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Intellectual Property in the EU-MERCOSUR FTA: A brief review of the negotiating outcomes of a long-awaited agreement

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Roxana Blasetti
In collaboration with
Juan I. Correa




SOUTH
CENTRE



RESEARCH PAPER

128

**INTELLECTUAL PROPERTY IN THE
EU–MERCOSUR FTA: A BRIEF REVIEW OF
THE NEGOTIATING OUTCOMES OF A LONG-
AWAITED AGREEMENT**

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SOUTH CENTRE

FEBRUARY 2021

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ABSTRACT

This paper provides a first glance at the Intellectual Property Chapter of the Free Trade Agreement (FTA) between the Southern Common Market (MERCOSUR) and the European Union (EU). It is not intended to provide an exhaustive analysis of the commitments involved but rather to briefly review the scope of intellectual property in the bi-regional negotiations, which took more than 20 years and ended in June 2019 with an “agreement in principle.” It also aims to put the Chapter into context with the whole commitments covered by the FTA and, finally, to highlight its most relevant aspects.

Este documento ofrece un primer vistazo al capítulo sobre propiedad intelectual del Tratado de Libre Comercio (TLC) entre el Mercado Común del Sur (MERCOSUR) y la Unión Europea (UE). No se pretende hacer un análisis exhaustivo de los compromisos implicados, sino más bien revisar brevemente el alcance de la propiedad intelectual en las negociaciones birregionales, que duraron más de 20 años y terminaron en junio de 2019 con un "acuerdo de principio". También tiene por objeto situar el capítulo en el contexto de todos los compromisos cubiertos por el TLC y, por último, poner de relieve sus aspectos más relevantes.

Ce document donne un premier aperçu du chapitre sur la propriété intellectuelle de l'accord de libre-échange (ALE) entre le Marché commun du Sud (MERCOSUR) et l'Union européenne (UE). Il n'a pas pour but de fournir une analyse exhaustive des engagements impliqués, mais plutôt de revoir brièvement la portée de la propriété intellectuelle dans les négociations bi-régionales, qui ont duré plus de 20 ans et qui se sont terminées en juin 2019 par un "accord de principe". Il vise également à mettre ce chapitre en contexte avec l'ensemble des engagements couverts par l'ALE et, enfin, à mettre en évidence ses aspects les plus pertinents.

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INTRODUCTION

This paper has two parts. The first part, on general aspects, briefly describes the initial association agreement (AA) between MERCOSUR and EU covering a political dialogue pillar and a cooperation pillar, which frame the commercial negotiation. It also discusses some of the political, social, and economic implications of the finally concluded Free Trade Agreement for MERCOSUR countries. The second part describes the most relevant agreed-upon aspects with a brief overview of various sections of the Intellectual Property Chapter.³ Finally, some preliminary conclusions are made.

I. GENERAL ASPECTS

The European Union (EU) and the Southern Common Market (MERCOSUR) signed an Interregional Framework Cooperation Agreement on 15 December 1995, in Madrid.⁴ The framework agreement entered into force on 1 July 1999,⁵ and included three pillars: a political dialogue pillar, a cooperation pillar, and a trade pillar. The first part of the process aimed to strengthen political, economic, business, cultural, and scientific ties, and the second phase sought to liberalize trade through harmonization and homogenization between the two free trade areas, under World Trade Organization (WTO) rules. Reaching a consensus on the trade pillar took the longest time. The objective of progressive trade liberalization to reach a free trade area between two customs unions was a complex process marked by political and economic events at national, regional, and international levels. It was finally achieved, constituting a unique agreement of its kind, with the challenges and opportunities created by an extended market of 580 million people.

In September 2000, MERCOSUR and EU began negotiations in Buenos Aires on a free trade area to eliminate tariffs and nontariff restrictions and agree on the disciplines that would govern bi-regional trade. However, it was not until 28 June 2019, that the ministers of both regions announced the successful conclusion of the negotiations of the trade pillar, i.e., the EU–MERCOSUR Free Trade Agreement (hereafter the Agreement), the first between two customs unions.

The Agreement liberalizes trade in goods (MERCOSUR will fully liberalize 91 per cent of its imports, and EU will liberalize 92 per cent of its imports from MERCOSUR). It also contains disciplines on trade in goods, rules of origin, customs and trade facilitation, trade remedies, sanitary and phytosanitary measures, technical barriers to trade, trade in services and establishment, public procurement, competition, subsidies, state-owned enterprises, intellectual property rights including geographical indications, trade and sustainable development, transparency, small and medium-sized enterprises, and dispute settlement, among others.

