report, *Brazil – Taxation*), para. 7.526; WTO, Panel Report, *European Union and its member States –Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018 (hereinafter, Panel Report, *EU – Energy Package*), para. 7.1360 (currently under appeal); WTO, Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add.1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R, DSR 2016:III, p. 1227 (hereinafter, Panel Report, *Colombia – Textiles*), para. 7.315; WTO, Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941 (hereinafter, Panel Report, *India – Solar Cells*), para. 7.361; WTO, Appellate Body Reports, *EC – Seal Products*, para. 5.210.

[61] Assessment of this factor was left out in WTO, see Appellate Body Report, *EC - Asbestos*.

'reasonably available' (hereinafter, "less trade restrictive test").

The process of assessing 'necessity' "begins with an assessment of the '*relative importance*' of the interests or values furthered by the challenged measure."[62] The more important the interest, the heavier it weighs in the assessment, and the heavier it weighs in the justification of a relatively more restrictive measure. Some case law suggests that the level of international support of the interest at stake[63] or the actual (as opposed to desired) contribution of the measure to achieve a claimed level of protection of public policy interest[64] could weigh in this assessment. Beyond this factor, it is unclear how WTO adjudicators assess the importance of different non-economic values. No objective has been characterized as 'unimportant'.

Step 2 in the assessment comprises a *weighing and balancing* of the contribution of the measure to the protected interest, with the trade restrictiveness of the measure in light of the relative importance of the protected interest or the underlying values of the objective pursued.[65] Situated on a continuum between 'indispensable' and 'making a contribution to', 'necessity' is understood as being closer to 'indispensable' rather than 'making a contribution to'.[66] Thus, the greater the contribution of the contested measure, and the less restrictive it is, the more likely it is to satisfy the necessity test.[67] It is, however, debated whether this or the following step is decisive in the assessment of necessity in practice.[68]

---

[62] WTO, Appellate Body Report, *US – Gambling*, para. 306; WTO, Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; WTO, Appellate Body Report, *Brazil –Retreaded Tyres*, para. 143; WTO, Panel Report, *US — Tariff Measures*, paras. 7.168-7.169.

[63] WTO, Panel Report, *Argentina – Financial Services*, paras. 7.671, 7.715; WTO, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755 (Appellate Body Report, *US – Shrimp*), para. 130.

[64] WTO, Appellate Body Report, *EC – Seal Products*, para. 5.502; Du (2016), p. 826-827.

[65] WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210; WTO, Appellate Body Report, *EC – Seal Products*, para. 5.210, WTO, *US –Gambling*, para. 306; WTO, Panel Report, *Argentina – Financial Services*, para. 7.684.

[66] WTO, Appellate Body Report, *Korea – Various Measures on Beef*, paras. 160-161; WTO, Appellate Body Report, *US – Gambling*, para. 310; WTO, Note by Secretariat, 'Necessity tests' in the WTO, S/WPDR/W/27, 2 December 2003, pp. 8-9.

[67] WTO, Panel Report, *Argentina – Financial Services*, paras. 7.685, 7.727, referring to WTO, Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

[68] One group of academics argues that the weighing and balancing in the assessment of necessity requires a fully-fledged proportionality or cost-benefits assessment. M. Andenas, S. Zleptnig. (2007). Proportionality: WTO Law in Comparative Perspective. Texas International Law Journal. 42, 414; M. Hilf, S. Puth. (2002). The Principle of Proportionality on its Way into WTO/GATT Law in A. von Bogdandy, P.C. Mavroidis, Y. Mény (eds.), European Integration and International Co-Ordination. Wolters Kluwer., p. 199; G. Marceau, J.P. Trachtman (2002). The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods. *Journal of World Trade*. 36(5), 826–828, 851–853; G. Marceau, J.P. Trachtman (2014). A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. Journal of World Trade. 48(2), 351-432, 368-369; Weber (2012), p. 43; I. Venzke (n 58), 1136. The other group, however, contends that the analysis of necessity turns on the assessment of reasonable availability of a less trade-restrictive measure. Kurtz, J. (2016). The WTO and International Investment Law. Converging Systems. Cambridge University Press, 199-201, D.H. Regan (2007). The Meaning of 'Necessary' in

In step 3 of the assessment, if the defending party has succeeded in making a *prima facie* case of 'necessity', the complaining party may rebut it by showing that a less trade-restrictive measure was 'reasonably available' to the defending party. This assessment includes a 'comparison between the challenged measure and possible alternatives …, and the results of such comparison should be considered in the light of the importance of the interests at issue.'[69] 'Reasonably available' is interpreted as allowing a WTO member to achieve *the same level of protection* of the public interest or objective pursued without prohibitive cost or substantial technical difficulties.[70] Furthermore, the burden of proof of whether an alternative measure is *actually* less trade restrictive is on the claimant, not the defendant. [71] Based on this interpretation, the comparison of alternative measures does not typically involve a fully-fledged proportionality assessment, which is arguably the case in the assessment of contested measure's contribution to the achievement of objective pursued.[72] Rather, this comparison involves the balancing of the administrative and enforcement costs of alternative measures granting the same level of protection to a public interest at issue against the trade costs of such measures.[73]

In most instances, the WTO adjudicating bodies base their reports on the basis of the less trade restrictive test. This is a more lenient approach than the proportionality test, as it arguably allows WTO members to choose the level of protection of the public interest at issue.[74] In *US-Gambling*, the Appellate Body explicitly equated the absence of necessity with the reasonable availability of another WTO consistent measure.[75]

However, the risk that WTO adjudicating bodies will conduct a fully-fledged cost-benefit analysis always remains. For example, in one of the most recent WTO Panel reports, the Panel based its analysis on the weighing and balancing of the three factors mentioned above *without*

GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing. World Trade Review. 6(3), 349.

