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## Slowly moving forward in the choppy waters of the negotiations for a WTO agreement addressing fisheries subsidies

Over the past three months, a number of WTO Members have submitted proposals within the Negotiating Group on Rules (hereinafter, the Group) pertaining to fisheries subsidies. Nonetheless, progress remains painstakingly slow and sources indicate that some countries continue to essentially frustrate any progress in the negotiations, highlighting the inability and perhaps inadequacy of the WTO to play a meaningful role in addressing some of the key issues that plague the fisheries sector, if compared to the progress and greater effectiveness of other national, regional and multilateral initiatives.

Within the context of the WTO, efforts to address fisheries subsidies began back in 2001, when Ministers agreed in the Doha Ministerial Declaration to "*clarify and improve WTO rules that apply to fisheries subsidies*". In 2005, the Hong Kong Ministerial Declaration included, in provision 9 of its Annex D, language recognising the "*broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing*". Provision 9 also stated that the *"[a]ppropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns*". Provision 10 of Annex D went on to "*direct the Group to intensify and accelerate the negotiating process in all areas of its mandate, on the basis of detailed textual proposals*" and complete the process as soon as possible. Provision 11 shows that the expected timeline in 2005 was for consolidated texts (which were to serve as the basis for the final stage of negotiation) to be prepared "*early enough to assure a timely outcome within the context of the 2006 end date for the Doha Development Agenda*".

New releases by the WTO and statements published by WTO Members indicate that a core aim of the negotiations is to reach an agreement that moves countries towards meeting the United Nations' Sustainable Development Goal (hereinafter, SDG) 14.6. SDG 14.6 states the following: "*by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective*

*special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation*". Recently, at the UN Conference to Support the Implementation of Sustainable Development Goal 14 of the 2030 Agenda in New York on 5-9 June 2017, the attending Heads of State and Government and high-level representatives affirmed their strong commitment to conserve and sustainably use our oceans, seas and marine resources for purposes of sustainable development. Indeed, in addition to this SDG, the UN has been active in its fight against illegal, unreported and unregulated (hereinafter, IUU) fishing. Recently, in April 2017, a set of draft '*Voluntary Guidelines on Catch Documentation Schemes*' was unanimously adopted during a technical consultation meeting within the UN Food and Agriculture Organisation (FAO) and, most notably, after its adoption in 2009, the UN Port State Measures Agreement, which builds on previous global instruments and adds the first set of binding minimum standards specifically intended to combat IUU fishing, entered into force in 2016.

Within the WTO, discussions appear to be progressing at too slow a pace. Since April 2017, while certain negotiating documents have been submitted to the Group by China, New Zealand, Pakistan, a Latin American group (*i.e.*, Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay), the EU, Indonesia, the African, Caribbean and Pacific (ACP) countries group, as well as Norway, these submissions have reportedly been viewed, in some cases, as actually slowing progress, and perhaps clouding efforts to directly address the goals of the negotiations. One proposal on trade remedies, for example, connected a multilateral agreement on fishery subsidies to separate efforts to reform the WTO rules on trade remedies. While not expressly linking the two areas, the proposal states that the two issues should both be considered under the architecture of the Group, a position with which some other members reportedly disagree. On the other hand, major exporters of fisheries products, such as Indonesia, have played a major role in ensuring that the goals of the Group are reached. For example, the communication dated 5 June 2017 and titled "*Proposed Disciplines on Prohibitions and Special and Differential Treatment for Fisheries Subsidies*" acknowledges that Indonesia is determined to revitalise the ocean as an economic driver through fisheries policy reform, and that an initial step is to eradicate IUU fishing through the use of deterrent measures. In this regard, enforcement is a key issue that should be covered in any agreement attempting to address the problem of IUU fishing, as well as fisheries subsidies. However, enforcement should not just come through national measures implemented by countries that produce and export fisheries products.

