

# 1. Introduction

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## LASTING CONNECTION AND DIALOGUE BETWEEN THE EU AND JAPAN

Although Europeans colonised many Asian countries between the sixteenth and eighteenth centuries, Japan miraculously avoided European colonisation, so to speak, and maintained its traditional culture. The first contact with the Europeans occurred when Portuguese missionaries arrived in *Chipangu* (Japan) in 1543. Europeans at that time were interested in this island particularly because merchant travellers such as Marco Polo depicted Japan as a symbol of richness. The European missionaries also imagined, in the wake of the Reformation, that as first movers they could seek to develop Catholicism in Japan because it was not known as a territory targeted by other religions such as Islam or Judaism. In 1549, the Jesuit missionary Francis Xavier arrived in Kagoshima, a southern part of Japan, and was authorised by the *Daimyo* (feudal lord) to be engaged in missionary work and to communicate European culture to the local people. The missionaries stayed in Japan not only to propagate religion; they also became advisors to the *Daimyo* and his subordinate for military and commercial issues. The trade between Spain/Portugal and Japan during this period was called *nanban boeki*. The Europeans imported Western medicine, founded a hospital where the first surgery in Japan was undertaken, and established the first orphanage in the country.<sup>1,2</sup> One of the characteristics of *nanban boeki* was that it was closely related to the spread of Christianity. Through the

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<sup>1</sup> José de Freitas Ferraz, 'Looking forward to 470 years of Japan-Portugal "Kizuna" bonds', *The Japan Times* (Tokyo, 10 June 2012).

<sup>2</sup> See, e.g., Frédéric Mantiéne, 'Commerce occidental et sociétés asiatiques, XVIIe–XVIIIe siècles, les marchands européens au contact des pratiques commerciales et des sociétés locales', in Martine Raibourd and François Souty (eds), *Europe-Asie, Echanges, Ethiques et Marchés, XVIIe–XXIe siècles* (Les Indes Savantes, 2004) pp. 60–62.

missionaries, Japan added European and Christian cultures to its own, which had already incorporated Confucian and Buddhist cultures.<sup>3,4</sup>

Confucianism seems to have arrived in Japan in approximately the third century AD and it became an important basis for Japanese philosophy. It has been disseminated in virtually every corner of Japan from daily life to academic work without being visibly identified. In contrast with the influence of Christianity in Europe, the influence of Confucianism is so embedded in Japanese culture and custom that it cannot be clearly distinguished from the other elements that have affected them as well.

Confucianism was developed by Confucius in China and was integrated into the fields of, among other things, culture, philosophy, politics, education, economics, history, art, literature and military science. Later, it became a central determinant of moral and ethical principles and a foundation for ideology and philosophy in other countries, including Japan. Competition is normally rooted in comparison and creates a winner and a loser. However, basic Japanese moral philosophy attached more value to social harmony, order and consensus, mainly owing to the influence of Confucianism.

More importantly for the purposes of this book, Confucius, who was a politician as well, created a political ideology of benevolent government and his philosophy contributed to the consolidation and development of Chinese culture and the economy through a wise government and a thoughtful ruler.<sup>5</sup> As he preached on how to govern the people in particular in difficult situations, Confucius has had an impact not only on the spirits of the people governed but also on the basic philosophy of those who govern the people such as the government and public authority. Although it is true that the traditional credibility of official bureaucracy has deep roots in Europe too, Japanese psychological

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<sup>3</sup> For details see, e.g., Teizo Kitamura, 'Portugal in the Age of European Expansion and the Introduction of Boobura (Pumpkin) into Japan', *Journal of Osaka Aoyama Junior College*, **25** (1999) 229–35 (in Japanese).

<sup>4</sup> In addition, Japanese culture is also based on other concepts including Shintoism and Taoism. Shinto is an indigenous spiritual concept in Japan, while Taoism was essentially 'imported' from China. Neo-Confucianism, which is a mixture of Confucian and Buddhist beliefs, was considered to be introduced into Japan at the turn of the twelfth and thirteenth centuries. See, e.g., Kong Xianglin, *Confucius* (Foreign Languages Press, 2010) p. 180.