[69] WTO, Appellate Body Report, *US – Gambling*, para. 307.

[70] *Ibid*., para 308; WTO, Appellate Body Report, *Korea – Various Measures on Beef*, paras. 176, 178.

[71] In *Australia –Tobacco Plain Packaging*, both the WTO Panel and Appellate Body set a high bar for the claimant to prove that alternative measures are less trade restrictive than the contested measure. See, AB report, para. 6.470, 6.476. Although this assessment was done in the context of Article 2.2 TBT, it could be relevant in the context of interpretation of the "necessity test" under the WTO general exceptions, which are formulated in a similar manner.

[72] M. Andenas, S. Zleptnig (n 68), 414; M. Hilf, S. Puth (n 68), 199; G. Marceau, J. Trachtman (2002) (n 68), 826–828, 851–853; G. Marceau, J. Trachtman (2014) (n 68), 368-369; R.H. Weber (2012). Regulatory Autonomy and Privacy Standards Under the GATS. *Asian Journal of WTO & International Health Law & Policy*. 7(1), 25-47, 43.

[73] Regan (n 68); McGrady, B. (2009). Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures. *Journal of International Economic Law*. 12(1); Lang, A. (2007). Reflecting on Linkage: Cognitive and Institutional Change in the International Trading System. *Modern Law Review*. 70(4).

[74] Regan (n 68), 350; I. Venzke (n 58), 1138.

[75] WTO, Appellate Body Report, *US Gambling*, para. 307 (stating that: '[i]t is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel *determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available"'.*) (emphasis added).

engaging into a comparison of the contested measure with reasonably available alternative measures.[76]

Furthermore, in practice, the WTO members' autonomy to choose and maintain their own level of protection could be much narrower than it may seem at first glance, notably because it can be narrowed depending on how the adjudicating bodies interpret the term '*same* level' of protection. From the Appellate Body Report in *Korea – Various Measures on Beef* it follows that alternative measures (compared to the contested measure) should not be required to achieve a higher level of protection than that *actually* achieved by the contested measure.[77] The level of protection *desired* by the defending WTO member is thus irrelevant. Remarkably, in that case, the alternative measure that, according to Appellate Body, was reasonably available to Korea, involved significantly higher administrative and enforcement costs.[78] Conversely, in *US – Gambling*, where the alternative measure proposed by the claiming party was dismissed as 'not an appropriate alternative', the Appellate Body explained that a 'reasonably available' alternative measure should preserve the responding Member's 'right to achieve its desired level of protection'.[79]

On a more general note, the analytical exercise of ensuring that an alternative measure would achieve exactly the same level of protection would be nothing more than educated second-guessing. When the public policy goals pursued by contested measures are non-economic values, in practice it may be especially difficult to accurately define the level of their protection which serves as a benchmark for the comparison of alternative measures. It is equally difficult to determine *ex ante* whether alternative measures would secure the same level of protection. Therefore, the way how this assessment will be done in a particular case is hard to predict.

B) Application to Restrictions on Onward Transfers of EU Personal Data from Japan

This section analyzes whether restrictions on onward transfers of EU personal data from Japan could be deemed not to impose restrictions on transfers of information greater than are required/necessary to protect privacy and personal data. The issue is first analyzed from the perspective of the exception from Free Data Flow Provision in CPTPP. This analysis is then

[76] WTO, Panel Report, *US – Tariff Measures*, paras. 7.232-7.238. It could, however, also be argued, that in that particular case the Panel did not consider reasonably available alternatives because the contested measure did not meet step 2 in the assessment. In particular, as a reason for not engaging in such analysis the Panel states that '[t]he Panel's preliminary conclusion, based on a weighing and balancing of the relevant factors, is that the United States has not explained how the chosen measures are apt to contribute to the public morals objective, as invoked by the United States, and how they could therefore be "necessary"'.
[77] WTO, Appellate Body Report, *Korea – Various Measures on Beef*, para. 178, internal footnotes omitted.
[78] *Ibid*. para 175.
[79] WTO, Appellate Body Report, *US – Gambling*, paras. 308, 317, footnotes omitted. (emphasis added). The WTO Appellate Body reiterated the same approach in WTO, Appellate Body Report, *EC – Seal Products*, para. 5.261: 'in order to qualify as a genuine alternative, the proposed measure must be not only less trade restrictive than the original measure at issue, but should also preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'. (internal footnotes and quotation marks omitted.)

applied to the respective exception in USJDTA, adjusted in light of the clarification in footnote 9 to the necessity requirement.