³ Although the intellectual property chapter of the Agreement has been finalized, the agreed text will undergo legal scrubbing. Hence, minor changes could appear in the final version.

⁴ Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part - Joint Declaration on political dialogue between the European Union and Mercosur. Available from <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A21996A0319%2802%29>.

⁵ European Commission, Countries and regions, available from <https://ec.europa.eu/trade/policy/countries-and-regions/regions/mercosur/>. Last accessed on 8 February 2021.

The Agreement can be seen as an example of the so-called “new regionalism” as contrasted with the “old regionalism” from the 1960s to the 1990s. In Latin America, several authors have analyzed the characteristics of this “new regionalism”,⁶ its relationship with multilateralism, and the mutual influence between them in bilateral, hemispheric, and bi-regional negotiations. This “new regionalism” responds to the simultaneity of two phenomena that began in the 1990s: the proliferation of economic integration agreements and the strengthening of General Agreement on Tariffs and Trade (GATT) /WTO disciplines.

One characteristic of the “new regionalism” is that integration agreements are not limited to countries with shared borders or cultural affinity. Moreover, multilateral rules are not restricted to trade in goods but also cover services and other aspects of domestic economic policy, intellectual property rights and investment. As Latin American countries have implemented unilateral trade liberalization and tariff reductions, tariffs have lost part of their importance; nontariff issues (technical obstacles to trade, sanitary and phytosanitary measures, subsidies, measures against unfair competition) became more relevant.⁷ From this perspective, it is interesting to analyze each MERCOSUR member’s assessment of the Agreement, in terms of the value they assign to the concessions they made in the light of the overall tariff and nontariff achievements obtained, including in the intellectual property rights chapter.

According to an official informative document prepared by the Argentine Government, EU is the “the first global investor, with a stock of investments exceeding 30 per cent of the world total, and imports making up 15 per cent of the total world purchases of goods and services and represents 20 per cent of the product of the international economy. It also implies access to a market of 500 million inhabitants.”⁸

The document further states that “the MERCOSUR–EU Agreement is much more than a trade agreement. It is a milestone for the international integration of the MERCOSUR countries. It is the broadest and most ambitious agreement reached by both blocs in their entire history, creating a market of goods and services for 800 million consumers who will have access to a more diverse and higher quality offer at more competitive prices.

It promotes the arrival of investments, generates an increase in the national gross domestic product (GDP) in the medium term, increases the exports of regional economies and the generation of quality employment, consolidates the participation of companies in global value chains, accelerates the process of technology transfer and increases competitiveness. It also constitutes an institutional signal that gives a permanent character and strategic relationship with the EU, guaranteeing transparency, predictability and clear rules for all the economic actors. Due to its capacity to transform the national economy and diversify the productive matrix, the Agreement serves commercial purposes and marks a before and after in the international integration of Argentina. The treaty is also the result of an effort of dialogue, coordination, and understanding among MERCOSUR member countries as well as between their governments and the private sector. Accordingly, the treaty strengthens MERCOSUR internally and also consolidates and expands the horizon for the future agenda of international insertion.”

⁶ Cfr. Susana C. de Zalduendo, *Las reglas multilaterales de comercio y las de los acuerdos regionales de integración ¿Oposición o coexistencia de ordenamientos?*, en “Derecho Industrial y de la Competencia” Nro. 6, Edic. Ciudad Argentina, Buenos Aires, 2004, pp. 143 ff.

⁷ Ibid.

⁸ Ministry of Foreign Affairs(Argentina), Mercosur-UE Strategic Agreement. Summary prepared by the Argentinian Government, available from https://eceur.cancilleria.gob.ar/userfiles/resumen_acuerdo_mcs-ue_elaborado_por_gobierno_argentino.pdf. Last accessed on 8 February 2021.

Meanwhile, according to the Government of Brazil,⁹ “The EU is MERCOSUR’s second trading partner and the first in terms of investment. MERCOSUR is the eighth largest extra-regional trading partner of EU. The flow of bi-regional trade was more than US\$ 90 billion in 2018. In 2017, the level of EU investment in the South American bloc amounted to around US\$ 433 billion. In 2018, Brazil registered a trade of US\$ 76 billion with EU and a surplus of US\$ 7 billion. Brazil exported more than US\$ 42 billion, approximately 18 per cent of the country’s total exports. Brazil stands out as the largest destination of foreign direct investment (FDI) from EU countries in Latin America, with almost 50 per cent of the level of investment in the region. Brazil is the fourth-largest EU destination for FDI, which is distributed in sectors of high strategic value.”