A modern and effective approach to ensuring sustainable fishing practices should require importing countries to treat all imported fisheries products on the basis of the same IUU standards and requirements. Sadly, that appears not to be the case with some '*offending countries*' products' even still being accorded preferential market access (under bilateral or GSP schemes) for products not complying with IUU rules. Trade is a powerful engine of compliance and trade provisions addressing this issue (multilatelly, plurilaterally or bilaterally) should '*commercialise*' enforcement, for instance by providing trade preferences only to countries that adhere to IUU obligations and not according them or withdrawing them in cases of breach. A discriminatory or asymmetrical application of the IUU rules to the importation of fisheries products is not only unfair and arguably trade discriminatory, but also distortive of the conditions of competition among exporting countries and traders, as well as counterproductive in the global fight to preserve the sustainability of the world's seas and oceans.

The latest WTO proposals in 2017 indicate that Members of the Group aim for an agreement to be reached by the 11th Ministerial Conference, which is being held in Buenos Aires, Argentina, on 10-13 December 2017. The Group is currently holding informal open-ended meetings (scheduled from 13-18 July 2017), with no other meetings currently scheduled before the 11th Ministerial Conference. Therefore, interested parties must pursue dialogues

directly with relevant government officials, so that the remaining issues may be addressed outside the context of scheduled meetings in Geneva. Although negotiations have long passed the deadlines of the initially-agreed timeframe under Provision 11 of Annex D of the Hong Kong Ministerial Declaration, the efforts to finalise a text to address the remaining issues must be genuine, and a push should be made to ensure that an effective, modern and fair agreement is adopted in December. The WTO owes it to the sustainability of the fisheries sector worldwide and to the planet itself.

## The EU and Japan reach an '*agreement in principle*' on their Free Trade Agreement

On 6 July 2017, the EU and Japan announced that they had reached an '*agreement in principle*' on the main elements of the Free Trade Agreement (hereinafter, FTA) under consideration since 2011 and under negotiation since 2013. This is the breakthrough that both parties had been anticipating for a while. Still, negotiations are not over, as many technical issues remain unresolved and no legal text has been published yet. However, a number of important commitments have now been announced.

The EU and Japan officially launched their FTA negotiations on 25 March 2013 (see *Trade Perspectives*, Issue No. 11 of 31 May 2013). For a considerable period of time, negotiations proceeded without significant progress. In 2016, the outcome of the various negotiation rounds demonstrated slow, but steady, progress, with various remaining obstacles, especially in the areas of agriculture, market access and non-tariff measures (hereinafter, NTMs) (see *Trade Perspectives*, Issue Number No. 10 of 20 May 2016). In October 2016, a report published by the European Commission (hereinafter, Commission) had indicated better progress in the negotiations, noting, *inter alia,* that work on various chapters was nearly finalised. On 17 February 2017, the Commission and the Government of Japan announced their "*commitment for an earlier conclusion*" of the bilateral trade negotiations by the end of 2017 (see *Trade Perspectives*, Issue No. 4 of 24 February 2017) and negotiations continued to progress (see *Trade Perspectives*, Issue No. 9 of 5 May 2017), in part incentivised by the withdrawal of the US from the Trans-Pacific Partnership (hereinafter, TPP). The EU already notes that this will be the most important bilateral trade agreement ever concluded by the EU. Prior to these negotiations, an FTA between the EU and Japan had for long been deemed unrealistic, mostly due to the large number of non-tariff barriers (NTBs) or NTMs that had to be addressed during the negotiations.

In order to be able to announce a political breakthrough, the EU and Japan have agreed on an '*agreement in principle*' on the main elements of the FTA. However, as the EU underlines in its summary document, the described results are not yet final and controversial areas remain. Still, negotiations on most chapters appear to be mostly finalised. A key chapter of remaining concern is the investment chapter and, in particular, the issue of investor-state dispute settlement (ISDS). Notably, Japan maintains reservations over the proposed EU's investment court system (hereinafter, ICS). The EU has managed to include the ICS in its most recent FTAs and does not intend to return to the previous, less institutionalised mechanism. However, after the Court of Justice of the EU opined, in Opinion 2/15 relating to the EU-Singapore FTA, that the EU does not have exclusive competence in the field of investment dispute settlement, the EU could also opt to exclude this area from the main agreement and find a separate solution with the EU Member States and Japan. Another outstanding issue concerns the modalities for the future regulatory cooperation, which will aim at promoting voluntary cooperation, while safeguarding each party's right to regulate. Furthermore, technical details remain under discussion in a number of other areas.

