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#### **Negotiating Capital and the EU-Japan Economic Partnership Agreement**

La negociación de capital y el Acuerdo de Asociación Económica UE-Japón

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# Negotiating Capital and the EU-Japan Economic Partnership Agreement

*La negociación de capital y el Acuerdo de Asociación Económica UE-Japón*

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**Summary:** I. Introduction.—II. Defining negotiating capital.—III. The European Union’s negotiating capital.—IV. Japan’s negotiating capital.—V. The totality of European Union and Japanese negotiating capital.—VI. Application to the EU-Japan economic partnership agreement.—VII. Conclusion.

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**Abstract:** The 2019 European Union (EU)-Japan Economic Partnership Agreement is, so far, the EU’s largest bilateral free trade agreement. While the agreement itself is an example of the growing strength of the EU-Japan relationship, it is also an example of how two vastly different trade regimes can overcome entrenched structural and administrative styles to reach a consensus. This paper analyzes one of these barriers: negotiating capital. This concept represents the political economy of how trade negotiators utilize their legal expertise, negotiating flexibility, and limited resources to maximize free trade agreement outcomes. However, trade negotiators have differing amounts of negotiating capital, which depends on their home states’ structural and administrative constraints and how the trade negotiators define and develop their trade expertise. The EU’s and Japan’s contrasting structural and administrative approaches to trade negotiations and how trade experts define and develop their expertise lend a unique opportunity to understand how changes in negotiating capital can alter free trade agreement negotiation outcomes. Ultimately, the EU’s inclusive, quasi-federal structure and the negotiators’ need to consider the limitations on their trade mandate show how their negotiating capital is relatively limited and translates into a more integrated agreement text, i.e., provisions on public opinion. On the other hand, Japan’s top-

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down reformist trade regime leads to a more reactive strain of negotiating capital relying heavily on adherence to hierarchy and limited inclusiveness, resulting in agreement commitments that are generally weak and narrow. Negotiating capital is an important reality that all trade negotiators face. It is politically and strategically important for parties to understand how these various factors' political economy impacts free-trade negotiations and outcomes.

**Keywords:** European Union, Japan, free trade agreements, negotiations, EU-Japan Economic Partnership Agreement (EU-Japan EPA).

**Resumen:** *El Acuerdo de Asociación Económica Unión Europea-Japón de 2019 es, hasta el momento, el mayor acuerdo de libre comercio bilateral de la UE. Si bien el acuerdo en sí mismo es un ejemplo de la creciente fortaleza de la relación UE-Japón, también es un ejemplo de cómo dos regímenes comerciales muy diferentes pueden superar obstáculos estructurales y administrativos arraigados para llegar a un consenso. Este trabajo analiza una de estas barreras: la negociación de capital. Este concepto refleja la economía política de los negociadores comerciales, es decir, cómo los negociadores utilizan su experiencia legal, flexibilidad de negociación y recursos limitados para maximizar los resultados del acuerdo de libre comercio. Sin embargo, los negociadores comerciales disponen de un capital de negociación diferente que depende de las limitaciones estructurales y administrativas de sus estados de origen y de cómo el negociador comercial defina y desarrolle su experiencia comercial. Los enfoques administrativos y estructurales dispares de la UE y Japón para las negociaciones comerciales y cómo los expertos en comercio definen y desarrollan su experiencia brindan una oportunidad única para comprender cómo los cambios en el capital de negociación pueden alterar los resultados de la negociación de los acuerdos de libre comercio. En última instancia, la estructura cuasi federal inclusiva de la UE y la necesidad de los negociadores de considerar las limitaciones de su mandato comercial muestran cómo su capital de negociación es relativamente limitado y se traduce en un texto de acuerdo más integrado, es decir, disposiciones sobre la opinión pública. Por otro lado, el régimen comercial reformista de arriba abajo de Japón conduce a una tensión más reactiva de negociación de capital que depende en gran medida de la adherencia a la jerarquía y la inclusión limitada, lo que resulta en compromisos de acuerdo que generalmente son débiles y limitados. Negociar capital es una realidad importante a la que se enfrentan todos los negociadores comerciales. Es política y estratégicamente importante que las partes entiendan cómo la economía política de estos distintos factores influye e impacta en las negociaciones y los resultados del libre comercio.*

**Palabras clave:** Unión Europea, Japón, acuerdos de libre comercio, negociaciones, Acuerdo de Asociación Económica UE-Japón (AAE UE-Japón).

