

Japan, digital trade and data governance

Uses and abuses of EU data adequacy decisions

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What we tried
to find out



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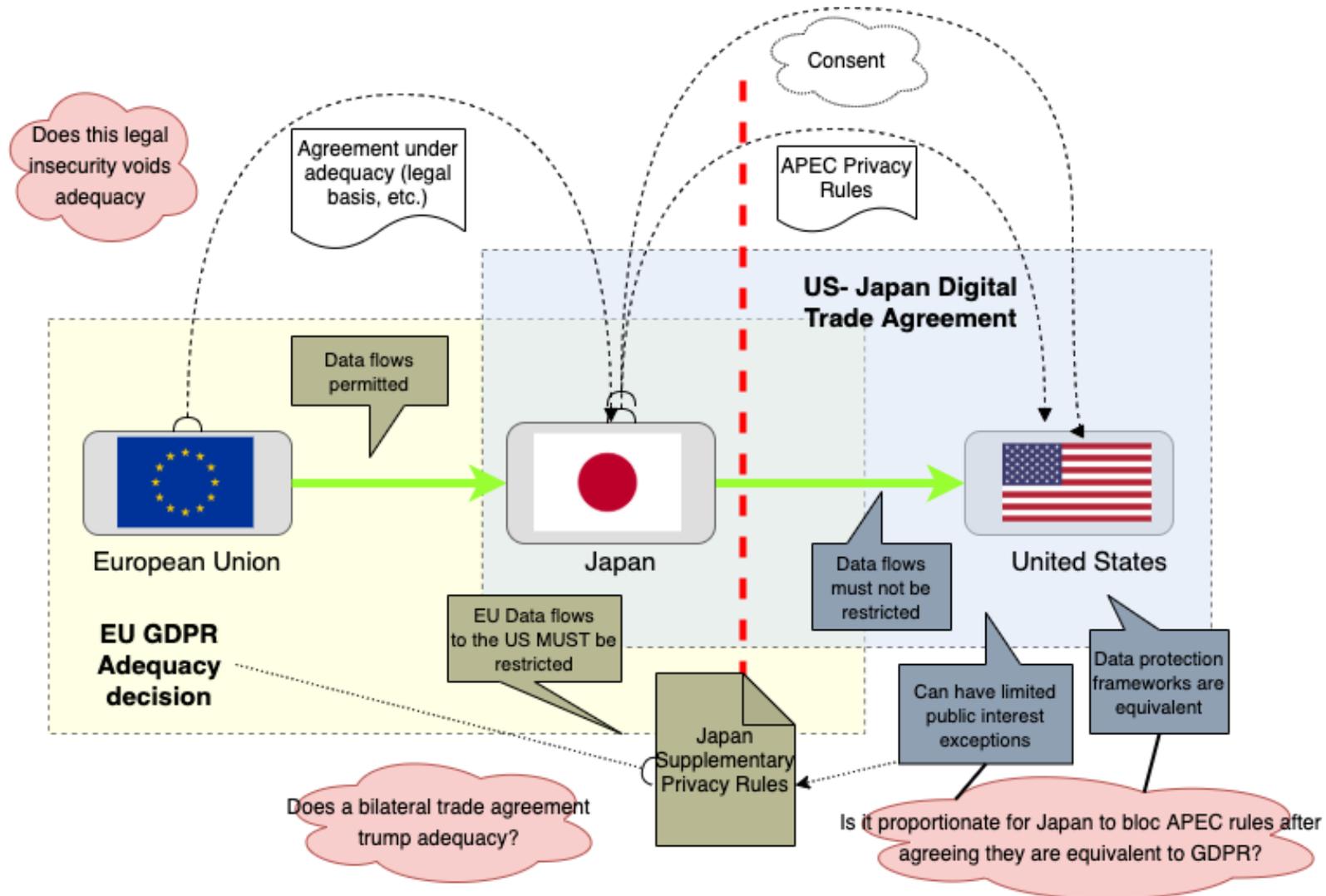
Focus: Viability of strategic litigation challenging the EU's data adequacy decision allowing unrestricted data flows to Japan.