<sup>5</sup> *Ibid.* at p. 5.

reliance, to a comparable degree, on public authority and on social norms favouring hierarchy may also be observed.<sup>6</sup>

Confucianism was also promulgated in Europe, but much later. *The Travels of Marco Polo* was considered the first book that made Confucius known to the Western world. Italian missionary Matteo Ricci arrived in China in 1582 and was the first to translate Confucian canons into a Western language, enabling an academic exchange between Europe and China. During the seventeenth century, Europe's attention to China was focused on Confucian doctrine, and numerous scholars and philosophers were influenced by Confucianism. Voltaire, who was the leader of the eighteenth-century Enlightenment movement, advocated Confucianism in his numerous publications. François Quesnay, a French economist of the eighteenth century, admired the economic doctrine and political principles preached by Confucius, and was himself highly regarded by his contemporaries as the 'Confucius of Europe'.<sup>7</sup> Thus, the philosophical base of Confucianism so important in Japan was already known to Europe a long time ago and shared with Europeans. For instance, in Europe the idea of a 'benevolent government and ruler' has been incorporated through Christianity and was, to a lesser extent, influenced by Confucianism.

In 1624, Japan decided to exclude the Spaniards and then in 1639 the Portuguese from its territory and close itself to the outside world under the *sakoku* (seclusion) policy. This decision came from the fear of the wider spread of Christianity in Japan. However, trade exchanges between the Japanese and the Europeans quietly continued. Holland was the only European country that escaped this ban and was exclusively allowed to come to Japan owing to its economic prosperity and rather weak link to Christianity.<sup>8</sup> At that time, in the Netherlands, numerous important academic and revolutionary books were being published. For instance, the first edition of *The Discourses and Mathematical Demonstrations Relating to Two New Sciences* by Galileo Galilei as well as *Meditation on*

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<sup>6</sup> See Frank Gibney, 'Introduction', in Frank Gibney, *Unlocking the Bureaucrat's Kingdom: Deregulation and the Japanese Economy* (The Brookings Institute, 1998) p. 9. Of course, trust in public institutions and governments in Europe, Japan and elsewhere is eroding significantly (without being replaced by greater trust in market-based institutions, for obvious reasons).

<sup>7</sup> Wei-Bin Zhang, *On Adam Smith and Confucius: The Theory of Moral Sentiments and the Analects* (Nova Publishers, 2000) pp. 22–28.

<sup>8</sup> In Japan and China, the European traders were under stricter control of the governors than those from Tonkin, Cochinchina, Burma and Siam. For further details, see Mantienne, *supra* note 2 at pp. 59–60.

*the First Philosophy* by René Descartes had been published in the Netherlands, partly because of the country's lenient attitude towards religion. Numerous publications were imported by the Dutch into Japan and developed *rangaku*, which at first meant 'Dutch learning' and at a later stage came to mean 'Western (European) learning of scientific and technological knowledge in Japan'. In turn, Dutch literature that depicted Japan and Japanese culture was published in the Netherlands and sold elsewhere in Europe. Furthermore, the Dutch continued to import Japanese objects such as porcelain, painting and clothes (*kimono*) and the Japanese tea ceremony, kabuki and architecture.<sup>9</sup> The European interest in Japanese culture reached its peak in the 1880s but it arose much earlier. The word *Japonisme* was created in 1872 by the French author and collector Philippe Burty to indicate a new area of study of artistic, historic and ethnographic borrowings from the Japanese arts.<sup>10, 11</sup>

Accordingly, even during the *sakoku* seclusion period (whose fundamental purpose was not economic isolation but rather, as suggested above, to remove a perceived threat to the social order posed by religious and potentially colonialist influences of Portuguese and Spanish origin), commercial trade and cultural and scientific exchanges between Europe and Japan still actively continued.<sup>12</sup> In the seventeenth century, despite the *sakoku*, many Europeans visited Japan and *Ieyasu Tokugawa*, the 'King of Chipangu', appointed William Adams, an Englishman, as a foreign advisor. Adams taught Tokugawa European sciences such as

<sup>9</sup> Discovery of Japanese art in Europe mainly started with the universal exposition in Paris in 1867. See Yvan Daniel, 'Le baron Charles-Gustave de Chassiron et Paul Clauel au Japon: Les éventails du voyageur', in Martine Raibourd and François Souty (eds), cited supra note 2, p. 123.