## I. Introduction

Free trade agreement (FTA) negotiations optimize limited resources and legal expertise to achieve certain outcomes. Trade negotiators are the lead, critical players in determining the proper approaches, bargaining strategies, and how trade objectives translate into draft text. However, trade negotiators have differing amounts of negotiating capital, a concept representing a negotiators' degrees of flexibility and "wobble-room" to request or make concessions or effectively bargain. The amount of negotiating capital trade negotiators possess depends on their home states' structural and administrative constraints and how they define and develop their trade expertise. I expect that varying levels of negotiating capital can result in unique variations of FTA negotiating expertise, strategy, and techniques. The amount of negotiating capital available to negotiators depends on several structural and procedural constraints present in their home state. These constraints and limitations include administrative governance factors, the chain of authority and agency roles, training and education, and consideration of third-party interests. While every state involved in FTA negotiations possesses these factors, it is crucial to consider their differences to understand their impacts on how trade negotiators acquire, use, and maximize their negotiating capital.

European and Japanese trade negotiators are prime examples of how domestic limitations and constraints affect how trade negotiators acquire, use, and maximize varying degrees of negotiating capital. The EU, as a quasi-federal governing structure accounting for 27 Member States (MMSS) and numerous cross-border businesses, non-government organizations, and civil society groups, trade negotiators must account for a plethora of interests and initiatives as part of their trade mandate. As a reforming former-mercantilist trading economy, Japan's powerful political and business authorities dominate the trade negotiation mandate but are responsive to external stimuli. This paper first traces the EU's and Japan's domestic constraints and limitations on their trade negotiator's negotiating capital. In the following section, this paper shows how the EU's and Japan's trade negotiators' levels of negotiating capital translate into variations in trade expertise, strategy, and techniques. Last, an application of this negotiating capital framework to the EU-Japan Economic Partnership Agreement (EU-Japan EPA) and the potential benefits and drawbacks of permitting or limiting trade negotiators' accessibility to negotiating capital.

## II. Defining negotiating capital

The negotiating capital concept, as previously mentioned, is a catch-all term that represents a trade negotiator's degrees of flexibility and "wiggleroom" to make requests, concessions, or bargain effectively, all as a part of their legal expertise. The amount of negotiating capital possessed by negotiators depends on the context of the state in which they work. The negotiating capital concept considers numerous factors that are in constant evolution, including administrative governance factors, the chain of authority and role of agency, training and education, and consideration of third-party interests. This paper will focus on the roles of these factors on the negotiator's negotiating capital.

Why investigate trade negotiators? Trade negotiators must use their legal expertise in light of limited negotiating capital to obtain trade-offs, determine objectives, and maximize results<sup>2</sup>. Further, trade negotiators work on behalf of the state they represent, meaning trade negotiators do not achieve trade objectives purely based on their expertise or individual choices. Instead, results derive from state interests, administrative processes, and collective deliberations. Trade negotiations are also a team effort not strictly limited to lawyers as trade specialists and economists also contribute their specialized expertise to accompany trade lawyers. How trade negotiators maximize minimal resources or how much flexibility they have in exercising their legal expertise to achieve favorable results is the key to understanding their role as legal experts.

Research on concepts mirroring negotiating capital is plentiful and will guide us on the most crucial factors contributing to this analysis. Political capital, for example, is a highly researched field that aims to understand how politicians and citizens use their connections, influence, and resources to achieve political objectives. For Sørensen & Torfing, political power represents "the individual powers to act politically that are generated through participation in interactive political processes linking civil society to the political system"<sup>3</sup>. Sørensen & Torfing see political capital as a resource of "endowment, the empowerment, and the political identity of the

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<sup>2</sup> For more on expertise in the context of the exchange of knowledge, information, and expertise, see Diane Stone, "Introduction: global knowledge and advocacy networks", *Global Networks*, 2(1), 2002.

Also see Chapters 4 and 5 in David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*, (Princeton: Oxford University Press) 2018.

<sup>3</sup> Eva Sørensen & Jacob Torfing, "Network Politics, Political Capital, and Democracy", *International Journal of Public Administration*, 26(6), 2003.

citizens”<sup>4</sup>. In short, citizens need a high level of political capital for a thriving, functioning democracy<sup>5</sup>. Sørensen & Torfing’s primary investigation mechanism is the “governance networks,” which have implications for negotiating capital. Much scholarly work exists on the political capital of the private sector and how such political connections can either result in favorable or unfavorable policy choices. Research on South Korean companies, for example, has shed light on trends that companies with political capital used government officials as catalysts to develop overseas international alliances<sup>6</sup>.

