

## THE PRECAUTIONARY APPROACH IN THE ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND JAPAN: A THREAT TO THE EUROPEAN PRECAUTIONARY PRINCIPLE?



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### I- INTRODUCTION

A “momentous event with global impact occurred on 1 February 2019. On that day, tariff walls fell, as economies covering one-third of the world’s gross domestic product, and a total of around 639 million people, sought to establish a level playing field for mutual trade. It was the day when then Economic Partnership Agreement (“EPA”) between Japan and the European Union (“EU”) came into force”<sup>1</sup>. Together with a more general Strategic Partnership Agreement (“SPA”) - provisionally entered into force and subject to ratification - EPA has become the cornerstone of an enhanced relationship between EU and Japan<sup>2</sup>. While the SPA is deemed to foster the cooperation between EU and Japan in identified areas for joint action such a disaster management, energy security, and cybercrime, EPA contains a number of provisions that will simplify trade and investment procedures, reduce export and investment-related costs<sup>3</sup>. Namely, tariffs on more than 90% of Japan’s imports from the EU will be eliminated. This will affect a wide range of sectors covering agriculture and food products, industrial products (including textiles, clothing), as well as forestry and fisheries. At the same time, exporters of Japanese products will benefit from the removal of European barriers. Besides, non-tariff barriers are expected to be substantially reduced for motor vehicles, medical devices, and the “quasi-drugs” sectors. Finally, EPA will facilitate the export of services from the EU to the Japanese market and will affect a significant number of industries from telecommunications to

postal services and the financial sector<sup>4</sup>.

Against this backdrop, Article 16.9 EPA states that: “when preparing and implementing measures with the aim of protecting the environment or labour conditions that may affect trade or investment, the Parties shall take account of available scientific and technical information, and where appropriate, relevant international standards, guidelines or recommendations, and the *precautionary approach*.” The understanding of Article 16.9 is of high importance. First, the implementation of precautionary measures involves a significant degree of uncertainty and discretion, which could be hard to coordinate with the multilateral trade regime established by EPA. Precautionary measures may be the source of controversies between EU and Japan because they could create regulatory barriers aimed at protecting, at the domestic level, environmental and labour standards and conditions. Moreover, such barriers could be hard to remove. Once a country has considered necessary to implement precautionary measures for a particular risk, it is likely to require a certain amount of time, depending on the specific features of the risk and uncertainty at stake, before the regulation of this risk comes under new consideration. From this perspective, to understand if and how precautionary measures could entail a restriction to EU-Japan’ trade and investments, it is worth analyzing the scope and the conditions for the application of the precautionary approach under EPA. Second, the reference to the precautionary approach contained in EPA shall be coordinated with the precautionary principle set forth by article 191 of Treaty on the Functioning of the European Union (“TFUE”) and with the obligation of European institutions to pursue a high level of protection of the environment (Art. 191 TFUE), public health (Art. 168 TFUE) and consumers (Art. 169 TFUE). In this regard, the question arises whether the

1 Gilson J., *EU-Japan Relations and the Crisis of Multilateralism* (Routledge 2019) 1.

2 Commission, ‘Japan’ <<https://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/>> accessed 28 February 2020.

3 Commission, ‘Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan’, COM(2018) 192 final.

4 EU-Japan Centre for Industrial Cooperation, ‘About the EU-Japan EPA’ <<https://www.eubusinessinJapan.eu/issues/economic-partnership-agreement/about-eu-japan-epa>> accessed 28 February 2020.

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precautionary approach under EPA has the potential to jeopardize the high standards of health, environment, and consumer protection set forth by EU law. In other words, shall EPA's precautionary approach hinders the EU institutions from applying the precautionary principle as established within EU law? To tackle these issues, Section II of this paper will draw a comparison between the precautionary approach set forth by Article 16.9 EPA and the precautionary principle enshrined in Article 191 § 2 TFUE. Furthermore, Section III will provide an assessment of the potential impact of EPA on the implementation of the precautionary principle under EU law. Section IV will address some concluding remarks.

## II- A COMPARISON BETWEEN THE EPA'S PRECAUTIONARY APPROACH AND THE EU'S PRECAUTIONARY PRINCIPLE

The comparison between the precautionary approach provided for by Article 16.9 EPA and the precautionary principle set forth by Article 191 § 2 TFEU will be carried out by taking into account the legal status (A) and the scope of application (B) of precaution under EPA and EU law.

### A- THE LEGAL STATUS OF PRECAUTION

Precaution has a different legal status under EU law (1) and EPA (2).

