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## **LEGAL INSTRUMENTS FOR IMPLEMENTING SUSTAINABLE DEVELOPMENT IN THE EUROPEAN UNION AND MERCOSUR'S TRADE AGREEMENT**

### **Abstract**

The subject of the study is the external trade relations of the EU as a subject of international law, concluded with organisations of states and individual countries within the framework of the EU Common Commercial Policy. The aim of the study is to assess the provisions of the EU-Mercosur Agreement made in terms of the choice of legal instruments for the association of the two regions in terms of sustainable socio-economic growth and trade, while ensuring environmental protection and consumer food safety. The essential considerations are preceded by a demonstration of the evolutionary changes in the approach to food safety and environmental protection in the EU's external trade agreements and Mercosur's internal regulations. The analysis carried out mandates a number of conclusions relating to the two chapters of the agreement governing food safety of imported food products and environmental protection. The norms as negotiated in the agreement do not implement the objective of sustainable development and should be renegotiated. The exclusion of the precautionary principle only confirms the thesis that has been put forward.

## KEYWORDS

Mercosur, international trade, food safety, forests, climate change

## SŁOWA KLUCZOWE

Mercosur, handel międzynarodowy, bezpieczeństwo żywności, lasy, zmiany klimatu

## 1. INTRODUCTION

One of the effects of globalization is the rapid turnover of goods, services, capital and the ability to undertake cooperation between many distant regions of the world. The conditions of increasing competition in the world market and the set goals of raising the level of economic prosperity force an increase in the volume of foreign trade. In order to increase market share as well as facilitate and liberalize international trade, regional economic groupings are formed and free trade agreements are concluded. This also applies to one of the largest economies in the world, which is the European Union (hereinafter: EU).

After years of negotiations, at the turn of the second and third decades of the 21st century, two agreements were signed between the EU (EU member states) and South American countries. On 19 June 2019, a new bilateral agreement was signed between the EU and MERCOSUR,<sup>1</sup> while on 9 December 2022, the EU and Chile completed negotiations on a new EU-Chile Association Agreement,<sup>2</sup> now called the Advanced Framework Agreement. The indicated agreements must be ratified in the 27 EU countries in order to be valid. This also applies to the 2019 agreement in 4 Mercosur parties and the 2022 agreement in Chile, respectively. However, the compromise reached after 20 years of negotiations between the EU and Mercosur is not satisfactory to either side as shown by the failure to undertake the ratification process within four years of the agreement.

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<sup>1</sup> New EU-Mercosur trade agreement The agreement in principle Brussels, 1 July 2019, text: [https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157964.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf) (accessed 15 May 2023), hereinafter cited as the “EU-Mercosur agreement”.

<sup>2</sup> EU-Chile Association Agreement, now called the Advanced Framework Agreement. EU-Chile Advanced Framework Agreement following the political conclusion between the Parties, announced on 9 December 2022. [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en) (accessed 15 May 2023).

The subject of the study is the external trade relations of the EU as a subject of international law, concluded with organisations of states and individual countries within the framework of the EU Common Commercial Policy (hereinafter: CCP). The EU-Mercosur agreement (sec. 14) is based on the principle that increased trade between the parties should not be at the expense of the environment but, on the contrary, should promote sustainable development, hence the various chapters of the agreement provide for instruments to implement this purpose. The aim of the study is to assess the provisions of the agreement made in terms of the choice of legal instruments for the association of the two regions in terms of sustainable socio-economic growth and trade, while ensuring environmental protection and consumer food safety. The essential considerations are preceded by a demonstration of the evolutionary changes in the approach to food safety and environmental protection in the EU's external trade agreements and Mercosur's internal regulations.

## 2. EXTERNAL TRADE RELATIONS OF THE EUROPEAN UNION

The intensive process of European integration and the extension of the powers of the European Community into ever new areas (including, since 1986, the Single European Act<sup>3</sup> on environmental protection) resulted in the transformation of the European Economic Community into EU in 1992. The decision of the member states formulated in the Treaty of Lisbon<sup>4</sup> had the effect of adopting a new legal construction of the Community and giving it a new legal character. Under the new Article 47 of the Treaty on the Functioning of the European Union,<sup>5</sup> the EU has legal personality, which means the transformation of the EU into a coherent international organization. EU also has international legal subjectivity, in particular, it has the right to conclude international agreements *ius tractatum*, as well as the right to join international organizations.<sup>6</sup>

The entity of international law formed in 2009 was given a number of competences, which were divided into exclusive competences (Art. 3 TfUE) and shared competences between the EU and member states (Art. 4 TfUE). EU CCP by virtue of these norms became one of the five areas of exclusive competence. This shaping of the EU's trade policy is due to the fact that China, the EU, and the

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<sup>3</sup> Single European Act, signed 17 February 1986, OJ L 169, 29 June 1987.

<sup>4</sup> Treaty of Lisbon OJ C 306, 17 December 2007.

<sup>5</sup> Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, p. 1.

<sup>6</sup> J. Barcz, *Charakter prawny UE* (in:) J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warszawa 2012, p. 30.

United States are the world's three largest players in the international trade arena, and the EU-27 accounts for about 14 % of global trade in goods.<sup>7</sup>

As C. Mik mentioned,<sup>8</sup> the UE has become an important actor of international relations in the economic sphere. It is a member (alongside or instead of member states) of numerous international economic organizations and a party to many important multilateral economic agreements. It standardizes bilateral agreements with its partners, conditions cooperation with regions of the world and individual states on the fulfillment of conditions expressing values important to the UE, adopts significant legislation with serious consequences for international economic relations. The UE has gained considerable influence in the spheres of customs, trade, transport, development, monetary and environmental policies and through these, undoubtedly, in making key global decisions.

As M. Nyka points out,<sup>9</sup> the external competence of the Union in this policy implemented within the framework of CCP also determines internal actions, such as strictly internal activities directed at the development of exports. The indicated factors caused the UE to emerge already at the end of the 20<sup>th</sup> century as a significant actor in international relations, or even a 'global actor',<sup>10</sup> producing a network of both internal and external relations. With ambitions to play the role of a world power, with influence over the course of events in different parts of the world and as one of the largest global trade actors it has a significant impact on the content of the external relations concluded. At the same time, it is becoming a significant source of development and humanitarian aid in the world. In the international arena, the EU relies on its *soft power*, as the means at the EU's disposal in its relations with third countries are primarily economic, diplomatic and political.<sup>11</sup> The Union concludes international agreements that cover a wide range of economic issues: trade, investment, intellectual property, technical standards and competition law.<sup>12</sup> In accordance with Article 21(2)(d-f) of the Treaty on European Union,<sup>13</sup> the Union shall, in defining and pursuing common policies and actions,

<sup>7</sup> Cited EUROSTAT data from: [https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy\\_pl](https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy_pl), or [https://ec.europa.eu/eurostat/databrowser/view/EXT\\_LT\\_INTROEU27\\_2020\\_\\_custom\\_3351101/default/bar?lang=en](https://ec.europa.eu/eurostat/databrowser/view/EXT_LT_INTROEU27_2020__custom_3351101/default/bar?lang=en) (accessed 15 May 2023).

<sup>8</sup> C. Mik (in): C. Mik (ed.), *Zewnętrzne stosunki gospodarcze Unii Europejskiej*, Toruń 2010, pp. 7-8.