For the Government of Paraguay,¹⁰ the Agreement provides special and differential treatment for the country, specifically key concessions have been obtained such as 10 million kg of organic sugar exclusively for Paraguay without tariffs, an achievement that will directly benefit small local producers. There will also be other concessions in the agricultural, meat and the biodiesel sectors. The Agreement will cover 95 per cent of the tariffs, tariff-free will be reached in a maximum period of 10 years, and it will be in the producers’ hands to benefit from these advantages.

Moreover, for the Government of Uruguay,¹¹ the result, according to the negotiating mandate, “is a broad and balanced Agreement comprising two integration blocs with a total reciprocal trade of approximately \$90 billion. The European Union as a whole is the second commercial destination of MERCOSUR, as well as the second destination of Uruguayan exports—only after China. Approximately 20 per cent of Uruguayan exports are directed to this destination, among which are bovine meat, cellulose, wood, rice, leather, citrus, and honey. The commercial chapter of the Agreement contemplates benefits for Uruguay’s exportable offer to EU and contemplates Uruguay’s interests in matters of intellectual property, services, public purchases, and special regimes, among others.”

According to the Institute for International Agricultural Negotiations (INAI), “the trade agreement improves the conditions of access to goods, services and investments, reducing restrictions and simplifying commercial operating procedures. After a prolonged impasse in the extra-regional negotiations of MERCOSUR, this progress in the bi-regional relationship not only benefits trade between the blocs but also allows a greater consolidation of MERCOSUR by reaffirming the process of South American integration, harmonizing current regulations and simplifying internal procedures.”¹²

From the perspective of MERCOSUR countries, the Agreement is favorable since it foresees that tariff reductions will be made progressively over long periods, which takes into account

⁹ Ministry of Foreign Affairs (Brazil), Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part - Joint Declaration on political dialogue between the European Union and Mercosur, available from <http://www.itamaraty.gov.br/es/notas-a-la-prensa/20561-conclusion-de-las-negociaciones-del-acuerdo-entre-el-mercosur-y-la-union-europea-nota-conjunta-de-los-ministerios-de-relaciones-exteriores-economia-y-agricultura-ganaderia-y-abastecimiento-bruselas-27-y-28-de-junio-de-2019>. Last accessed on 8 February 2021.

¹⁰ Ministerio de Relaciones Exteriores, *características del acuerdo MERCOSUR unión europea y logros para el Paraguay*. Available from https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/negociadores-de-paraguay-consiguieron-trato-especial-y-diferenciado-en-acuerdo-mercosur-union-europea?ccm_paging_p=110. Last accessed on 8 February 2021.

¹¹ Ministerio de relaciones exteriores (Uruguay), MERCOSUR y Unión Europea alcanzaron un Acuerdo de Asociación que vincula a más de 800 millones de personas. Available from <https://www.gub.uy/ministerio-relaciones-exteriores/comunicacion/noticias/mercosur-union-europea-alcanzaron-acuerdo-asociacion-vincula-800-millones>. Last accessed on 8 February 2021.

¹² INAI, Se firmó el Acuerdo de Asociación Estratégica Mercosur-UE. Available from <http://inai.org.ar/archivos/notas/Se%20firmo%20el%20Acuerdo%20de%20Asociaci%F3n%20Estrategica%20MSUE.pdf>. Last accessed on 8 February 2021.

MERCOSUR producers' interests. The EU commits to reduce tariffs after a shorter period (maximum of 10 years) while MERCOSUR will have longer terms of up to 15 years. This is the result of a "special and differential treatment" achieved by the South American bloc, with a view that, according to the WTO disciplines, tariff reduction periods in regional agreements as a general rule are up to 10 years.

Considering the MERCOSUR member's evaluation, the fact that MERCOSUR has not made significant intellectual property concessions (as will be discussed below) despite the consistent efforts made by EU to obtain them, points to a successful negotiation by MERCOSUR on this sensitive issue.

Likewise, in a context of growing protectionism, this Agreement constitutes a clear signal by both integration blocs' political authorities towards the defense of a world trade system based on rules, through a clear normative framework and a dispute settlement mechanism that provides certainty about the new set of disciplines to civil society, governments and the private sector, including investors.