#### a) The status of precaution under EU law

Under article 191 § 2 TFEU, precaution is qualified as a *principle* of EU environmental law. As it was argued by Eric Naim-Gesbert, if the binding force of the precautionary principle has been long controversial, it is no longer part of the "puzzle" of EU environmental law<sup>5</sup>. This conclusion is drawn from the interpretation of Article 191 § 2 TFEU. This article provides that the Union's policy on the environment *shall* be based on the precautionary principle. The use of the indicative (and not the conditional) shows the will of the legislator to make recourse to the precautionary principle obligatory and thus to oblige the authorities to act in the direction indicated by this principle<sup>6</sup>. This was, moreover, the interpretation put forward by the Court of First Instance of the European Union [now the General Court] which, in the *Artegodan* case of 26 November 2002, considered that "the precautionary

principle is expressly enshrined in Article 174(2) EC [now Article 191 § 2 TFEU], which establishes the *binding nature* of that principle<sup>7</sup>." This interpretation has also been validated by the Court of Justice of the European Union ("CJEU") which, in several cases, has affirmed that the precautionary principle *requires* the competent authorities to take appropriate measures in order to prevent potential risks to the environment and public health<sup>8</sup>. In line with the statements of the Court of Justice, a large majority of the doctrine recognizes today that precaution is a binding principle of EU law<sup>9</sup>. Nevertheless, although recognized, the binding force of the precautionary principle remains "weak"<sup>10</sup>. The precautionary principle is a "soft" principle which epitomizes a non-authoritarian legal direction of conduct<sup>11</sup>. Texts indicate objectives that it would be desirable to achieve, set guidelines that it would be appropriate to follow, make recommendations that it would be good to respect, but they do not specify the binding force of the precautionary principle<sup>12</sup>. From this perspective, Article 191 § 2 TFEU provides that European policy on the environment shall be based on the precautionary principle, but no further details are given. This implies that it is not possible to deduce, with precision, the obligations arising from the precautionary principle and that, consequently, EU institutions have a wide margin of appreciation as to the modalities of its application.

The precautionary principle, as a soft principle, is only *procedurally binding* on its recipients<sup>13</sup>. This can be explained if one considers that such a principle is applied in order to prevent the realization of uncertain

7 CFI, *Artegodan GmbH e.a. v. EC Commission*, joint cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, para 182, EU:T:2002:283.

8 CJEU *National Farmers' Union e.a.*, Case C-157/96, para 64, EU:C:1998:191; CJCE, *United Kingdom v. EC Commission*, Case C-180/96, para 100, EU:C:1998:192; CJEU, *EC Commission v. Kingdom of the Netherlands*, C-41/02, para 45, EU:C:2004:762.

9 De Sadeleer N, *EU environmental law and the internal market*, *op. cit.*, 41; Hilsen C., 'Rights and principles in EU law: a distinction without foundation' (2008), v° 15, n° 8, 93-216; Winter G., 'The legal nature of environmental principles in international, EC and German law' in Macrory R. (eds), *Principles of European environmental law* (Europa Law, 2004) 19-22.

10 Donati A, *Le principe de précaution en droit de l'Union européenne* (Thèse, Université Paris 1 Panthéon Sorbonne 2019) 21.

11 Delmas-Marty M., 'Où va le droit ? Entre pot au noir et pilotage automatique, le droit peut-il nous guider vers une mondialité apaisée ?', *La Semaine Juridique* (2018) n° 14, 677.

12 Chevallier J., 'Vers un droit post-moderne ? Les transformations de la régulation juridique', *Revue du droit public et de la science politique*, *Librairie Générale de Droit et de Jurisprudence* (1998) n° 3, 677-678.

13 Donati A, *Le principe de précaution en droit de l'Union européenne*, *op. cit.*, 21.

5 Naim-Gesbert E., *Droit général de l'environnement* (Lexis-Nexis, 2014) 91.

6 De Sadeleer N., *EU environmental law and the internal market* (OUP, 2014) 41-42.

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risk. In this context, it is difficult, if not impossible, to predetermine the factual elements that decision-makers will face in each case, and thus, the content of the actions they will have to implement. Uncertainty does not allow prognoses to be made based on experience or a causal relationship. Given the impossibility of fixing in advance the substantive content of the precautionary principle, it is preferable to set general objectives (in this case, the protection of the environment and public health) and the procedural obligations that decision-makers will have to meet in order to achieve them<sup>14</sup>. A careful reading of the EU secondary legislation containing a reference to the precautionary principle shows that the binding force of that principle must be interpreted in the sense of an *obligation to take into account*<sup>15</sup>. In these texts, whether it concerns the transboundary movement or deliberate release of GMOs into the environment, waste management, the safety of toys or the placing on the market of food or biocidal products, the obligation for decision-makers to apply the precautionary principle is conceived as an obligation to take into account. Such an obligation has procedural content. As stated by the General Court, compliance with procedural obligations constitutes the primary *raison d'être* of the precautionary principle<sup>16</sup>. This means, from one side, that EU institutions must take into account the results of the scientific expertise, which shall be carried out before the adoption of any precautionary measure<sup>17</sup>. The obligation to take into account the scientific expertise entails a duty of care and of motivation<sup>18</sup>. For the CJEU, the duty of care implies the obligation of the decision-makers to analyse carefully and completely all the elements likely to determine their decision<sup>19</sup>, as well as the obligation to carry out an adequate instruction of the file by gathering the appropriate factual elements<sup>20</sup>. As regards the obligation of motivation, decision-