<sup>9</sup> M. Nyka, *Handel światowy w zintegrowanym porządku prawnym*, Poznań 2010, p. 19.

<sup>10</sup> J. Ciechanowicz-McLean, *Stosunki prawnomiedzynarodowe między Unią Europejską a Australazją* (in): C. Mik (ed.), *Pozycja Unii Europejskiej w świecie – Aspekty Prawne i Polityczne*, Toruń 2005, p. 245.

<sup>11</sup> P. Craig, G. de Burca, *EU Law. Text, Cases, and Materials*, Oxford University Press, Oxford 2020, pp. 353 - 355.

<sup>12</sup> E. Coll, *Prawno-instytucjonalne uwarunkowania stosunków zewnętrznych Unii Europejskiej – wybrane aspekty* (*Legal and Institutional Determinants of the European Union's External Relations – Selected Aspects*), "Zeszyty Naukowe. Uniwersytet Ekonomiczny w Krakowie: Problemy społeczne, polityczne i prawne" 2013, Vol. 2, Issue 917, pp. 35-47.

<sup>13</sup> Treaty on the European Union, consolidated version 2016, OJ C 202 of 7 June 2016, p. 13.

aim to, *inter alia*: promote the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade, and contribute to the elaboration of international measures to preserve and to improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

Agreements concluded by the European Union (the EU member states) in previous three decades, *inter alia*, with:

- 1) countries of the European Free Trade Association (EFTA), a party to the Agreement on the Establishment of the European Economic Area (EEA) signed in 1992.<sup>14</sup> Geographical convergence and cultural ties made these organizations predestined to develop close cooperation;<sup>15</sup>
- 2) States of Africa, Asia and the Pacific (French: *Etats d'Afrique, des Caraïbes et du Pacifique ACP*) parties to the Cotonou Agreement of 2000, between the EU (EU countries) and 79 African, Caribbean and Pacific states.<sup>16</sup> In 2020, these countries formed the Organization of African, Caribbean and Pacific States (OACPS). In addition to this change, in legal and organizational structure, the impending expiration of the Cotonou Agreement is an opportunity to renew but also strengthen relations with the OACPS countries, while taking into account the new economic realities and global challenges facing all countries;<sup>17</sup>
- 3) European and Asian countries within the framework of the European Neighborhood Policy, implemented since 2006.<sup>18</sup> The policy operates on the basis of previously concluded international agreements with countries in the region, especially those participating in the Mediterranean Partnership and countries bound by Partnership and Cooperation Agreements including: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel,

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<sup>14</sup> OJ L 1994, p. 3. The agreement entered into force on 1 January 2004.

<sup>15</sup> M. Nyka, *Handel światowy* ..., pp. 33-34.

<sup>16</sup> Partnership Agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000. OJ L 317, 15.12.2000, pp. 3-353. Originally set to expire on 29 February 2020, the application of the Cotonou Agreement is extended until 30 June 2023, unless a new agreement enters into force or is provisionally applied before that date.

<sup>17</sup> Partnership Agreement, between the European Union/The European Union and its Member States, of the one part, and members of the Organization of African, Caribbean, and Pacific States, of the other part. Negotiated Agreement text initiated by the EU and OACPS chief negotiators on 15 April 2021. Hereafter cited as "Draft EU-OACPS Agreement".

<sup>18</sup> M. Nyka, *Handel światowy* ..., p. 36.

Jordan, Lebanon, Libya, Morocco, Moldova, Palestine, Syria, Tunisia and Ukraine;<sup>19</sup>

- 4) the countries of Australasia, primarily Australia and New Zealand, which for historical reasons and close ties with the British Commonwealth (The Commonwealth) are linked not only by language, history and culture but also by declared values such as democracy, human rights and the rule of law. The European Union has concluded two agreements belonging to the category of soft law international agreements: with Australia under the Declaration of 26 June 1997<sup>20</sup> and New Zealand under the Declaration of 4 May 1999.<sup>21</sup> The parties to these agreements reaffirmed their mutual commitments to make efforts in implementing political and economic reforms and improving development assistance and market expansion.<sup>22</sup> The conclusion of these agreements was the basis for closer cooperation, which resulted in the form of free trade agreements. The European Commission presented the EU-New Zealand trade agreement for ratification on 17 February 2023,<sup>23</sup> while negotiations with Australia to conclude an agreement on the basis of the draft<sup>24</sup> presented in 2015 have not yet been completed.<sup>25</sup>

### 3. ENVIRONMENTAL PROTECTION AND CLIMATE CHANGE MITIGATION AS PART OF SUSTAINABLE NEGOTIATIONS

Traditionally, developed countries have been leaders in international environmental policy. In recent decades, the Union's activity, as a subject of international law, has gone beyond economic affairs; it can be seen in such areas as human

<sup>19</sup> Data from <https://www.europarl.europa.eu/factsheets/pl/sheet/170/europejska-polityka-sasiedztwa>

<sup>20</sup> Joint Declaration on the relations between the European Union and Australia.

<sup>21</sup> Joint Declaration on the relations between the European Union and New Zealand.

<sup>22</sup> More widely P. Murray, *New Agendas for Dialogue. Australia and European Superpower: engaging with the European Union*, Melbourne University Press 2005, or J. Ciechanowicz-McLean, *Stosunki prawnomiedzynarodowe ...*, pp. 241- 249.

<sup>23</sup> Council Decision on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and New Zealand, Brussels 17 February 2023, COM(2023) 82 final 2023/0037(NLE).

<sup>24</sup> Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part, Brussels 14 April 2016, JOIN/2016/08 final – 2016/0113 (NLE).

<sup>25</sup> More extensively on the proposed agreement: A. Elijah, D. Kenyon, K. Hussey, P. van der Eng (in:) A. Elijah, D. Kenyon, K. Hussey, Mr. Pierre van der Eng (ed.), *Australia, The European Union and the New Trade Agenda*, Australian National University Press 2017, pp. 1-18, 257-277.

rights, social affairs and environmental protection. Agreements being made in the second and third decades of the 21<sup>st</sup> century must already be focused on measures to promote inclusive economic growth, climate action and disaster resilience, peace and security, migration management, democracy, the rule of law, human rights and much more.

One of the fundamental principles of environmental law is the principle of precaution derived from Principle 15 of the Rio Declaration.<sup>26</sup> According to it, all states should broadly apply a precautionary approach to protect natural resources. In the case of a threat of serious or irreversible changes, the lack of complete scientific certainty must not be a reason for delaying effective measures whose implementation would lead to environmental degradation. The precautionary principle has also been incorporated into many international conventions on environmental protection.<sup>27</sup> The precaution principle is essential for the protection of human health and the environment when implemented in the field of food production and distribution.<sup>28</sup> A particular development concerns primarily regulations relating to the protection of public health and secondarily to the protection of the environment, especially at the intersection of these fields with regard to food safety and GMOs or hazardous substances.

In the first decade of the 21<sup>st</sup> century, this principle has been applied to a number of regulations, whether in the field of agricultural law, food law, environmental protection or public health. Regulations relating to food safety, GMOs, pesticides and EU chemical regulations can be mentioned here. The principle was invoked by the EC in 1989 when beef imports were banned because the animals were fed hormones and in 2000 the organization fully adopted the principle as a general principle of international law. The principle was also invoked in 1999 by Australia and New Zealand when they sued Japan for allegedly overfishing bluefin tuna. This principle is therefore essential for the protection of human health

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<sup>26</sup> Rio de Janeiro Declaration, A/CONF.151/26 ( Vol. I).

