Japan’s Quest for Food Export Disciplines in Trade Negotiations: A Critical Assessment of Its Economic Partnership Agreements

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This paper assesses whether Japan’s quest for food export disciplines in trade negotiations was successful, and concludes that it ended in failure. The export disciplines in Japan’s economic partnership agreements (EPAs) are not necessarily stronger than those in regional trade agreements (RTAs) by third countries. The Food Supply chapter in Japan’s EPA with Australia is far from ‘WTO-plus’ in comparison with its own WTO proposals and similar provisions in RTAs by European countries. Japan’s real goals of demanding tighter disciplines were not to secure stable imports but to counter exporting countries and sell politicians unpopular trade agreements for successful ratification.

Key words: food export restrictions, World Trade Organization (WTO), regional trade agreements (RTAs)

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1. Introduction

The disciplines on food export restrictions in international trade agreements attracted renewed attention in the wake of food price spikes in 2007–08. Export restrictions instituted by food exporting countries were considered as a cause of amplifying food price surges, and many observers called for enhanced disciplines on export restrictions by way of international trade agreements. As global trade negotiations in the World Trade Organization (WTO) stalled and opportunities for establishing multilateral disciplines on export restrictions faded away, high expectations were placed on regional trade agreements (RTAs) as an alternative device to establish tighter disciplines on export restrictions. To this end, Japan’s economic partnership agreement (EPA) with Australia, which incorporates a ‘Food Supply’ chapter not to invoke food export restrictions for the first time, is applauded by some as a success of Japan’s long-term pursuit for securing stable food imports through international trade agreements.

However, such a hasty admiration for the Japan-Australia EPA (JAEPA) may be premature. The value of its Food Supply chapter cannot be appropriately assessed unless they are compared with Japan’s past proposals in the WTO negotiations and similar provisions in RTAs concluded by third countries. Existing literature is unfortunately scant. Despite Japan’s heavy reliance on food imports and resulting a high interest in securing tighter disciplines on export restrictions, research on Japan’s attitude toward food export disciplines in trade negotiations is limited to Yamashita (2013). The literature written in English also entails insufficient scrutiny of export provisions in trade agreements: the vast majority of articles address the rules and negotiations in the WTO (e.g. Anania, 2013; Cardwell and Kerr, 2014) while those on RTAs have just emerged recently (Gruni, 2013; Korinek and Bartos, 2012).

Against this background, the paper aims to assess whether Japan’s pursuit of tighter discipline on food export restrictions in trade negotiations was successful by filling a gap in the literature on export provisions in RTAs. The methodology employed is a comparative historical case study to induce a stylised pattern. The paper is structured as follows. Section 2 summarises existing disciplines on food export restrictions in the WTO agreement and discussions in the Doha Round of WTO negotiations. Section 3 outlines the current state of WTO-plus provisions on food export restrictions in RTAs concluded by Japan and third countries and shows that the former’s export disciplines are not necessarily stronger than the latter. Section 4 reveals that the export disciplines in the JAEPA are not WTO-plus by comparing them with Japan’s own proposals in the WTO and RTAs concluded by European countries. Section 5 explores the underlying reasons for the disparity between Japan’s obsession with tighter disciplines on food export restrictions and weak provisions realised into its EPAs. Section 6 presents a conclusion.

2. Export Disciplines in the WTO

Prior to the examination of export disciplines in the WTO, the definition of export restrictions needs to be clarified.
Export restrictions are defined in the WTO in its panel report of the Dispute Settlement Body as ‘a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the products calculated to limit the quantity of exports’ (WTO, 2001, p. 75). As such, export restrictions include ‘quantitative restrictions on exports’ which restrict the volume of exports and ‘export taxes’ which levy a tax on exports. While the 1994 General Agreement on Tariffs and Trade (GATT) imposes the same disciplines on restrictions on imports and exports in theory, this is not the case in practice. The discrepancy summarised in Table 1 is examined in turn.

| Table 1. Comparison of disciplines in WTO Agreement |
|--------------------------|--------------------------|
| **Taxes** | **Quantitative restrictions** |
| **Imports** | Allowed (bound and reduced comprehensively) | Prohibited (limited exceptions) |
| **Exports** | Allowed (bound and reduced partially) | Prohibited (broad exceptions) |

Taxes on imports and exports are explicitly allowed in the GATT. Therein, Article XI:1 stipulates that ‘no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party’. Taxes on imports, nonetheless, have been a subject for binding and reduction commitments as a result of successive multilateral trade negotiations under the GATT. Taxes on exports, on the other hand, have been largely intact from such commitments. The only exception is that newly acceded countries to the WTO such as China and Russia accepted some disciplines on export taxes in their accession protocols (Kazeki, 2006). To this end, a clear asymmetry exists in WTO disciplines on taxes between imports and exports.