<sup>10</sup> It is well known that Van Gogh imported Japanese prints and used them for his paintings. The numerous other artists who were influenced by *Japonisme* and gave a new direction to the arts included Renoir, Monet, Whistler, Munch, Gallé and Puccini. See, e.g., Lionel Lambourne, *Japonisme: Cultural Crossings between Japan and the West* (Phaidon, 2005).

<sup>11</sup> For the influence of Europe, and in particular of France, on Japan during the nineteenth century, see, e.g., Robert Calvet, 'La faiblesse de la présence française dans le Japon du XIX<sup>ème</sup> siècle', in Martine Raibourd and François Souty (eds), cited supra note 2, pp. 91–101.

<sup>12</sup> Professor Oshima (a historian) has explained that the impression the Japanese word *sakoku* gives is misleading, because one of the Chinese characters used to write *sakoku* has the meaning of chains, but it is wrong to consider that Japan was completely subjugated by the Japanese rulers and completely secluded from the rest of the world during the early modern period. See Akihide Oshima, 'Name of "Sakoku Soho"', Prefectural University of Kumamoto, *Bunsai*, 6 (2010) 29, at 30 (in Japanese).

mathematics and navigation. European influence came to Japan indirectly as well, through other Asian countries such as China, and the exotic aspects of European culture understandably appealed to the public in the period of seclusion since the law prohibited Japanese people from travelling abroad.<sup>13</sup> Indeed, isolation under the *sakoku* regime made the people even more curious and prepared to absorb Western culture.

Japan opened its frontiers 250 years later to the industrialized nations.<sup>14</sup> During the Meiji era, which started in 1868 and ended in 1912, exchanges in the field of culture, science, economy and law became significantly active and this gave rise to the famous words *bunmei kaika* (civilization and enlightenment). Some studied law and economics in Europe at schools such as Leiden University in the Netherlands and published what they learned after returning to Japan.<sup>15</sup> Numerous *rangaku* scholars played an important role in the modernisation of the country. *Rangaku* scholars generally took a pro-Western stance, but later some of them opposed European imperialism. One such scholar was Yukichi Fukuzawa, who visited Europe and the US and published enlightening works; he believed that Europe owed its advanced developments to an education system based on the principle of equal opportunity, national and individual independence, competition and communications. Although not all the cultural and industrial evolution coming from the Western world was smoothly integrated into traditional Japan,<sup>16</sup> the radical change from a feudal society to a modern society inspired by *bunmei kaika* were in general appreciated by Japanese society.

As comparative legal scholars know, the Japanese legal system supporting the enforcement of the Antimonopoly Act was also based largely on European models. Although the Antimonopoly Act itself was drafted

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<sup>13</sup> The popularity of Chikamatsu's Kabuki play *The Battles of Coxinga* (battles that lasted over 200 years) was partly attributed to the exotic appeal of its Chinese scenes to the Japanese public during the Tokugawa period. See Donald Keene, *Four Major Plays of Chikamatsu* (Columbia University Press, 1998).

<sup>14</sup> For the European involvement during the opening of the Japanese territories, see, e.g., Calvet, *supra* note 11, pp. 92–93.

<sup>15</sup> Amane Nishi and Mamichi Tsuda, who studied public international law in the Netherlands, published *Taisei Kokuho-ron* (A Treatise on Western Public Law) and *Elements of International Law*, respectively.

<sup>16</sup> Modern Japanese novelist Soseki Natsume mentions in his publication *The Enlightenment of Modern Japan* that Japan's development in that period was driven mainly by external forces, while European growth was the result of endogenous factors. He also considers that it is natural that Japan could not digest everything at once when it faced so many novelties at the same time.

on the basis of US sources,<sup>17</sup> the Constitution of 1889 was influenced by Germany while the Japanese Civil Code was enacted in 1896 under the influence of the Code Napoléon and later revised following the German Civil Code.<sup>18</sup> The Law of Civil Procedure was based on the German model.<sup>19</sup> In addition, the current Commercial Code was enacted under mixed influences of the German, American and traditional Japanese rules.<sup>20</sup>

After World War II, amidst reconstruction efforts on both the losing and winning sides, Europe established the European Economic Community in 1957 to develop a common market. European leaders saw the need for a unified Europe unhampered by national political interests and economic protectionism, and to achieve conciliation between France and Germany.<sup>21</sup> Against this background, on 1 January 1958, the Treaty of Rome, with its distinctive competition provisions, entered into force. Thus, as in Japan, competition law in Europe was created in the context of economic and social crisis, in particular, the post-traumatic difficulties following the war.