II. THE INTELLECTUAL PROPERTY CHAPTER: AN OVERVIEW OF THE INTELLECTUAL PROPERTY CHAPTER OF THE EU–MERCOSUR FREE TRADE AGREEMENT

1. The Intellectual Property Chapter: A Red Line for MERCOSUR

Many authors have analyzed how TRIPS-plus standards (that is, standards that increase or expand the protection mandated under the Agreement on Trade-related Aspect of Intellectual Property Rights-TRIPS-) affect free trade agreements with developing countries under the “new regionalism”.¹³ The objective of this paper is not to address these issues, but only to describe the commitments reached in the Agreement in the light of the MERCOSUR Member States’ concerns during the entire negotiation process, as well as to highlight the significance of the negotiating outcomes achieved in the complex area of intellectual property rights.

Since the earliest bi-regional meetings of the MERCOSUR–EU Working Group on Intellectual Property, MERCOSUR had rejected the EU demand to incorporate a specific chapter on intellectual property into the Agreement, on the assumption that EU would aim at imposing TRIPS-plus obligations as a trade-off for agricultural market access. Instead, MERCOSUR proposed a “bi-regional dialogue” on the subject. Negotiations were interrupted in 2006 and were not resumed until July 2010. In fact, during the re-launch meetings in Lisbon in 2009, where the conditions for restarting the negotiating process were evaluated, MERCOSUR rejected any commitment regarding intellectual property, repeating that it was a “red line” for the South American bloc.

The negotiations were indeed re-launched in 2010. The Working Group (then called the Working Group on Intellectual Property/Geographical Indications and Wines [WG IP/GI/WINES]) met but did not work on a text proposal as this had been a condition required by MERCOSUR for the re-launch of discussions. Negotiations were interrupted again toward the end of 2012, without any text on intellectual property.

Finally, negotiations were reopened in mid-2016 after significant political changes in MERCOSUR countries. In November 2016, EU presented a proposal for an intellectual property chapter to start negotiations on the text, which included commitments with significantly higher standards of protection than the multilateral commitments under the TRIPS Agreement.¹⁴ At the Buenos Aires meeting in March 2017, MERCOSUR finally agreed to negotiate on the text but rejected the EU text as a working basis and presented an alternative. Thereafter, the negotiation process was accomplished in record time, despite the parties’ widely different perspectives.

The rationale for MERCOSUR’s refusal to accept intellectual property commitments was based on the precedents of chapters already negotiated by EU with developing countries, which had included many TRIPS-Plus obligations.¹⁵ The MERCOSUR bloc was reluctant to accept a trade-off between intellectual property and market access because of the legal effects and economic costs likely to be involved if TRIPS-plus standards were accepted, particularly (but not only) in the field of access to medicines.

¹³ Ibid.

¹⁴ European Commission, EU proposal for a legal text on Intellectual Property Rights in the Trade Part of the EU-Mercosur Association Agreement. Available from https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155070.pdf. Last accessed on 8 February 2021.

¹⁵ See for example EU-Chile http://www.sice.oas.org/trade/chieu_s/chieu_s.asp#ART%C3%8DCULO_170.

An important aspect of the negotiating process—that largely explains its outcomes—is that MERCOSUR countries always maintained a uniform position vis-à-vis the EU proposals, and were able to put forward elaborated arguments to deal with the EU demands. It was also important as a basis for the negotiation, that in order to align national legislations with international standards, the TRIPS obligations were timely implemented; the TRIPS Council's legislation review for MERCOSUR members had been satisfactory, and no TRIPS violations by them were found by the Dispute Settlement Body (DSB).

MERCOSUR insisted that the protection granted at the national level was in accordance with its member countries' level of development and that it has not been demonstrated that the protection they provided was inconsistent with the TRIPS agreement or otherwise insufficient. Another argument by MERCOSUR with regard to TRIPS-Plus obligations was that all concessions eventually made to the EU on intellectual property matters, would be extended immediately and unconditionally under Article 4 of the TRIPS Agreement (the most-favored-nation clause) to nationals of all other WTO members, which would further increase the negative costs of such a concession (without any reciprocal concession by the beneficiaries thereof).

