

Research on the impacts of the EU-Mercosur trade negotiations

Analysis of draft texts, especially the chapters on goods, SPS, TBT and government procurement

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Overview of documents

Consolidated texts

TITLE: EU-MERCOSUR: Consolidated texts of the trade part of the EU-Mercosur Association Agreement

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- *N.B.: Contains 15 chapters resulting from the 28th round of negotiations (3-7 July 2017)*
- *Chapters analyzed: Trade in Goods, Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Government Procurement, Trade and Sustainable Development*
- *This leaked document reflects both EU and Mercosur proposals.*

EU proposals published on Commission website so far

- EU proposal on trade and sustainable development (Articles 14-18), 6 October 2017
- EU proposal on transparency, 10 April 2017
- EU proposal on trade and sustainable development (Articles 1-13), 10 April 2017
- EU proposal on Agriculture (trade in goods), 10 April 2017
- EU proposal on technical barriers to trade in the automotive sector, 10 April 2017
- EU proposal on access to energy and raw materials (trade in goods), 10 April 2017
- EU proposal Access to energy and raw materials (services and establishment), 10 April 2017
- EU proposal on Small and Medium Enterprises in the trade pillar of the EU-Mercosur Association Agreement, 23 September 2016
- EU proposal on State-owned enterprises, enterprises granted special rights or privileges, and designated monopolies, 23 September 2016
- EU proposal on Intellectual Property Rights, 23 September 2016

N.B. highlighted proposals partly overlap with the consolidated texts.

Executive Summary

- The EU's tariff rate quotas offering increased market access to Mercosur exporters have been the main bone of contention throughout the EU-Mercosur negotiations. However, the highly mediatized quota conflict obscures the fact that Mercosur already exports huge amounts of agricultural commodities to the EU. In important product groups such as soybeans, beef and poultry Mercosur exporters have become the EU's dominant suppliers.
- Although the precautionary principle is legally enshrined in EU law, the consolidated text of the Mercosur agreement does not provide adequate provisions protecting its application. This of particular concern, first, due to the huge amount of Mercosur agricultural exports destined for the EU market, and second, because of the fact that some of the main export products are controversial, such as genetically modified soybeans.
- The proposals found in the draft SPS chapter of the consolidated texts may compromise regulations aimed at improving private standards (e.g. GlobalGAP, Roundtable on Responsible Soy, Bonsucro) if these have an impact on trade.
- The draft consolidated text of the Mercosur agreement contains only very weak language on cases where parties apply measures deviating from international standards. This could affect, inter alia, approval processes of herbicides such as glyphosate or deviations from recommended maximum residue levels (MRLs) for pesticides.
- The JBS scandal revealed severe and systematic shortcomings of the animal health controls in Brazil. Despite the alarming findings of the Commission's DG SANTE, the EU proposes provisions in the Mercosur agreement aimed at fast-tracking, rather than improving, the bilateral system of animal health controls.
- The draft chapter on Technical Barriers to Trade (TBT) may affect important health, environment and consumer protection measures, such as labelling schemes providing information on nutritional values, food additives, pesticides or GMOs. In particular, the TBT rules may frustrate attempts to introduce regulations requiring labelling of products obtained from animals fed with GMOs.

- In addition, the TBT provisions on regulatory cooperation could stimulate processes triggering a downward spiral weakening environmental and health regulations. This concern might also be nurtured by specific clauses enabling business lobbyists to participate in official decision making on technical regulations.
- The draft chapter on government procurement obliges governments purchasing goods and services to competitive transatlantic tendering above certain thresholds. Contrary to Mercosur proposals, the EU wants to cover all levels of government, including entities at the regional and municipal level like local authorities or public schools.
- Due to its weak provisions on environmental and health protections, the procurement chapter could frustrate programs acquiring locally produced food aimed at supporting family farms, organic agriculture or healthy low-meat diets.

1 Trade in Goods

The draft title on Trade in Goods contains three chapters dealing with tariffs, non-tariff measures and common provisions such as general exceptions. The chapter on tariffs foresees the reduction and elimination of customs duties. Schedules annexed to the chapter will outline the stages of tariff elimination for individual products, the implementation of tariff rate quotas, and the small set of sensitive products potentially exempt from tariff elimination.¹

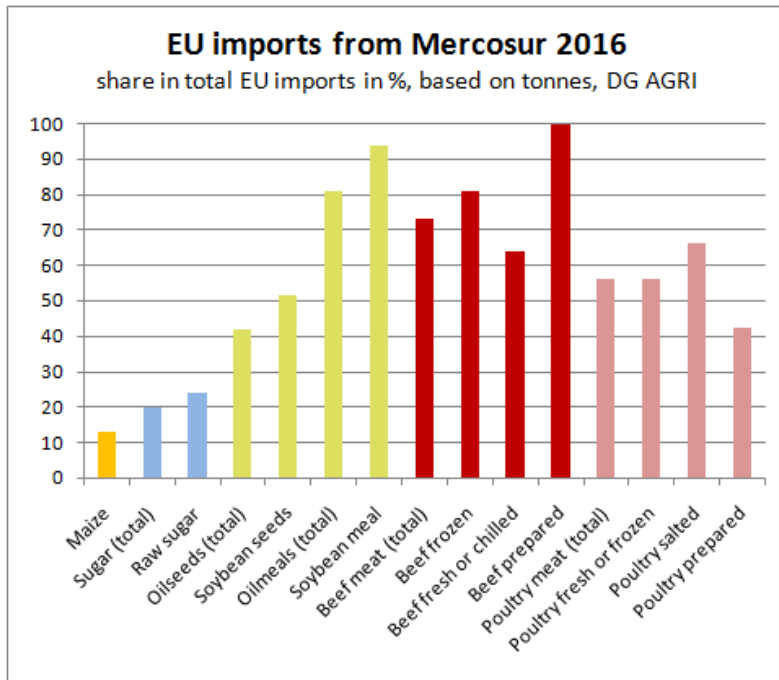
The EU's tariff rate quotas offering increased market access to Mercosur exporters of, inter alia, beef, poultry, ethanol and sugar have been the main bone of contention throughout the EU-Mercosur negotiations. However, the highly mediatized quota conflict obscures the fact that Mercosur already exports huge amounts of agricultural commodities to the EU.