<sup>27</sup> Among others, the 1985 Vienna Convention for the Protection of the Ozone Layer, which took place in Vienna on 22 March 1985, text: <https://ozone.unep.org/treaties/vienna-convention/vienna-convention-protection-ozone-layer> (accessed 7 May 2023), the 1991 Bamako Convention on the Prohibition of Imports into Africa and the Control of Transboundary Movements and Management of Hazardous Wastes in Africa (UN Bamako Convention, negotiated by 12 nations of the African Union, former Organization of African Unity at Bamako, Mali in January 1991, it came into force in 1998), as well as to agreements adopted at the 1992 Rio de Janeiro Conference: United Nations Framework Convention on Climate Change 1992, FCCC/INFORMAL/84, GE.05-62220 (E) 200705, and the Convention on Biological Diversity (United Nations Convention on Biological Diversity, Rio de Janeiro, 5 June 1992), <https://www.cbd.int/doc/legal/cbd-en.pdf> (accessed 7 May 2023).

<sup>28</sup> M.A. Król, *Prevention Principle and the Precautionary Principle* (in:) J. Cremades, C. Her-mida (eds.), *Encyclopedia of Contemporary Constitutionalism*, Springer Nature Switzerland AG 2023, p. 4, [https://doi.org/10.1007/978-3-319-31739-7\\_162-1](https://doi.org/10.1007/978-3-319-31739-7_162-1).



and the environment and it must be implemented in the field of food production and distribution.<sup>29</sup>

Since the beginning of the 21<sup>st</sup> century, the EU has also taken a leading role in climate change mitigation.<sup>30</sup> As M. Nyka points out,<sup>31</sup> agreements concluded in the framework of trade negotiations are a manifestation of the realization of sustainable development and climate change. This position is confirmed by conducting *ex ante* environmental impact analysis of the proposed trade agreements concluded by the European Union. The assessment process analyses the impact of the agreement on economic, social and environmental aspects. The analysis indicates measures that must be excluded and accompanying (mitigation and enhancement) measures are envisaged.<sup>32</sup> For example, the ongoing renewal negotiations with the OACPS include a comprehensive political agreement that supports the EU's commitment to sustainable development and climate action, building on the UN 2030 Agenda for Sustainable Development,<sup>33</sup> the European Consensus on Development<sup>34</sup> and the Paris Agreement<sup>35</sup>. For this reason, the draft EU-OACPS agreement includes Title III, "Environment, Natural Resources Management and Climate Change".

Similarly, based on the post-2020 Eastern Partnership priorities announced in July 2021,<sup>36</sup> the EU's Eastern Partnership policy will continue to be flexible

<sup>29</sup> V. Hulley, *Environmental Laws*, Delve Publishing, 2020, p. 46.

<sup>30</sup> B. Kilian, O. Elgstrom, *Still a green leader? The European Union's role in international climate negotiations*. "Cooperation and Conflict" 2010, Vol. 45, Issue 3, pp. 255-273, doi: 10.1177/0010836710377392.

<sup>31</sup> M. Nyka, *Zasada zrównoważonego rozwoju w Transatlantyckim Partnerstwie Handlowo-Inwestycyjnym* (in:) S. Dudzik, B. Iwańska, N. Półtorak (ed.), *Inteligentna i zrównoważona gospodarka sprzyjająca włączeniu społecznemu – wyzwania dla systemów prawnych Unii Europejskiej i państwa*, Warszawa 2017, pp. 158-159.

<sup>32</sup> D. Colyer, *Green Trade Agreements*, Palgrave Macmillan London 2011, p. 154. The author points out that analyses of the environmental impact of environmental agreements are also conducted by the United States and Canada. Although the nature and procedures in their analyses are different from those of Europe, they all seek to identify all harmful environmental effects of trade agreements and to help negotiators address potential problems in the process of finalizing the agreement or to enable other appropriate actions to mitigate negative effects.

<sup>33</sup> Transforming our world: the 2030 Agenda for Sustainable Development, UN General Assembly, 25 September 2015, A/RES/70/1.

<sup>34</sup> Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament, and the Commission: The New European Consensus on Development "Our World, Our Dignity, Our Future" 2017/C, OJ UE C 210 of 30 June 2017, p. 1.

<sup>35</sup> Paris Agreement, the crowning agreement of the 21st UN Climate Change Conference in 2015. The agreement requires all countries to submit by 2020 long-term schedules for reducing greenhouse gas emissions in accordance with the methodology adopted by the IPCC.

<sup>36</sup> Joint Staff Working Document, *Recovery, Resilience and Reform: post 2020 Eastern Partnership priorities*, High Representative of the Union for Foreign Affairs and Security Policy, Brussels, 2 July 2021, SWD(2021) 186 final.



and allow for significant differentiation, a tailored approach and enhanced incentive-based cooperation that benefits the countries most committed to the reform. Accordingly, the policy emphasizes a number of goals including strengthening resilient, sustainable and integrated economies, supporting accountable institutions, the rule of law and security, digital transformation, or strengthening efforts for equitable and inclusive societies, among them environmental resilience and climate change mitigation and adaptation.

Declarations of cooperation with Australia and New Zealand referred to the promotion and implementation of sustainable economic development and protection of the global environment. At the same time, the agreement with Australia was dominated by socio-economic issues, while the agreements with New Zealand were dominated by socio-environmental issues, as the country has a strong track record in this field.<sup>37</sup>

#### 4. THE SOUTH'S COMMON MARKET IN SOUTH AMERICA

The Common Market of the South (Spanish: *Mercado Común del Sur* – MERCOSUR, Portuguese: *Mercado Comum do Sul* – MERCOSUL) is an international economic organization established in 1991, under the Treaty of Asunción signed on 26 March 1991 by the governments of Argentina, Brazil, Paraguay and Uruguay.<sup>38</sup> The Ouro Preto Protocol of 17 December 1994<sup>39</sup> sanctioned Mercosur as an entity under international law.

It is South America's most important regional integration organization. It was established in the so-called second phase of regionalism<sup>40</sup> and has been based on mutual tariff concessions between Argentina and Brazil since the 1960s and numerous programs of economic integration and cooperation since the 1980s.<sup>41</sup> In the late 1980s and early 1990s, in an effort to accelerate economic cooperation, the countries successively signed the Treaty of 29 November 1988 on Integration,

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<sup>37</sup> New Zealand has 13 national parks covering 30,000 km<sup>2</sup>. In addition to national parks, in 2020 New Zealand had 54 conservation parks (including 36 forest parks) covering 2,690,191 hectares. Data from: *Report New Zealand, Asia & Pacific. Protected Planet. World Database of Protected Areas* (accessed 14 September 2020).

<sup>38</sup> The treaty entered into force on 29 November 1991, UNTS Vol. 2140. ILM 1991, Vol. XXX, No. 4, p. 1043. Text of the Treaty of Asunción <https://www.mercosur.int/documento/tratado-asuncion-constitucion-mercado-comun/> (accessed 7 May 2023).

<sup>39</sup> Text of the Protocol <https://www.mercosur.int/documento/protocolo-ouro-preto-adicional-tratado-asuncion-estructura-institucional-mercador/> (accessed 7 May 2023).