Why: Japan has made digital trade commitments to enable free data flows to other countries with lower protections, such as the USA. This creates uncertainty, risks and potential conflicts of laws.

Wider implications: Japan is used as the example of interoperability of data regimes by advocates of reducing consumer protections to liberalise digital trade.



Japan's two-sided data regime

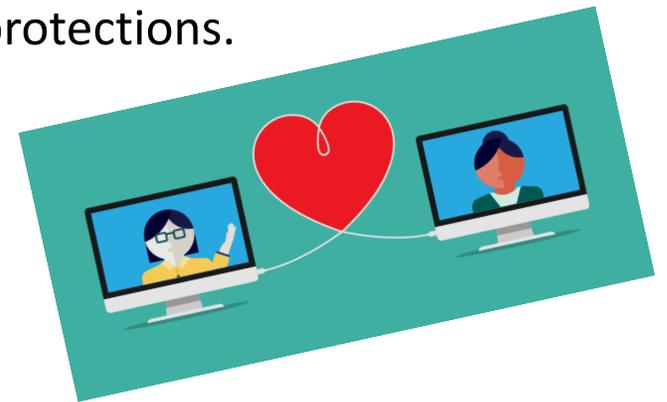


What we DID NOT try to find out

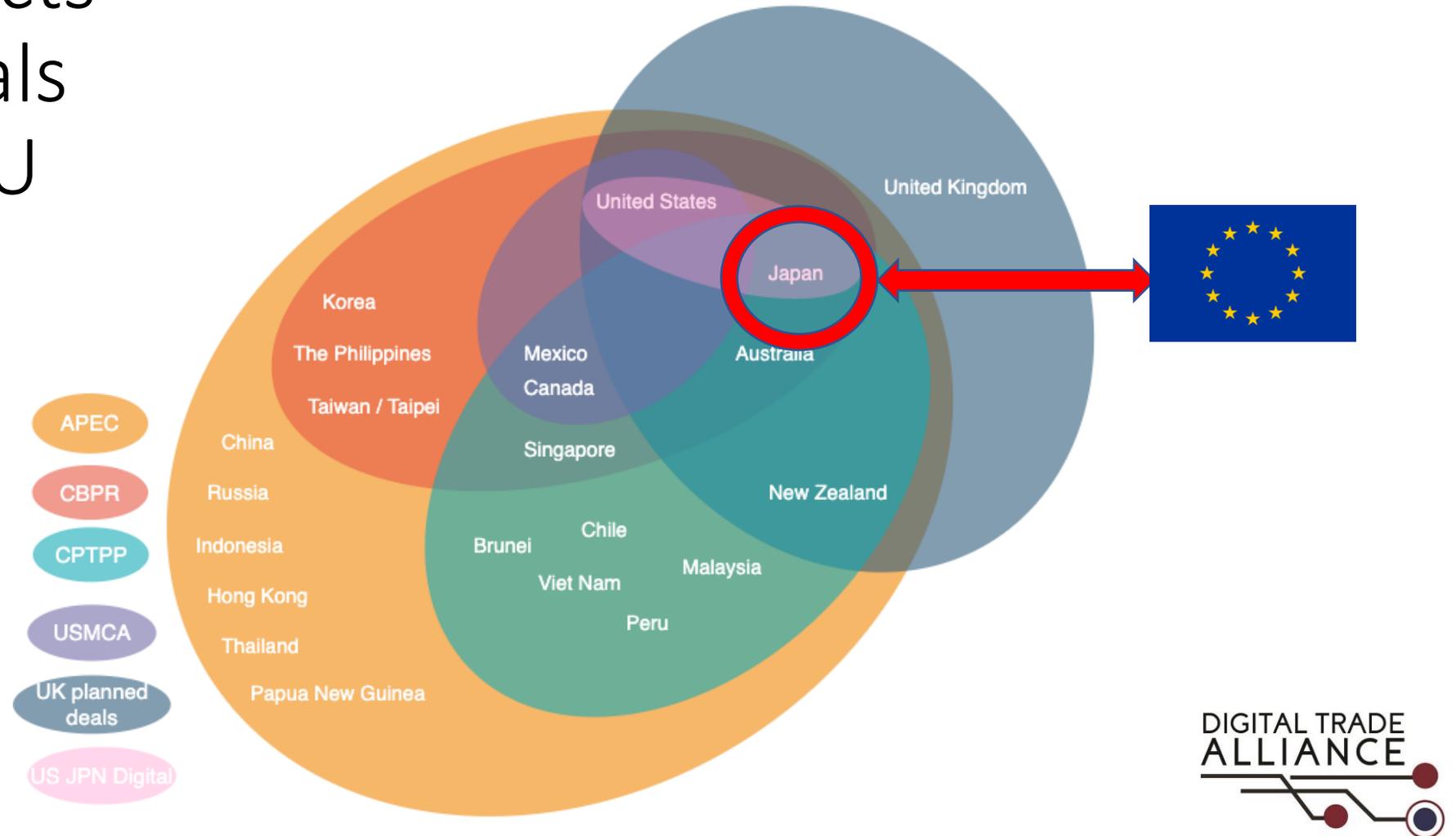
- Protecting the privacy and fundamental rights of Europeans over Japanese, Americans, or anyone else.
- Undermining the EU framework and GDPR by making it seen as impossible to achieve.
- Imposing the EU approach to data protection on other countries and regions.
- Restricting personal data flows with adequate privacy and consumer protections.