In important product groups Mercosur exporters have become the EU's dominant suppliers. For instance, in 2016, Mercosur's share in total EU imports of oilseeds amounted to 42 percent, of oilmeals 80 percent, of beef meat 73 percent and poultry meat 56 percent. Notably, 94 percent of EU soybean meal imports – widely used as protein-rich feedstuff in EU livestock farms – originate in Mercosur, mainly Argentina and Brazil (see chart).²

¹ See: Consolidated texts, Chapter on Goods, Title X: Trade in Goods

² European Commission, Directorate-General for Agriculture and Rural Development, EU-28 – Import from Mercosur, Statistical Regime: 4, 1 March 2017:

https://ec.europa.eu/agriculture/sites/agriculture/files/statistics/trade/2016/eu28-qsp/trade_qty_imp_mesu.pdf



Source: European Commission, Directorate-General for Agriculture and Rural Development, EU-28 – Import from Mercosur, Statistical Regime: 4, 1 March 2017

Soya plantations, large parts of which using genetically-modified seeds, feature among the main drivers of land-use change and deforestation threatening subtropical and tropical forests in Argentina, Brazil and Paraguay. But soybeans and -meals as well as other oilseeds already enjoy duty-free access to the EU market since the 1960ies.³ This is, however, not the case for animal products such as beef and poultry facing customs duties due to be reduced by offering larger import quotas at lower tariff rates. These quotas may also fuel the expansion of soya plantations in Mercosur by enabling additional EU imports of meat derived from poultry, pigs and cattle fed with South American soymeal.

³ During the GATT's Dillon Round in 1962, the EU bowed to US pressure and dropped its import tariffs on oilseeds.

2 Precautionary Principle

Although the precautionary principle is legally enshrined in EU law (Chapter 2.1), the consolidated text of the Mercosur agreement does not provide adequate provisions protecting its application (Chapter 2.2). This is of particular concern due to the huge amount of Mercosur agricultural exports destined for the EU market.

2.1 Background: The precautionary principle and the WTO

Article 191 of the *Treaty on the Functioning of the European Union* (TFEU) stipulates that the EU's policy on the environment shall contribute to "preserving, protecting and improving the quality of the environment", "protecting human health", and "in particular combating climate change". Furthermore, the EU's environmental policy "shall be based on the precautionary principle".⁴ The precautionary principle enables the EU and its Member States to take regulatory measures against a risk, even if the risk has not yet been scientifically proven or there is scientific uncertainty about the risk in question.⁵

The EU already lost two dispute settlement cases in the World Trade Organization (WTO), both filed by the United States, involving the precautionary principle as a justification for its regulatory measures. The WTO's dispute settlement body as well as the appellate body found that the EU's import ban on beef treated with growth hormones violated provisions of the WTO agreement on *Sanitary and Phytosanitary Measures* (SPS).⁶ The second lost case concerns the EU's 1999-2003 de facto moratorium on the approval of genetically modified organisms (GMOs). Again, the WTO panel found that the EU had acted inconsistently with certain obligations under the SPS agreement.⁷ In both cases, the EU's attempt to rely on the precautionary principle failed. In the GMO case, all four Mercosur countries (Argentina, Brazil, Paraguay and Uruguay) joined the complaint as third parties.⁸

⁴ <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xx-environment-climate-change/479-article-191.html>

⁵ See: Peter-Tobias Stoll et al.: CETA, TTIP and the EU precautionary principle, Commissioned by foodwatch, June 2016

⁶ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm

⁷ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm

⁸ Ibid.

The WTO's SPS agreement deals with sanitary and phytosanitary measures taken to protect "human, animal or plant life or health", such as food safety measures, health inspections, risk assessments and approval procedures for GMOs, pesticides, antibiotics and food additives.⁹ It only permits measures which

- are "based on scientific principles"¹⁰ and are "not maintained without sufficient scientific evidence",
- are deemed "necessary" to fulfill their claimed objective, and
- do not constitute "a disguised restriction on international trade".

In cases where scientific evidence is insufficient, SPS measures may only be adopted "provisionally", according to Article 5.7. Within a "reasonable period of time", WTO members taking such measures must provide additional information enabling "a more objective assessment of risk".¹¹ These are very onerous requirements, since it can take many years to obtain sufficient scientific evidence proving a certain risk, and this evidence may still be contested as long as it does not reflect a scientific consensus.