In contrast, quantitative restrictions on imports and exports are prohibited, as is evident in GATT Article XI:1. There are, however, certain exceptions to this general ban on quantitative restrictions such as Article XI:2(a) (critical shortage of foodstuffs), Article XI:2(b) (restrictions necessary to the application of standards, etc.), Article XX (general exceptions) and Article XXI (security exceptions). The most relevant provision pertaining to food is Article XI:2(a), which explicitly allows ‘export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party’. This provision is often cited as a symbol of asymmetry because there is no comparable limitation on the use of export restrictions on foodstuffs under Article XI:2(a), whereas an escape clause allowing import restrictions on agricultural products under Article XI:2(c) (restrictions necessary to the enforcement of government measures) is now terminated by Article 4.2 (tariffication clause) of the WTO Agreement on Agriculture (AOA).

Nevertheless, the procedures for instituting export restrictions on foodstuffs are constrained by the AOA. Specifically, its Article 12 stipulates that, when a country uses the GATT Article XI:2(a) shortage exception to justify an export restriction on foodstuffs, it must give due consideration to the effect of such restrictions on the food security of food importing countries. Moreover, members must notify the WTO Committee on Agriculture of new export restrictions on foodstuffs and consult with affected member states. Exporting countries must ‘give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure’. This applies to developed countries, and to developing countries that are net exporters of the foodstuff in question (Korinek and Bartos, 2012). However, compliance with these obligations is problematic. While 31 countries instituted food export restrictions from mid-2007 to mid-2008 (FAO, 2008), it was merely the Kyrgyz Republic that notified its export restrictive measures to the WTO in the same period (WTO, 2013).

Disciplines on export restrictions on foodstuffs have also been discussed in the Doha Round of WTO negotiations. Food-importing countries such as Japan, Switzerland and South Korea are the leading advocates of strengthening disciplines on export restrictions on foodstuffs (Anania, 2013; Kim, 2010). For example, Japan stated in its initial proposal in 2001 that, in view of redressing the imbalances of the rights and obligations between importing and exporting countries and of maintaining the food security of food-importing countries, rules and disciplines on
export-promoting and -restricting measures should be established (WTO, 2000). Specifically, Japan proposed converting export restrictions to taxes that would then be reduced, which is similar to the tariffication of import restrictions (Kim, 2010).

Furthermore, Japan and Switzerland jointly circulated an informal paper in 2008 calling for stricter WTO rules on the introduction of export restrictions for food products and on the consultation and notification procedures (WTO, 2008a). The paper proposes that countries should be required to notify the WTO Committee on Agriculture before introducing an export restriction and that this was to be implemented only after consultations with other members involved were completed, either by their agreeing on the introduction of the export restriction, or, if countries could not reach an agreement within a certain amount of time, by the favourable decision of a binding arbitration (Anania, 2013). Nevertheless, little progress has been made on disciplines on quantitative export restrictions in selected 93 RTAs. However, the number of samples is reduced to 87 RTAs since Japan's six EPAs (with Switzerland, Viet Nam, Chile, Indonesia, Mexico and Thailand) covered in the original OECD study is subtracted herein to avoid overlap. Table 2 presents the classification of 87 RTAs by the OECD study and Japan's 14 EPAs by the author, wherein they are divided as to whether WTO-plus provisions on export restrictions are included. In Table 2, a RTA is classified as 'WTO-plus' if it strengthens the WTO disciplines on export taxes or forbids quantitative export restrictions where WTO allows them (Korinek and Bartos, 2012).