Although, as discussed above, the necessity assessment may be limited to the less trade restrictive test, the discussion below applies all three criteria of "necessity" identified in section 4.3.2.A) above.

CPTPP

A CPTPP dispute settlement panel is likely to recognize the protection of privacy and personal data as important policy objectives in the context of cross-border data flows for at least two reasons. First, Article 14.8(1) on Personal Information Protection explicitly recognizes "the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce." Furthermore, paragraph 2 of this article contains an *obligation* of each Party to "adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce." Second, as already mentioned, such protection is widely recognized by trade scholars and pundits as important and essential for building and maintaining trust in electronic commerce.[80] The importance of privacy and personal data protection is also acknowledged by existing international guidelines, such as 2013 OECD Privacy Framework and 2015 APEC Privacy Framework,[81] to which all parties to the CPTPP adhere.

That said, while the importance of the goal itself is unlikely to cause any difficulty in the application of the "necessity test", it is the comparatively higher *level* of protection of privacy and personal data required under EU and Japanese law due to their constitutional/fundamental rights nature that may be problematic from a CPTPP perspective. The assessment of the "necessity" of the measure is a case by case assessment, in which adjudicators of the CPTPP dispute settlement panel would have substantial discretion, also in the question on whether and to what extent to follow the WTO case law on the interpretation of "necessity".

As discussed above, there are three types of restrictions on onward transfers of EU personal data from Japan: consent of the individual concerned, equivalence assessment or private law mechanisms, such as contractual clauses and other binding agreements between companies.

[80] See (n 55).

[81] The APEC Privacy Framework should *not* be confused with APEC Cross-Border Privacy Rules (CBPR). https://www.apec.org/docs/default-source/publications/2017/8/apec-privacy-framework-(2015)/217_ecsg_2015-apec-privacy-framework.pdf?sfvrsn=1fe93b6b_1 While all CPTPP countries adhere to the APEC Privacy Framework, the CBPR have been accepted by only the following countries Australia, and Chinese Taipei, Canada, Japan, the Republic of Korea, Mexico, Singapore and the United States of America.

Contribution of each of these restrictions to the protection of EU personal data would be determined on the basis of their actual application in Japanese law. For example, the overall compliance culture can play a role in this assessment.

Neither Japanese law nor Japan's commitments under Supplementary Rules of the adequacy decision prohibit onward transfers of EU personal data, which would be an ultimate form of restriction that is extremely difficult to justify. The availability of different types of mechanisms for onward transfer of EU personal data provides some flexibility for businesses to transfer personal data.

In the privacy literature, consent is one of the key mechanisms of ensuring the protection of privacy and personal data in multiple legal systems.[82] An *additional* consent as a condition of a transfer of personal data to a third country is less widely accepted. For example, in the U.S. and Canada, a consent is required as a condition for processing personal data, but no additional consent is needed to transfer personal data to a third country.[83] The question is whether such additional consent adds something to the protection of privacy and personal data. The effectiveness of consent as a data protection tool has been questioned in literature.[84] One could argue, that such additional consent is counterproductive because it enhances the so-called "consent fatigue"[85] Presented with two consent forms instead of one, the individuals could be even less likely to give due consideration to these consent requests and even easier agree to provide such consent.

In terms of trade restrictiveness, obtaining and recording an additional consent for an onward transfer of EU personal data contributes to compliance costs. This would be especially the case in a situation when the decision to transfer EU personal data outside Japan is made after the collection of data. First, because it requires in some cases two consents instead of one, and, second, because consent for onward transfer of EU personal data should be *especially well informed*.

The effectiveness of equivalence assessment depends on how it is administered. An *equivalence assessment* is one of the mechanisms that aims to compensate the lack of consent to an onward transfer of personal data. As an additional option to transfer data, it reduces the trade restrictiveness of consent (as in the absence of this option, data could no longer be transferred if the individual refused consent). At the same time, equivalence assessment itself could be costly and lengthy procedure. In terms of contribution to the protection of personal

[82] See, for example, G. Greenleaf (2012) The influence of European data privacy standards outside Europe: implications for globalization of Convention 108, International Data Privacy Law, 2(2).
[83] Office of the Privacy Commissioner of Canada, Guidelines for Processing Personal Data Across Borders, January 2009.
[84] See, for example, D. J. Solove, (2013) Introduction: Privacy Self-Management and the Consent Dilemma Harvard Law Review 126; B. W. Schermer, B. Custers, S. van der Hof, (2014) The crisis of consent: how stronger legal protection may lead to weaker consent in data protection, Ethics and Information Technology, 16.
[85] *Ibid.*

data, it could be argued that it yields a higher level of protection that the consent requirement. But then if consent is sufficient as a mechanism for transfer, the contribution of equivalency assessment to the overall protection of EU personal data is rather limited and fragmented. So far, equivalency has been afforded to only the UK and countries in the European Union (including the EEA) on a reciprocal basis (this is why the European Commission referred to its adequacy decision for Japan as "mutual adequacy").