Proponents of the scientific approach enshrined in the SPS agreement often try to portray the precautionary principle as "unscientific". However, this is not the case, since the application of the precautionary principle is a multi-stage process involving a scientific evaluation of available evidence and subsequent assessments of the degree of scientific uncertainty. What is termed the "science based approach" actually means that certain substances may only be prohibited after negative effects have occurred and authorities managed to provide sufficient evidence linking the damage done with the suspected substance. As a consequence, the burden of proof rests solely with governments and not with businesses selling potentially harmful products. This approach has therefore often been called "risk based" rather than "science based".¹²

⁹ https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

¹⁰ It should be noted here that the SPS agreement does not define "scientific principles" (see SPS, Annex A: https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm#fnt4), which may therefore be interpreted in very different ways. That is an important detail since critics of the precautionary principle often try to dismiss this approach as "unscientific". However, this is far from the truth because applying the precautionary principle involves several stages, starting with a scientific evaluation of available evidence on a particular risk. At each of the following stages the degree of scientific uncertainty is being identified.

¹¹ https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

¹² See for instance: <http://www.greenpeace.org/international/en/press/releases/2016/Greenpeace-Netherlands-releases-TTIP-documents/>

2.2 The precautionary principle in the Mercosur agreement

Given the EU's difficulties to defend SPS measures based on the precautionary principle in the WTO, one would expect the EU to insert stronger language facilitating the adoption of precautionary measures in its bilateral trade agreements. But this is unfortunately not the case. Quite to the contrary. The Mercosur agreement's draft SPS chapter exhibits a complete lack of any reference to the precautionary principle.¹³ Even attempts to provide more leeway for regulatory bodies considering precautionary measures have been avoided. To a large extent, the chapter boils down to a simple restatement of the highly restrictive SPS agreement.

In the entire consolidated texts, the EU only introduced one single reference to the precautionary principle. Tellingly, this mention appears in the rather weak chapter on Trade and Sustainable Development which is excluded from the agreement's state-state dispute settlement mechanism.

Yet, the precautionary principle has not only been relegated to a non-sanctionable chapter but also been phrased in a very restrictive fashion. According to the EU proposal, when implementing environmental or labour protections potentially affecting trade, each Party shall take into account available scientific and technical information, [...] "including the precautionary principle". The reference goes on as follows: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."¹⁴

While generally permitting precautionary measures taken under scientific uncertainty about a specific risk, the particular wording of this proposal still reveals several limitations:

- Precautionary measures may only be taken in cases of threats entailing "serious or irreversible damage". Such phrases typically open ample room for interpretation on what might or might not constitute "serious" or "irreversible" damage. For instance, it could be questioned whether more gradual or creeping deteriorations of the environment qualify as serious damage.

¹³ Consolidated texts, Chapter on Sanitary and Phytosanitary Measures

¹⁴ Consolidated texts, Chapter Trade and Sustainable Development, Article 10 – Scientific and Technical Information. It should be noted that this sentence stems from Principle 15 of the 1992 Rio Declaration on Environment and Development. However, the important first sentence is missing: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities". See: Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex I: Rio Declaration on Environment and Development:
<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

- Precautionary action has been restricted to “cost-effective measures”. This phrase as well opens scope for interpretation on what might be deemed a “cost-effective” intervention. The clause is also somewhat contradictory, since the uncertainty about a particular risk renders attempts to calculate the supposed “cost-effectiveness” of preventive measures largely futile. As long as the risk is uncertain, judgements on the effectiveness or proportionality of regulatory costs are largely hypothetical, if not impossible.
- The clause only refers to precautionary measures taken to prevent “environmental degradation”. However, the EU’s concept of the precautionary principle is far broader and not limited to environmental measures. It has been applied to many more policy areas, including health and consumer protection. The clause therefore neither reflects the legal foundation of the precautionary principle as enshrined in the Lisbon treaty nor the political practice in the EU. The European Commission itself based numerous regulations on the precautionary principle, including rules on the approval of drugs or food additives.

3 Sanitary and Phytosanitary Measures - SPS

The proposals found in the draft SPS chapter of the consolidated texts may compromise regulations aimed at improving private standards (e.g. GlobalGAP for agricultural and fishery products, Bonsucro for sugarcane, Roundtable on Responsible Soy) if these have an impact on trade. Some of these standards have been criticized by Civil Society Organizations as being weak and insufficient. Yet, the draft SPS chapter could frustrate their improvement (Chapter 3.2).

The draft SPS chapter contains only very weak language on cases where parties apply measures deviating from international standards. This could affect, inter alia, approval processes of herbicides such as glyphosate or deviations from recommended maximum residue levels (MRLs) for pesticides (Chapter 3.3).

The JBS scandal revealed severe and systematic shortcomings of the animal health controls in Brazil. Despite the alarming findings of the Commission's DG SANTE, the EU proposes provisions in the Mercosur agreement aimed at fast-tracking, rather than improving, the bilateral system of animal health controls (Chapter 3.4).

3.1 Importing the SPS agreement

The chapter on Sanitary and Phytosanitary Measures (SPS) contained in the consolidated texts not only lacks a reference to the precautionary principle but explicitly restates both parties' commitments under the WTO's SPS agreement. According to Article 3, the "Parties reaffirm their rights and obligations under the SPS Agreement". As this sentence comes without brackets, it belongs to those provisions reflecting a consensus between both parties. In other words: the EU reaffirms obligations of an agreement under whose rules it has already lost two WTO cases.

Mercosur negotiators proposed an even stricter amendment to Article 3 making the WTO's SPS treaty "an integral part of this Agreement, except otherwise provided in this agreement".

They also propose language stressing “the importance of implementing Decisions adopted in the WTO/SPS Committee”.¹⁵

3.2 Controversy over private standards

Another Mercosur proposal to Article 3 relates to private standards and demands that the parties “undertake to exert every precaution to avoid that the commitments under this Chapter are undermined by the application of private standards [...] generated by no-governmental organizations”. This clause echoes a lasting controversy in the WTO SPS Committee on the role of private standards such as GlobalGAP, a certification scheme developed by European supermarket chains defining binding rules on “good agricultural practices” for their suppliers.