Scholars have also noted the role of legal expertise in the trade negotiating process. Nicola’s examination of the United States-EU Transatlantic Trade and Investment Partnership (US-EU TTIP) negotiations and the politicization of legal expertise shows how trade negotiators use newfound leverage from politicized transparency claims in regulatory cooperation negotiations<sup>7</sup>. In a parallel, Annelise Riles’ research of the Japanese derivatives market and swap contracts emphasizes the role of back-room legal expertise in shaping finance markets from the “margins”<sup>8</sup>. Both Nicola and Riles have underscored the expert’s role in obtaining leverage and shaping processes. This paper hopes to achieve a similar outcome, albeit through different terms. Here, negotiating capital takes on an evolving, constraining, and multi-factored notion of legal expertise that fits within the process-oriented legal expertise described by Nicola and Riles.

### III. The European Union’s negotiating capital

EU trade negotiators operate within a quasi-federal structure within a bottom-up mandate development process. Accordingly, there are various limiting effects on EU negotiators’ amount of negotiating capital. Foundational principles enshrined in the EU’s treaties require the trade negotiations to be transparent, open, and democratic. Article 1 of the Treaty on the European Union (TEU), decisions made in the European Union institutions will be taken “as openly as possible and as closely as possible

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<sup>4</sup> *Ibidem*, 623.

<sup>5</sup> *Ibidem*.

<sup>6</sup> Jordon Siegel, “Contingent political capital and international alliances: evidence from South Korea”, *Administrative Science Quarterly*, 57, 2007.

<sup>7</sup> Fernanda Nicola, “The Politicization of Legal Expertise in the TTIP Negotiation”, *Law & Contemporary Problems*, 78(4), 2015.

<sup>8</sup> Annelise Riles, “Collateral Expertise”, *Current Anthropology*, 51(6), Dec. 2010.

to the citizen”<sup>9</sup>. Article 15 on the Treaty on the Functioning of the European Union (TFEU) proclaims that “to promote good governance and ensure participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible”<sup>10</sup>. Article 15 also commits the MMSS to maintain the right of access to documents by the public. The more recent Laeken Declaration of 2001 on the future of the EU explicitly states that European citizens “want the European institutions to be less unwieldy and rigid and, above all, more efficient and open”<sup>11</sup>. The paragraph “More democracy, transparency, and efficiency in the European Union” argues that EU legitimacy derives from democratic, transparent, and efficient institutions. Article 218 of TFEU dictates the EU’s trade negotiations process<sup>12</sup>.

The most critical phases of the negotiating process for our purposes lie in the pre-negotiation preparations. Numerous checks and balances within the preparatory process indicate a relatively finite and bounded mandate development for EU negotiators. Understandably, the checks and balances limit the amount of negotiating capital held by the EU negotiators. The mandate development process begins with the Commission, which first presents to the Council a recommendation to conclude a trade agreement with a third country, and the Council decides whether to authorize negotiations<sup>13</sup>. The Commission’s recommendation includes an impact assessment, public consultations, and a “scoping exercise” to set out what the parties wish to negotiate.<sup>14</sup> The Commission and Council develop negotiating directives that prioritize objectives for trade negotiators and the final agreement. These directives are sent to Parliament and the EU national governments and made available to the public<sup>15</sup>. Additionally, the Commission shall work closely with the

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<sup>9</sup> Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C-325/5; 24 December 2002, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>

<sup>10</sup> Article 15, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

<sup>11</sup> *Presidency Conclusions: European Council Meeting In Laeken*, 14 and 15 Dec. 2001, 19-26, <https://www.consilium.europa.eu/media/20950/68827.pdf>

<sup>12</sup> Article 218, *supra* note 5.

<sup>13</sup> *Ibidem*.

<sup>14</sup> “Negotiating EU Trade Agreements,” [https://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149616.pdf](https://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf)

<sup>15</sup> “State of the Union 2017 – Trade Package: Commission unveils initiatives for a balanced and progressive trade policy”, *European Commission Press Release*, Sept. 14, 2017; State of the Union 2017 – A Transparent and Inclusive Trade Negotiation Process, [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156041.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156041.pdf).

Council's trade policy committee<sup>16</sup> and the Advisory Group on EU trade agreements and keep the Council and Parliament fully informed after each negotiation round. The Commission must consult the Council and inform Parliament if it wishes to include additional negotiating proposals<sup>17</sup>.