makers shall indicate the factual and legal elements on which their decision is based and, if they wish to depart from the results of the scientific assessment, they shall support their decision on the basis of another opinion of a scientific level at least equivalent to that of the opinion departed from<sup>21</sup>. From the other side, in addition to any available scientific evidence, EU institutions should take into account all the other costs and benefits of the action<sup>22</sup>. When carrying out a cost-benefit analysis, decision-makers enjoy a wide discretion. Still, they shall take into account their obligation to give precedence to environmental and public health protection requirements over economic considerations<sup>23</sup>.

#### b) The status of precaution under EPA

Unlike EU law, under Article 16.9 EPA, precaution is not defined as a *principle*, but rather as an *approach*. This qualification represents a step backward, as the term “approach” is generally regarded as less stringent and more ambiguous than “principle”<sup>24</sup>. As a result, if the precautionary approach expresses the same awareness of the limits of scientific knowledge and of the need to take action to prevent a risk, it is not granted with the same legal status as the precautionary principle<sup>25</sup>. As stated by the judge Laing in his individual opinion relating to the cases *New Zealand v. Japan* and *Australia v. Japan* before ITLOS, “adopting an approach, rather than a principle, judiciously offers some room for *manoeuvre* and tends, even if not voluntarily, to indicate a reluctance to pronounce prematurely on desirable normative structures<sup>26</sup>.”

The soft nature of precaution under EPA agreement is also confirmed by the fact that, according to Article 16.17, provisions under Chapter 16 of EPA are not subject to the general dispute settlement mechanism under Chapter 21 EPA. As a result, in

14 Lopez-Jurado Escribano F., ‘Los procedimientos administrativos de gestión del riesgo’, in Barnes J. (eds), *La transformación del procedimiento administrativo* (Global Law Press Editorial Derecho Global, 2008) 153.

15 Regulation 1946/2003 (CE), whereas 22; Directive 2001/18 (CE) whereas 8; Directive 2008/98 (CE), art. 4; Directive 2009/48 (CE), art. 39; Regulation 178/2002 (UE), art. 6 (3) ; Regulation 528/2012 (UE), art. 1(1).

16 CFI, *Pfizer Animal Health v. Conseil*, Case T-13/99, para 170-172, EU:T:2002:209.

17 CJEU, *Monsanto Agricultura Italia*, Case C-236/01, para 113-114, EU:C:2003:431.

18 Donati A., *Le principe de précaution en droit de l'Union européenne*, *op. cit.*, 235.

19 CFI, *Michael Becker v Court of Auditors of the European Communities*, Case T-93/94, para 37, EU:T:1996:30.

20 GC, *Animal Trading Co, and others v European Commission*, T-333/10, para 84, EU:T:2013:451.

21 CFI, *Pfizer Animal Health v. Conseil*, *supra*, para 199.

22 Commission, ‘Communication on the precautionary principle’, COM (2000)1 final, 19.

23 CJEU, *United Kingdom v. EC Commission*, Order, C-180/96, para 93, EU:C:1996:308; CJEU *Affish*, C-183/95, para 43 and 57, EU:C:1997:373.

24 Dinnen N., ‘Precautionary discourse. Thinking through the distinction between the precautionary principle and the precautionary approach in theory and practice’, *Politics and the Life Sciences* (2013) 2.

25 Gaillard E., ‘Principe de Précaution - Systèmes juridiques internationaux et européens’, *Fascicule 2415, JurisClasseur Environnement et Développement durable* (2017) 40.

26 ITLOS, 27 August 1999, cases n° 3 et 4, *New Zealand vs. Japan and Australia vs. Japan*, Independent Opinion, M. Laing, Rec. TIDM 1999, 19.

