

EU-Mercosur Association Agreement:

The SPS and sustainability chapters in the Uruguay leaks

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Overview of documents

Uruguay leaks: documents analysed

A) CHAPTER TRADE AND SUSTAINABLE DEVELOPMENT

30th November 2017

Consolidated text resulting from the 30th round of negotiations (6-10 November 2017) on trade and sustainable development

B) Chapter XX: Sanitary and phytosanitary measures

07 November 2017

Consolidated text resulting from the 30th round of negotiations (6-10 November 2017) on sanitary and phytosanitary measures

C) Chapter XX: [EU: Dialogues / MCS:Cooperation] 1

Consolidated text resulting from the 30th round of negotiations (6-10 November 2017) on dialogues

Executive Summary

- Similar to the July 2017 draft of the Mercosur agreement, the November 2017 version only contains one single reference to the precautionary principle in the non-sanctionable Chapter on Trade and Sustainable Development. However, the wording has been modified compared to the earlier version. The November draft, for instance, contains a new provision explicitly prohibiting precautionary measures constituting a “disguised restriction on international trade”.
- The chapter on Sanitary and Phytosanitary Measures (SPS) continues to ignore the precautionary principle while favoring the risk-based approach to regulation of the WTO’s SPS agreement.
- The November 2017 draft contains a new chapter on dialogues establishing working groups on animal welfare, biotechnology, antimicrobial resistance and food safety under the SPS Subcommittee. But so far, the draft provisions do not foresee adequate safeguards preventing corporate capture or ensuring democratic control of future decisions taken by the SPS Subcommittee. This is of particular concern given the highly sensitive issues conferred to the SPS working groups, such as “asynchronous approvals” of genetically modified organisms (GMOs).
- According to the November 2017 draft, the EU apparently succeeded in establishing its light-touch approach to food import controls (“pre-listing”). This is of huge concern given the recurrent food scandals particularly in the industrial livestock sector. The pre-listing approach could also undermine future attempts to improve animal welfare or to combat antibiotic resistance.

1) Introduction

The Uruguay leaks contain so-called “consolidated texts” emanating from the 30th round of the EU-Mercosur negotiations (6-10 November 2017) on a comprehensive Association Agreement. The draft texts relate to the trade part of the planned agreement. The analysis presented here concentrates on differences between the Uruguay leaks and the “Mercosur leaks” released in December 2017.¹ The Mercosur leaks cover a selection of documents resulting from the 28th negotiation round (3-7 July 2017).

2) The precautionary principle in the Sustainability Chapter

The precautionary principle as enshrined in the Lisbon treaty enables the EU and its Member States to take regulatory measures against a risk, even if that risk has not yet been scientifically proven or there is scientific uncertainty about the risk in question.

Similar to the July version, the November 2017 draft of the consolidated text only contains one single reference to the precautionary principle introduced by the EU in the non-sanctionable Chapter on Trade and Sustainable Development (i.e. this chapter is excluded from the agreement’s state-state dispute settlement mechanism). However, the wording has been modified compared to the earlier version. The respective provision in Article 10 (Scientific and Technical Information) of the November draft reads as follows:

[Alt (2): In cases when scientific knowledge is insufficient or inconclusive, and there is a risk of serious environmental degradation [or to occupational safety and health] [in its territory], a Party may adopt [MS: provisional] measures [EU: based on the precautionary principle]. Such measures shall be based upon available pertinent information and subject to [periodic] review, [MS: within a reasonable period of time], in the light of new or additional scientific information. [...]