Contractual clauses and other binding agreements could be an effective way of ensuring continuity of EU personal data protection, and compared to equivalence assessment they are less trade restrictive. However, negotiating, concluding and administering those contracts could present substantial costs, especially in the absence of any model contracts published by the Japanese PPC. On the other hand, however, in the absence of any specific guidance, in practice, those binding arrangements may yield a lower standard than the standard of "essential equivalency" required under the EU adequacy decision, and impair their effectiveness as a transfer mechanism.

In the application of the necessity test, the next question is whether a least trade restrictive alternative is reasonably available to Japan to ensure the same level of protection of EU personal data.

It is out of the question that in least trade restrictive alternatives for governing transfers of personal data do exist. For example, under paragraph 32 of the APEC Privacy Framework,

> A personal information controller should be accountable for complying with measures that give effect to the Principles stated above. When personal information is to be transferred to another person or organization, whether domestically or internationally, the personal information controller should obtain the consent of the individual or exercise due diligence and take reasonable steps to ensure that the recipient person or organization will protect the information consistently with these Principles.

Against the backdrop of this provision that regulates transfers of personal data (generally, within and outside a specific country), restrictions on onward transfers of EU personal data from Japan are clearly *not* the least trade restrictive for the following three reasons. First, this rule does not discriminate between domestic and international transfers of personal data, thus providing for a general consent requirement for any type of transfers. As discussed above, Japan's legal framework in relation to EU personal data requires two separate consents for domestic and international transfers (as mentioned above, internal and cross-border transfers are regulated in different articles of APPI, 27 and 28 respectively). Thus, if EU personal data were to be transferred to organizations within and outside Japan, two separate consents might need to be secured.

Second, the core of the above-cited rule from the APEC Privacy Framework is the accountability principle, that puts the responsibility of due diligence on the controller of personal information. This approach is less trade restrictive than a burdensome equivalence

assessment used as one of alternative mechanisms for onward transfers of EU personal data. Third, accountability also implies that it is up to the data controller to choose the appropriate measures to ensure protection of personal information. Although Japan's PPC does not provide any model clauses for privacy arrangements, PPC Guidelines provide detailed measures that each individual controller must take into account when relying on contractual clauses and other binding arrangements. Overall, APEC Privacy Framework thus offers less trade restrictive and also less costly ways of protecting personal information.

In the WTO interpretation of the least trade restrictive requirement, an important aspect is the right of the defending party *to choose its own level of protection* of the relevant policy objective. In other words, the question is whether the less trade restrictive alternative identified above allows Japan to ensure the same level of protection without prohibitive cost or substantial technical difficulties.

In this context, the following provisions are relevant. The first paragraph of the Free Data Flow Provision in the CPTPP provides that "each Party may have its own regulatory requirements concerning the transfer of information by electronic means."[86] Furthermore, paragraph 5 of Article 14.8 CPTPP on Personal Information Protection recognizes that "the Parties may take different legal approaches to protecting personal information" and encourages the Parties to develop mechanisms to promote compatibility between these different regimes, such as "the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks." Paragraph 2 of Article 14.8 also requires that "in the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies." Footnote 6 to this provision further clarifies, that "a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy."

These provisions, on the one hand, seem to safeguard Japan's right to choose their own "regulatory requirements" concerning data transfers and to take "different legal approaches to protecting personal information". However, they can undermine that very right in at least the following way. The above-mentioned provisions put an emphasis and even an obligation to take into account principles and guidelines of relevant international bodies. The most relevant international guidance in the CPTPP context is the APEC Privacy Framework, as all parties to CPTPP are also members of APEC (even though APEC Privacy Framework is not explicitly mentioned anywhere in the CPTPP Electronic Commerce Chapter). Furthermore, Section 4-2 of the PPC Guidelines on the Act on the Protection of Personal Information state that "international consistency is considered taking standards of international frameworks such as

[86] Article 14.11(1) CPTPP.

the Privacy Guideline by Organisation for Economic Co-operation and Development (OECD) and Privacy Framework by APEC into account." The fact that APEC Framework is explicitly endorsed by the PPC in the context of data flows may suggest that this framework is viewed as providing the same level of protection, and, therefore, the less trade-restrictive accountability mechanism for transfers of personal data that it contains is *reasonably available* to Japan.