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case of disagreement between EU and Japan on any matter regarding the interpretation or application of the precautionary approach (and, more in general, of Chapter 16), the following procedure shall apply. First, the parties shall enter into government consultations (Article 16.17). Second, if no solution is reached through consultation, the Committee on Trade and Sustainable Development shall be convened (Article 22.3). If no later than 75 days of the date of request by a Party to convene the Committee, the parties do not reach a mutually satisfactory resolution of their dispute, a party may request that a Panel of Experts be convened (Article 16.18). The Panel of Experts shall issue a final report to the Parties no later than 180 days after the date of its establishment. The report of the Panel of Experts is nonetheless neither binding on the parties nor able to issue any form of penalty for breaches of Chapter 16. Thus, due to the *de facto* lack of enforceability of these provisions, their actual legal relevance remains to be determined and will primarily depend on the willingness of the EU and Japan to live up to their commitments.

Several reasons could explain the choice to refer to a precautionary approach under EPA. First, while under EU law, since 1992 (Treaty of Maastricht), precaution has been enshrined in the TFUE and has been qualified as a principle of EU law, in Japan, to date, it is unclear whether the basic Japanese environmental law includes precaution<sup>27</sup>. Indeed, no legal provisions directly make reference to this principle, but as suggested by professor Otsuka, “it might be possible to interpret that Article 4 of the Japanese basic environmental law, which provides that interference with environmental conservation can be anticipatively prevented through enhancing scientific knowledge, recognizes the precautionary principle”<sup>28</sup>. The different regime under the contracting parties’ national legislation could justify their decision to opt for a more “nuanced” version of precaution. Second, the reference to a precautionary approach instead than a precautionary principle reflects the controversy which characterizes the legal status of precaution under international law<sup>29</sup>. Both the diversity of treaties mentioning precaution and the plurality of approaches adopted by international judges

have led to the conclusion that if an international consensus exists today on the scope of precaution, this consensus can be described as negative, that is to say, that it resides in the non-recognition of precaution as a general principle of international law<sup>30</sup>. For the rest, the precautionary principle remains a highly controversial principle that is expressed in various forms and is the subject of uncertainty. Third, the uncertainties as to the legal status of precaution have been confirmed under WTO law, which sets forth the common ground of trade relations between the EU and Japan. Indeed, under Article 1.9 EPA, “nothing in this Agreement shall require either Party to act in a manner inconsistent with its obligations under the WTO Agreement.” As a result, EPA can be seen as defining additional obligations on top of WTO rules and obligations, which remains the basis of their trade relations. From one hand, the WTO Sanitary and Phytosanitary Agreement (“SPS Agreement”) does not contain a reference to precaution. However, Article 5.7 has been interpreted as the “clearest reflection” of precaution in the SPS Agreement<sup>31</sup>. By allowing the possibility to maintain or introduce a provisional measure even though it has not been adequately backed up by scientific evidence, Article 5.7 indirectly recognizes a precautionary approach under the SPS Agreement<sup>32</sup>. On the other hand, insight regarding the relationship between precaution and WTO law comes from the interpretation of the WTO Appellate Body in the EC – Hormones case<sup>33</sup>. In this case, the WTO Appellate Body called to evaluate the European decision to ban hormone-treated beef on the basis of, *inter alia*, the precautionary principle, considered that the status of the precautionary principle in international law is the subject of debate among academics, law practitioners, regulators, and judges. Therefore it stated

30 Le Bris C., ‘Les différents visages de la « précaution » : l’interprétation variable des juridictions internationales’, in D’Ambrosio L., Giudicelli-Delage G., Manacorda S. (eds), *Principe de précaution et métamorphose de la responsabilité* (Collection de l’Institut des sciences juridiques et philosophiques de la Sorbonne, 2018) 43-55.

31 Zander J., ‘The application of precaution in international law’, *op. cit.*, 43; Ruiz-Fabri H., ‘La prise en compte du principe de précaution par l’OMC’, *Revue Juridique de l’Environnement*, numéro spécial (2000) 61.

32 Article 5.7 SPS Agreement: “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time”.

33 WTO AB, *European Communities – Measures Concerning Meat and Meat Products*, January 16, 1998 (EC Hormones ABR).

27 Nakanishi Y., ‘Climate change and environmental issues in the economic partnership agreement and the strategic partnership agreement between the European Union and Japan’, *Hitotsubashi Journal of Law and Politics* 48 (2020) 17.

28 Otsuka T., *Environmental Law* (Japanese), 3 ed., 2010, Yuhikaku, 55, cited by Nakanishi Y., *ibidem*.

29 Zander J., ‘The application of precaution in international law’, in Zander J., *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (CUP, 2010); Gaillard E., ‘Principe de Précaution – Systèmes juridiques internationaux et européens’, *op. cit.*

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“that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question”<sup>34</sup>.

If the EU precautionary principle diverges from the EPA’s precautionary approach about its legal status, other differences can be identified as to their respective scope of application.