The role of the MMSS and public consultations as part of the EU's negotiation process is notable and has expanded in recent years as part of Commissioner Cecilia Malmström's "Trade For All" policy<sup>18</sup>. The Commission aims for a broad range of stakeholder involvement by implementing increased transparency measures, such as publishing negotiating directives and consulting with the Advisory Group<sup>19</sup>. The Advisory Group, established as part of the 2017 State of the Union policy commitments, consists of a balanced group of stakeholders representing trade unions, employers' organizations, consumer groups, and other non-governmental organizations<sup>20</sup>. The group's primary role is to provide technical expertise and practical experience relevant to trade agreement negotiations and advise the Commission on stakeholder perspectives on specific issues, the implementation of trade agreements, and public perception and debate over the negotiations<sup>21</sup>. The Advisory Group's experts consist of 28 entities, including the European Automobile Manufacturers' Association, the European Consumer Organization, the European Farmers and European Agri-Cooperatives, and the European Engineering Industries Association<sup>22</sup>. The comprehensive consultation process and the Trade For All policy created a strong mandate for EU negotiators to include trade commitments on sustainability, environmental, and labor standards mixed with industry input. Without commitments in these sectors, the EU institutions would likely not ratify the final agreement text<sup>23</sup>.

EU trade negotiators' negotiating capital reflects the EU's bottom-up administrative governance processes that support the essential pillars of transparency, openness, and accountability. By developing a system of

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<sup>16</sup> Article 207(3), *ibidem*.

<sup>17</sup> *Ibidem*.

<sup>18</sup> "Trade For All," European Commission, [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>19</sup> *Supra* note 9.

<sup>20</sup> "Commission sets up advisory group on EU trade agreements," Dec. 22, 2017, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1777>

<sup>21</sup> State of the Union 2017 – A Transparent and Inclusive Trade Negotiation Process, *supra* note 10.

<sup>22</sup> Expert group on EU trade agreements, *European Commission*, [https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc\\_156487.pdf](https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156487.pdf)

<sup>23</sup> "A Balanced and Progressive Trade Policy to Harness Globalization", COM (2017) 492 Final, Sept. 13, 2017; Interview, Oct. 16, 2020.



checks and balances while also incorporating broad public participation and debate, EU negotiators must consider numerous behind-the-scene factors that influence the amount of negotiating capital they possess and how effectively they may use it. The EU negotiators' bottom-up system contrasts that of their most recent FTA partner, Japan, in which negotiators operate in a top-down and overall less-inclusive environment.

#### IV. Japan's negotiating capital

Japanese trade negotiators operate within a system quite different from the EU. Japan's top-down, less-inclusive, and economic-revitalization-orientated approach alongside former-Prime Minister Abe's strengthening of the executive role had substantial implications for the trade mandate development and trade negotiators' negotiating capital<sup>24</sup>. Also, Japanese civil servants' definition of legal expertise stands in stark contrast to their European counterparts.

Japan's economic situation forced a significant change in international trade policy. Economic stagnation led Japan to rely less on the multilateral trade system and instead opt for bilateral and regional FTAs. This push for bilateral and regional arrangements began in the early 2000s by Japan's major multinational corporations, the *keiretsu*<sup>25</sup>, and their political representation as part of the *Keidanren*, the Japan Business Federation. The interconnectedness of the Japanese political and corporate elite meant business interests typically coalesced into a uniform international trade policy, particularly in light of Japan's history of economic development<sup>26</sup> and *Keidanren*'s role as a "pressure group, an information provider, and an interest coordinator"<sup>27</sup>. The private sector's primary interest in FTA

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<sup>24</sup> Abe Shinzo was Prime Minister of Japan from December 26, 2012 to September 16, 2020, making him the longest serving Prime Minister in Japanese history.

<sup>25</sup> The *keiretsu* are Japan's major multinational corporations that consist of closely related business entities with some possessing interlocking equity in each other; for more on the *keiretsu*, see Katsuki Aoki, Thomas Taro Lennerfors, "The New, Improved Keiretsu", *Harvard Business Review*, Sept. 2013.

<sup>26</sup> This relationship is called the "Iron Triangle" of the Liberal Democratic Party, the strong bureaucracy, and big businesses; the declining practice of *amakudari* has played a major role in the politics-business relationship.

<sup>27</sup> "Urgent Call for Active Promotion of Free Trade Agreements", July 2000, <https://www.keidanren.or.jp/english/policy/2000/033/index.html>, accessed December, 2021.

"Towards the Implementation of Strategic Trade Policies", June 2001, <https://www.keidanren.or.jp/english/policy/2001/029.html>, accessed December, 2021.

Hidetaka Yoshimatsu, "Japan's Keidanren and Free Trade Agreements", *Asian Survey*, 45(2), April 2005.

negotiations was to improve Japan's economic situation, maintain a competitive edge in foreign markets, solidify regional integration, and promote internal adjustments from outside competition<sup>28</sup>.