¹ See: <https://trade-leaks.org/mercousur-leaks/>

3. Such measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.²

While permitting precautionary measures taken under scientific uncertainty about a risk, the particular phrasing still contains some important limitations:

- Compared to the July version, the November draft slightly extends the causes permitting recourse to precautionary measures. In addition to measures taken to prevent “serious environmental degradation” (these were already mentioned in the July draft), the more recent version could also permit measures tackling risks to “occupational safety and health”. However, as this option appears in brackets, it is unclear whether it will survive until the final stages of the negotiations. But even if it survived, the present wording still falls short of the EU’s far broader concept of the precautionary principle, which has been applied to many more policy areas, including health and consumer protection.
- The phrase only permitting precautionary measures entailing “serious” environmental degradation opens room for interpretation. As it is unclear what might, or might not, constitute a “serious” degradation, specific precautionary measures could be questioned.
- Unlike the July version, the November draft lacks the sentence on the precautionary principle taken from the 1992 Rio Declaration on Environment and Development (“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.”³). As this phrase requires precautionary measures to be “cost-effective”, this change appears rather positive.
- The provision prohibiting precautionary measures constituting “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade” has been added to Article 10 in the November version. It adds a further straitjacket to the application of the precautionary principle, given that many such measures almost inevitably have a trade-restricting impact. It may even be part of the very rationale of a

² Consolidated text resulting from the 30th round of negotiations (6-10 November 2017): Chapter Trade and Sustainable Development

³ Consolidated text resulting from the 28th round of negotiations (3-7 July 2017): Chapter Trade and Sustainable Development, Article 10 – Scientific and Technical Information. <https://trade-leaks.org/mercous-leaks/trade-and-sustainable-development/>

precautionary measure to restrict trade of products posing a particular risk to the environment or human health.

3) SPS Chapter: main weakness unresolved

In the November version of the draft EU-Mercosur text, the chapter on Sanitary and Phytosanitary Measures (SPS) continues to lack any reference to the precautionary principle while restating both parties' commitments under the highly restrictive SPS agreement of the WTO.⁴ By doing so, the SPS agreement's risk-based concept of regulation effectively takes precedence over the EU's precautionary principle. Proponents of the SPS agreement tend to portray this concept as the only true "science-based" approach to regulation.

4) Cooperation on GMOs, Animal Welfare and Antimicrobial Resistance (AMR)

The July 2017 version of the SPS chapter contained specific articles on Animal Welfare (Article 17) and Antibiotic Resistance (Article 15) which were viewed as rather progressive elements of the Association Agreement. In the November 2017 draft, the SPS chapter has been reorganised and both Articles shifted to a separate chapter on Dialogues/Cooperation. The EU wants this chapter to be called "Dialogues", while the Mercosur proposes the term "Cooperation".⁵ Article 1 of the EU proposal outlines the objectives of this chapter:

Building upon their well-established partnership and shared values, the Parties agree to establish dialogues with the objective to:

- 1. Strengthen bilateral cooperation to reach a common understanding on animal welfare matters.*

⁴ Consolidated text resulting from the 30th round of negotiations (6-10 November 2017): Chapter XX: Sanitary and phytosanitary measures, Article 3: Rights and Obligations

⁵ Consolidated text resulting from the 30th round of negotiations (6-10 November 2017): Chapter XX [EU: Dialogues / MCS: Cooperation]

- 2. Cooperate on issues related to the application of agricultural biotechnology through the Dialogue on Biotech market access issues.*
- 3. Cooperate in combating antimicrobial resistance (AMR).*
- 4. Establish scientific cooperation/dialogue on food safety*
- 5. Cooperate in any other matter that the subcommittee established in Article XX of the SPS Chapter (the SPS Sub-committee) may agree.*

According to Article 2, all of these dialogues shall be conducted by “working groups appointed by the SPS Subcommittee”. The working groups shall be composed of “representatives of the Parties with technical expertise” on the various matters concerned. This clause does not preclude the participation of business representatives or experts with links to the private sector. The negotiators are pretty aware of this possibility as reveals a provision in Article 6 of the Dialogues chapter. Here the EU inserted a proposal requiring the SPS Subcommittee to “establish the rules on conflict of interest for the participants” of the working groups. Since these rules are still unknown, it is unclear whether they might be effective in preventing corporate interests from unduly influencing the various SPS working groups.