<sup>40</sup> S. Santander, *Le régionalisme sud-américain, l'Union européenne et les Etats-Unis*, Bruxelles 2008, p. 83.

<sup>41</sup> C. Mik, *Fenomenologia regionalnej integracji państw. Studium prawa międzynarodowego*, T. I: Teoria i Praktyka regionalnej integracji państw, Warszawa 2019, p. 249.

Cooperation and Development<sup>42</sup> and the Buenos Aires Act on 6 July 1990.<sup>43</sup> This cooperation was joined over time by Uruguay and in 1990 by Paraguay. For this reason, this period has been referred to in the literature as the revitalization stage of Latin American integration.<sup>44</sup> Venezuela's membership was suspended in 2016 due to violations of the democratic order.<sup>45</sup> Chile, Colombia, Ecuador, Guyana, Peru and Suriname have an associate status. Bolivia is in the accession process.

This international organization covers an area of almost 15 million km<sup>2</sup>, with a population of more than 295 million. Collectively, the economies of the Mercosur member countries rank fifth in the world.<sup>46</sup> The organization encompasses a geographic area characterized by an enormous wealth of natural resources, rich biodiversity and still incompletely understood forest ecosystems in tropical forests.

The purpose of the organization thus created, which originally consisted of four states, was, under Article 1 of the Treaty of Asunción, to create a common market by ensuring the free movement of goods, services and factors of production, eliminating customs duties and creating a common external tariff, adopting a common trade policy and coordinating positions in regional and international economic as well as trade forums, coordinating macroeconomic and sectoral policies in a number of areas to ensure proper competition among the states parties, and harmonizing national legislation to strengthen the integration process. To this end, in accordance with the provisions of the Treaty of Asunción, a Common Market was established, which came into force on 31 December 1994, under the name "Common Market of the South". The purpose of this organization was to increase competitiveness and bargaining power in the international market.

The Latin American Common Market is no longer just an organization for regional economic integration but is now entering other areas. In addition to the typical trade-related objective, the scope of integration has been expanded to include, among others, issues of common antitrust rules, harmonization of intellectual property rules, energy cooperation and public procurement. In the field of movement of people, visa traffic has been regulated. Rules for the recognition of diplomas, certificates and titles have been established and agreements have been made on education and science. In the human rights field, the Asunción

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<sup>42</sup> The treaty entered into force on 11 September 1989, UNTS, Vol. 1545.

<sup>43</sup> C. Mik, *Fenomenologia regionalnej...*, p. 250.

<sup>44</sup> M. Belén Olmos Giupponi, *Rethinking Free Trade, Economic Integration and Human Rights in the Americas*, Hart Publishing, Oxford, Portland, Oregon 2017, p. 17.

<sup>45</sup> The Republic of Venezuela is suspended from all rights and obligations related to its status as a State Party to MERCOSUR, in accordance with the provisions of the second paragraph of Article 5 of the Ushuaia Protocol.

<sup>46</sup> Area of 14,869,775 km<sup>2</sup>, total population of 295,007,000, <https://www.mercosur.int/en/> (accessed 7 May 2023).

Protocol of 20 June 2005 on the promotion and protection of human rights has been adopted, whereas in the social sphere, social security has been regulated.<sup>47</sup>

Mercosur is also concentrating on environmental issues. In 2001, the Framework Agreement on the Environment was signed,<sup>48</sup> which emphasized the need to cooperate for the protection of the environment and the sustainable use of natural resources, in order to achieve improved quality of life and sustainable economic, social and environmental development. The preamble to the agreement articulates the belief in the benefits of the participation of civil society in environmental protection and sustainable management of natural resources. The agreement makes explicit reference to Agenda 21, the final document of the 1992 Rio de Janeiro Earth Summit,<sup>49</sup> by reaffirming the commitments of states parties to adhere to the principles expressed in the Rio Declaration on Environment and Development by, among other things, integrating environmental requirements into sectoral policies, promoting sustainable development, or applying the principle of prevention and the precautionary principle.

The States Parties have agreed on 4 thematic areas, listed in the annex to the agreement: 1) sustainable management of natural resources including wildlife, forests, biodiversity, soil and water resources; 2) quality of life and environmental planning, including, but not limited to, urban planning, renewable or alternative energy sources, waste, hazardous substances and products; air protection; 3) environmental policy instruments, among others, environmental impact assessments, or environmental control instruments; environmental technologies, industrial accidents; 4) environmentally sustainable production activities in sustainable agriculture, sustainable forestry, sustainable fisheries or ecotourism, among others.

Under the Additional Protocol to the Mercosur Framework Agreement on the Environment on cooperation and assistance in case of environmental emergencies, signed on 7 July 2004, the scope for action in this area was developed.<sup>50</sup> This agreement deals with the occurrence of an environmental emergency that has occurred on the territory of one of the State Parties due to natural causes (volcanic eruption, earthquake, tornado, fire, flood, drought, landslide) or caused by an

<sup>47</sup> C. Mik, *Fenomenologia regionalnej...*, pp. 263-264.

<sup>48</sup> Decisión N° 02/01 Acuerdo Marco Sobre Medio Ambiente Del Mercosur, of 22 June 2001, ratified Paraguay LEY N° 2068 of 28 January 2003, Brasil Decreto Legislativo N° 333, 24/07/2003, Argentina N° 25841, Uruguay LEY N° 17712 of 27 November 2003.

<sup>49</sup> Agenda 21: programme of action for sustainable development, Rio Declaration on Environment and Development, statement of forest principles: the final text of agreements negotiated by Governments at the United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio de Janeiro, Brazil, <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (accessed 7 May 2023).

<sup>50</sup> Protocolo Adicional Al Acuerdo Marco Sobre Medio Ambiente Del Mercosur En Materia De Cooperación Y Asistencia Ante Emergencias Ambientales of 7 July 2004, ratified in Paraguay: LEY N° 2760, 3 November 2005, in Brasil: Decreto Legislativo N° 150, 14/06/2011 and Uruguay: LEY N° 18372, 17 October 2011.

accident (industrial accident, substance spill, explosion, fire), causing an actual or potential threat to people and the environment, occurring on its territory and having a transboundary impact. The agreement provides for an incident notification system, the development of a risk minimization system, contingency plans, the establishment of a bank of specialists in environmental risk prevention and remediation, as well as mutual assistance in the event of an emergency.

It is also worth highlighting that the establishment of the common market, in order to strengthen the integration process, implied an obligation on the state parties to harmonise their legislation in relevant areas (such as food safety or environmental protection).

## 5. EU-MERCOSUR AGREEMENT ON FOOD SAFETY AGREEMENT

The result of an advanced form of the globalization process is that many of the world's economies are much more open to foreign markets than they were before. As of the end of 2023, the World Trade Organization (WTO) notes 361 regional free trade agreements that have been submitted, but if you include those already in the approval process, the number of agreements is 594.<sup>51</sup> Groups of countries form regional economic groupings and conclude free trade agreements among themselves to facilitate international trade and liberalize trade. Mercosur was a closed economic group in its first years, gradually reviving relations with the outside world and concluding international agreements, including agreements with the EU. The trade agreement signed in 2019 between the two groups of countries that make up the international organization, after 20 years of negotiations, was judged to be the most comprehensive trade agreement the organization has signed.<sup>52</sup> However, the agreement was based on mutually beneficial calculations related to trade.<sup>53</sup>

<sup>51</sup> Data from WTO compilation, RTA Section, December 2022 [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm) (accessed 30 December 2023).