The policy of FTA negotiations proceeded relatively slowly for many years but took a significant step forward during Abe's administration as one of his "Three Arrows"<sup>29</sup>. The administration prioritized FTAs as a foremost mechanism to improve Japan's sluggish economic situation. Abe's priority in negotiating FTAs was to promote structural economic reforms and re-introduce competition into the Japanese market<sup>30</sup>. This purely economic-revitalization objective behind Japan's FTA mania contrasts that of the FTA motives of the EU, which seeks to export its regulatory standards abroad.<sup>31</sup> This singular motive's impact on Japan's trade mandate is to limit the provisions negotiated to only those chapters that achieve this end<sup>32</sup>. Thus, Japanese negotiators do not seek to include sustainability, environment, and labor standards chapters and instead prefer to make only a limited number of concessions as permitted by the executive.

The executive and the ministries play an important and consequential role in Japanese negotiators' negotiating capital. Abe's ability to consolidate and centralize the executive's authority makes him a powerful "exception" to the typical Prime Minister and, in many aspects, was the "apex of powerful Prime Ministers"<sup>33</sup>. Japan's executive authority began shifting in the early 2000s, mainly during the Koizumi administration and the weakening influence of interparty factionalism<sup>34</sup>. While this shift continued until Abe's second administration, Abe's strong political positioning derived from the Liberal Democratic Party's (LDP) rallying from its previous defeat by the Democratic Party of Japan (DPJ) and

<sup>28</sup> *Ibidem*.

<sup>29</sup> The "Three Arrows" (fiscal consolidation, aggressive monetary easing, and structural reforms) are the major policy objectives of "Abenomics"; Naoyuki Yoshino and Farhad Taghizadeh-Hesary, "Three Arrows of 'Abenomics' and the Structural Reform of Japan", *ADB Working Paper Series*, Aug. 2014.

<sup>30</sup> Robert A. Rogowsky and Gary Horlick, "TPP and the Political Economy of U.S.-Japan Trade Negotiations", *Wilson Center*, 2014.

<sup>31</sup> Anu Bradford, "The Brussels Effect", *Northwestern University Law Review*, vol. 17, no. 1, 2012.

<sup>32</sup> See, for example, the Keidanren's model FTA: <https://www.keidanren.or.jp/english/policy/2000/033/reference.html>

<sup>33</sup> Interview, Nov. 21.

<sup>34</sup> Tobias S. Harris, *The Iconoclast* (C. Hurst & Co. Ltd) 2020, chapters 6-8; also see Ellis S. Krauss and Benjamin Nyblade, "Presidentialization in Japan? The Prime Minister, Media, and Elections in Japan", *British Journal of Political Science*, 35(2), April 2005.

successes in securing both houses of the Diet shortly after<sup>35</sup>. The LDP hailed Abe as a hero for bringing the LDP back to the political forefront<sup>36</sup>. In 2014, Abe tightened his grip over the bureaucracy by establishing the Cabinet Bureau of Personnel Affairs, a bureau working below the Prime Minister's office, allocating ministry and agency appointments<sup>37</sup>.

According to several interviews, Abe was high involvement in the trade negotiators' trade mandate development, including throughout the negotiations process<sup>38</sup>. For Japanese trade negotiators, intra-agency communications for compromises, trade-offs, and bargains are essential as such decisions require approval from the affected ministries, such as the staunchly protective Ministry of Agriculture, Forestry, and Fisheries. However, as Abe consolidated power, all major trade negotiation issues were brought directly to the Prime Minister's office as his decisions carried substantial deference<sup>39</sup>. Abe's strengthened authority over trade matters also permitted quick amendments to the negotiators' mandates. The completion of trade negotiations with the EU, US, and the United Kingdom (UK) are examples of Abe's strong push for results amid the unpredictable atmosphere during the Trump administration, the coronavirus pandemic, and the UK's finalization of Brexit<sup>40</sup>. In the words of one EU negotiator, bargaining and making trade-offs was initially very tough. However, once Abe permitted broader negotiator discretion in response to the changing international situation, the negotiations proceeded and rapidly concluded<sup>41</sup>. In the case of the EU-Japan FTA, the Diet's Lower House ratified the agreement on November 29, 2018, followed by the Upper House on December 8, only eight days later<sup>42</sup>.

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<sup>35</sup> Dae Kyu Lee, "Japanese Prime Minister Shinzo Abe's Two Administrations", *Naval Postgraduate School*, Dec. 2016, Section IV.

<sup>36</sup> *Ibidem*.

<sup>37</sup> Mayu Terada, "The Changing Nature of Bureaucracy and Governing Structure in Japan", *Washington International Law Journal*, 28(2), 2019, Part VI.

Reiji Yoshida, "Abe moves to boost control of bureaucrats", *The Japan Times*, May 27 2014.