If a CPTPP panel were to follow the WTO jurisprudence, the question would still remain, whether these APEC rules allow a party to achieve *the same level* of protection of privacy and personal data as the restrictions of onward transfer of EU personal data from Japan under Japanese law and Supplementary Rules of the adequacy decision. One could argue that Japan aims to achieve a higher level of privacy and data protection than the level of protection ensured by APEC Privacy Rules. These rules indicate consumer trust and confidence in the privacy and security as key enablers of reaping the benefits of electronic commerce,[87] thus setting an *purely economic goal* of privacy protection. In contrast, both in Japanese law and in adequacy decision, the aim of protection is safeguarding constitutional and fundamental rights, which, arguably requires a higher level of protection than required to achieve economic goals.[88]

Four potential issues with these arguments, however are, first, that it is not clear that Japanese law in practice ensures a level of protection higher than the one that also APEC Privacy Framework could achieve (especially because PPC guidance explicitly endorses the APEC Framework). Second, the above-mentioned provisions of the CPTPP deem equivalent different approaches to protecting personal data, in particular, the personal data protection laws, on the one hand, and self-regulatory framework, on the other hand. If a safe-regulatory framework is viewed as able to yield the same level of protection generally, then it could do so also in the specific context of cross-border data flows. Third, in light of difficulty to assess the level of protection of a non-economic value such as privacy and data protection, a CPTPP Panel could simply imply that it is the economic rather than constitutional aim of privacy and personal data protection that Japan pursues in reality, as this is the goal Japan (together with other parties) declared in the article on Personal Information Protection ("The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce"[89]). Fourth, and finally, mechanisms available for onward transfer of EU personal data themselves achieve different levels of protection. For example, consent expresses the will of individual to transfer personal data outside Japan, even if protection of personal data in a country of destination is low. Thus, in itself, consent does not affect the level of protection of the transferred personal data in the country of destination. Contractual mechanisms, arguably,

[87] APEC Privacy Framework, p. 2
[88] For discussion, see S. Yakovleva. (2020) Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy, University of Miami Law Review, 74 (2).
[89] Article 14.8(1) CPTPP.

achieve lower levels of protection than the equivalency assessment by the PPC. Difference in the levels of protection achieved by different transfer mechanisms creates uncertainty regarding what the benchmark should be in determining the "same" level of protection.

USJDTA

The application of the necessity test of the exception from the Free Data Flow Provision in CPTPP to restrictions on onward transfers of EU personal data from Japan is relevant for the same exception in the USJDTA with three caveats. First, the difference in the wording of the article on Personal Information Protection (see table 2 below for comparison of relevant provisions). Second, an additional "necessity" requirement in the introductory phrase. Third, and finally, the clarification of the "necessity test" in footnote 9. This section discusses how these caveats affect the application of the necessity requirement discussed above.

Table 2. Comparison on Personal Information Protection provisions in CPTPP and USJDTA

Article 14.8 CPTPP Personal Information Protection	**Article 15 USJDTA Personal Information Protection**	**Relevant differences of USJDTA provisions from CPTPP**
The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce. (paragraph 1)	The Parties recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented. (paragraph 4)	- Recognition of important of compliance with personal information measures, rather than the protection of personal information itself - Recognition of importance that any restrictions on cross-border data flows are proportionate to the risks presented
To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies (paragraph 2)	Each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. (paragraph 1)	- No obligation to take into account relevant international standards
Recognising that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility	Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote interoperability	- Absence of reference to international standards as one of the means to achieve compatibility of personal information protection regimes

between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. <…> (paragraph 5)	between these different regimes. (paragraph 3)	

The absence of both any reference to international standards and an explicit recognition of personal information protection as an economic and societal value in the USJDTA could indicate a lower weight of the protection of privacy and personal data on the importance scale in the first step of necessity assessment.

Then, the reference to *proportionality* between restrictions on cross-border data flows to the risks presented invites a cost-benefit proportionality assessment (step 2 in the necessity assessment as discussed in section A above). In light of the scholarly debate around the relationship between proportionality test in step 2 and "less trade restrictive test" in step 3 in the context of WTO case law, an explicit reference in Article 15 USJDTA to proportionality between restrictions and risks they aim to address could afford more weight to proportionality assessment than in most of WTO jurisprudence.

It is unclear how to interpret the reference to the necessity requirement which, as noted above, appears twice in the USJDTA exception from the Free Data Flow Provision. On the one hand, they do seem to have the same meaning. On the other hand, the rules on interpretation of this provision in "good faith"[90] might require doing it in a way that does not deprive any part of the provision of its meaning.[91] Mentioning "necessity" twice could indicate that both a proportionality test *and a* least trade restrictive test must be applied to measures restricting cross-border data flows. The first "necessity" in USJDTA's introductory clause is formulated in a way similar to necessity in the GATS Article XIV(a)-(c). The second "not greater than are necessary" requirement is more similar to least trade restrictive requirement. Some scholars argued that simultaneous application of both proportionality and least trade restrictive tests leads to a contradiction.[92] Nevertheless, this would lead to a higher threshold of necessity than in the CPTPP. In addition, in light of arguably lower importance afforded to personal information protection, that plays a role in proportionality assessment, restrictions on onward transfer of EU personal data from Japan will be harder to justify under the USJDTA than under the CPTPP.

[90] Article 31 VCLT.
[91] See WTO, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3 (hereinafter, Appellate Body Report, *US – Gasoline*), p. 23.
[92] See, e.g., See, e.g., I Venzke (n 58), 1136; Regan (n 68), 348.