<sup>52</sup> H. Erkekoğlu, B. Yılmaz, *Mercosur Ülkelerinin Ab İle Dış Ticaretinin Serbest Ticaret Anlaşması Kapsamında Değerlendirilmesi*, "Pamukkale University Journal of Institute Social Sciences" 2021, Issue 45, p. 87.

<sup>53</sup> From the European Commission's figures, EU industries will get an increase in exports of products that have so far been subject to high and sometimes prohibitive tariffs. These include automobiles (tariffs of 35%), auto parts (14-18%), machinery (14-20%), chemicals (up to 18%), pharmaceuticals (up to 14%), clothing and footwear (35%) or knitwear (26%). The EU's agri-food sector will benefit from a reduction in Mercosur's existing high tariffs on EU export products, including chocolate and confectionery (20%), wines (27%), spirits (20 to 35%) and soft drinks (20 to 35%). The agreement is also expected to provide duty-free access subject to quotas on EU dairy

Particularly strict provisions apply to food safety. The EU-Mercosur agreement includes Chapter V. *Sanitary and Phytosanitary Regulations* (hereinafter: “Chapter V”), a commitment to upholding food safety standards included in EU standards. The agreement upholds strict sanitary and phytosanitary regulations protecting EU consumers (food safety, animal health and plant health) and any standards applied by the EU, when importing agricultural or fish products.

As L. Pastorino points out,<sup>54</sup> the provisions of Chapter V are crucial for both Parties, but especially for Mercosur countries as food exporters, since they aim, in addition to achieving the sanitary and public interest objectives already contained in the WHO Sanitary and Phytosanitary Measures (hereinafter: “WTO SPS Agreement”),<sup>55</sup> at facilitating trade by simplifying procedures and regulating in greater detail the claims and defences of importing and exporting countries.

In accordance with the principle of sovereignty, the EU-Mercosur Agreement explicitly recognizes that the regulations of the importing country apply to exports of agricultural or food products (Art. 6(1) Chapter V).<sup>56</sup> Another section of that article states that the parties shall ensure that their sanitary and phytosanitary measures are applied in a proportionate manner and do not cause arbitrary or unjustified discrimination between EU member states or Mercosur member states with identical or similar conditions, including between their territory and that of the other party. In Pastorino’s opinion,<sup>57</sup> the agreement confirms that sanitary and phytosanitary measures will not be applied in a way that constitutes a disguised restriction on international trade.

It was emphatically pointed out that the EU standards will not be relaxed in any way by the Mercosur agreement and that EU standards for Sanitary and Phytosanitary Measures SPS are and will remain non-negotiable. In practice, this means fulfilling the standards included in the Codex Alimentarius<sup>58</sup> and the provisions of dozens of EU laws related to food safety, animal and plant health. The EU-Mer-

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products (the previous tariff was 28%), particularly cheese. [https://Ec.Europa.Eu/Commission/Presscorner/Detail/En/IP\\_19\\_3396](https://Ec.Europa.Eu/Commission/Presscorner/Detail/En/IP_19_3396) (accessed 9 May 2023).

<sup>54</sup> L.F. Pastorino, *Sanitary and Phytosanitary Measures in the Agreement Between the European Union and Mercosur, the Precautionary Principle and Trade Facilitation. Introductory Remark* (in:) K. Leśkiewicz (ed.), *Legal protection of human health against the unsafe agricultural food*, Warsaw 2022, p. 158.

<sup>55</sup> The Agreement on the Application of Sanitary and Phytosanitary Measures is one of the agreements that is part of WTO law. The purpose of the SPS Agreement is to set rules for the application of sanitary and phytosanitary measures by members of the organization. Text: [https://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm) (accessed 9 May 2023).

<sup>56</sup> Draft trade part of the EU-Mercosur Association Agreement, Chapter Sanitary and Phytosanitary Measures <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/8e389497-7cbd-44e1-a951-aa913344cf7c/details> version 8 September 2022, (accessed 9 May 2022), hereinafter cited as: “Chapter SPS”.

<sup>57</sup> L.F. Pastorino, *Sanitary and Phytosanitary...*, p. 159.

<sup>58</sup> Codex Alimentarius is a set of food standards developed by the Codex Alimentarius Commission a subsidiary body subordinate to the FAO Conference. See more: T. Srogosz, *Międzynaro-*

cosur agreement includes provisions relating to the development commitment to scientific issues related to food safety issues, such as maximum residue levels, and animal and plant health. The cooperation will aim to increase the amount of scientific information available to the Parties to support their respective approaches to regulatory standards that may affect mutual trade. It will also address the collection of scientific data and improve cooperation in building a common understanding of the World Organization for Animal Health standards,<sup>59</sup> the International Plant Protection Convention<sup>60</sup> and the Codex Alimentarius.

The EU by concluding free trade agreements with non-negotiable clauses of European standards, seeks to uphold the principles of international (global) food law focusing on food security and sustainable food development.<sup>61</sup> In this system, protection and development of indigenous agricultural production based on sustainable use of resources and natural production methods is of great importance. It should also be remembered that food sustainability in the EU is based on the principle of prevention and the precautionary principle of human life, health and the environment. It is the fundamental principle of the Community today.

Requirements relating to the safety of food and feed imported into the EU are regulated by Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in the field of food safety.<sup>62</sup> Food and feed business operators shall ensure, at all stages of production, processing and distribution in enterprises under their control, that such food or feed complies with the requirements of food law relevant to their activities controlling compliance with such requirements (Art. 17(1) of the Regulation 178/2002).

The specific food and feed safety, sanitary and phytosanitary requirements are very extensive. In this regard, it is possible to indicate the requirements relating to:<sup>63</sup>

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*dowe prawo żywnościowe*, Warszawa 2020, p. 87, or K. Leśkiewicz, *Prawo żywnościowe*, Warszawa 2020, pp. 9-10.

<sup>59</sup> World Organization for Animal Health (OIE) is an international organization established on 25 January 1924, under an agreement signed in Paris by 28 countries to improve animal health worldwide. The standards, directives and recommendations set by the OIE are considered as global references of the World Trade Organization (WTO), particularly the agreement on sanitary and phytosanitary measures.

<sup>60</sup> The International Plant Protection Convention IPPC, established in 1952 by the UN agency for world agriculture and food (FAO), an international treaty organization, tasked with preventing the spread of plant diseases. One of its functions is to maintain a list of plant diseases and pests.

<sup>61</sup> More on this subject: K. Leśkiewicz, *Prawo żywnościowe* ..., p. 3.

<sup>62</sup> Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in the field of food safety, OJ L 31, 1 February 2002, p. 1.

<sup>63</sup> K. Leśkiewicz, *Prawo żywnościowe*..., pp. 86 - 106.