On the other hand, MERCOSUR suggested to hold a bi-regional dialogue to introduce the discussion on the topics of the World Intellectual Property Organization (WIPO) Development Agenda,¹⁶ including norms related to technology transfer, genetic resources and traditional knowledge, disclosure of origin of biological resources, access to health, access to knowledge, and food security, among others.

The outcome of the negotiation on intellectual property is a text with balanced commitments, with the sole exception of geographical indications (hereafter GIs). The result on this matter is undoubtedly the most controversial concession made by MERCOSUR in the intellectual property chapter. For the EU, GIs constitute a “deal-breaker,” and for this reason, to satisfactorily conclude the negotiations, MERCOSUR had to adjust its position on this matter. The ministers included several of the most iconic and controversial GIs protected in EU in the closing meeting of 27 June 2019.

2. Overview of the Main Commitments

The intellectual property chapter is organized into four sections:

- General Provisions and Principles
- Standards Concerning Intellectual Property Rights
- Enforcement of Intellectual Property Rights
- Final Provisions

These are further subdivided into specific subsections.

3. General provisions¹⁷

1. Each Party affirms the rights and obligations under the WTO Agreement on Trade Related Aspect of Intellectual Property Rights and any other multilateral agreement related to intellectual property to which it is a Party.

¹⁶ WIPO, WIPO Development Agenda: Background (2004-2007). Available from <https://www.wipo.int/ip-development/en/agenda/background.html>. Last accessed on 8 February 2021.

¹⁷ Article 1, Intellectual Property Chapter.

2. Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice, in a manner consistent with the objectives and principles of the TRIPS Agreement and of this Chapter.

In the general provisions of the intellectual property chapter, each party reaffirmed the TRIPS standards. The inclusion of “*any other multilateral agreement related to intellectual property*” but “*only those to which it is a Party*” is also crucial because no commitment to ratify any new international agreements arises, as MERCOSUR countries are not party to the same set of intellectual property agreements.

It is also noteworthy that the obligations in the Agreement cannot be directly invoked in the parties’ domestic legal systems. As noted, the legal framework for the commitments assumed by the parties is the TRIPS Agreement. Moreover, the room for *maneuver* for the national interpretation and implementation of this Agreement is fully preserved.

Objectives¹⁸

The objectives of this Chapter are to:

- a) Facilitate access, production and commercialization of innovative and creative products and foster trade and investment between the Parties contributing to a more sustainable, equitable and inclusive economy for the Parties;*
- b) Achieve an adequate and effective level of protection and enforcement of intellectual property rights that provides incentives and rewards to innovation while contributing to the effective transfer and dissemination of technology and favoring social and economic welfare and the balance between the rights of the holders and the public interest;*
- c) Foster measures that will help the Parties to promote research and development, and access to knowledge, including a rich public domain.*

The three objectives reflect a balance of the parties’ different but not opposing views. The first objective is to facilitate access to and the production and commercialization of innovative and creative products fostering trade and investment but with the ultimate purpose of contributing to a more sustainable, equitable, and inclusive economy for the parties.

Notwithstanding that the second objective seeks to achieve an adequate and effective level of protection and enforcement of intellectual property rights, it is linked to the effective transfer and dissemination of technology favoring social and economic welfare, thereby introducing a public interest dimension.

Finally, the third objective envisages encouraging measures to promote research and development, as well as knowledge access, including a rich public domain. This latter reference suggests that the Agreement’s sole goal is not to protect the interests of right-holders, but also to ensure the interest of the public in protecting and expanding the pool of knowledge in the public domain. This can be done, for instance, by granting patents under rigorous standards of patentability only, a policy that MERCOSUR members have put in practice (albeit with different modalities).

¹⁸ Article 2, Intellectual Property Chapter.

Nature and scope of obligations¹⁹

- 1. For the purposes of this Agreement, intellectual property rights refer to all categories of intellectual property that are the subject of sections 1 through 7 of Part II of the TRIPS Agreement and Article 9 through Article 43 of this Chapter.*
- 2. Protection of intellectual property includes protection against unfair competition as referred to in Article 10bis of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967).*
- 3. Nothing shall prevent a Party from adopting measures necessary to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology, provided that such measures are consistent with the provisions of this Chapter.*
- 4. The Parties acknowledge the provisions in the TRIPS Agreement regarding competition.*
- 5. This Chapter does not create any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.*
- 6. No Party shall be obliged to implement in its law more extensive protection than is required by this Chapter. This Chapter does not preclude the Parties from applying provisions of domestic law introducing higher standards for the protection and enforcement of intellectual property, provided that they do not violate the provisions of this Chapter.*

The parties reaffirm that intellectual property rights refer to all the categories thereof covered by the TRIPS Agreement and the standards rights sections of the chapter. Such rights also include the protection against unfair competition as referred to in Article 10bis of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967) and acknowledged the TRIPS Agreement's competition provisions.

