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Q&A - leaked EU-Japan trade agreement

Greenpeace

1. What has Greenpeace Netherlands released?

Greenpeace Netherlands has released fifteen documents totalling 205 pages of previously undisclosed chapters from secret talks for an [EU-Japan](#) trade agreement (known as JEFTA). The documents are available on trade-leaks.org.

The negotiations were officially launched on 25 March 2013 and the [EU Commission expects to conclude them in 2017](#). The leaked documents are dated between January 2016 and January 2017. The original trade mandate from July 2012 has also been published online. The original documents have been retyped to protect our sources.

Drafts of the EU-Japan trade agreement texts released by Greenpeace Netherlands:

Issue	Title of the text	Number of pages	Date of the text
Mandate for the negotiations	Mandate (in German)	19	July 2012
General trade rules	Trade in Goods	13	December 2016
	Rules of Origin	20	January 2017
	Sanitary and Phytosanitary Standards (SPS)	11	January 2017
	Technical Barriers to Trade (TBT)	14	Date not mentioned*
	Electronic commerce	6	January 2017
State to State Dispute Settlement	Dispute Settlement	19	December 2016
	Code of Conduct	3	Date not mentioned*
Investment	Investment	18	December 2016
	Investment Dispute Resolution	33	September 2016
Environment, Labour, Animal Welfare	Trade and Sustainable Development (TSD) [older version]	12	January 2016
	Trade and Sustainable Development (TSD)	12	September 2016
	Animal Welfare	1	Date not mentioned*

Specific Services	Financial Services	10	January 2017
	Telecommunication Services	14	January 2017
TOTAL		205	

* Document was part of package of document published January 2017

2. What do these documents tell us?

The documents reveal the state of the negotiations and the positions of both the EU and Japan. The documents comprise proposals for final text, most of which appears to be agreed by both parties. They also show proposed text that was not common to both parties (as of when the documents were dated), with Japan's proposals in red and the EU's proposals in blue.

3. Why have the documents been leaked?

Greater public access to JEFTA negotiating documents is good for democracy and will enable more balanced and transparent public participation by experts, politicians, civil society and the media. The European Commission has itself frequently highlighted the importance of democratic principles and transparency. When publishing the [EU's new trade strategy paper](#) in October 2015, the Commission stated: *"The Commission will, for example, request that the Council publish negotiating mandates and publish EU text proposals online for all negotiations, following the practice in TTIP."*

4. Were any documents available before the leak?

The documents leaked by Greenpeace Netherlands have not been published before. Some [media reports](#) have referred to an earlier version of the regulatory cooperation chapter (not included in the Greenpeace Netherlands leak) and to texts on investment and investment dispute resolution in March 2017. The day after these news stories were published, the Commission made two texts available, one on small and medium-sized enterprises ([SMEs](#)) and one on [Regulatory Practices](#).

5. What do the documents say about illegal timber and why should we care?

The Chapter on Trade and Sustainable Development covers timber trade issues. Japan is the largest importer of wood and plywood in the world, the second largest importer of logs, and the third largest importer of lumber. The Commission's Trade Sustainability Impact Assessment ([TSIA](#))¹ for JEFTA warns that the *"main environmental impacts of JEFTA, for both the EU and Japan, will lie in the countries from which they import their timber"*. On page 237, it emphasises that: *"Japan's failure so far to effectively control its imports of illegal timber has arguably had an inhibiting effect on the negotiations between the EU and Malaysia on a Voluntary Partnership Agreement."* It also specifically mentions illegal logging in Brazil, Malaysia, China and Indonesia (among other countries) that could be exacerbated by JEFTA. A 2016 [report by the Environmental Investigation Agency](#) revealed that Japanese companies are also sourcing illegal timber from Romania; a trade flow that would be covered by JEFTA.