A fairly sensitive issue throughout the negotiations has been the area of agricultural and processed agricultural goods. Japan is an important export market for EU agricultural and processed agricultural goods and trade is expected to increase significantly as a consequence to the FTA. Apart from high tariffs, there were (and remain) also a high number of NTMs that hinder market access. Key affected products include pork meat, alcoholic beverages, such as wine and beer, and dairy products. Pork, in particular, is the EU's most important agricultural export product to Japan and is currently subject to a complex import scheme, including an *ad valorem* duty and a specific duty. While the scheme will be maintained, under the FTA tariffs will be significantly lowered, with the *ad valorem* duty for high value cuts reportedly disappearing and the specific duty for low value cuts being reduced from Yen 482 (EUR 3,82)/kg to Yen 50 (EUR 0,50)/kg. Wine, which is the second most important agricultural sector for EU exports to Japan, and currently subject to a 15% duty, will be liberalised by the entry into force of the FTA. Also, the issue of tariff classification of beer originating in the EU appears to have been resolved. According to the EU summary, beer originating in the EU can, from 2018, be exported as beer and not anymore as '*alcoholic soft drinks*' and will, therefore, be subject to the same taxation on the Japanese market as Japanese '*like*' products. Japan is also a particularly important and growing destination for processed dairy products, such as cheese. Tariffs of up to nearly 30% on hard cheeses will be reportedly phased out over a long period of 15 years, while fresh and processed cheese will be covered by a tariff-rate quota (TRQ). Finally, on the long-controversial issue of food additives, Japan has reportedly already implemented a number of measures to improve transparency and the approval of a number of additives is expected shortly.

A key sector of negotiations has been the automobile sector, in terms of tariffs, but also in terms of NTMs. In an important negotiating success for Japan, EU tariff lines on automobiles (currently at 10%) stand to be fully liberalised within seven years of the entry into force of the FTA. As for car parts, that tariff reduction will take place either at entry into force of the FTA or at varying instances within seven years of the entry into force. Thereby, Japanese automobile manufacturers are hoping to regain competitiveness in the EU market, in particular vis-à-vis competitors from South Korea, which already concluded an FTA with the EU in 2010. In its summary document on the '*agreement in principle*', the EU notes that a general disparity in terms of liberalisation (*i.e.*, at the end of the phase-out periods Japan will still have more tariffs in place than the EU) would be justified by Japan's commitments to eliminate non-tariff barriers to EU exports. This includes, most notably, virtually a complete alignment towards the international standards in the automobile sector. This alignment is detailed in a sector-specific '*Auto annex*' (hereinafter, Annex) and has reportedly solved all issues notified by the EU automobile industry in the sub-sectors of passenger cars and commercial vehicles, such as buses and trucks of all sizes, as well as motorcycles. The Annex covers an important part of the United Nations Economic Commission for Europe (hereinafter, UNECE) Regulations, which, despite its denomination, includes 56 member States in Europe, North America and Asia and which sets out norms, standards and conventions to facilitate international cooperation within and outside Europe.