#### B- THE SCOPE OF APPLICATION OF PRECAUTION

Both under EU law and EPA, precaution nurtures a close relationship with the notion of sustainable development. Pursuant to the Brundtland Commission, sustainable development is defined as the one that meets the needs of the present without compromising the ability of future generations to meet their own needs<sup>35</sup>. In line with the Brundtland Commission’s definition, sustainable development is understood under EPA as composed of three dimensions: economic development, social development and environmental protection<sup>36</sup>. Since it aims to avoid the realization of uncertain risks that could cause severe damage to the environment and public health, the precautionary principle is the crucial element of sustainable development policies. By anticipating the time of public action in the face of uncertainty, precaution makes it possible to safeguard the future by preventing future generations from having to bear the unpredictable consequences of our actions<sup>37</sup>. It is for this reason that the latest 7<sup>th</sup> EU Environment Action Program enshrines precaution as the basis for European policy up to 2020<sup>38</sup> and that the EU sustainability strategy expressly refers to the precautionary principle as one of the pillars of sustainable development<sup>39</sup>. It can be argued that it is for the same reasons that precaution has been inserted in Chapter 16 of EPA dedicated to trade and sustainable development.” In this context, the Parties recognize, from one side, “the importance of promoting the development of international trade

in a way that contributes to sustainable development, for the welfare of present and future generations” and, from the other side, that “the purpose of this Chapter is to strengthen the trade relations and cooperation between the Parties in ways that promote sustainable development<sup>40</sup>.”

If a correlation can be found between EU law and EPA as to the recognition of a link between precaution and sustainable development, some differences exist as to the delimitation of the scope of application of precaution under EU law (1) and EPA (2).

#### a) The scope of application of precaution under EU law

The precautionary principle applies, first of all, in sectors that fall under European environmental law. Article 191 § 2 TFEU states that Union policy on the environment shall be based on the precautionary principle. The notion of “environment” is heterogeneous. As it has been stated, in the search for a definition of environment, we “encounter a hundred”<sup>41</sup>. The term environment is a neologism imported from the United States in the 1960s, which expresses the act of surrounding<sup>42</sup>. It implies a binary relationship, that which a center (man and other living species) has with its surroundings (the natural environment). By environment, we thus mean, all the factors that influence the environment in which man lives: the quality of air, water and soil, the preservation of natural habitats and biodiversity, climate protection, waste management and the fight against nuisances are all factors that have an impact on the environment in which man lives and which are generally included within the scope of EU environmental law. The breadth of the definition of the environment explains the diversity of uses of the precautionary principle under EU law. This principle has been applied to prevent the realization of an uncertain risk concerning: the protection of marine ecosystems<sup>43</sup>; the control of invasive alien species<sup>44</sup>; the limitation of the emission of certain pollutants in ozone<sup>45</sup>; the monitoring and assessment of the level of exposure to certain greenhouse gas emissions<sup>46</sup>; waste management<sup>47</sup>; the authorisation of the placing on the

34 *Ibidem*, para. 123.

35 The Commission on Environment and Development was established in 1987 by the 38th session of the United Nations General Assembly.

36 Nakanishi Y., ‘Climate change and environmental issues in the economic partnership agreement and the strategic partnership agreement between the European Union and Japan’, *Hitotsubashi Journal of Law and Politics* 48 (2020) 11.

37 Prieur M., *Droit de l’environnement, droit durable* (Bruylant, 2014) 56.

38 Decision 1386/2013 of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, 20 November 2013.

39 Council, New strategy of the EU for sustainable development, 26 June 2006, n° 10917/06.

40 Article 16.1 EPA.

41 Van Lang A., *Droit de l’environnement* (4 Edition, PUF 2016) 13.

42 Prieur M. (eds), *Droit de l’environnement* (Dalloz, 2016) 1.

43 Directive 2008/56 (CE); Directive 2014/89 (UE).

44 Regulation 1143/2014 (UE).

45 Directive 2001/81 (CE); Regulation 850/2004 (UE) art. 1.

46 Regulation 525/2013 (UE).

47 Directive 2008/98 (CE).

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market of biocidal products<sup>48</sup>, pesticides<sup>49</sup>, and chemical products<sup>50</sup>.