Some WTO members like the EU hold that setting standards is a legitimate private sector activity with which governments should not interfere. Other members, particularly developing countries, insist that the SPS agreement makes governments responsible for standards set by their private sectors.¹⁶ This view stems from provisions in Article 13 obliging WTO members to take “reasonable measures as may be available to them to ensure that non-governmental entities within their territories [...] comply with the relevant provisions of this Agreement”. Article 13 also stipulates that WTO members shall refrain from measures requiring or encouraging “non-governmental entities [...] to act in a manner inconsistent with the provisions of this Agreement”.¹⁷

Latin American countries wanted the SPS Committee to permanently monitor private standards and to identify whether these constitute disguised restrictions to trade.¹⁸ Their rationale is to “export” the restrictive WTO law into the sphere of private standardization initiatives such as GlobalGAP, the Roundtable on Responsible Soy (RTRS), Bonsucro (formerly Better Sugarcane Initiative), Roundtable on Sustainable Palmoil (RSPO), and others. These initiatives, which have often been criticized for their comparatively weak

¹⁵ Consolidated texts, Chapter on Sanitary and Phytosanitary Measures, Article 3

¹⁶ Christiane Wolff: Private Standards and the WTO Committee on Sanitary and Phytosanitary Measures, Conf. OIE 2008, 87-93

¹⁷ https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

¹⁸ Makane Moïse Mbengue: Private standards and WTO law, BIORES, Volume 5, Number 1, 6 April 2011: <https://www.ictsd.org/bridges-news/biores/news/private-standards-and-wto-law>

standards, could become even weaker when they incorporate the restrictive requirements of the SPS agreement.¹⁹

However, in the draft consolidated text of the Mercosur agreement, the EU included a footnote asserting that “private standards belong to the private scope” and that “neither the Commission nor the authorities of the EU Member States can intervene in this regard”. The issue should therefore “be excluded from the Agreement”.²⁰

Yet, this assertion overtly contradicts the EU approach taken with regards to the certification of biofuels under the renewable energy directive (RED). In order to count towards national renewable energy targets of EU Members States, private certification schemes must comply with sustainability criteria set by the European Union. This requirement compelled private standardisation initiatives such as Bonsucro, RTRS and RSPO to improve their own standards and develop specific certification schemes geared towards complying with the EU’s sustainability criteria.²¹

By reaffirming its SPS commitments, which indeed oblige WTO members to refrain from measures encouraging private actors to violate the SPS agreement, the EU could endanger own initiatives aimed at strengthening private standards if these have an impact on trade. Rather than simply restating SPS obligations, the Mercosur agreement should instead contain safeguards enabling regulatory measures aimed at improving private standards which proved to be inadequate to effectively protect the environment. By denying the possibility of influencing private standardisation schemes – as happened in the Mercosur negotiations – the EU neglects its own environmental and social commitments enshrined in EU law.

3.3 Deviations from international standards and the glyphosate row

The draft consolidated text of the Mercosur agreement contains only very weak language on cases where parties apply measures deviating from international standards. There are three main international organisations recognized under the SPS agreement, whose standards and

¹⁹ For a critical assessment of GlobalGAP see, for instance: <http://www.greenpeace.org/international/en/campaigns/oceans/seafood/changing-your-business/what-about-certification/GLOBALGAP/>. On the RSPO: <http://www.greenpeace.org/international/en/publications/Campaign-reports/Forests-Reports/Certifying-Destruction/>

²⁰ Consolidated texts, Chapter on Sanitary and Phytosanitary Measures, Article 3, Footnote 3, Negotiator note

²¹ See the list of voluntary schemes currently recognised under the RED: <https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/voluntary-schemes>

recommendations WTO members must take account: the *Codex Alimentarius Commission* on food standards, the *International Office of Epizootics* (OIE) on animal health, and the Secretariat of the *International Plant Protection Convention* (IPPC) on plant health.²²

According to the Mercosur agreement's draft SPS chapter, in case of conflicts on particular SPS measures taken by the importing party, the exporting party may request consultations. The failure of such consultations could trigger a dispute under the agreement's state-state dispute settlement mechanism. In Article 12 of the SPS chapter, the EU included the following proposal: "when the importing Party considers that its measure differs from the international standards, guidelines or recommendations listed in paragraph (a), or there are no international standards, guidelines or recommendations, the importing Party shall provide the scientific justification for its measure".

It is very disturbing that the EU refers to a "scientific justification" without any reference to the precautionary principle. Once again, it limits itself to repeating the onerous requirements of the SPS agreement instead of inserting provisions expanding its policy space. Applying measures whose protections are higher than those of international standards is an issue repeatedly criticized by exporting nations in the WTO's SPS committee.

For instance, the EU is under constant attack over the highly contested renewal of the authorisation of glyphosate. In a March 2017 session, the U.S., Argentina, Brazil and others raised concerns, the EU would deviate from Codex Alimentarius standards on glyphosate – a concern repeated in a November 2017 SPS meeting.²³ These countries fear the EU could no longer comply with the maximum residue levels (MRLs) for glyphosate defined by the Codex Alimentarius Commission.