It is important to note that, while the FTA has not yet entered into force, and likely will not do so until early 2019, implementation of the commitments is already well under way in Japan, with a view to have most issues resolved by the entry into force. Thus, even if final negotiations take longer than expected (or for some reason are never concluded), domestic changes will already be in place, benefitting EU car manufacturers and all other car exporters to Japan. Finally, the Annex includes an important safeguard clause, which would allow the EU to actually reintroduce tariffs should Japan stop to apply the UNECE Regulations, reintroduce any of the removed NTMs or introduce new NTMs. Most notably, the safeguard clause is supposed to contain a "*quasi automatic*" '*snap-back*' mechanism on tariffs for affected products. Such mechanisms aim at contributing to the compliance with the commitments and at allowing easy reactions to non-compliance without having to have

recourse to lengthy and costly dispute settlement proceedings. Such safeguard clauses and '*snap-back*' provisions will likely find their way into more and more agreements and product-sectors. On a separate note, the FTA will also include a bilateral solution for hydrogen-fuelled cars, until Global Technical Regulations under the UNECE will be in place, which is intended to significantly facilitate market access for EU-manufactured hydrogen fuelled cars in Japan.

Considering the trade volume between the two parties, the future FTA looks poised to significantly affect global trade flows. The EU states that the value of EU exports to Japan could potentially increase by up to EUR 20 billion. The potential effects already appear to have industries in other major trading countries worried. In particular, US companies are concerned, especially after the US Administration's decision to withdraw from the TPP Agreement, which would have included the US and Japan. However, considering that Japan has already been changing a number of procedures to mitigate non-tariff measures, most of those regulatory changes should benefit all trading partners.

In conclusion, while a breakthrough has been achieved, the '*agreement on principle*' does not yet mean the end of the negotiations. As noted, in some chapters, technical details still need to be worked out and a number of chapters were excluded from the '*agreement on principle*'. In addition, once an agreement has been reached on the entire text, the FTA will still need to undergo legal verification and translation into the official EU languages, which is supposed to be completed by mid-2018 and will then be submitted to the EU Member States and the European Parliament for approval. The EU currently aims for an entry into force in early 2019. Therefore, industry, businesses, trade associations and non-governmental organisations should remain actively involved and monitor any further development in the final negotiation rounds, as the trade talks approach their ultimate conclusion. The coming months will provide the last opportunities to shape the outcome of this important trade deal and all interested parties should take advantage of them.

## Agreement on criteria for endocrine disruptors in the field of plant protection products in the EU

On 4 July 2017, the European Commission's (hereinafter, Commission) Standing Committee on Plants, Animals, Food and Feed (SCPAFF), made up of experts from the EU Member States, agreed on the Commission's draft *Regulation amending Annex II to Regulation (EC) No 1107/2009 by setting out scientific criteria for the determination of endocrine disrupting properties* in the area of plant protection products (hereinafter, PPPs). The vote in the SCPAFF (Section Phytopharmaceuticals – PPPs) was preceded by several meetings in which the Commission presented revised versions of its drafts. On 15 June 2016, the Commission had presented two legal acts to specify the criteria to identify endocrine disruptors: a delegated act applicable to the chemical substances falling under *Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products*; and a *Commission Regulation applicable to the chemical substances falling under the Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market*.

Endocrine disruptors are chemicals, which affect the hormone system of animals and humans. They have three cumulative characteristics: a hormonal function, an adverse effect, and a causality between the two. In 2002, the World Health Organisation (hereinafter, WHO) defined the concept of '*endocrine disruptor*' as a substance or mixture that alters function(s) of the endocrine system and consequently causes adverse health effects in an intact organism, or its progeny, or (sub) populations.

Both, *Regulation (EC) No 1107/2009 on PPPs and Regulation (EU) No 528/2012 on biocides,* require that endocrine disruptors be banned. On 16 December 2015, in Case T-521/14, the General Court of the EU backed Sweden, saying that the Commission breached EU law by failing to publish a definition of endocrine disrupters for biocides. The draft voted in the SCPAFF now defines them in the area of PPPs. The Commission decided to proceed with the criteria for the PPPs legislation first, because EU Member States had to approve them. This was done with the aim of ensuring consistency between these two pieces of legislation, which is particularly important because the properties that make a substance an endocrine disruptor do not depend on the use of the substance. It was scheduled that the criteria for endocrine disruptors in the area of biocides should also be adopted by the Commission shortly after the meeting of the SCPAFF on 12 July 2017.