<sup>38</sup> Interviews, Oct. 16 and Nov. 21.

<sup>39</sup> *Ibidem*. This trend can be described as *nemawashi*, a largely informal process where policy is briefed and discussed beforehand and input from higher authorities are heard; see Rochelle Kopp, "Defining Nemawashi", *Japan Intercultural Consulting*, <https://japanintercultural.com/free-resources/articles/defining-nemawashi/>, accessed December, 2021.

<sup>40</sup> *Ibidem*, also Yoshihiro Nagata, "Bureaucracy of Power-Dependence in Domestic Politics in Japan and Interdependence of International Relations in the UK, US, and the EU", *The International Academic Forum*, 2017.

<sup>41</sup> *Ibidem*.

<sup>42</sup> EU-Japan Economic Partnership Agreement Legislative Train Schedule, <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-japan-epa>, accessed December 2021.

Japanese trade negotiators are highly risk-averse, reflective of the executive's growing authority<sup>43</sup>. In the words of an interviewee, "what else does one do to make the Prime Minister happy other than defend as much as possible"<sup>44</sup>. According to those with knowledge of the EU-Japan EPA negotiations, Japanese negotiators were unwilling to accept commitments with too broad a degree of constructive ambiguity and grey areas. This trend contrasts with the EU's negotiations with Vietnam, whose negotiators were willing to make the commitments and hash out specifics later if necessary<sup>45</sup>. In addition, Japan's trade negotiators are often replaced as part of the government's rotation-style of employment<sup>46</sup>. Unfamiliarity with the negotiations process may explain the negotiators' risk-averse behavior. In light of Japan's typically protectionist domestic market, past trade policy, and rotation-style employment, it is no surprise that Japanese trade negotiators' strategies are couched in risk-aversion and a dislike for grey areas in FTA commitments. Japanese negotiators are also cautious on concessions as the general mentality is that conceded terms in past agreements may become the demands of other third countries in future negotiations.

As a part of the Japanese civil service, Japanese trade negotiators define and develop their legal expertise differently than their European counterparts. First, bureaucratic expertise is limited to a small cohort that operates outside of the public eye<sup>47</sup>. Government advisory councils, the *Shingikai*, are formal groups that provide political and administrative expertise as a part of a process called *nemawashi*<sup>48</sup>. The *Keidanren* and other large-scale business organizations also work closely with the executive and

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Also see JiJi, "Japan's Upper House approves free trade pact with EU by majority vote", *The Japan Times*, Dec. 8, 2018. (Parties opposing the ruling coalition expressed concerns over impacts in Japan's agricultural sector, including dairy).

<sup>43</sup> Interviews, Oct. 16 and Nov. 21.

<sup>44</sup> *Ibidem*.

<sup>45</sup> *Ibidem*.

<sup>46</sup> See Rochelle Kopp, "Jinji-Ido – The Japanese organizational "refresh" button", *Japan Intercultural Consulting*, describing *jinji ido* (人事異動) as closest to "developmental reassignment of employees." For example, the Ministry of Finance publishes its reassignments and transfers here: [https://www.mof.go.jp/about\\_mof/introduction/personnel/transfers/index.htm](https://www.mof.go.jp/about_mof/introduction/personnel/transfers/index.htm)

<sup>47</sup> See Katsuya Uga, "Development of the Concepts of Transparency and Accountability in Japanese Administrative Law", in *Law in Japan: A Turning Point*, ed. by Daniel H. Foote. (University of Washington Press) 2007, 276-303; Professor Uga describes Japanese bureaucrats as having a "culture of secrecy".

<sup>48</sup> See generally Frank J. Schwartz, *Advice and Consent: The Politics of Consultation in Japan* (Cambridge University Press) 1998; also Mayu Terada, page 452-3, *supra* note 34. For a definition of *nemawashi*, see note 34.

the ministries to advocate their preferred policies by providing business expertise<sup>49</sup>. As for public participation, the Diet acts in this capacity, and there is comparatively less outside opportunity for consultations<sup>50</sup>. As for experts working within the government, expertise is developed less through the actual practice of law or other technical fields but primarily through negotiating tactics.<sup>51</sup> These negotiating tactics, coined as “tricks” by a former civil servant, represent one’s knowledge of operating in a challenging and highly structured bureaucratic process and maximizing results<sup>52</sup>. For example, a ministry may be unwilling to concede on a particular proposal, but rather than decline outright might choose “foot-dragging” as an appropriate way to play hardball while also not appearing too confrontational<sup>53</sup>. The counter-tactic for experienced civil servants is to move up the hierarchy to present the proposal at one of the numerous meetings held within the ministry - if the proposal is to be thrown out, it is best to have it thrown out at the very top<sup>54</sup>. According to interviewees, success in Japan’s domestic politics consists of 80% of tactics and tricks. Further, civil servants emphasize working within the bureaucratic system instead of education and aim to be “generalists” rather than specialists<sup>55</sup>. As mentioned earlier, many who work within the bureaucratic system are part of a rotation employment system to develop their skills in various offices<sup>56</sup>.