Despite the absence of explicit reference to international standards in Article 15 USJDTA, in the third step of the necessity assessment, the mechanisms under the APEC Privacy Framework or the APEC Cross-Border Privacy Rules (CBPR), to which both the US and Japan are party, can be invoked as less trade restrictive. The adequacy decision itself explicitly states that the APEC CBPR do not guarantee the same high level of protection as required under EU and Japanese law.[93] It is questionable, however, whether this unilateral conclusion by the EU in the adequacy decision would weigh heavily in the interpretation of the USJDTA in a hypothetical dispute settlement. From a VCLT perspective, the EU Commission Implementing Decision (the legal act adopting the adequacy decision) is unlikely to be taken into account.

According to a clarification of the USJDTA "necessity test" in footnote 9, a measure does *not* meet the necessity conditions if:

1) it accords different treatment to data transfers solely on the basis that they are cross-border

2) in a manner that modifies the conditions of competition to the detriment of a covered person.

This provision is novel and, to the knowledge of the author of this report, has not yet been interpreted by any international trade adjudicating bodies. In WTO case law, however, such a clarification could be read as a non-discrimination requirement, combining elements of both national treatment (prohibition to discriminate between domestic and foreign goods, services, service suppliers) and most-favored nation treatment (prohibition to discriminate between different foreign goods, service suppliers) in the GATS. Part 2 of the clarification, in particular, is similar to "no less favorable" requirement of the WTO non-discrimination clauses. For example, under Article GATS Article XVII(3), which clarifies "no less favorable" criterion in the GATS national treatment provision, "[f]ormally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

In WTO case law, the general exceptions discussed above provide for possibilities to justify a violation of any of the non-discrimination clauses. Therefore, building a non-discrimination requirement *in the exception itself*, as is arguably the case in footnote 9, is rather unusual. In essence, it means that a measure restricting cross-border data flows should either be non-discriminatory (a hypothetical example could be the APEC consent requirement that applies to transfers of personal data to third parties both domestically and internationally), or can discriminate on any other criterion than cross-border nature of the transfers (a hypothetical

[93] Recital 79 of the EU adequacy decision for Japan.

example could be consumer preferences regarding the transfers of personal data to a certain country). Whether a lower level of personal information protection in a third country could also be a legitimate reason to discriminate domestic and cross-border data transfers is unclear. In the interpretation of non-discrimination clauses, WTO case law does not take into account regulatory intent.[94]

All restrictions on onward transfers of EU personal data from Japan discriminate between transfers of such data between businesses within and outside Japan *on the assumption* that without such restrictions EU personal data will not be sufficiently protected. These restrictions are horizontal and do not take into account consumer preferences with respect to certain countries, parameters of the goods or services of which such transfers are a part, or the actual level of protection of personal data in third countries' legal systems. These restrictions affect the conditions of competition between Japanese and non-Japanese providers, because conditions for transfers of personal data within Japan are more lenient (Article 23(1) and (2) APPI contain several exceptions where consent or other additional safeguards are not applicable) than those for transfers outside Japan (Article 24 APPI). Therefore, these restrictions are unlikely to meet the necessity test under USJDTA in light of footnote 9.

4.3.3 Are Restrictions on Onward Transfers of EU personal data "Applied in a Manner Which Would Constitute a Means of Arbitrary or Unjustifiable Discrimination or a Disguised Restriction on Trade"

If the onward transfers of EU personal data meet the "necessity test", they would need to be assessed against the second requirement (so-called "chapeau requirement") of the exceptions from Free Data Flows Provisions in the CPTPP and USJDTA. Since this requirement is formulated in the same way in both agreements, they are analyzed together.

The chapeau requirement in the exception from Free Data Flow Provisions in both CPTPP and USJDTA requires that restrictions on transfers of information are not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade". As already mentioned above, this wording is very similar to the wording of the chapeau of the GATS General Exception.

The only difference between the two provisions is that the chapeau of the GATS General Exception contains an additional clarification that the unjustifiable discrimination should be "between countries where like conditions prevail". The absence of this requirement in the specific exceptions of CPTPP and USJDTA indicates that, for the purposes of establishing unjustified discrimination, the difference of conditions in the two countries is irrelevant. This makes the chapeau requirement in CPTPP and USJDTA exceptions even harder to justify than under the chapeau requirement of the general exception.

[94] See, e.g. Lang, A. (2011). World Trade Law After Neoliberalism. Oxford University Press Online, 255.

The following section will first explain how the chapeau requirement is interpreted in the WTO law. Relying on his interpretation, it will then apply the chapeau requirement of CPTPP and USJDTA to restrictions on onward transfers of EU personal data from Japan.