- 1) food of animal origin, regulated by Regulation (EC) No. 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs<sup>64</sup> and Regulation (EC) No. 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin.<sup>65</sup> Under Article 5 of Regulation No. 852/2004, food business operators shall develop, execute and maintain a permanent procedure or procedures based on the seven HACCP principles, which include conducting a hazard analysis, designating critical control points, determining concentration levels, monitoring, or developing corrective actions;<sup>66</sup>
- 2) additives, the so-called food additives (sweeteners, colours, preservatives, antioxidants), added intentionally for technological reasons, the use of which is regulated by the provisions of Regulation (EC) No. 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives.<sup>67</sup> Only those additives included in the list of EU-permitted food additives described in Commission Implementing Regulation No. 1129/2011 of 11 November 2011 amending Annex II to Regulation (EC) No. 1333/2008 of the European Parliament and of the Council by establishing a EU list of food additives<sup>68</sup> that may be used. Only additives included in the EU list may be placed on the market and used in food under the conditions described in the annex;
- 3) flavorings and enzymes are agents not intended for direct consumption, added to foodstuffs to impart or alter their aroma or flavor. They are made from or contain products with flavorings, flavor preparations, flavorings from thermal processing, including smoke, according to Article 1(2)(a) of Regulation No. 1334/2008 of 16 December 2008 on flavorings and certain food ingredients with flavoring properties for use in and on foods.<sup>69</sup> Annex I to Regulation 1334/2008 establishes the UE list of flavorings and source materials;

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<sup>64</sup> Regulation (EC) No. 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, OJ L 139, 30 April 2004, pp. 1-54.

<sup>65</sup> Regulation (EC) No. 853/2004 of the European Parliament and of the Council of 29 April 2004, laying down specific hygiene rules for food of animal origin, OJ L 139, 30 April 2004, p. 55.

<sup>66</sup> Codex Alimentarius, Code of Hygienic Practice for Precooked and Cooked Foods in Mass Catering, CAC/RCP 39, 1993.

<sup>67</sup> Regulation (EC) No. 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives, OJ L 354, 31 December 2008, pp. 16-33.

<sup>68</sup> Commission Regulation (EU) No. 1129/2011 of 11 November 2011 amending Annex II to Regulation (EC) No. 1333/2008 of the European Parliament and of the Council by establishing a Union list of food additives, OJ L 295, 12 November 2011, pp. 1-177.

<sup>69</sup> Regulation (EC) No. 1334/2008 of the European Parliament and of the Council of 16 December 2008. on flavorings and certain food ingredients with flavoring properties for use in and on foods and amending Council Regulation (EEC) No. 1601/91, Regulations (EC) No. 2232/96 and (EC) No. 110/2008 and Directive 2000/13/EC, OJ L 354, 31 December 2008, pp. 34-50.



- 4) pesticide residues in Regulation No. 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in and on food and feed of plant and animal origin,<sup>70</sup> determines permissible maximum levels for pesticide residues in food and feed (hereinafter: NDP), to eliminate the differences arising from national legislation that could create barriers to trade in agricultural products in advance and ensure free movement of goods and equal conditions of competition and a high level of consumer protection. These considerations determined the harmonization at the EU level of maximum residue levels of NDP for products of plant and animal origin, taking into account good agricultural practices.<sup>71</sup>

Whereby “good agricultural practice” under Article 3(2)(a) of Regulation 396/2005 means the nationally recommended, permitted or registered safe use of plant protection products under specific conditions at any stage of production, storage, transport, distribution and processing of food and feed. It also implies the application, in accordance with Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC,<sup>72</sup> of the principles of integrated pest control in a specific climatic zone, as well as the use of minimum quantities of pesticides and the setting of NDP timelines at the lowest level to achieve the desired effect.

In contrast, “good plant protection practice” under Article 3(18) of Regulation 1107/2009 means a practice in which treatments with plant protection products applied to the plants or plant products in question, in accordance with the conditions of authorized use, are selected, dosed and planned to ensure acceptable efficacy with the minimum necessary amount, taking due account of local conditions and the possibilities for control by mechanical and biological methods.

According to Article 18 of Regulation 396/2005, products of plant and animal origin covered by Annex I to that act may not contain, at the time of placing on the market as food or feed, or at the time of administration to animals, any pesticide residue exceeding the MRLs for those products

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<sup>70</sup> Regulation (EC) No. 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in and on food and feed of plant and animal origin, amending Council Directive 91/414/EEC, OJ L 70, 16 March 2005, p. 1.

<sup>71</sup> More extensively on the pesticides regulation aspects: D. Szostek (in:) A. Szymecka-Weśółowska, *Bezpieczeństwo żywności i żywienia. Komentarz*, Warsaw 2013, pp. 115-121, 164-170.

<sup>72</sup> The provision originally indicated Directive 91/414/EEC, which, however, was repealed in 2009 by Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ EU L 309 of 24 November 2009.

described in Annexes II and III, or 0.01 mg/kg for those products for which there is no specific NDP in the annexes;

- 5) contaminants, including nitrates, mycotoxins, metals (lead, cadmium, mercury, arsenic) or glycidyl esters of fatty acids, all of which have undesirable properties for human health. The content in food is regulated by Commission Regulation 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs.<sup>73</sup> This act introduces orders and prohibitions relating to the maximum levels of contaminants, including: a) prohibition of marketing foodstuffs listed in the annex to the regulation that contain contaminants at levels exceeding the maximum level; b) ordering the application of the maximum levels included in the annex; c) ordering the consideration for products that are dried, diluted, processed or composed of more than one ingredient; d) ordering food operators to present and take into account specific concentration or dilution factors during official inspections. In addition, if EU law does not regulate maximum levels for food products for infants and young children, Member States may introduce more stringent levels;
- 6) microorganisms or substances such as bacteria, viruses, fungi, molds, algae, protozoa, parasites, parasitic worms and their toxins and metabolites. Foodstuffs should not contain microorganisms, their toxins or metabolites in amounts that pose an unacceptable risk to human health. Their prevention in food is regulated by Commission Regulation 2073/2005 (EC) of 15 November 2005 on microbiological criteria for foodstuffs.<sup>74</sup> The regulations introduce the term 'microbiological criterion' which means a requirement for accepting a product, batch of foodstuffs or process based on the absence, presence or number of microorganisms and/or the amount of their toxins or metabolites per unit of mass, volume, surface or batch. It also provides guidance for the acceptance of foodstuffs and their production, handling and distribution. The application of microbiological criteria should be an integral part of the implementation of procedures based on the principles established under the requirements of Article 5 of Regulation No. 852/2004 on implementation and application of the 7 principles of the HACCP system and other hygiene control measures;

Producers of food sector are required by Article 3 of Regulation 2073/2005 to ensure that foodstuffs comply with the relevant microbiological criteria listed in Annex I. In this regard, at each stage of food production, processing and distribution, including retail, food business operators shall take measures, within the framework of their procedures based on HACCP principles

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<sup>73</sup> Commission Regulation (EC) No. 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs, OJ EU L 364 of 2006, p. 5.

<sup>74</sup> Commission Regulation (EC) No. 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs, OJ L 338, 22 December 2005, p. 1.

and within the framework of the implementation of good hygiene practices, to ensure: a) that raw materials and foodstuffs under the company's control are supplied, processed and handled in such a way that the process hygiene criteria are met; b) that the food safety criteria applicable throughout the shelf life of the products can be met under reasonably foreseeable conditions of distribution, storage and use.