These general provisions reinforce the primacy of national systems. The Agreement will not create any obligations on the distribution of resources as between intellectual property enforcement rights and law enforcement in general, and no party shall be obligated to implement more extensive protections in its laws than those required by the chapter, but it does not preclude adopting higher protections if consistent with the Agreement.

Principles²⁰

Each Party recognizes that the protection and enforcement of intellectual property rights can and must be done in a manner conducive to economic, social, and scientific progress. Each Party shall ensure the enforcement of intellectual property rights within its own legal system and practice.

In formulating or amending its laws and regulations, each Party may establish exceptions and flexibilities permitted by the multilateral instruments to which the Parties are Signatories.

The Parties support the achieving of the United Nations Sustainable Development Goals (SDGs).

¹⁹ Article 3, Intellectual Property Chapter.

²⁰ Article 4, Intellectual Property Chapter.

The Parties support the World Health Assembly Resolution WHA 60.28 and the Pandemic Influenza Preparedness (PIP) Framework adopted on The Sixty-fourth World Health Assembly.

The Parties recognize the importance of promoting the implementation of Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, adopted by the World Health Assembly on 24 of May 2008 (Resolution WHA 61.21 as amended by Resolution WHA 62.16).

The Parties acknowledge the Development Agenda recommendations, adopted in 2007 by the General Assembly of the World Intellectual Property Organization (WIPO).

Where the acquisition of an intellectual property right is subject to the right being granted or registered, each Party shall make best efforts to ensure the procedures for granting or registration of the right are conducive to the granting or registration within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

The statement of the principles for the interpretation and implementation of the Agreement also shows a balanced outcome of the negotiation, reflecting both parties' sensitivities.

On its side, MERCOSUR was able to include in the text implementation exceptions and flexibilities, public health objectives, economic and social development, the United Nations Sustainable Development Goals (SDGs), and the WIPO Development Agenda Recommendations.

For its part, EU introduced within the principles a clause related to registration procedures regarding the "alleged delays" because MERCOSUR did not agree to include it as an obligation.

National treatment²¹

The parties agreed to accord to the other party's nationals treatment no less favorable than that which it accords to its own nationals regarding the protection of intellectual property rights covered by this Chapter, subject to TRIPS exceptions provided for in Articles 3 and 5 of the TRIPS Agreement.²²

Exhaustion²³

Regarding exhaustion of rights, given the EU regional exhaustion and the MERCOSUR countries' preference for international exhaustion, the parties agreed that each party shall be free to establish their own regime for the exhaustion of intellectual property rights subject to the provision of the TRIPS Agreement, with the reservation that in the area of copyright and related rights, exhaustion of rights applies only to public distribution by sale or otherwise of the original of tangible works or their tangible copies.

²¹ Article 5, Intellectual Property Chapter.

²² Articles 3 and 5, TRIPS Agreement.

²³ Article 7, Intellectual Property Chapter.

Protection of biodiversity and traditional knowledge²⁴

1. *The Parties recognize the importance and value of biological diversity and its components and of the associated traditional knowledge, innovations and practices of indigenous and local communities. The Parties furthermore reaffirm their sovereign rights over their natural resources and recognize their rights and obligations as established by the Convention of Biological Diversity of 1992 (henceforth referred to as CBD) with respect to access to genetic resources, and to the fair and equitable sharing of benefits arising out of the utilization of these genetic resources.*
2. *Recognizing the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions, the parties agree that access to genetic resources for food and agriculture shall be subject to specific treatment in accordance with the International Treaty on Plant Genetic Resources for Food and Agriculture (2001).*
3. *The Parties may, by mutual agreement, review this Article subject to the results and conclusions of multilateral discussions.*

The original demand of MERCOSUR, maintained over the entire negotiation, was to include a mandatory “disclosure of the origin” of the genetic resource. This was not acceptable for EU, and a nonbinding, declarative text was agreed upon. But considering that the multilateral-level discussion was not concluded and that there could be some progress in such an important issue for MERCOSUR countries, a final paragraph was introduced for the review, by mutual agreement, of this article.