But JEFTA's article 7 on timber does not take the TSIA recommendations into account. Instead, the parties only *"recognize the importance of ensuring the conservation and sustainable management of forests"*, *"encourage conservation"*, *"contribute to combating illegal logging"*, and *"exchange information and share experiences"*. These are weak commitments, made even weaker by their inclusion in JEFTA's Trade and Sustainable Development chapter, which has no enforcement mechanisms (non-compliance will at most result in a report from 'experts'). This is in stark contrast with the Commission's mandate from European

¹ [Trade Sustainability Impact Assessments](#) are a *"DG Trade-specific tool for supporting major trade negotiations. SIAs provide the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations."* According to the Commission, TSIA's are meant to help *"steer the negotiations"* and ensure *"that the related policy choices are optimised"*.

governments in the Council, which calls for special attention on timber and sustainable development issues (Trade Mandate 2012, art. 40).

It is also alarming that JEFTA's provisions on timber are weaker/less precise than similar sections² in CETA, the controversial free trade agreement between the EU and Canada that the Commission refers to as its 'gold standard'. For instance, CETA contains commitments from the parties to cooperate, but JEFTA only says they "may" cooperate. If CETA was the best the Commission can do, then JEFTA is clearly a step back. In fact, even the Trans-Pacific Partnership agreement (the floundering trade deal known as [TPP](#)), which Japan has signed, has more comprehensive provisions on timber than JEFTA. TPP includes obligations for parties to "adopt, maintain and implement laws..." and to undertake an extensive range of activities in order to tackle the illegal trade in wild flora and fauna, illegal logging and associated illegal trade.

The [Commission's position paper on the TSIA](#) notes that "Japan recently adopted new legislation on illegal logging". However, the 2016 Japanese law is based on a voluntary registration system, with no prohibition of illegally sourced timber. In addition, the law's definition of legal timber and standards for due diligence remain unclear.

6. What do the leaks say about whaling?

The EU has repeatedly condemned Japan for its whaling activities (Japan is one of only three countries in the world to allow commercial whaling and the only one to hunt whales outside their territory). Yet, the draft JEFTA text does not mention the issue at all. The European Parliament, which must be consulted in the process of ratification of all EU trade deals, emphasised that JEFTA negotiations should be based on clear negotiating directives, including specifically a call to discuss the abolition of whale hunting and the trade in whale products. The Parliament reiterated this demand again in a [2016 resolution](#), referencing the ongoing negotiations and calling on Japan to stop its whaling activities.

In response, the Commission has only made one [vague statement](#), describing the Trade and Sustainable Development chapter as "an additional platform to foster dialogue and joint work ... on environmental issues." However, this chapter fails to commit either side to co-operate on biodiversity protection, and contains no reference to whaling, nor the International Whaling Commission (the body responsible for the conservation and management of whales and the regulation of whaling).

7. What else does the chapter on sustainable development say?

Contrary to the Commission's claims that it will negotiate an "[ambitious chapter](#)", JEFTA's sustainable development provisions are even weaker than those in CETA and the TPP (both of which also pose a serious threat to the environment).

Both CETA and JEFTA lack concrete, binding commitments on the environment, sustainable development and labour issues. JEFTA's narrow approach once more contradicts [Commissioner Malmström's pledge](#): "The EU intends to negotiate with Japan an ambitious chapter on Trade and Sustainable development, including commitments to high levels of environmental protection in domestic law and effective implementation of multilateral environmental agreements. Particular emphasis should be put on the conservation of biological diversity, fisheries resources and timber, with reference to the Convention on Biological Diversity, the Convention on International Trade in Endangered Species, and Food and Agriculture Organisation instruments."

Both CETA and TPP contain more substantial commitments to cooperate. In JEFTA, parties only state that they "may" cooperate, with the exception of the commitment to cooperate on regulatory cooperation (with the aim of enhancing trade and investment, rather than any sustainable development goals).

² See articles 24.10.2(b), (c), (d), 24.12.1 and (g), and 25.3)

Finally, non-compliance with the provisions in the Trade and Sustainable Development chapter will result, at best, in a report from a panel of experts prompting parties to “*discuss actions or measures*”. Evidently, JEFTA negotiators place little value on sustainable development and trade.