A) Interpretation of the chapeau of general exception in the WTO case law

In the abundant literature on WTO law, the language of the chapeau has often been criticized, for example as unclear,[95] 'rife with ambiguity',[96] and 'the vaguest, and therefore the most problematic' requirement of all those found in exception clauses.[97] In *US-Shrimp*, the Appellate Body underlined that the "standards established in the chapeau are … necessarily broad in scope and reach". The upshot is that it gives a broad discretion to adjudicators. Just as the necessity test of the general exception discussed above, the standard of the chapeau is fairly hard to meet and has a very low success rate in the WTO case law so far.[98]

As is apparent from its wording, the chapeau is meant to address the manner in which a measure is *applied*, rather than the measure itself or its content. In more recent case law, however, the WTO Appellate Body departed from this narrow interpretation of the chapeau requirement. In contrast, it clarified that the application of a measure can also "most often be discerned from the *design, the architecture, and the revealing structure* of a measure".[99]

In relation to the legal standard set by the requirements of "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade of the chapeau, the Appellate Body in *US-Gasoline* held that, taking into consideration the object and purpose of the provision and the drafting history, their meaning overlaps.[100] It focused on the

---

[95] Bartels, L. (2015). The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction. *American Journal of International Law*. 109(55), pp. 95-125. J. A. Micallef (2019). Digital Trade in EU FTAs: Are EU FTAs Allowing Cross Border Digital Trade to Reach Its Full Potential? *Journal of World Trade*. 53(5), 96 (stating that although the disputes in *US—Gasoline*, *US—Shrimp*, *U.S.—Gambling* , *Brazil—Retreaded Tyres*, *EC—Seal Products* 'have given the chapeau a high profile, and yet it is still not clear what it requires'.

[96] C. Riffel (2018). The Chapeau: Stringent Threshold or Good Faith Requirement. *Legal Issues of Economic Integration*. 45(2), 143.

[97] *Ibid.*, p. 176.

[98] See, e.g., *Ibid.*; Daniel Rangel, WTO General Exceptions: Trade Law's Faulty Ivory Tower Only Two of 48 Attempts to Use the World Trade Organization's GATT Article XX/GATS Article XIV "General Exceptions" Have Ever Succeeded, Public Citizen's Global Trade Watch, February 2022 https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_-1.pdf It should be taken into account, however, that in the WTO case law the chapeau test is only applied after the contested measure met the "necessity test".

[99] WTO, Appellate Body Reports, *EC – Seal Products*, para. 5.302, internal footnotes omitted, emphasis added. See also WTO, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97 (Appellate Body Report, *Japan – Alcoholic Beverages II*), p. 29; WTO, Appellate Body Report, *US-Shrimp*, para. 160. Panel Report, *Argentina – Financial Services*, para. 7.748 (referring to Appellate Body Report, *EC – Seal Products*, para. 5.302) and para. 7.761.

[100] WTO, Appellate Body Report, *US – Gasoline*, p. 25. This interpretation has been repeated in relation to Article XIV GATS chapeau in WTO, Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797 (hereinafter, Panel Report, *US-Gambling*), paras. 6-579-6.580. See also C.M. Cantore (2018). The Prudential Carve-Out for Financial Services. Cambridge University Press, 173.

"fundamental theme" behind them rather than the exact meaning of each phrase.[101] The Appellate Body concluded that the 'purpose and object' of the chapeau "is generally the *prevention of abuse* of the exceptions' of Article XX GATT and to ensure that the exceptions are not invoked 'as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement".[102]

In *US-Shrimp*, the Appellate Body explained that the chapeau is "a fundamental part of *the balance of rights and obligations* struck by the original framers of the GATT 1947".[103] This balancing of the rights and obligations the Appellate Body is linked to the principle of good faith.[104] In the same report, the Appellate Body also explained that the location of the "line of equilibrium" between the rights and obligations of the Members, which the chapeau aims to achieve, "is not fixed and unchanging; *the line moves* as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[105] The "actual contours and contents" of "arbitrary or unjustifiable discrimination" and "disguised restriction on trade" themselves vary depending on the type of measure under examination and the public policy interest which that measure aims to protect.[106] This approach at least suggests that what the standard of the chapeau means is impossible to define *in general*, that is, without its application to the facts of a particular dispute.

Turning to the assessment of whether discrimination is "arbitrary" or "unjustifiable", the Appellate Body has primarily considered the cause or the rationale of the discrimination in light of the objectives listed in paragraphs of Article XX.[107] Looking at the cause or rationale behind a contested measure, the Appellate Body considered, in particular, the following factors:[108]

---

[101] *Ibid.*

[102] WTO, Appellate Body Report, *US – Gasoline*, p. 22, 25. (emphasis added). See also WTO, Panel Report, *US-Gambling*, paras. 6-579-6.580.

[103] WTO, Appellate Body Report, *US – Shrimp*, paras. 157-159.

[104] WTO, Appellate Body Report, *US – Shrimp*, paras. 158-159, internal footnotes omitted, emphasis added. See also WTO, Appellate Body Report, *US – Gasoline*, p. 22. The same 'reasonableness' requirement the Appellate Body read in Art. XIV GATS the chapeau in WTO, Appellate Body Report, *US – Gambling*, para. 339.

[105] WTO, Appellate Body Report, *US – Shrimp*, paras. 158-159, emphasis added.

[106] WTO, Appellate Body Report, *US – Shrimp*, para. 120. For a discussion see D. McRae (2000). GATT Article XX and the WTO Appellate Body, in M. Bronckers, Quick, R., *New Directions in International Economic Law, Essays in Honour of John H. Jackson*. Kluwer Law International, 225.

[107] WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225, 229-230; WTO, Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133 (hereinafter, Appellate Body Report, *US – Tuna II (Mexico) Art. 21.5*), para. 7.316.