Since no other TFEU provision contains a reference to the precautionary principle, it could be considered that this principle applies only to environmental matters. However, since the *National Farmers' Union and United Kingdom v Commission* judgments of 5 May 1998, the Court of Justice has consistently held that the precautionary principle may also be invoked in the field of public health<sup>51</sup>. The CJEU considers that the extension of the scope of the precautionary principle to the field of public health can be explained in terms of the integration between EU environmental and health policies. First, both environmental policy and public health policy occupy a privileged position in EU law since they must be considered in a cross-cutting manner. On the one hand, Article 168 TFEU requires that a high level of human health protection be ensured in the definition and implementation of all Union policies and activities and, in similar terms, Article 9 TFEU provides that in defining and implementing its policies and activities, the Union shall take into account requirements relating, *inter alia*, to a high level of human health protection. On the other hand, under Article 11 TFEU, environmental protection requirements are to be integrated into the definition and implementation of Union policies and activities. Secondly, Article 191 § 2 TFEU states that Union policy on the environment shall contribute to further protecting human health. Health protection is thus seen as one of the objectives of environmental policy. This means that, when taking action to protect the environment, decision-makers must also ensure the protection of health<sup>52</sup>. Based on these two arguments, the CJEU states that the precautionary principle, enshrined in Article 191 § 2 as one of the principles of environmental policy, may also be applied in the field of public health. The precautionary principle is most often invoked today in the field of public health<sup>53</sup>. However, a definition of public health has not yet been formulated under EU law. While the Commission recognizes that this includes human, animal, and plant health issues, no

further clarification is given as to how these concepts should be interpreted<sup>54</sup>. The difficulty of defining the concept of public health, as well as the flexibility and complexity of the precautionary principle, could explain the variety of applications of the precautionary principle. This latter has been invoked to counter uncertain risks associated both with the consumption or ingestion of enzymes<sup>55</sup>, flavourings<sup>56</sup>, additives<sup>57</sup>, food supplements<sup>58</sup> as well as with the placing on the market of cosmetic products<sup>59</sup>, and medicinal products for human use<sup>60</sup>.

#### b) The scope of application of precaution under EPA

The scope of application of the precautionary approach under EPA is narrower than the one of the EU precautionary principle. On the one hand, Article 16.9 EPA states that a precautionary approach shall be applied "when preparing and implementing measures." The reference to the need to have a *measure* seems to exclude the possibility of invoking a precautionary approach in all cases in which the handling of uncertain risks does not materialize in the adoption of such measure. Unlike EU law, where precaution is an open-context principle that can be invoked in any case in which the EU institutions need to act to manage an uncertain risk, under EPA, the application of precaution is conditional upon the execution of a measure. It is true that one may consider that the notion of *measure* under EPA is sufficiently broad to cover any act, independently of its legal nature and content, which falls within the scope of EPA. However, this limitation is not trivial if compared to EU law. Under this latter, decision-makers are granted with a wide margin of discretion to decide whether and how to act on the basis of the precautionary principle. Since the precautionary principle is only binding on the procedural side, decision-makers are free to decide, on the substantial side, the content and the modalities of the precautionary action. This means that they could adopt a precautionary measure, but they are not obliged to do so. Considering the features of the risk and the uncertainty at stake, decision-makers could, for example, decide that the adoption of a specific risk-management measure is not necessary and/or appropriate, and they could opt for a further re-evaluation of the situation. In this event,

48 Regulation 528/2012 (UE).

49 Regulation 1107/2009 (UE).

50 Regulation 1907/2006 (UE).

51 CJEU, *National Farmer's Union*, Case C-157/96, para 64, EU:C:1998:191; CJEU, *United Kingdom v. EC Commission*, C-180/96, para 100, EU:C:1998:192.

52 CJEU, *National Farmer's Union*, *supra*, para 63- 64 ; CJEU, *United Kingdom v. EC Commission*, *supra*, para 99-100.

53 CJEU, *Codacons and Federconsumatori*, Case C-132/03, EU:C:2005:310; CJEU, *Agrarproduktion Staebelow*, Case C-504/04, EU:C:2006:30; CFI, *Malagutti-Vezinhet*, Case T-177/02, EU:T:2004:72; GC, *Acino v. Commission*, Case T-539/10, EU:T:2013:110.

54 Commission, 'Communication on the precautionary principle', *op. cit.*, 2.

55 Regulation 1332/2008 (UE).

56 Regulation 1334/2008 (UE).

57 Regulation 1333/2008 (UE).

58 Directive 2002/46 (CE).

59 Regulation 1223/2009 (UE).

60 Directive 2001/83 (CE).

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the precautionary principle would be applied even if no concrete measures are adopted. If we accept the interpretation given to Article 16.9, this scenario would not be possible under EPA, where the implementation of precaution would necessarily be linked to the adoption of a specific measure handling the uncertain risk at stake.