## V. The totality of European Union and Japanese negotiating capital

Analyzing the foundational differences between the EU and Japan has substantial implications for their respective trade negotiators’ negotiating

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<sup>49</sup> Hidetaka Yoshimatsu, “Japan’s Keidanren and Political Influence on Market Liberalization”, *Asian Survey*, 38 (3), March 1998.

<sup>50</sup> Interview, Tokyo summer 2019. There is a general nuance in the Japanese bureaucracy that the common populace in Japan should be led rather than listened to; see David Vogel, “Protection and Protectionism in Japan”, *The Journal of Japanese Studies*, 18(1), Winter, 1992, 119-122, referencing Seuishi Tomitaro and Nishimura Shuzo.

<sup>51</sup> Interview, Nov. 21.

<sup>52</sup> *Ibidem*.

<sup>53</sup> *Ibidem*.

<sup>54</sup> *Ibidem*, according to an interview, “the Japanese love meetings”, and taking advantage of this characteristic of Japan’s bureaucracy was a learned skill. The interviewee also characterized the Japanese as doing these “tricks in meticulous ‘Asian’ ways.”

<sup>55</sup> *Ibidem*. Also Mayu Terada, 438, *supra* note 38. An interviewee linked the preference for generalists as a remnant of Japan’s economic success through “catching-up”, where expertise was less important, something the interviewee considered a possible con for future economic growth.

<sup>56</sup> *Ibidem*.

capital. The negotiating capital concept represents a trade negotiator's degrees of flexibility and "wobble-room" to make requests, concessions, or bargain effectively, all as a part of their legal expertise. In administrative governance, we have seen that the EU trade mandate development constitutes a bottom-up structure consisting of oversight and transparency checks and balances and broad stockholder consultations, and public participation. EU trade negotiators operating within this system are provided limited negotiating capital. Administrative and public interests require specific objectives, including incorporating sustainability, environmental, and labor standards, or else risk rejection by Parliament. Further, the general trade policy of the EU is to gain concessions in the harmonizing standards and regulations, a substantially more integrative endeavor than mere market access. In light of the numerous considerations, EU trade negotiators have less "wobble-room" and stricter limitations on their ability to make concessions, trade-offs, bargains, and less opportunity to use their expertise to maximize potential outcomes.

Japanese trade negotiators operate in a top-down, closed-circuit process where the executive has centralized authority over the trade mandate development process. The executive, particularly under former Prime Minister Abe, could quickly expand the trade mandate and negotiating capital in response to international developments. Concerning consultations, Japanese trade negotiators primarily consider the interests of the ministries, inter-government experts, and corporate influence while receiving less input from civil society and the general public. These factors leave Japanese trade negotiators with a more significant degree of "wobble room" to make concessions, trade-offs, and bargains. One example of Japanese negotiators' utilizing their extra negotiating capital is the non-tariff barrier concessions made on Japanese railway procurements. Japan's "Operational Safety Clause," which purported to ensure rail transport safety, was likely permitted by the executive to be offered as a bargaining chip in exchange for EU concessions<sup>57</sup>. Below are hierarchies for both the EU and Japan's trade mandate development process and impacts on negotiating capital.

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<sup>57</sup> An introduction to the EU-Japan Economic Partnership Agreement: Public Procurement, [https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155719.pdf](https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155719.pdf), accessed December 2021.

EU's Limited Negotiating Capital	Japan's Reactive Negotiating Capital
Bottom-up process	Top-down process
Authority in multiple institutions	Authority in executive
Openness and transparency	Inter-agency communications
Checks and balances	Reactive to international trends
	Increased risk-aversion
Multi-faceted trade policy	Single-faceted trade policy
Standard and regulatory setting	Economic revitalization
Foreign market access	
Public consultations and participation	Limited circuit for participation
Advisory Group consults Member States, NGOs, businesses, interest groups, and a variety of other stakeholders	Government groups, large business organizations, and ministry interests are prioritized
Trade negotiator expertise through training and education	Trade negotiator expertise as a "generalist"
"Ladder-climbing" and development through technical fields	Experience developed through working within the bureaucracy
	Negotiating tactics as expertise

## VI. Application to the EU-Japan economic partnership agreement

In early 2019, the EU put into action its largest trade deal signed so far: the EU-Japan EPA. Based on a series of interviews in Tokyo with civil servants, lawyers, and academics about the new challenges of negotiating a comprehensive trade agreement, the interviewees noted the different approaches to negotiations as obstacles to success. Most importantly, the EU negotiators drove a hard bargain, and Japanese negotiators felt they were navigating uncharted waters, despite having been one of the first countries to begin negotiating new era trade agreements, starting with Singapore. To understand how different levels of negotiating capital affect FTA text, the following section considers the EU-Japan EPA's transparency chapter.