The criteria endorsed on 4 July 2017, concerning substances falling within the PPPs legislation, are based on the WHO definition for endocrine disruptors. They identify known and presumed endocrine disruptors, but contain a number of exceptions. They also specify that the identification of an endocrine disruptor should be carried out by taking into account all relevant scientific evidence including animal, *in-vitro* or *in-silico* studies, and using a weight of evidence-based approach. The Commission intends to adopt the same criteria for biocides.

Initially, France, backed by Sweden and Denmark, reportedly argued for the adoption of a definition "*based on the intrinsic properties of hazard, without taking into account the 'potency'*" of the substance, or the amount required for a substance to generate an effect on the human organism. Based on this definition, it was suggested to establish three broad sets of criteria geared to the level of certainty of the scientific community over their impact on the hormone system: '*verified*', '*presumed*' or '*suspected*'. But these three categories faced opposition by other EU Member States, including Germany, which insisted on the need to consider hazard and exposure jointly, as well as potency, in order to evaluate the actual risk for humans. CEFIC, the EU chemical industry association, reportedly warned that, "*without potency built-in, substances present in everyday food and drinks which are safe for consumption such as caffeine or soybean proteins could be identified as an endocrine disruptor*".

The debate on the possible '*risk-based*' approach versus a '*hazard-based*' approach (without '*potency*') is not new. In June 2016, when the Commission published the proposals relating to the identification of endocrine disruptors in the PPPs and biocides areas, a major point of interest for businesses and third countries was whether the Commission would eliminate the '*hazard-based*' approach to the regulation of endocrine disruptors in favour of a '*risk-based*' approach. At that time, the Commission appeared to choose to maintain its '*hazard-based*' approach, which, if fully implemented, could have major effects on the industry. At various meetings of the WTO Committee on Technical Barriers to Trade (hereinafter, TBT), WTO Members stated that a '*hazard-based*' approach could restrict imports and exports, without actually increasing safety for consumers (see *Trade Perspectives*, Issue No. 12 of 17 June 2016). In fact, under Article 2.2 of the WTO TBT Agreement, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks that non-fulfilment would create. With respect to this risk-based approach mandated under the TBT Agreement, Article 2.2 thereof goes on to state that, *"[i]n assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products*".

21 EU Member States, representing 72.35% of the EU population, voted in favour of the text, with four EU Member States abstaining and three EU Member States voting against. Denmark and Sweden, which voted against the criteria adopted, issued a statement, included in the minutes, in which they stated that the criteria require an unprecedented high

level of evidence to identify endocrine disruptors compared to other problematic substances, such as carcinogenic, mutagenic, and reprotoxic (CMR) substances, and do not properly reflect today's scientific knowledge on endocrine disruptors. The effect of the high level of evidence required is that the ban will not cover substances for which there are substantial data pointing towards endocrine disrupting properties, but not yet reaching the high level of required evidence.

The Commission considers the adoption of these criteria as a great success, advancing in the direction of the first regulatory system in the world with legally binding criteria to define endocrine disruptors. Once implemented, the text would ensure that any active substance used in PPPs, which is identified as an endocrine disruptor for people or animals, can be assessed and withdrawn from the market. However, the European Crop Protection Association (ECPA), representing manufacturers of PPPs, called on EU legislators to reject the criteria, stating that they "*do not allow authorities to clearly separate those substances that have the real potential to cause harm from those that do not*". The ECPA went on to say that "*by the Commission's own admission, the criteria provide no additional protection for health and the environment and only serve to have a disproportionate and discriminatory impact on European farmers who will suffer from yet another arbitrary reduction in the number of tools available to them*". In the absence of the derogation, the ECPA hopes that the Council and European Parliament will reject the Commission's proposal. Environmentalists, NGOs and part of the scientific community consider that the definition requires a too high level of evidence to identify endocrine disruptors and offers too far-reaching exemptions. In essence, it is argued that the definition will only cover '*proven*' endocrine disruptors and not '*presumed*' or '*suspected*' ones, undermining the precautionary principle.