According to a WTO report on the March 2017 session of the SPS committee, "Argentina reiterated concerns that some Members were considering the possibility of rescinding the use of glyphosate and thereby no longer apply the Codex MRL. [...] Argentina recalled the obligations of Article 3 of the SPS Agreement, highlighting that Members had the obligation to base their food safety measures on Codex standards or on scientific evidence. No scientific

²² See SPS agreement, Annex A: Definitions: https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

²³ Sarantis Michalopoulos: Market disruption fears grow as glyphosate ban looms, Euractiv, 15 November 2017: <https://www.euractiv.com/section/agriculture-food/news/market-disruption-fears-grow-as-glyphosate-ban-looms/>

evidence had been provided by the European Union to justify deviation from the Codex standard.”²⁴

However, in the past decades, the Codex Alimentarius Commission has raised the MRL for glyphosate across several crops. In 1997, it agreed an MRL for glyphosate in soybeans of 20 milligram per kilogram. In 1999, the EU followed this decision and raised its MRL for glyphosate in soybeans drastically from 0.1 mg/kg to 20 mg/kg.²⁵ Many observers suspect that these decisions were largely taken to accommodate the interests of the pesticides industry keen to sell more glyphosate to farmers. The German government admitted that “changes to maximum glyphosate residue levels are usually based on changes in agricultural practice”.²⁶

However, trade concerns may also guide decisions on MRLs. A report by Friends of the Earth Europe asserts that: “In 2012, at the request of Monsanto, the European Commission raised the EU’s MRL for glyphosate in lentils to 10mg/kg, above the international limit. This was to allow the import of glyphosate-treated lentils from Canada and the United States.”²⁷ Against this background, it may be suspected that the EU’s weak language introduced in the Mercosur agreement’s SPS chapter also intends to accommodate the trade interests of the pesticides and farming industries.

Ultimately, the efforts of Mercosur governments to secure a renewal of the approval of glyphosate in the EU proved to be successful. On 27 November 2017, a qualified majority of EU Member States agreed to the Commission proposal to renew the approval for a period of 5 years (until December 2021).²⁸ In order to put pressure on the EU, Mercosur governments not only used the forum of the WTO but also direct channels. Argentina’s agriculture minister Ricardo Buryaile, for instance, sent a letter to the EU commissioners for agriculture and health, Phil Hogan and Vytenis Andriukaitis respectively, expressing his concern about the impacts of a potential glyphosate ban on soybean exports.²⁹

²⁴ WTO, Committee on Sanitary and Phytosanitary Measures: Annual Report on the Procedure to Monitor the Process of International Harmonization, Note by the Secretariat, 8 June 2017, G/SPS/GEN/1550, page 3

²⁵ Thomas Bohn/Marek Cuhra: How “Extreme Levels” of Roundup in Food Became the Industry Norm, Independent Science News, March 24, 2014: <https://www.independentsciencenews.org/news/how-extreme-levels-of-roundup-in-food-became-the-industry-norm/>

²⁶ Quoted in: Friends of the Earth Europe: Human contamination by glyphosate, June 2013, page 5. The quote stems from a Government response to a Green party request and goes as follows: “Änderungen an Rückstandshöchstgehalten bei Glyphosate sind i.d.R. durch die landwirtschaftliche Praxis bedingt.” In: Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Harald Ebner, Cornelia Behm, Hans-Josef Fell, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 17/6858 –, 27 September 2011

²⁷ Friends of the Earth Europe: Human contamination by glyphosate, June 2013, page 5

²⁸ See: https://ec.europa.eu/food/plant/pesticides/glyphosate_en

²⁹ Simon Marks/Giulia Paravicini: Fears grow that EU glyphosate ban could disrupt global trade, Politico.eu, 9 November 2017: <https://www.politico.eu/article/glyphosate-ban-fears-grow-could-disrupt-global-trade/>

3.4 Animal health and the JBS scandal

The provisions on animal health foreseen in the draft SPS chapter should also be cause of concern, especially against the background of the recent meat scandal involving export companies and the Brazilian government. In March 2017, the Brazilian police raided 21 slaughterhouses and meat packagers belonging to two of Brazil's largest meat companies, JBS and BRF. The companies bribed government officials and politicians to get health certificates for huge chunks of rotten meat.

According to a Commission document circulated by the European Council in June 2017, the EU reacted by putting in place three measures:

- “Suspension of imports from the establishments implicated in the fraud that were approved for export to the EU. These establishments are now withdrawn from the list of premises authorised to export to the EU;”
- “Reinforcement of import control checks [...]”.
- “In addition, an extensive Commission audit was carried out from 2 to 12 May 2017 to evaluate the operation of the Brazilian controls [...]”.³⁰

The EU response differs from those of some other importing countries. The United States, for instance, imposed a ban on all beef imports from Brazil, i.e., not only imports from establishments implicated in the fraud as in the case of the EU.³¹

A report of the Commission's Directorate-General for Health and Food Safety (DG SANTE) on its audit conducted in Brazil raises further doubts on the adequacy of the EU's response, as it did not detect any deficits of the Brazilian control system for the production of beef. The only shortcomings relate to the control of horse and poultry meat, where “the system is not fully or effectively implemented and this compromises the reliability of export certification”.³²

³⁰ Council of the European Union 2017: Meat fraud in Brazil: State of play – Information from the Commission, Brussels, 9 June 2017, 10168/17

³¹ <https://www.beefcentral.com/news/us-imposes-blanket-ban-on-brazilian-beef-imports-over-safety-concerns/>

³² European Commission, Directorate-General for Health and Food Safety: Final Report of an Audit Carried Out in Brazil from 02 May 2017 to 12 May 2017, DG(SANTE) 2017-6261

However, the specific shortcomings of the Brazilian horse and poultry controls raise questions about the reliability of the whole system. The DG SANTE report finds that, inter alia:

- “The competent authorities have failed to ensure that all poultry meat slaughterhouses approved for EU exports are under the supervision of official veterinarians”;
- “the implementation of the system in place does not guarantee that the list of establishments approved for EU export and communicated to the Commission is accurate and kept up-to-date.”
- “In some cases the arrangements in place do not ensure that staff performing official tasks is free from conflict of interest.”
- “The competent authorities are signing export certificates despite being unable to ascertain the veracity of certain statements therein.”³³

Ironically, the DG SANTE report contains some findings which question its positive verdict on the Brazilian beef control system. The report admits that the actions of the Brazilian authorities “were limited to the 21 establishments under police investigation and the staff involved: they carried out no investigations of linked establishments (e.g. belonging to the same food business operator)”. Even worse, the central government authority “had not considered any long term actions to prevent similar situations in the future.” DG SANTE’s overall conclusion should ring the alarm bells: “It is of particular concern that most of the shortcomings detected during this audit were the subject of recommendations in previous DG SANTE audits.”³⁴

Against this background, one would expect the Mercosur agreement to be equipped with strong provisions enabling a strengthening of animal health controls. But this is also not the case. The EU even introduced a new article on “Trade Facilitation Measures” (Article 6) aimed at fast-tracking the approval of animal products destined for export.³⁵ As this article does not have any equivalent in the SPS agreement, it constitutes a typical WTO-plus (or SPS-plus) provision.

According to Article 6, “approval shall be granted without prior inspection of individual establishments by the importing Party if the exporting Party provides sufficient guarantee that they fulfil the sanitary requirements of the importing Party.” The notion of “sufficient

³³ Ibid.

³⁴ Ibid.

³⁵ Consolidated texts, Chapter on Sanitary and Phytosanitary Measures, EU: Article 6: Trade Facilitation Measures

guarantee” appears rather optimistic given the repeated failures of the Brazilian authorities to comply with EU recommendations, as DG SANTE stressed in its report. The EU also wants to limit controls to not more “than a single physical import check”, while the frequency of import checks may be reduced. In addition, Article 6 foresees a “[s]implication of approval procedures” by ensuring that “each product is subjected to a uniform import approval process for the entire territory”.³⁶

The European Union calls this light-touch approach to meat trade controls “pre-listing”. An EU submission to the WTO’s SPS committee explains that this system has been designed to dismantle “trade-prohibitive practices” impeding food exports mainly of animal origin.³⁷ To facilitate trade with animal products, including those of European farms of course, pre-listing would avoid “cumbersome audit/inspection procedures”, “unjustified delays” and “exorbitant costs”. The EU paper openly admits that this system represents a risk based approach while avoiding any mention of the precautionary principle: “Risk based approach – The audit system targets those commodities that pose the highest risk. This means that it is not imposed on *all* animals, plants and their products imported into the European Union.”³⁸

The tendency of EU trade policy makers to favour risk based approaches over the precautionary principle results from their predominant interest to support EU exports. For instance, in 2013, Brazil lifted its import ban on EU beef, which had been in place due to BSE since 2001. According to a European Parliament report, “[t]he EU had considered these measures as overly restrictive, scientifically unjustified and going beyond international standards”. Even after the relaxation, the Commission continued to complain “that Brazilian legislation is still overly burdensome, non-transparent and lengthy, as it still requires bilateral approval procedures and accreditation of establishments before export.”³⁹ In other words: Brazil did not apply the pre-listing system promoted by the EU.

³⁶ Ibid.

³⁷ WTO, Committee on Sanitary and Phytosanitary Measures: The European Union’s Approach to SPS Audits and Inspections in Third Countries. Communication from the European Union, 23 June 2011, G/SPS/GEN/1095

³⁸ Ibid.

³⁹ European Parliament: Agriculture in Brazil and Relations with the EU, Directorate General for Internal Policies, Study, 2015, IP/B/AGRI/NT/2014_03, page 32

4 Technical Barriers to Trade – TBT

The Mercosur agreement's draft chapter on Technical Barriers to Trade (TBT) may affect important health, environment and consumer protection measures, as, for instance, labelling schemes providing information on nutritional values, food additives, pesticides or GMOs. The strict rules foreseen in the chapter could undermine attempts to improve official labelling requirements as well as private schemes. In the EU, for instance, this may frustrate attempts to introduce additional regulations requiring labelling of animal products such as meat, milk and eggs obtained from animals fed with GMOs (Chapters 4.1 and 4.2).

In addition, the TBT provisions on regulatory cooperation could stimulate processes triggering a downward spiral weakening environmental and health regulations. This concern might also be nurtured by specific clauses enabling private sector representatives to participate in official decision making on technical regulations. Due to the lack of proper safeguards, these provisions will most likely serve primarily the interests of well-resourced business lobbyists (Chapter 4.2).

4.1 Background: Labelling requirements as trade barriers

The objective of the draft Mercosur agreement's chapter on Technical Barriers to Trade (TBT) is to identify, prevent and eliminate technical barriers to trade and to enhance bilateral cooperation with the aim of harmonizing or mutually recognizing technical standards. More specifically, it applies to “standards, technical regulations and conformity assessment procedures” (Article 3).⁴⁰ The chapter's provisions may affect important health, environment and consumer protection measures, as, for instance, certification and labelling schemes providing basic information on nutritional values, food additives, pesticides or genetically modified organisms (GMOs).