Let us first review the disciplines on export taxes. Table 2 shows that 63 out of 87 RTAs in the OECD study include WTO-plus provisions which strengthen the WTO disciplines on export taxes. These 63 RTAs can be divided into two subgroups: 11 RTAs prohibiting new export taxes only (i.e. standstill clause) and the remaining 52 RTAs imposing a general prohibition on export taxes. However, in applying a general ban on export taxes, many RTAs include additional exceptions beyond those on export quantitative restrictions in GATT Articles XI and XX, such as 'situational' exceptions (e.g. threat of re-export) and 'product-specific' exceptions (e.g. coffee or wood products).

Thus, the latter 52 RTAs imposing a general prohibition on export taxes can be further classified into the following: (i) 43 RTAs with both situational and product-specific exceptions, (ii) 4 RTAs with only product-specific exceptions and (iii) 5 RTAs with only situational exceptions.

| Severity of disciplines | OECD study | Japan EPAs |
|-------------------------|------------|------------|
| Export taxes            |            |            |
| WTO-plus                | 63 (72%)   | 7 (50%)    |
| Others                  | 24 (28%)   | 7 (50%)    |
| Quantitative            |            |            |
| WTO-plus                | 15 (17%)   | 0 (0%)     |
| restrictions Others     | 72 (83%)   | 14 (100%)  |
| Total                   | 87 (100%)  | 14 (100%)  |

Source: Author's calculation based on Korinek and Bartos (2012).

In Japan's 14 EPAs, the severity of disciplines on export taxes are mixed. Seven out of 14 EPAs include WTO-plus provisions on export taxes: six EPAs (with Singapore, Mexico, Chile, Switzerland, Peru and Australia) impose a general prohibition on export taxes, and one EPA (with Brunei) prohibits new export taxes only. The remaining seven EPAs are considered as 'WTO-equal': one EPA (with the Philippines) stipulates 'best efforts' to eliminate export taxes, and the other six EPAs have no provision on them. The former seven EPAs obliging a general ban on export taxes are meaningful in that GATT Article XI is not incorporated into these EPAs and export taxes under 'critical shortage of foodstuffs' are therefore not permitted. However, such disciplines on export taxes are not stringent as they first appear, since all provisions of 'general exceptions' stipulated in GATT Article XX are incorporated in the EPAs and parties are free to impose export taxes if these conditions are met.

With regard to the disciplines on quantitative export restrictions, 15 out of 87 RTAs include WTO-plus provisions which strengthen WTO disciplines on

1) These figures are drawn from Appendix III. in Korinek and Bartos (2012, p. 52) as those cited in the text include errors.
quantitative export restrictions. These 15 RTAs are further divided into two subgroups: 3 RTAs which impose conditions on the use of exceptions and 12 RTAs which allow fewer exceptions than the GATT. Among the latter subgroup, RTAs concluded by European countries impose the most stringent disciplines on quantitative export restrictions on foodstuffs. Specifically, the convention of the European Free Trade Area (EFTA)\(^2\) and its RTAs with Israel and Chile, the convention of the European Union (EU) and its RTAs with South Africa, and the Central European Free Trade Agreement (CEFTA)\(^3\) entirely eliminate the ‘shortage exception’ (Korinek and Bartos, 2012).

In contrast, there is no single Japanese EPA which includes WTO-plus provisions on quantitative export restrictions. Japan’s EPAs commonly prohibits any non-tariff measures on imports or exports ‘which are inconsistent with its obligations under the WTO Agreement’, and such a provision explicitly allows quantitative export restrictions under GATT Articles XI, XX and XXI. To be sure, seven EPAs (with Singapore, Thailand, Brunei, ASEAN, Viet Nam, India and Australia) contain clauses to enhance transparency of export restrictions that are permitted under the WTO Agreement. Furthermore, three EPAs establish independent chapters for stable imports of natural resources: ‘Energy and Mineral Resources’ with Indonesia, ‘Energy’ with Brunei and ‘Energy and Mineral Resources’ with Australia. Nevertheless, neither of these EPAs are WTO-plus since these obligations merely cover additional procedures in instituting export restrictions by failing to curb their use.