If necessary, food companies responsible for manufacturing the product in question should conduct tests in accordance with Annex II to examine compliance with the criteria throughout the shelf life. This applies in particular to ready-to-eat products in which the growth of *Listeria monocytogenes*<sup>75</sup> is possible and which may pose a public health risk due to the presence of this bacterium;

- 7) residues of pharmacologically active substances, based on Article 2(a) of Regulation (EC) No. 470/2009 of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of maximum residue limits of pharmacologically active substances in foodstuffs of animal origin<sup>76</sup> are all pharmacologically active substances, the content of which is expressed in mg/kg or µg/kg of fresh weight, which includes both active substances and excipients, breakdown products and their metabolites remaining in food of animal origin. According to the provisions of this act, the maximum residue limits of pharmacologically active substances (MLPs) the presence of which is permitted in food of animal origin and the level of residues of these substances is determined for control purposes.

The precautionary principle applied here, as the findings were based on a scientific risk assessment and recommendations with regard to risk management, aims to ensure a high level of human health protection and prevent adverse effects of the lack of availability of appropriate veterinary medicinal products on human health and animal health and welfare.<sup>77</sup> The opinion takes into account all relevant findings of the European Food Safety Authority (EFSA);

- 8) radioactive contamination as defined by the provisions of Council Regulation (Euratom) 2016/52 of 15 January 2016 setting maximum permitted levels of radioactive contamination of food and feed following a nuclear

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<sup>75</sup> A species of relatively anaerobic, intracellularly living bacterium that is the etiologic agent of listeriosis.

<sup>76</sup> Regulation (EC) No. 470/2009 of the European Parliament and of the Council of 6 May 2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin and repealing Council Regulation (EEC) No. 2377/90 and amending Directive 2001/82/EC of the European Parliament and of the Council and Regulation (EC) No. 726/2004 of the European Parliament and of the Council, OJ L 152, 16 June 2009, pp. 11-22.

<sup>77</sup> M.A. Król, *Prevention Principle...*, pp. 6-8.

accident or other radiation event.<sup>78</sup> A “radiation event” is defined as an abnormal situation or event related to a radiation source that requires immediate action to mitigate serious adverse effects on human health and safety, quality of life, property or the environment, or a hazard that could lead to such serious adverse effects. The issuance of the regulation’s provisions was related to the 2011 accident at the Fukushima nuclear power plant and the recorded levels of radionuclides<sup>79</sup> found in some food products originating in Japan.<sup>80</sup>

In addition to the sanitary and phytosanitary regulations indicated, EU law regulates issues relating to organic farming and to materials and products intended to come into contact with food, as well as food information.

As noted by L. Pastorino,<sup>81</sup> Article 3.2 Chapter V provides an interpretive standard giving hierarchy to the standards established by the WTO, stipulating that in case of inconsistency between the definitions contained in the SPS Agreement and those agreed upon by both Parties or those adopted by Codex Alimentarius or the International Office of Epizootics (hereinafter: “OIE”) or the International Plant Protection Convention (hereinafter: “IPPC”), the definitions contained in the WTO SPS Agreement shall prevail.

In addition, according to Article 4 Chapter V, the parties reaffirm their rights and obligations under the WTO SPS Agreement, and that none of the chapters agreed between them may affect these rights and obligations. In this sense, the EU’s agreement with Mercosur should develop existing provisions or add new ones to the WTO SPS Agreement.<sup>82</sup>

## 6. EU-MERCOSUR AGREEMENT ON THE ENVIRONMENT

The purpose of introducing a chapter on sanitary and phytosanitary security into the EU-Mercosur agreement is clearly to protect human life and health.

<sup>78</sup> Council Regulation (Euratom) 2016/52 of 15 January 2016 laying down maximum permitted levels of radioactive contamination of food and feed following a nuclear accident or any other case of radiological emergency and repealing Regulation (Euratom) No. 3954/87 and Commission Regulations (Euratom) No. 944/89 and (Euratom) No. 770/90, OJ L 13, 20 January 2016, pp. 2-11.

<sup>79</sup> On radioactive contamination caused by the Fukushima Nuclear Power Plant accident after 10 years: S. Hashimoto, M. Komatsu, S. Miura, *Radioactive Materials Released by the Fukushima Nuclear Accident* (in:) *Forest Radioecology in Fukushima*, Springer, Singapore 2022, pp. 1-10.

<sup>80</sup> S. Merz, K. Shozugawa, G. Steinhäuser, *Analysis of Japanese Radionuclide Monitoring Data of Food Before and After the Fukushima Nuclear Accident*, “Environmental Science and Technology” 2015, 49, pp. 2875–2885.

<sup>81</sup> L.F. Pastorino, *Sanitary and Phytosanitary...*, pp. 158-159.

<sup>82</sup> *Ibidem*, pp. 158-162.

The solutions adopted also contribute significantly to the protection of the environment: elements of the biosphere, especially animals, plants, waters and soils. The agreement also contains separate provisions relating to the environment in Chapter XIV *Trade and Sustainable Development* (hereinafter: “Chapter XIV”) which confirms the standard of the agreement to match those of the agreements with Mexico or Japan.

The EU-Mercosur agreement is based on the premise of sustainable development and the statement that increased trade should not take place at the expense of the environment for the well-being of present and future generations (Art. 1(3) Chapter XIV). In addition, Parties to the agreement in Article 7 *Trade and Biodiversity* affirm compliance with multilateral environmental agreements, among others, the Convention on Trade in Wild Animals CITES from 1973,<sup>83</sup> the Convention on Biological Diversity (CBD) from 1992<sup>84</sup> and the related International Treaty on Plant Genetic Resources for Food and Agriculture.<sup>85</sup> These provisions of the agreement do not introduce any new obligations for the parties, as both states parties to the agreement signed and ratified the designated international agreements many years ago.

Article 6, by introducing a mutual agreement of the parties to combat climate change and effective implementation, successfully implements the UNFCCC and the Paris Agreement<sup>86</sup> established under it. All Mercosur countries are parties to the Paris Agreement. It would appear that the obligation to effectively implement a treaty implies an obligation to continue to be a party to the treaty in question. Consequently, it could be argued that the termination of the Paris Agreement by a party would violate the EU-Mercosur agreement.

Article 8 of Chapter XIV of the Agreement also includes a commitment to sustainable forest management and combating deforestation. The Parties recognise the importance of sustainable forest management and the role of trade in achieving this goal and of restoring forests for their conservation and sustainable use. In addition to the general provisions on promoting trade in products from sustainably managed forests harvested in accordance with the laws of the country of harvest, the parties have committed to implementing measures to combat illegal logging and related trade. The provisions of this provision should also apply to agricultural products from areas of predatory, often illegal, logging. Unlike Article 7 of the Agreement, the provision in Article 8 does not refer to the obligation to comply with the provisions of the Convention on Biological Diversity relating

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<sup>83</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., on 3 March 1973.

<sup>84</sup> Convention mentioned in footnote 27.

<sup>85</sup> The International Treaty on Plant Genetic Resources for Food and Agriculture, signed in Rome in 2001, entered into force in 2004 under the auspices of the Food and Agriculture Organisation of the United Nations (FAO).

<sup>86</sup> Paris Agreement mentioned in footnote 35.

to forests or the 1992 Rio de Janeiro Official Position on Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests.<sup>87</sup> The protection and sustainable management of forests and, above all, the reduction of deforestation should be an instrument of the agreement's norms relating to climate change. The EU-Mercosur agreement also lacks reference to the International Tropical Timber Agreement.<sup>88</sup>

The aspiration of the EU, as a global trading partner underpinned by a treaty basis (Art. 21(2) TEU), to introduce and enforce high standards of natural resource protection in free trade agreements can be of great importance for global environmental protection. Action in this regard is recognised as an approach based on corporate social responsibility as a concept whereby companies voluntarily integrate social and environmental considerations into their commercial activities and in their dealings with their stakeholders.<sup>89</sup> For this reason, the provisions of the EU-Mercosur agreement can be considered as an instrument for sustainable agriculture, a zero deforestation supply chain or, more broadly, corporate social responsibility, the basis of which in the EU was set out in the 2001 Green Paper<sup>90</sup> and the 2002 White Paper,<sup>91</sup> which highlighted the importance of action in this area for sustainable development.