The strict rules foreseen in the chapter could undermine attempts to improve mandatory labelling requirements as well as private or voluntary schemes.⁴¹ In the EU, for instance, there

⁴⁰ Consolidated texts, Chapter on Technical Barriers to Trade, Article 3: Scope, Coverage and Definitions

⁴¹ While the “technical regulations” referred to in the SPS chapter encompass binding rules (e.g. laws requiring compulsory labelling), the “standards” refer to non-binding rules, including, for instance, voluntary and private labelling schemes. This division stems from the SPS agreement incorporated into the Mercosur agreement. For

are still huge loopholes regarding GMO labelling. While human food and animal feed containing GMOs have to be labelled, this requirement does not extend to products such as meat, milk and eggs obtained from animals fed with GMOs. Adopting mandatory labelling of products derived from GM-fed animals would probably affect export opportunities for GM soybeans harvested in the Mercosur.

4.2 Importing and sharpening the TBT agreement

The TBT chapter has some similarities with the SPS chapter, for instance, with regard to its close link to the very restrictive TBT agreement of the WTO. In the chapter's Article 2, the parties "reaffirm their rights and obligations with respect to the TBT Agreement [...] and they commit to its comprehensive implementation". The EU inserted an even stricter clause explicitly incorporating the most problematic parts of the TBT agreement into the Mercosur agreement: "Articles 2 to 9 and Annexes 1 and 3 of the TBT Agreement are hereby incorporated into and made part of this Agreement".⁴²

The TBT agreement's Article 2 only allows those technical regulations which are not "more trade-restrictive than necessary to fulfil a legitimate objective" such as the protection of the environment or human, animal or plant life and health.⁴³

In its Annex 3, the TBT agreement contains a "Code of Good Practice for the Preparation, Adoption and Application of Standards", covering also non-binding voluntary or private schemes. Article 4 stipulates that WTO members "shall take reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories [...] accept and comply with this Code of Good Practice".⁴⁴ Once again, the TBT agreement shows similar provisions to those of the SPS agreement, subjecting not only government regulations but also private standardization schemes, including those of environmental NGOs or consumer groups, to international trade rules.

In the Mercosur agreement, the EU introduced even stricter requirements particularly targeting mandatory labelling schemes. In Article 8 (Marking and Labelling), the EU

an in-depth analysis see: Matthew Stilwell: Protecting GMO labeling from a WTO challenge, Center for International Environmental Law (CIEL):

https://www.iatp.org/files/Protecting_GMO_Labeling_from_a_WTO_Challenge.htm

⁴² Ibid, Article 2: Relationship with the TBT Agreement

⁴³ See: https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

⁴⁴ Ibid.

proposes a clause saying that “the Party shall not require any prior approval, registration or certification of the labels o[r] markings of the products, nor any fee disbursement, as a precondition for placing on the market products that otherwise comply with its mandatory technical requirements”.⁴⁵ This clause may restrict regulations aimed at improving labels beyond minimum technical requirements by implementing, for instance, more ambitious mandatory certification of these labels. Such restrictions appear particularly problematic because the TBT chapter too lacks any reference to the precautionary principle.

4.3 Regulatory Cooperation: concerns of a downward spiral

Another concern relates to the TBT chapter’s provisions on regulatory cooperation which might stimulate processes triggering a downward spiral in environmental and health regulation. For instance, in Article 9 on “Cooperation and Technical Assistance”, the EU inserted a clause according to which both sides agree to “[i]dentify, develop and promote trade facilitating initiatives which may include, but are not limited to, simplifying and avoiding unnecessary divergence in technical regulations, standards and conformity assessment procedures”.⁴⁶ The practical consequence of this clause could be to scrutinize, for instance, each party’s labelling requirements and to revise downwards the more ambitious ones, should these prove to be “more trade-restrictive than necessary”.

This clause has to be interpreted together with Article 7 on transparency and Article 3 on trade facilitation, as both enable private sector participation in governmental decision making concerning technical regulations. Article 7 has a clause requiring the contracting parties, “when developing major technical regulations [...] that transparency procedures exist that allow persons of the Parties to provide input through a formal public consultation process”, except in cases of urgency.

While the term “persons of the Parties” may include business lobbyists amongst other groups, Article 3 – a Mercosur proposal – is even more explicit. It proposes to establish thematic working groups in order to implement the SPS chapter and states that, beside government officials, “representatives of private sector, academia and civil society, among others, may be

⁴⁵ Consolidated texts, Chapter on Technical Barriers to Trade, EU: Article 8: Marking and Labelling

⁴⁶ Ibid., Article 9: Cooperation and Technical Assistance

invited, when previously agreed, to take part in these groups.”⁴⁷ The problem here is that these proposals do not foresee any provisions preventing the well-known bias in European decision making awarding business representatives privileged access to policy makers and regulatory bodies, especially in the case of the EU and its different bodies. Due to the lack of proper safeguards, these provisions will most likely serve primarily the interests of business representatives and their well-resourced lobby groups.

⁴⁷ Ibid, Article 3: Trade Facilitating Initiatives

5 Government Procurement

The Mercosur agreement's chapter on government procurement obliges governments purchasing goods and services to competitive transatlantic tendering above certain thresholds. Contrary to Mercosur proposals, the EU wants to cover all levels of government, including entities at the regional and municipal level like local authorities, public schools or hospitals (Chapter 5.1). Due to its weak provisions on environmental and health protections, the chapter could frustrate programs acquiring locally produced food aimed at supporting family farms, organic agriculture or healthy low-meat diets (Chapter 5.2).