What will the criteria mean for the approval and use of plant protection products in the EU? EU legislation provides that active substances used in PPPs are only approved for a limited period of time, and that these approvals are routinely reviewed. EU legislation for plant protection products also provides that active substances, which are endocrine disruptors, shall not be approved, unless there is negligible exposure, in which case they may be approved under stricter conditions. As regards the criteria for the environment, the specificity of some active substances, which have endocrine modalities that affect target arthropods (*e.g.*, insects), but that do not affect vertebrates including humans, has been acknowledged. These substances, of particular interest for integrated pest management, will be subjected to a specific risk assessment and will only be only approved if there are no unacceptable effects on non-target organisms.

The Commission noted that the adopted criteria will provide a stepping stone for further actions to protect health and the environment by enabling it to start working on a new strategy to minimise exposure of EU citizens to endocrine disruptors, beyond PPPs and biocides. The strategy will aim at covering, for example, toys, cosmetics and food packaging. In parallel, the Commission announced that a substantive new research on endocrine disruptors, with an important budget of approximately EUR 50 million, would be allocated in 2018 to around 10 projects in the Horizon 2020 work programme. As for pesticides and biocides, the Commission announced that it would not delay any action and would already apply the criteria to substances for which assessment or re-evaluation are undergoing or for which confirmatory data concerning endocrine properties have been requested.

The European Parliament and the Council of the EU now have three months to examine the agreed text. The Commission has noted that it counts on the support of the European Parliament and the Council, involved in the decision making process, for a smooth adoption and entry into force of the criteria. The text will enter into force 20 days after its publication in the Official Journal and be applicable six months after this. Interested parties should continue

monitoring developments and take a proactive stand in the ongoing development of legislation on the criteria for defining endocrine disruptors (also beyond PPPs and biocides) and guidance documents for the approval of PPPs and biocides.

## Recently Adopted EU Legislation

### Market Access

- *Commission Implementing Regulation (EU) 2017/1238 of 7 July 2017 making imports of certain corrosion resistant steels originating in the People's Republic of China subject to registration*

### Trade Remedies

- *Commission Implementing Regulation (EU) 2017/1187 of 3 July 2017 imposing a definitive countervailing duty on imports of certain coated fine paper originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council*

### Customs Law

- *Commission Implementing Regulation (EU) 2017/1264 of 12 July 2017 establishing the allocation coefficient to be applied to the quantities covered by the applications for import licences lodged from 30 June to 7 July 2017 in the context of the tariff quota for maize opened by Regulation (EC) No 969/2006*

- *Commission Implementing Regulation (EU) 2017/1205 of 5 July 2017 laying down the allocation coefficient to be applied to the quantities covered by the applications for import licences lodged from 23 June 2017 to 30 June 2017 under the tariff quotas opened by Implementing Regulation (EU) 2015/2081 for certain cereals originating in Ukraine*

### Food and Agricultural Law

- *Commission Regulation (EU) 2017/1237 of 7 July 2017 amending Regulation (EC) No 1881/2006 as regards a maximum level of hydrocyanic acid in unprocessed whole, ground, milled, cracked, chopped apricot kernels placed on the market for the final consumer*

- *Commission Regulation (EU) 2017/1202 of 5 July 2017 refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health*

- *Commission Regulation (EU) 2017/1201 of 5 July 2017 refusing to authorise a health claim made on foods, other than those referring to the reduction of disease risk and to children's development and health*

- *Commission Regulation (EU) 2017/1200 of 5 July 2017 refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health*

## Other

- *Commission Regulation (EU) 2017/1262 of 12 July 2017 amending Regulation (EU) No 142/2011 as regards the use of manure of farmed animals as a fuel in combustion plants*

- *Commission Regulation (EU) 2017/1261 of 12 July 2017 amending Regulation (EU) No 142/2011 as regards an alternative method for processing certain rendered fats*

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