## 7. THE PRECAUTIONARY PRINCIPLE IN THE EU-MERCOSUR AGREEMENT

The detailed provisions relating to the precautionary principle found in Article 10(2) to (4) of Chapter XIV require separate attention. In cases where scientific evidence or information is insufficient or inconclusive and there is a risk of serious degradation of the environment or a threat to health and safety at work in the territory of a Party, a Party may adopt measures based on the precautionary principle. Such measures shall be based on available relevant information and

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<sup>87</sup> Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, UN, New York 21 April 1992, A/CONF.151/6.

<sup>88</sup> The 2006 International Tropical Timber Agreement – European Community Declaration in accordance with Art. 36(3) of the Agreement – Declaration, OJ UE L 262, 09 October 2007, pp. 8-26.

<sup>89</sup> M. Bernatt, *Společná odpovědnost biznesu. Wymiar konstytucyjny i międzynarodowy*, Warszawa 2009, pp. 93-97.

<sup>90</sup> Commission of the European Communities, Green Paper Promoting European Framework for Corporate Social Responsibility, Brussels, 18 July 2001 r. COM/2001/0366 final.

<sup>91</sup> Commission of the European Communities: Corporate Social Responsibility: A business contribution to Sustainable Development, 2 July 2002, COM (2002) 347.

shall be reviewed periodically. The Party adopting a measure shall endeavour to obtain new or additional scientific information necessary to make a more conclusive assessment and shall review the measure as necessary. Where a measure adopted pursuant to the foregoing paragraph affects trade or investment, a Party may request the Party adopting the measure to provide information indicating that the scientific knowledge is insufficient or inconclusive with respect to the matter at issue and that the measure adopted is consistent with its level of protection. Such measures shall not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Further, Chapter XIV of the agreement reaffirms explicitly the ‘precautionary principle’ and the right of both sides to adopt measures to mitigate any perceived risk of serious environmental as well as human health and safety.<sup>92</sup>

On the other hand, Chapter V of the Agreement includes the provisions of Article 11(1)(e) and (f) indicating that, upon the request of a Party and within 15 months from the date of its submission, information on the relationship of the measure taken to international standards, guidelines and recommendations shall be exchanged. Where a measure is not based on an international standard, the Parties shall list the scientific information with which the SPS measure does not comply and indicate the reasons for the measure. In cases where the relevant scientific evidence is insufficient, the Party adopting the SPS measure shall provide the available relevant information on which the measure is based and, if available, additional information to enable a more objective risk assessment, and shall review the SPS measure accordingly within a reasonable time.

Adopting such a solution leads to a limitation of the precautionary principle and the possibility of temporarily applying a sanitary or phytosanitary measure, which is contrary to the principles adopted in Article 2 and 5 of the WTO SPS Agreement. The doctrine has expressed the view<sup>93</sup> on the exclusion in the normative part of Chapter V of the precautionary principle. L. Pastorino, referring to an official presentation by the Argentine Foreign Ministry, appeared to say that “The Agreement establishes clear rules that prevent the use of unjustified and arbitrary sanitary measures for access to the European market for our (Mercosur) products, stressing the importance of basing measures on scientific grounds, as opposed to the precautionary principle”.<sup>94</sup> Such a measure is incompatible with the development of EU regulation and the increasing importance of the precau-

<sup>92</sup> M. Mendez-Parra et al., *Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur, Final Report*, Luxembourg, December 2020, p. 160.

<sup>93</sup> *Ibidem*, pp. 387, 409-410 or L. Pastorino, *Sanitary and Phytosanitary...*, pp. 158-162.

<sup>94</sup> L. Pastorino, *Sanitary and Phytosanitary...*, pp. 158-162 and Ministerio de Relaciones Exteriores, Comercio Internacional y Culto, República Argentina, “Resumen de contenidos del pilar comercial”, available at <https://www.cancilleria.gob.ar/es/acuerdo-mercador-ue/resumen-de-contenidos-del-pilar-comercial> (accessed 7 October 2021).



tionary principle in relation to human health safety and environmental protection. Risk assessment and confrontation with scientific achievements is one of the pillars of the precautionary principle.

## 8. SUMMARY

The EU, as the world's leading trade partner, in exercising its exclusive treaty powers to shape trade policy and seeking to promote sustainable economic as well as social development, enters into free country agreements in which high standards of food safety and the protection of the world's natural resources must be introduced and enforced. Negotiated for 20 years, the EU-Mercosur agreement was to become one of the most important bi-regional agreements in international trade. The agreement reached is not satisfactory to either side, hence the four-year period since its conclusion has not brought any ratification.

The analysis carried out mandates several key conclusions. The first relates to the strict food safety provisions declared in the agreement, which are found in Chapter V. These are notably sanitary and phytosanitary provisions protecting the health and lives of consumers. These provisions essentially implement the provisions of the WTO SPS Agreement. It has been categorically stated that the extensive EU regulations relating to food safety will not be touched and, in the event of divergent interpretations, the standards contained in the WTO rules will prevail.

By contrast, the more serious allegations relate to the environmental provisions in Chapter XIV of the agreement, particularly the agreement's vague provisions on the protection of biodiversity and combating deforestation for agricultural production, which is an essential instrument for combating climate change. The norms as negotiated in the agreement do not realise the objective of sustainable development and should be renegotiated. The exclusion of the precautionary principle in Chapter V only confirms this thesis. However, the change in the political and economic situation in Europe in 2022 has triggered the EU's desire to preserve food sovereignty and the impetus for another round of negotiations.<sup>95</sup> Considerable progress has been made in the past few months. The negotiations will

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<sup>95</sup> Joint communiqué of the European Union and Mercosur, Directorate-General for Trade, 8 March 2023: Meeting of the European Union-Mercosur chief negotiators. Facing the new global political and economic scene, and mindful of the strategic importance of the bi-regional relationship, both delegations agreed on the importance of intensifying the dialogue in order to finalise a mutually beneficial and balanced agreement. To this end, the Chief Negotiators of the EU-Mercosur Agreement agreed on a work schedule for the first half of 2023. [https://policy.trade.ec.europa.eu/news/meeting-european-union-mercotur-chief-negotiators-2023-03-08\\_en](https://policy.trade.ec.europa.eu/news/meeting-european-union-mercotur-chief-negotiators-2023-03-08_en) (accessed 9 May 2023).

continue with the ambition of completing the process and reaching an agreement in 2024.<sup>96</sup>

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<sup>96</sup> EU-Mercosur Joint Press Statement, 7 December 2023, Brussels, Directorate-General for Trade, [https://policy.trade.ec.europa.eu/news/eu-mercotur-joint-press-statement-2023-12-07\\_en](https://policy.trade.ec.europa.eu/news/eu-mercotur-joint-press-statement-2023-12-07_en) (accessed 30 December 2023).

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