On the other hand, under Article 16.9 EPA, a precautionary approach shall be applied to the preparation and implementation of measures aimed at “protecting the environment or labour conditions that may affect trade or investment.” Despite EU law, where the precautionary principle applies to any risk related to the environment and public health to ensure a high level of protection of the environment and public health, under EPA, its scope of application is more limited. First, a precautionary approach shall only be adopted with regard to measures that have the potential to affect the trade and investment regime provided for by EPA. The scope of application of precaution is therefore limited by the need to prove a potential attempt to trade or investment. Second, a precautionary approach shall only be implemented with the purpose of protecting the environment and labour conditions of the contracting parties. No reference is included in EPA to the protection of human, animal, and plant health. From this perspective, Article 16.9 shall be read together with Article 16.2 according to which: “1. [...] each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.”

### III- AN ASSESSMENT OF THE IMPLICATIONS OF EPA' PRECAUTIONARY APPROACH ON THE EU PRECAUTIONARY PRINCIPLE

In light of the less stringent legal status and the narrower scope of application of precaution under EPA, a question could be raised: has EPA the potential to hinder and inhibit the EU to continue regulating environmental and public health matters in accordance with its own precautionary principle? The answer to this question is not straightforward, and two different arguments could be made.

On the one hand, one might consider that the EU precautionary principle is sufficiently safeguarded by EPA<sup>61</sup>. Three different reasons could explain this

statement. First, *the right to regulate* under Article 16.2 § 1 EPA preserves the right of each Party to “determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify its relevant laws and regulations”. Accordingly, “each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection”. As a consequence, according to Article 16.2 § 2, “the Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations.” Therefore, in case of divergences between EU and Japan as to the level of protection associated with the adoption of a precautionary measure, Article 16.2 EPA grants to each party the right to maintain its domestic level of environmental and labour protection, provided that this level is sufficiently high. Second, Article 18.1 § 3 EPA on *regulatory cooperation* provides the right of each party to continue “adopting, maintaining, and applying regulatory measures in accordance with its legal framework, principles, and deadlines in order to achieve its public policy objectives at the level of protection it deems appropriate.” For the EU, such principles include those established in the TFEU as well as in regulations and directives adopted pursuant to Article 289 TFEU. Since the precautionary principle is set forth by Article 191 § 2 TFEU, its application under EU law should not be prevented or hindered by the execution of the trade agreement between the EU and Japan. Third, under Article 1.9 EPA, WTO rules continue to apply in full between the parties to EPA. As indicated above, the WTO SPS Agreement does not contain a reference to precaution. However, by allowing the possibility to maintain or introduce a provisional measure even though it has not been adequately backed up by scientific evidence, Article 5.7 has been interpreted as indirectly recognizing a precautionary approach under the SPS Agreement. From this perspective, the continuous application of the precautionary principle would be guaranteed by the implementation of the WTO law in the trade relations between the EU and Japan.

On the other hand, it could be argued that the EU precautionary principle is not sufficiently protected by EPA's provisions<sup>62</sup>. First of all, as to the right to

61 See for example, Commission, *An introduction to the EU-Japan Economic Partnership Agreement - Precautionary principle*, (2019)

[https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155718.pdf](https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155718.pdf) accessed 5 March 2020.

62 See, for example, The Greens, European free alliance, 'EU-Japan agreement Preliminary Review on behalf of the Green/

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regulate and the regulatory cooperation mechanism, if it is true that these provisions do not directly and openly contradict the precautionary principle, it can, however, be considered that their methods and basic assumptions “do not sufficiently safeguard the precautionary principle as a regulatory approach<sup>63</sup>.” Although these provisions acknowledge the parties’ commitment to high standards of environmental and labour protection and preserve the parties’ right to apply their legal principles, they don’t prevent the emergence of a potential regulatory clash in the handling of risks. As it was noted, the language used in these chapters roots in modern regulatory methodology and culture, which generally favors an approach that calls for proving causation of a risk for measures to be taken against it. Therefore, “notwithstanding that scientific foundation of regulation forms an important part of the EU precautionary principle as well, such language will make it hard for the EU to introduce other regulatory criteria than science in case there is no available scientific proof for a certain risk, which is central to the EU precautionary principle<sup>64</sup>.” As a consequence, if the parties are granted with a marge of flexibility as to the implementation of their own regulatory measures, the precise extent of the sovereignty concessions that the EU can accept and request from its trading partner, will depend on future interpretations conducted by arbitration tribunals called to interpret the relevant EPA’s provisions <sup>65</sup>. Second, if it is true that a precautionary approach -with a limited scope of application - is recognized under the WTO SPS Agreement, the EU has lost twice in the WTO against US and Canada trying to defend its own precautionary principle (hormones and GMO cases)<sup>66</sup>. In both disputes, the EU unsuccessfully tried to justify its protective measures concerning the specificities of the EU precautionary principle, but its reasoning was not upheld. In light of the WTO disputes and the EU’s lack of success in invoking the precautionary principle, the reference to WTO-law into EPA must appear as if “the EU conceded its position on the admissibility