Out of scope but of wider interest to the DTA:

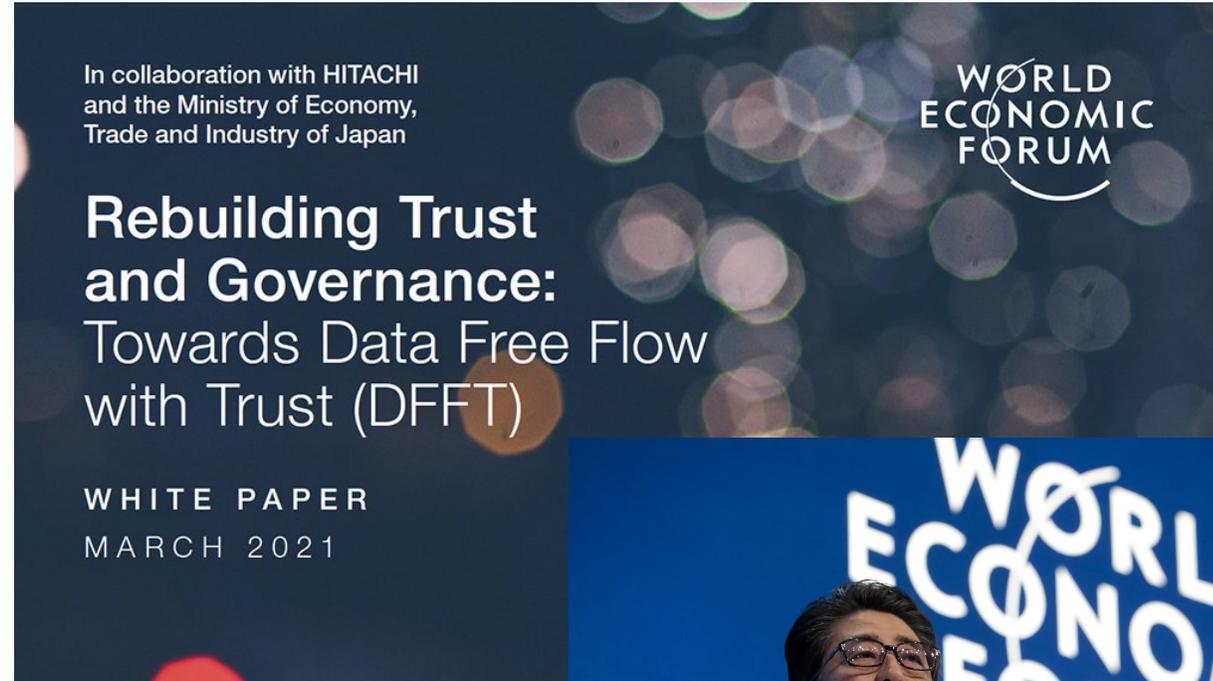
- Data flows enabling or hindering fair technology transfers and global justice.
- Wider technology and innovation policies, AI regulations, etc.
- Digital trade with China.