5.1 Controversy over Special and Differential Treatment

In the procurement chapter the EU wants Mercosur to permit European companies to bid for public contracts on all levels of government, including central, regional and local government entities like ministries, local authorities, schools, hospitals and utilities. Public purchases of goods and services above 130.000 special drawing rights⁴⁸ (corresponding to some € 155.000) shall be put out for transatlantic tenders.⁴⁹ The EU essentially tries to impose the strict rules of the WTO's Government Procurement Agreement (GPA) on the Mercosur.⁵⁰ Yet, so far, none of the Mercosur countries signed up to this plurilateral accord.⁵¹

The draft consolidated text reveals considerable differences among the parties regarding the depth and scope of the procurement chapter. These differences culminate in the chapter's Article 26 which Mercosur wants to be called "Special and differential treatment".⁵² The Mercosur proposal states that, contrary to EU demands,

- the Mercosur thresholds for mandatory transatlantic tendering "in all cases, will be higher than the European Union thresholds";
- "MERCOSUR will only include federal level entities";

⁴⁸ Special Drawing Rights (SDR) is a currency basket used by the International Monetary Fund (IMF).

⁴⁹ European Commission, Directorate-General for Trade: Note for the Attention of the Trade Policy Committee: EU-Mercosur agreement – technical adaptations of the EU Government Procurement offer, Brussels, 28 November 2017

⁵⁰ See: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm

⁵¹ So far, the GPA has been signed by 19 parties, including the EU and the United States. Argentina and Brazil have only become observers to this treaty: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

⁵² Consolidated texts, Chapter on Government Procurement, Article 26

- Mercosur governments may exclude goods, services “as well as programs or government policies which they consider necessary to secure the fulfilment of their public policy compliance”.
- Mercosur members may apply so-called “offsets” allowing governments to impose specific procurement criteria supporting “local providers” such as “domestic content”-requirements;
- Finally, Mercosur proposes that these special and differential treatment provisions “will be in effect indefinitely”.⁵³

By contrast, according to the EU proposal, Mercosur members would only “benefit from transitional measures which they may need before giving full access to its procurement market”.⁵⁴ On offsets, the EU presents itself even more uncompromising. Its Article 9 proposal stipulates: “With regard to covered procurement, a Party shall not seek, take account of, impose or enforce offsets.”⁵⁵

5.2 Impact on food acquisition programs

The draft procurement provisions foreseen in the Mercosur agreement could potentially affect public purchases of locally produced food, especially if these are linked to more ambitious quality criteria. The EU’s own offer on government procurement, which is still unpublished, contains the following reservation: “The Chapter shall not apply to: Procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes (e.g. food aid including urgent relief aid).”⁵⁶

While this clause could potentially enable EU member states to exempt food purchases carried out under agricultural support or human feeding programs (e.g. food banks) from mandatory tendering, it does not cover more specific criteria. For instance, linking public purchases to quality criteria supporting organic agriculture, family farms, GM-free food or healthy diets (low-fat, low-meat) appear to fall outside the scope of this reservation.

⁵³ Ibid., Article 26: MERCOSUR: Special and differential treatment

⁵⁴ Ibid., Article 26: EU: transitional measures

⁵⁵ Ibid., Article 9: EU: Offsets

⁵⁶ European Commission, Directorate-General for Trade: Note for the Attention of the Trade Policy Committee: EU-Mercosur agreement – technical adaptations of the EU Government Procurement offer, Brussels, 28 November 2017

Basing these kinds of quality criteria on the exceptions foreseen in the chapter could also be difficult. Article 4 on “General Exceptions” states that the procurement chapter shall not prevent the parties from adopting measures “necessary to protect human, animal, or plant life or health including environmental measures”.⁵⁷ Yet, in case of disputes, it may be challenging to prove the required “necessity” of more ambitious quality criteria for food procurement.

A tribunal to be established under the agreement’s state-state dispute settlement procedure would have to assess whether governments could have chosen alternative measures less restrictive to trade. It would probably also take into account Article 14 on “Technical Specifications” which puts any procurement criteria into a tight straitjacket. While procurement entities may apply specifications “to promote the conservation of natural resources or protect the environment”, these are only allowed if they do not have “the effect of limiting competition, creating unnecessary obstacles to international trade, or discriminating between suppliers”.⁵⁸ It is questionable whether food procurement criteria supporting organic agriculture or low-meat diets could survive this challenging necessity test built into the Mercosur agreement.

The hurdles to ambitious procurement criteria being erected by the draft text may also affect Brazil’s successful Food Acquisition Program set up in 2003. Under the program, state entities purchase food locally produced by family farms, often using organic farming practices, which is then being distributed to food insecure populations through social programs and public entities like schools. The program also aims at preserving biodiversity by encouraging crop diversification and the exchange of traditional seed varieties.⁵⁹ Unfortunately, the present Brazilian administration of President Temer has seriously cut the Food Acquisition Program. Civil society organizations fear the government’s austerity policies could threaten the program’s very existence.⁶⁰

⁵⁷ Consolidated texts, Chapter on Government Procurement, Article 4: General Exceptions

⁵⁸ Ibid., Article 14: Technical Specifications

⁵⁹ For more information on the Food Acquisition Program see, for instance: <http://www.b4fn.org/case-studies/case-studies/the-food-acquisition-program-in-brazil/>

⁶⁰ On the impact of these cuts, see: <https://www.brasildefato.com.br/2017/08/29/corte-no-programa-de-aquisicao-de-alimentos-ameaca-familias-do-semiarido/>; for a civil society response, see: <http://www.agroecologia.org.br/2017/09/27/sistema-confederativo-contag-reage-a-cortes-no-orcamento-para-a-agricultura-familiar/>