The EU-Japan EPA's transparency chapter generally possesses low integration levels, a characteristic that contrasts the EU's past FTAs while being more similar to those FTAs of Japan. Article 17.3 on publication, for instance, includes only two sub-provisions dedicated to introducing or changing measures of general application along with a requirement for prompt publication and a reasonable interval between publication and implementation<sup>58</sup>. There are no commitments for the parties to consider public

<sup>58</sup> EU-Japan EPA, Article 17.3 (a) & (b).

comments<sup>59</sup>. In contrast, the EU's FTAs with South Korea, Singapore, and Vietnam include an integrative transparency chapter and transparency provisions dispersed through other chapters. For example, the EU-Singapore text contains six sub-provisions dedicated to the comments from interested persons, the availability of both previously implemented measures of general application, and those measures planning to be adopted or amended<sup>60</sup>. Thus, rather than looking only at the transparency chapter, one can find multiple transparency initiatives in other portions of the EU-Japan agreement<sup>61</sup>. Perhaps EU negotiators were satisfied with a more minor, less inclusive transparency chapter in the EU-Japan EPA so long as transparency provisions found in other chapters remained consistent with their past frameworks.

In the EU-Japan EPA, both EU and Japanese trade negotiators maximized their negotiating capital to achieve their objectives by making concessions, trade-offs, and bargains. EU trade negotiators maximized their limited negotiating capital by accepting Japan's preferred transparency text while also successfully incorporating high transparency commitments with the possibility of acquiring additional gains in other portions of the agreement. Japanese trade negotiators also maximized their negotiating capital by structuring the transparency chapter commitments to align with their risk-aversion style and desire to limit concessions while remaining open to making transparency concessions in other portions of the agreement.

## VII. Conclusion

Trade negotiators are the lead, critical players in determining the appropriate approaches, bargaining strategies, and how trade objectives translate into draft text. Their negotiating capital represents degrees of flexibility and "wobble-room" to make requests, concessions, or bargain effectively, all as a part of their legal expertise. Additionally, negotiating capital formation can indicate trade negotiators' reactivity to international events and trends. On a more foundational level, the

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<sup>59</sup> *Ibidem*.

<sup>60</sup> EU-Singapore FTA, Article 13.3 (1) & (2).

<sup>61</sup> Japan-EU EPA, sub-provisions on transparency commitments appear in Chapter 4 on Customs Matters and Trade Facilitation, Chapter 5 on Trade Remedies, Chapter 6 on Sanitary and Phytosanitary Measures, Chapter 7 on Technical Barriers to Trade, Chapter 8 on Trade in Services, Investment Liberalization, and Electronic Commerce, Chapter 11 on Competition Policy, Chapter 14 on Intellectual Property, and lastly Chapter 16 on Trade and Sustainable Development.



interconnectedness of negotiating capital and expertise offers insights into trade negotiators' preferences for negotiating styles, such as risk-aversion characteristics.

By undergoing a comparative analysis of the EU and Japanese trade mandate development process, this paper has highlighted some characteristics of how trade negotiators acquire, use, and maximize varying degrees of negotiating capital. Differences in these sectors are visible across the EU-Japan EPA, including the case study of the transparency chapter. The transparency chapter displayed the EU trade negotiators' maximization of limited negotiating capital and consideration of Japan's risk-aversion approach by making concessions on a highly integrative set of transparency commitments while ensuring transparency commitments in the EPA's other chapters.

Analyzing and understanding the factors influencing trade negotiators' negotiating capital offers opportunities to optimize the concession, trade-off, and bargaining process. The above frameworks can help determine what types of provisions, their levels of integration, and possible bargaining strategies trade negotiators will bring to the negotiating table. Rather than develop a mandate and aim for a set of objectives, trade negotiators could develop an increasingly flexible negotiation style while also entering into FTA negotiations with a clearer understanding of which commitments the opposite state's negotiators are willing to fight or make concessions. States can also use this framework to reflect on how to optimize their trade mandate development process better to better achieve their trade objectives, especially in the era of growing bilateral and regional FTAs.

## About the author

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