Regarding genetic resources for food and agriculture, both parties agreed to abide by the specific treatment provided for under the International Treaty on Plant Genetic Resources for Food and Agriculture (2001). This is quite an innovation in FTAs.

Public health²⁵

Crucial for MERCOSUR was the inclusion of an explicit affirmation that public health is a safeguarded policy objective that could not be limited by the intellectual property rights commitments under the Agreement. In this regard, the parties recognized the importance of the “Doha Declaration on the TRIPS Agreement and Public Health”²⁶ adopted on 14 November 2001, and the commitment to implement Article 31bis of the TRIPS Agreement, as well as the Annex and Appendix to the Annex, which entered into force on 23 January 2017.

4. Substantive Standards for Intellectual Property Rights

Copyright and related rights²⁷

Regarding copyright and related rights, the Agreement includes several clauses: international agreements, rights of authors, performers and producers, broadcasting organizations, terms

²⁴ Article 6, Intellectual Property Chapter.

²⁵ Article 8, Intellectual Property Chapter.

²⁶ WTO, Doha Declaration on the TRIPS agreement and public health. Available from https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. Last accessed on 8 February 2021.

²⁷ Articles 9 to 20, Intellectual Property Chapter.

of protection, collective societies' management, technological protections measures (TPMs), exceptions and limitations, and *droit de suite* (or resale right).

First, the Agreement recognizes the relevance of different international instruments on the subject matter with the clarification that they are not binding to those that are not party to them. MERCOSUR members have not ratified all the international agreements regarding copyright and related rights.

The agreed provisions incorporate sanctions against the circumvention of technological measures controlling access to digitized works. This rule implements article 11 of the WIPO Copyright Treaty (WCT) and article 18 of the WIPO Performances and Phonograms Treaty (WPPT). Civil liability is also established when an act is done deliberately and for commercial purposes.

Regarding the terms of protection, the Agreement allows MERCOSUR members to maintain the terms included in the Berne Convention and, if higher, their domestic laws. The provision includes terms of protection for literary and artistic works, anonymous works, performers' rights, and broadcasting organizations.

The text also contains provisions on copyright exceptions and limitations. In particular, it refers to the three-step test included in the Berne Convention and the TRIPS Agreement. It also includes an exception for incidental or ephemeral reproduction, which is defined as a reproduction with the sole purpose of making a work accessible instead of making a copy of it.

In summary, the subsection on copyright includes a small number of commitments for MERCOSUR countries which in some cases will have to be incorporated into their domestic laws.

Trademarks²⁸

With respect to international agreements, the parties reaffirm their commitment to comply with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, signed in Nice on 15 June 1957, and amended on 28 September 1979 ("Nice Classification"). They shall also exert their best efforts to comply with the Protocol Related to the Madrid Agreement Concerning the International Registration of Marks, adopted in Madrid on 27 June 1989, and last amended on 12 November 2007.

The commitments of the subsection concerning trademarks do not imply a higher level of protection as compared to the TRIPS standards and MERCOSUR countries' domestic laws, except the "coexistence" of trademarks and GIs. Such commitments include rules referring to registration procedures, rights conferred by a trademark, well-known trademarks, invalidation of the registration application in bad faith, and exceptions to the rights conferred by a trademark.

Among the exceptions, it should be noted that Article 26 mentions the protection of GIs as an exception to the trademark owner's rights; this is further reinforced in the section on GIs, as explained below. The Agreement establishes that:

*[e]ach Party shall provide for limited exceptions to the rights conferred by a trademark such as the fair use of descriptive terms, including in the case of geographical indications*²⁹ . . .

²⁸ Articles 21 to 26, Intellectual Property Chapter.

²⁹ Article 26, para. 1, Intellectual Property Chapter.

*The trademark shall not entitle the owner to prohibit a third party from using . . . Indications concerning the kind, quality, quantity, intended purpose, value, geographical origin . . .*³⁰

Designs³¹

MERCOSUR countries are not parties to the Geneva Act (1999) of the Hague Agreement concerning the International Registration of Industrial Designs adopted in Geneva on 2 July 1999, of which the EU has been a party since 1 January 2008. The Agreement introduces, however, the commitment for the parties to exercise their best efforts to comply with the provisions of this agreement.