8. What does JEFTA say about climate change?

The Paris climate agreement is mentioned in JEFTA’s Trade and Sustainable Development chapter (article 4). While the EU and Japan “*reaffirm their commitment to achieving the ultimate objective of the United Nations Framework Convention on Climate Change*” and “*commit to work together to take actions to address climate change*” (Article 4.4), these pledges by nature of their placement in the Trade and Sustainable Development chapter are not backed by meaningful enforcement mechanism. Both parties have shied away from assessing the adequacy of the others’ domestic climate plans, despite experts warning of the [inadequacy of Japan’s climate action and slowing climate action in the EU](#).

Alarming, the text shows that the Commission has backtracked from how it addressed multilateral environmental agreements in CETA. CETA allows parties to derogate from the agreement in order to meet obligations under international environmental agreements.³ JEFTA offers less flexibility. Quite the opposite, some of the JEFTA provisions appear to deliberately blur the commitments made under international agreements by introducing conditions on how parties can comply with them. For example, Article 4.5 states: “*Nothing in this Agreement prevents a Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is a party provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade.*”⁴

9. Is the precautionary principle protected in JEFTA?

Like CETA, JEFTA does not mention the precautionary principle in its chapters on Sanitary and Phytosanitary (SPS) measures or Technical Barriers to Trade (TBT). Given that Japan, like the EU, [has unsuccessfully invoked the precautionary principle](#) in WTO disputes, one would have thought that both parties had an interest to ensure its admissibility in SPS and TBT cases.

JEFTA’s Trade and Sustainable Development chapter refers to the “*precautionary approach*” (Article 9), whereas Article 191 of the Treaty on the Functioning of the European Union enshrines the precautionary principle in EU law. Reference to an “*approach*” is generally considered to be weaker than a reference to a “*principle*”.

10. Does JEFTA address concerns about corporations suing states?

No, it does not. As with CETA, JEFTA creates a parallel justice system available only to foreign investors, and in principle allows any corporation to establish and use a mailbox company in Japan to sue the EU or a national government.

The Investment Dispute Resolution chapter in JEFTA is even more problematic than the Investment Court System (ICS) in CETA. States’ “*right to regulate*” is limited to adopting “*measures necessary to achieve legitimate policy objectives*”, begging the question as to what is considered “*legitimate*” and who gets to decide. Moreover, the provision is essentially rendered meaningless, if parties can be sued when exercising this right. Amongst others, it can lead to a regulatory “*chill*” effect, where policymakers abstain from legislating out of fear of being sued.

³ Parties have the “*right to use Article 28.3 (general exceptions) in relation to environmental measures, including those taken pursuant to MEAs to which they are a party*” (CETA Article 24.4.4).

⁴ This language mirrors provisions in GATT Article XX and GATS Article XIV. This language has been criticised for being circuitous and unclear.

JEFTA provisions allowing foreign investors to sue governments are also worse than in CETA. CETA explicitly excludes claims based on losses, or potential losses.⁵ JEFTA provisions merely state that: *“the mere fact that a Party takes or fails to take action including through a modification to its laws that may negatively affect an investment or an investor’s expectations, including expectations of profits, does not amount to a breach of an obligation under this Section”* (Article 13.2, chapter on investment).

The addition of the word "may" (compared to the equivalent text in CETA, see footnote 5) means that JEFTA only excludes claims based on potential losses, i.e. investors could bring claims for damages, provided their interests are actually affected.

11. What is the alternative to JEFTA?

The current global trade and investment regime imposes high social and environmental costs on people and planet. In many cases, governments favour trade over social and environmental standards that protect the public interest. To bring about a transparent, just and fair trade system, globalisation must be governed by rules. These rules must respect national and cultural values, enable sustainable development and effectively implement the aims of United Nations agreements such as the Paris climate agreement, the Convention on Biological Diversity and the Sustainable Development Goals. Environmental treaties, human rights agreements and international labour standards – with principles of equality and intergenerational responsibility at their heart – must take precedence over trade rules. Greenpeace has formulated [ten principles for trade that work for people and the planet](#).

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⁵ *“The mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach”* (CETA Article 8.9(2)).