4. Export Disciplines in the Japan-Australia EPA

Japan’s EPA with Australia, which entered into force in 2015, apparently represents a milestone in its long-term quest for tightening disciplines on food export restrictions. The JAEPA establishes a ‘Food Supply’ chapter for the first time, incorporates a ‘best endeavour’ clause in its Article 7.3:2(a) not to impose export restrictions under GATT Article XI:2(a) on ‘essential food’ and designates 14 products including meat, dairy, wheat, barley and sugar as essential foods in its Annex 4. However, the severity of disciplines on export restrictions in the JAEPA must be judged by vis-à-vis Japan’s past proposals in the WTO negotiations and similar provisions in the RTAs concluded by third countries. This section addresses these tasks in turn.

| Table 3. Comparison of disciplines on export restrictions |
|---------------------------------------------------------|
| Japan’s WTO proposal | JAEPA’s Article 7.3 |
| Condition | |
| any new export prohibition or restriction shall be limited to the extent strictly necessary… (paragraph 2(a)) | (a party) shall seek to limit such prohibition or restriction to the extent necessary… (paragraph 2(a)) |
| Notification | |
| Before any Member institutes an export prohibition or restriction, it shall give notice in writing promptly in advance to the Committee on Agriculture. (paragraph 2(c)) | (a party) shall, before adopting such a prohibition or restriction, provide notice in writing, as far in advance as practicable, to the other party… (paragraph 2(b)) |
| Consultation | |
| The Member shall consult with any other Member having a substantial interest as an importer with respect to any matter related to the proposed measure in question. (paragraph 2(c)) | (a party) shall, on request, provide the other Party with reasonable opportunity for consultation with respect to any matter related to such prohibition or restriction… (paragraph 2(c)) |
| Arbitration | |
| If the consultations fail to settle within [60] days after the beginning of the consultations, a standing committee of experts shall render its judgment on the measure in question, which is binding. (paragraph 2(c)) | (none) |

Source: WTO (2008a) and MOFA (2014)

Note: Italics are added by the author.

Above all, the export disciplines incorporated into the JAEPA have little value in their entirety. They are much weaker than Japan’s joint proposal to the WTO (WTO, 2008a) in a number of ways, as summarised in Table 3. First, the conditions for initiating export restrictions are more lenient in the JAEPA than those in the WTO proposal. Second, the timing of notification is prior to the initiation in the WTO proposal, whereas it can be after in the JAEPA. Moreover, the latter’s wording is exactly the same as Article 12 of the AOA and thus has no add-value at all since Australia, a net-exporting country of the ‘essential food’ concerned, is already required to notify its quantitative export restrictions under the AOA. Third, consultation is obligatory in the WTO proposal while burdens on an exporter are much lighter in the JAEPA. Fourth, an

\(^2\) Signatories are Iceland, Lichtenstein, Norway and Switzerland (Korinek and Bartos, 2012, p. 40).

\(^3\) Signatories are Albania, Bosnia and Herzegovina, Croatia, Macedonia, Moldova, Montenegro, Serbia and Kosovo (Korinek and Bartos, 2012, p. 40).
**arbitration** clause is included in the WTO proposal, whereas no comparable provision exists in the JAEPA.

Moreover, weakness in the export disciplines in the JAEPA is further magnified if they are contrasted with comparable provisions in RTAs concluded by European countries. As summarised in the previous section, RTAs concluded by the EU and EFTA entirely eliminate the shortage exception under GATT Article XI:2(a), even in those signed with developing countries (i.e. South Africa and Chile). In contrast, the JAEPA not only maintains the shortage exception based on GATT Article XI:2(a) but also fails to impose meaningful disciplines in terms of notification, consultation and arbitration. In short, the Food Supply chapter in the JAEPA, which falls short of rigorousness compared with the Japan’s proposals in the WTO and similar provisions in RTAs concluded by European countries, is far from WTO-plus. The Food Supply chapter is therefore a proof of a setback and not a success in Japan’s quest for tighter disciplines on food export restrictions in trade negotiations.

### 5. Reasons for Weak Disciplines in Japan’s EPAs

A disparity between Japan’s long-term obsession with tighter disciplines on food export restrictions in trade negotiations and weak provisions realised in its EPAs including the JAEPA poses a paradox. A rational question to be answered is as follows: why has such a divergence emerged? This section identifies the possible causes by reviewing the evolution of Japan’s attitude toward disciplines on food export restrictions in the GATT/WTO and EPA negotiations.