This lack is of particular concern given the wide-ranging powers granted to the SPS Subcommittee. According to the SPS chapter’s Article 19, the Subcommittee shall establish “the necessary arrangements to resolve the problems raised by the implementation of this Chapter” and to reach “mutually acceptable solutions”. A further clause allows to confer potentially unlimited powers to the Subcommittee: “Perform any other function or consider any matter referred to it expeditiously, as agreed by the Parties”.⁶

This provision in particular raises the question of parliamentary control and democratic legitimacy of the various bodies created under the EU’s trade agreements. The SPS chapter, for instance, does not foresee any procedures ensuring democratic control of decisions taken by the SPS Subcommittee and its working groups after the entry into force of the Association Agreement.

In terms of content, the SPS working groups raise further questions concerning their effectiveness. According to the EU proposal, the working group on animal welfare would be

⁶ Consolidated text resulting from the 30th round of negotiations (6-10 November 2017): Chapter XX: Sanitary and phytosanitary measures, Article 19: Subcommittee

tasked with developing “adequate and science-based animal welfare standards”.⁷ However, by only mentioning “science-based” standards and ignoring the precautionary principle the EU reveals its rather low ambition to achieve meaningful improvements of animal welfare.

The EU’s reticence to include the precautionary principle in the SPS agreement is particularly worrisome in case of the working group dealing with “Cooperation on Biotechnology”. Several sensitive issues feature among the topics foreseen for the working group, such as “asynchronous authorisations of genetically modified organisms” or “low level presence of GMOs”.⁸ Once again, the EU misses an opportunity to support the precautionary approach in the especially contested area of GMO authorisations.

By contrast, the objectives of the planned working group on “Combating Antibiotic Resistance” seem rather positive, at least at first glance. Bilateral and international cooperation to “promote reduced use of antibiotics” in animal production, including “the phasing out” of the use of antibiotics as growth promoters, are certainly necessary steps to fight the emergence of bacteria resistant to antibiotics. However, the effectiveness of such measures may be constrained by the EU’s parallel attempt to establish its light-touch approach to food import controls, so-called pre-listing (see below).

5) Pre-listing: accelerating food controls

The EU’s pre-listing approach aims at accelerating the approval of mainly animal products destined for export. An EU proposal outlining this approach was already part of the July 2017 version of the Mercosur text. It appeared in the SPS chapter’s Article 6 on “Trade Facilitation Measures”, but at that time still entirely in brackets. In the November 2017 draft, Article 6 reappeared, but – apart from part C on “Simplification of approval procedures” – the brackets largely disappeared. Apparently, the EU succeeded in imposing its pre-listing approach during the negotiations. The core idea of pre-listing is being outlined in Article 6.2:

⁷ Consolidated text resulting from the 30th round of negotiations (6-10 November 2017): Chapter XX [EU: Dialogues / MCS: Cooperation], Article 3: Cooperation on Animal Welfare

⁸ Ibid., Article 4: Cooperation on Biotechnology

The 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.⁹

In addition to mutually recognising their respective control systems, the parties agree to “simplify controls and verifications and reduce the frequency of the import checks”. Given the recurrent food scandals, as evidenced by the recent cases in Brazil (JBS) or France (Lactalis), simplifying controls and reducing the number of import checks represent largely inadequate responses to the huge risks associated with industrial livestock farms.

Moreover, the pre-listing approach casts doubts about the sincerity of the EU proposing working groups on animal welfare and antibiotics. Improving animal health and reducing the use of antibiotics in livestock farming will almost certainly require improvements of veterinary inspections and far more thorough controls of animal products destined for export. It is therefore difficult to see how fast-tracking controls and reducing import checks could be reconciled with the stated objective of combating antibiotic resistance and improving animal health.

⁹ Consolidated text resulting from the 30th round of negotiations (6-10 November 2017): Chapter XX: Sanitary and phytosanitary measures, Article 6: Trade Facilitation Measures