Why Japan?
Wider impacts
of trade deals
and weak EU
adequacy



Why Japan? Policy leading: DFFT



WORLD TRADE ORGANIZATION



Research project:
expert reports and
convenorship



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- Japanese privacy regime, recent reforms and enforcement.
- Japan's digital trade agreements, policy exceptions and conflicts.
- Evidence of cross-border data transfers between the EU, Japan and USA.
- Approaches to litigation, standing, administrative complaints, CJEU.
- Advocacy, gaps and strengths in civil society collaboration.

Outputs at dtalliance.org :

- **REPORT: Scope and Applicability of Free Data Flow Exceptions in US-Japan Digital Trade Agreement and the CPTPP**
Svetlana Yakovleva, PhD
- **REPORT: The Japanese Regulations on Data Transfer toward Data Free Flow with Trust**
Prof. Hiroshi Miyashita, Chuo University
- **REPORT: EUJUS FLOW: A Strategic Approach to Tracking International Cross-Border Data Flows Across the EU-JAPAN and the US**
Eticas Consulting
- English Translation of Japan's **"Guidelines on the Act on the Protection of Personal Information"**

Key takeaways: Japan privacy

- Japanese data protection framework improved but concerns remain.
- Weaker regime than the EU enabling seemingly incompatible regimes.
- Two-tier regime for EU data.
- Transparency loopholes on consent and weak enforcement of the complex rules for international transfers create risks for individuals even with EU restrictions on use of APEC-CBPR.
- Growing social concern about privacy but global openness important progressive value.



Key takeaways: privacy and trade disputes

- Restrictions on EU data likely disproportionate and more trade restrictive than necessary, and potentially discriminatory.
- Risks not clear cut, as using adequacy is not mandatory.
- Lack of specific jurisprudence mean WTO case law central, but this looks bad as only 2 out of 48 successful policy exceptions.



Key takeaways: evidence of data flows

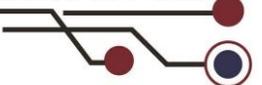
- Some 25% of Japanese corporations send substantial data across the EU, Japan and US.
- All top Japanese game developers have subsidiaries and affiliated companies in the United States and in their privacy policies/terms of service agree to data sharing with the United States.



YAHOO!
JAPAN

- APEC-CBPR private certification is limited in Japan at present. Only three companies have registered, but tellingly one (Yahoo Japan) has stopped EU services to avoid conflicts.

DIGITAL TRADE
ALLIANCE

A graphic element consisting of a horizontal line with three circular nodes at the end, colored red, blue, and red from left to right.

Key takeaways: litigation

- Experts agree litigation has basis and it is viable for EU-based groups. Several options if people are interested can follow up.
- Need to avoid Privacy Shield situation of impasse.
- Key elements may need to be tested first: Japanese hierarchy of laws, trade agreements, adequacy commitments.
- UK in a similar situation to Japan could also be challenged.
- EU possibly changing its digital trade policy to include data flows in agreements.



Main takeaway: improved civil society collaboration and advocacy

- Convening discussions between Europe and Asia-Pacific region showed gaps and value.
- Any activities need to involve Japanese civil society organizations.
- G7 and IGF 2023 in Japan.



OUR MEMBERS



Public Citizen, United States



Privacy International, United Kingdom



The European Consumer Organisation (BEUC), European Union



Derechos Digitales, Latin America



Foundation for Media Alternatives, Philippines



European Digital Rights (EDRI), European Union



La Asociación por los Derechos Civiles (ADC), Argentina



Open Rights Group (ORG), United Kingdom



The Federation of German Consumer Organizations (vzbv), Germany



The Centre for Intellectual Property and Information Technology Law (CIPIT), Kenya