The first piece of evidence is a history of incorporating Article 12 into the AOA during the GATT Uruguay Round. Although Japan proposed such a clause at the beginning of negotiations in 1987, it was not until the last moment in 1993 when Japan pressed it seriously. At that time, Japanese Diet members still resisted minimum access import requirements of rice even despite being exempted from tariffication in the draft of the Uruguay Round agreement. To this end, parliamentarians influential in agricultural policies demanded the Ministry of Agriculture, Forestry and Fisheries (MAFF) to secure Article 12 to ‘sell’ domestic politicians unpopular Uruguay Round agreement for winning a successful ratification in the Diet by creating an artificial merit for food importing countries (Yamashita, 2013). In diet deliberations on the Uruguay Round agreement in 1994, the then Foreign Minister emphasised that Article 12 considerably tightened food export disciplines in the GATT and ensured the balance of interests between exporting and importing countries (National Diet Library, 2015).

The second piece of evidence is the evolution of Japan’s attitude toward the disciplines on food export restrictions in the Doha Round of WTO negotiations. As stated earlier, Japan emphasised redressing the imbalances of the rights and obligations between importing and exporting countries, and proposed converting export restrictions to taxes that would then be reduced in its initial proposal in 2000 (WTO, 2000). However, its insistence on export disciplines faded away once ‘tariff capping’ and ‘tariff rate quota (TRQ) expansion of sensitive products’ emerged as the most crucial defensive interests for domestic stakeholders in 2003. Japan had been reticent about export disciplines until 2008 when food export restrictions attracted renewed attention.

The third piece of evidence concerns a Japan’s behaviour in its EPA negotiations over the disciplines on food export restrictions. The MAFF declared in 2004 the pursuit of ‘stable and diversified imports through the elimination of such impediments as export restrictions and taxes’ in its EPA strategy (MAFF, 2004). However, this statement was not translated into a sufficient action: Among 8 EPAs whose negotiations were initiated after 2005, those with meaningful WTO-plus provisions on export taxes are merely four (with Brunei, Switzerland, Peru and Australia) and those on export restrictions are zero, as shown earlier. Nevertheless, the Japanese government recast the Food Supply chapter in the JAEPA as a victory once it has concluded the negotiations with Australia.

The Food Supply chapter was surely instrumental in a successful ratification of the JAEPA. In diet deliberations in 2014, even opposition parliamentarians from the Japan Innovation Party and the Party for Future Generations welcomed the chapter as an advantageous deal for Japan (National Diet Library, 2015). In response, Agricultural and Foreign Ministers praised themselves, claiming that it was an unprecedented result for ensuring stable food supply. Accordingly, despite Japan’s acceptance of a drastic tariff cut in beef, the JAEPA was approved in both houses by a majority vote not only of ruling parties but also of most opposition parties except the Japan Communist Party and the Social Democratic Party (House of Representatives, 2014; House of Councillors, 2014).
These narratives induce a stylised pattern of three steps in Japan’s strategy for the disciplines on food export restrictions in trade negotiations: (i) proposing tighter disciplines on export restrictions at the beginning of the negotiations, (ii) concentrating on protecting defensive interests in market access during the negotiations and (iii) making an appeal the export disciplines in trade agreements as a triumph to domestic stakeholders after the negotiations. Therefore, Japan’s quest for stringent disciplines on food export restrictions in past trade negotiations is not motivated by a genuine desire for securing stable food imports. Japan’s real goals were as follows: (i) to counter food exporting countries requesting drastic tariff cuts by proposing additional obligations on them at the beginning of the negotiations, and (ii) to sell politicians unpopular trade agreements for a successful ratification by presenting an artificial advantage of the agreements after the negotiations.

6. Conclusion

This paper concludes that Japan’s quest for tighter disciplines on food export restrictions in trade negotiations ended in failure. Section 3 reveals that the disciplines on export taxes and quantitative restrictions in Japan’s EPAs are not necessarily stronger than those in RTAs concluded by third countries. Section 4 shows that the Food Supply chapter in the JAEPAs is far from WTO-plus by falling short of rigorously compared to the Japan’s proposals in the WTO and to similar provisions in RTAs concluded by European countries. Section 5 indicates that the source of the failure stems from the fact that there is a difference between its words and actual intentions. Japan’s real goals of demanding tighter disciplines in trade negotiations were not to secure stable imports, as has been perceived, but to counter food exporting countries insisting on drastic tariff cuts at the beginning of the negotiations and to sell unpopular trade agreements to domestic politicians for a successful ratification in the Diet after the negotiations.

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