In the meantime, Japan envisaged expanding market access on various national European markets. Confronting radically reduced productivity and decimated infrastructure in Europe, in the 1970s and 1980s, the bilateral relations between Europe and Japan were marked by trade

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<sup>17</sup> See, e.g., Harry First, 'Antitrust in Japan: The Original Intent', *Pacific Rim Law and Policy Journal*, 9 (2000) 67–70. See also David J. Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford University Press, 2010) p. 209. Japan does follow an imported Western model but it operates on principles and cultural patterns often quite different from those found in the US or the EU.

<sup>18</sup> For example, Gustave Emile Boissonade Fontarabie's immense contribution to the drafting of the Civil Code of 1890 is famous in Japan. Boissonade was also involved in drafting the criminal law. For the details of his work as a legal adviser to the Meiji government, and of his role in drafting legal codes and advancing legal education, see, e.g., Harushi Kishigami, 'Analysis of Introduction of Japanese Civil Law: Boissonade and Legislative Intent', *Chukyo Hogaku*, 30 (4) (April 1996) 7–37. See also Jean-Louis Sourieux (translated by Katsuhiko Yoshida), 'Boissonade's Influence on Drafting of the Japanese Civil Code', *Horitsu Jiho*, 71 (2) (1999) 40–47 (in Japanese).

<sup>19</sup> For the details on the process of drafting, see, e.g., Masahiro Suzuki, *History of the Law of Modern Civil Procedure: Japan* (Yuhikaku, 2004).

<sup>20</sup> For further details, see, e.g., Mitsuo Matsushita, *International Trade and Competition Law in Japan* (Oxford University Press, 1993) pp. 1–4.

<sup>21</sup> Pascal Fontaine, *Jean Monnet l'Inspirateur* (Jacques Grancher, Paris, 1988) pp. 53, 58–66.

frictions, and both became important players in the global market.<sup>22</sup> In the 1980s, the main cases before the European Commission involving Japanese companies concerned antidumping, but these were later overtaken by competition cases.

The foundations of modern relations between the EU and Japan were laid down in the Joint Declaration between Japan and the European Community and its Member States, signed in The Hague in 1991.<sup>23</sup> The Joint Declaration confirmed the need for enhanced cooperation between the parties. Following its adoption, a number of important summits and informal 'dialogues' have taken place with a view to strengthening trade and economic ties both on the bilateral and multilateral levels. Subsequently, the EU-Japan Regulatory Reform Dialogue was launched in 1994 and formalised in 1995.<sup>24</sup>

Subsequently, at the 2001 EU-Japan Summit an Action Plan was adopted, which signalled a new decade of reinforced partnership.<sup>25</sup> Special emphasis was put on ensuring improved market access in Japan by gradually removing entry barriers to trade and foreign investment.

In 2002 the EU-Japan Mutual Recognition Agreement came into force. This agreement allows both parties to accept a conformity assessment carried out by one party in accordance with the rules of the other in certain product areas.<sup>26</sup> This Agreement was perceived as an important step towards effective market access. Further, in 2003 the Agreement on Co-operation on Anti-Competitive Activities between the EU and Japan was signed by both parties.<sup>27</sup> The purpose of this Agreement is to facilitate cooperation and coordination of the Commission and JFTC to promote effectiveness of antitrust enforcement in both jurisdictions and reduce the likelihood of conflicting decisions. Moreover, a Free Trade Agreement between the EU and Japan is currently under negotiation.

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<sup>22</sup> For a history of EU-Japan relations, see, e.g., Hans Dietmar Schweisgut, 'The EU and Japan: The Way Forward of Two Likeminded Strategic Partners', in Globalization and Review on EU Integration (eds), *EU Studies in Japan*, 32 (EU Studies Association in Japan, 2012) 1.