[108] WTO, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225 (referring to WTO, Appellate Body Report, *US – Shrimp*, paras. 163-166, 172, and 177). These factors were also reiterated in WTO, Appellate Body Reports, *EC-Seal Products*, para. 5.305.

1) whether the contested measure was 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*';[109]

2) whether the contested measure took into account different circumstances that may occur in territories of other WTO members;[110] and

3) whether the defending party negotiated seriously with all WTO members, as opposed to doing so with some but not with others.[111]

In prior cases, the Appellate Body considered a requirement to adopt an 'essentially the same' regulatory framework, as failure to take into account different circumstances in other WTO members and negotiating with some but not with others as inconsistent with the chapeau requirement.[112]

In applying the chapeau in the context of trade in services, the key factor that the WTO panel considered in the assessment of "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" was the *consistency* of the overall domestic regulatory framework.[113] In that particular case, the Panel concluded that the contested measure did not meet the chapeau requirement because of inconsistency between the US federal measure prohibiting the remote supply of gambling and betting services and the interstate measure that permitted interstate pari-mutuel wagering over the telephone or other modes of electronic communication.[114] In contrast, isolated instances of enforcement or lack thereof must be "placed in their proper context" as government might have good reasons to refrain from enforcement in certain cases for reasons unrelated to discriminatory intent and without discriminatory effect.[115]

B) Application to restrictions on onward transfers of EU personal data

In light of the broad meaning of the chapeau requirement that boils down to the principles of good faith and abuse of right, it is hard to predict precisely how a particular adjudicating body will interpret this requirement in relation to restrictions on onward transfers of EU personal data from Japan in a particular case. We can make a number of observations, however. Overall, the application of more concrete criteria to restrictions on onward transfers of EU personal data from Japan allows to highlight the risks that such restrictions may not pass the test of the chapeau in the CPTPP and USJDTA exceptions. Four points are worth making.

[109] Appellate Body Report, US – Shrimp, para. 177(emphasis added); see also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 163.
[110] WTO, Appellate Body Report, *US – Shrimp*, paras. 163- 165.
[111] *Ibid.*, paras. 166 and 172.
[112] WTO, Appellate Body Report, *US-Shrimp*, paras. 166, 172.
[113] WTO, Panel Report, *US-Gambling*, para. 6.584, 6.607.
[114] *Ibid.*, para. 6.599.
[115] WTO Appellate Body, *US – Gambling*, para. 356.

First, the equivalency assessment requires that the level of protection of EU personal data in a third country (after transfer from Japan) must be *equivalent.* In this sense, it can be viewed as a 'rigid and unbending', and, therefore, contrary to the chapeau requirement. Although this requirement operates in terms of the level of protection rather than design of specific rules, it could be argued that equivalency of level of protection is the highest comparative standard possible, which is hard to achieve with a totally different design of rules ensuring such protection. On the other hand, however, equivalency assessment is only *one of* the mechanisms in the "toolbox" of onward transfer mechanisms of EU personal data from Japan. Availability of other alternatives, arguably, makes this requirement less rigid. Personal data can still be transferred even in the absence of an equivalency assessment.

Second, the onward transfer rules clearly do *not* take into account different circumstances in CPTPP countries or the US, where this data can be transferred under the CPTPP and USJDTA. These requirements apply in the same way when personal data is transferred to all countries outside the EU and Japan. Third, and relatedly, Japan did not negotiate restrictions on onward transfers seriously (or at all) and adopted them unilaterally in Japanese law. So far, only the EEA and the UK received the equivalency decision. There is no indication of other trading partners obtaining an equivalency assessment from Japan. Fourth, the fact that consent requirement has no link with the third country's regulatory framework, requiring that alternative tools yield an equivalent level of personal data protection could be viewed as a sign of inconsistency of Japan's legal framework. If consent is sufficient as a mechanism to safeguard a high level of protection of EU personal data, then the required standard for equivalency assessments and contractual and other binding arrangements might have to be lowered.

5. Conclusions

This report argues that there are risks that in a hypothetical dispute under the CPTPP or USJDTA restrictions of onward transfer of EU personal data from Japan could be found in violation of Free Data Flow Provisions that cannot be justified under the exceptions from such provisions. Should this situation occur, Japan will have a difficult choice between, on the one hand, bringing restrictions of onward transfers in compliance with the CPTPP or USJDTA requirements, while breaching the conditions for the EU adequacy decision, or, to continue complying with the conditions of the EU adequacy decision while not bringing its restrictions on onward transfers in compliance with the CPTPP or USJDTA.

These conclusions are instructive not only for Japan, but also for other countries that may find themselves in a similar situation. In particular, the UK, Canada and New Zealand, which maintain an adequacy decision from the EU and are parties to CPTPP and other trade agreements with free data flow provisions.

To preserve the credibility of its adequacy decisions, the EU should monitor developments on this issue, in particular, as part of periodic review process of the adequacy decisions. It should maintain a credible threat of suspension or revocation of adequacy decisions if compliance with such decisions is endangered by relevant countries' international trade commitments.