of the precautionary principle” <sup>67</sup>, and accepted “the state of affairs as they stand<sup>68</sup>.” The reference in EPA to the WTO SPA agreement thus transfers the existing legal uncertainty on this matter in WTO-law into EPA, without clarifying the EU’s position and making use of existing margins in WTO law for the application of the precautionary principle<sup>69</sup>. This might be problematic also in view of the recognition of equivalence of measures as envisaged under Article 6.14 EPA. Procedures for the recognition of equivalence require one party to explain the reasons for a particular regulation as well as its objectives and its basis for the other party to be able to show that its standards and regulations meet the same objective. In this process, however, the EU could come under pressure, as it is required to justify its regulations by the WTO SPS Agreement and its underlying values and purposes, which do not reflect the EU precautionary principle. Although recognition of equivalence does not directly change European standards of protection, the precautionary principle and its implementation could be constrained. Indeed, Japan’s products could be recognized as equivalent to the European ones and marketed in the EU, without being previously authorized under an EU regime according to the precautionary principle<sup>70</sup>.

#### IV- CONCLUSION

The execution of EPA marked a milestone for the economic relations between EU and Japan and is expected to boost trade in goods and services between these two countries by creating new opportunities of exchange and investments<sup>71</sup>. However, at this stage, it is hard to evaluate the impact that the precautionary approach, under article 16.9 EPA, will exercise in the trade and investment relations between EU and Japan and in the implementation of the precautionary principle under EU law. From the one side, the soft legal nature and the flexible/open content of the precautionary approach under EPA transfers to the Parties and, in case of controversies, to the Committee on Trade and

EFA Trade Working Group’, <<https://www.greensefa.eu/files/doc/docs/3c6173360eb7d066246880001c0740c.pdf>> (2018) accessed 28 February 2020.

63 For similar considerations as to CETA and the TTIP, see: Tobias P., Douma W.T., De Sadeleer N., Patrick A., ‘CETA, TTIP and the EU precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’ <[file:///C:/Users/DonatiA/Downloads/2016-06-21\\_foodwatch-study\\_precautionary-principle.pdf](file:///C:/Users/DonatiA/Downloads/2016-06-21_foodwatch-study_precautionary-principle.pdf)> accessed 28 February 2020.

64 *Ibidem*.

65 *Ibidem*.

66 WTO, EC Measures Concerning Meat and Meat Products (Hormones), Appellate Body Report of 16 January 1998; WTO, European Communities - Measures Affecting the Approval and Marketing of Biotech Products, Panel Report of 29 September 2006.

67 Tobias P., Douma W.T., De Sadeleer N., Patrick A., ‘CETA, TTIP and the EU precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’, *op. cit*.

68 Zank M. W., ‘The effects of Ceta on the continuous implementation of the precautionary principle within the European Union’, *Global trade and customs journal* (2019) 179-198.

69 Tobias P., Douma W.T., De Sadeleer N., Patrick A., ‘CETA, TTIP and the EU precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’, *op. cit*.

70 *Ibidem*.

71 EU-Japan Centre for Industrial Cooperation, ‘About the EU-Japan EPA’ <<https://www.eubusinessinJapan.eu/issues/economic-partnership-agreement/about-eu-japan-epa>> accessed 28 February 2020.



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Sustainable Development and the Panel of Experts, the duty to interpret and implement, in each specific case, the precautionary approach. On the other side, precaution grants a large marge of appreciation to Japan and EU institutions to fix the level of protection they deem appropriate and to adopt the protective measure they consider necessary to achieve such level. The EU precautionary principle and its future application are not sufficiently anchored and safeguarded in the text of EPA to exclude any possible interference in its use. Still, at the same, its implementation is not necessarily threatened by the entry into force of EPA. The right to regulate and the regulatory cooperation mechanism to be exercised under the framework of EPA and the WTO law ensures a minimum defense to the EU precautionary principle but don't consistently prevent the incurrence of regulatory clashes and trade disputes over the adoption of a precautionary measure. Thus, it remains to be seen how, on a case by case basis, the relevant authorities will make use of their discretionary power: will they use it to align the trade and investment relations between EU and Japan to the higher standards of protection set forth under EU law? Or will they take advantage of the softness of the precautionary approach to decrease such level of protection? The answer to these questions is not yet given, and many different factors, including the political will to protect the environment and public health over economic interests, will play a key role in shaping not only this answer but also the future of EU-Japan trade relations.