<sup>23</sup> Available on the European Commission's website at [http://eeas.europa.eu/japan/docs/joint\\_pol\\_decl\\_en.pdf](http://eeas.europa.eu/japan/docs/joint_pol_decl_en.pdf).

<sup>24</sup> For further details, see the European Commission's explanation on External Action, available at [http://eeas.europa.eu/japan/regulatory\\_reform\\_en.htm](http://eeas.europa.eu/japan/regulatory_reform_en.htm).

<sup>25</sup> An Action Plan for EU-Japan Cooperation, available on the European Commission's website at [http://eeas.europa.eu/japan/docs/actionplan2001\\_en.pdf](http://eeas.europa.eu/japan/docs/actionplan2001_en.pdf).

<sup>26</sup> Agreement on Mutual Recognition between the European Community and Japan, OJ L284/3-26.

<sup>27</sup> Official Journal L183, 22.7.2003, pp. 12–17, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22003A0722\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22003A0722(01):EN:NOT).



Another significant channel of EU-Japan bilateral relations has been the Regulatory Reform Dialogue. As noted above, the Dialogue has aimed at reducing unnecessary and burdensome regulations hindering the development of trade and foreign investment. For the last two decades, the EU and Japan have actively participated in each other's regulatory reforms, mainly with a view to improving the rules governing the establishment of business and facilitating investment flows into Japan.<sup>28</sup> For instance, in Japan, the modernisation of EU competition policy of 2003 was appreciated as an example of regulatory reform that reduced the cost of conducting business.<sup>29</sup>

In 2009, the Liberal Democratic Party, which had pursued the principle of a free market economy together with the ideology of cooperation as a ruling party, was replaced by the Democratic Party of Japan, which places less emphasis on free market competition. However, regulatory reform has not been neglected by the DPJ; to the contrary, it has advanced in various sectors.

Ever since the *nanban boeki* trade with Spain and Portugal developed in the mid-sixteenth century, economic relations have been always at the centre of Europe-Japan relations. Competition law is a reflection of culture, politics, industrial and economic policies, and the EU and Japan have influenced each other for approximately 470 years, that is, for much longer than the duration of US-Japan diplomatic economic relations. It would not be surprising to find that there is more in common between the EU and Japan than between Japan and the US. Although after World War II, for political reasons, Japan adopted its first competition law on the model of US statutes, it does not necessarily mean that the constitution of the competition culture in Japan was more similar to that of the US than to that of the EU. Rather, because Japanese competition law and policy adopted the US model at the outset, Japan developed its life and economy in an American-oriented way after World War II.

In light of the foregoing, this book proceeds on the premise that a comparative analysis of Japan and the EU will yield insights regarding both jurisdictions.<sup>30</sup> The main aims of the book are three: to compare the

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<sup>28</sup> The EU has cited the revision of the AMA as one of the results of the Regulatory Reform Dialogue. For further details see the European Commission's website at [http://eeas.europa.eu/japan/regulatory\\_reform\\_en.htm](http://eeas.europa.eu/japan/regulatory_reform_en.htm).

<sup>29</sup> See, e.g., Mitsuo Matsushita, 'The New Enforcement Rule of EU/EC Competition Law', *Journal of the Japanese Institute of International Business Law*, 31 (5) (2003) 616 (in Japanese).

<sup>30</sup> In a recent Japanese-language work, Professor Takigawa undertakes a comparative approach to three jurisdictions, i.e., the EU, Japan and the US. See



EU and Japanese approaches to competition law and policy; to examine the reasons why there are differences and similarities between them; and to explore how the future enforcement of EU competition law and of the Japanese Antimonopoly Act could be developed in a harmonious way.

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Toshiaki Takigawa, *Competition Laws and Policies in Japan, the US and the EU* (4th edn, Seirin Shoin, 2010). Another notable comparative study was conducted by Haley, who focused on Japan and Germany. See John O. Haley, *Antitrust in Germany and Japan: The First Fifty Years, 1947–1998* (University of Washington Press, 2001). The present book is the only one thus far in English, to our knowledge, presenting, from a legal perspective, detailed comparisons between Japan and the EU.