As in the case of trademarks, the commitments of the subsection concerning designs do not imply a higher level of protection with respect to TRIPS standards and MERCOSUR countries' domestic laws. The respective articles include rules referring to the protection of registered designs, terms of protection (the duration of protection, including renewals (for at least 15 years from the date the application was filed), protection conferred to unregistered designs, and exceptions and exclusions. Importantly, each party may establish limited exceptions to the protection of designs.

Geographical indications³²

Before analyzing the complex subsection on GIs, it is useful to consider its structure, which consists of the following:

- Dispositive part (Articles 33 to 39).
- Annex I: This contains the legislation in force in both parties (EU legislation and the legislation of each MERCOSUR country).
- Annex II: This contains the lists of GIs that the parties will reciprocally recognize (Part A: European Union List (355 names) and Part B: MERCOSUR countries list (220 names): Argentina: 96 wines and 8 agricultural products, Brazil: 8 wines and spirits and 30 agricultural products, Paraguay: 2 wines and spirits and 21 agricultural products, and Uruguay: 55 wines and spirits.
- Appendix to Annex II: Here, the parties define the terms for which protection is not sought/granted.
- Annex III: Lists of non-agricultural GIs in Brazil and Paraguay: These lists are separate as they are not covered by the EU legislation. The decision was for EU to protect them insofar as the EU legislation is modified. Argentina and Uruguay do not protect non-agricultural GIs either.

The general rules concerning the protection afforded to GIs are found in Articles 33 to 39. It is highly important to note that while such rules are mandatory, they shall apply only to those lists reciprocally recognized by the parties in Annex II and are limited to such lists. This implies that those names included in the lists will have a level of protection given by the Agreement and not by the national laws and procedures in force. These lists will not be subject to individual "registration" according to the parties' respective legislation, as the GIs in the lists as a whole will obtain protection based on the Agreement.

The commitment included in this respect states that

³⁰ Article 26, para. 2(b), Intellectual Property Chapter.

³¹ Articles 27 to 32, Intellectual Property Chapter.

³² Annex I, II, and III and Appendix to Annex II, Articles 33 to 39, Intellectual Property Chapter.

*[t]he Parties, having examined both the legislation of the other Party referred to in Annex I and the geographical indications of the other Party listed in Annex II, and having completed an objection procedure or public consultation related to the geographical indications of the other Party listed in Annex II, undertake to protect since the date of entry into force of the Agreement those geographical indications in accordance with the level of protection laid down in this Sub-Section including specifically related provisions . . .*³³

At this point, an important question arises: would it be possible for MERCOSUR countries to have a double standard and give a higher protection to European GIs? Should domestic law be adapted to avoid discrimination against local GIs? It is important to highlight in this respect that the text establishes that “[p]arties shall take the necessary measures to implement the protection of geographical indications in their territories, determining the appropriate method for such implementation within their own legal system and practice.”³⁴

The European Union also firmly demanded the possibility to add in Annex II new GIs to be protected pursuant to a mutually agreed decision.³⁵

Level of protection³⁶

With respect to the level of protection of GIs, it is worth noting that this has been the most significant concession made by MERCOSUR in the Intellectual Property Chapter. In effect, MERCOSUR accepted the extension of the higher protection for wines and spirits as provided for in TRIPS Article 23³⁷ to **all** agricultural products, the increase of the said protection standard by incorporating evocation as an infringement to the holder’s rights, and the renouncement of invoking exceptions allowed under TRIPS Article 24³⁸ in cases of prior users’ rights (except for the exceptions contained in Article 35.9, which will be discussed in detail below).

Having said this, it is also crucial to highlight that MERCOSUR obtained “the continuity of use” for many terms. Moreover, the text defines “as levels of protection” not only the protection-plus agreed but also the “special situations contemplated” (rights of prior users). This implies that in the case of a dispute, the invocation of “the special situation” of the prior user would not reverse the burden of proof. This was legally crystallized by including both the general rules of protection and all special situations in the same Article 35. Given the importance of this article, it will be further analyzed in detail below.

Article 35

Scope of Protection for Geographical Indications

1. For the geographical indications listed in Annex II, which have been assessed pursuant to the provisions of paragraphs 3 to 12, each Party shall provide the legal means, according to its domestic legislation, for interested parties to prevent:

³³ Article 33, para. 4, Intellectual Property Chapter.

³⁴ Article 33, para. 2, Intellectual Property Chapter.

³⁵ A provision for new geographical indications was included as Article 34.

³⁶ Article 33, Intellectual Property Chapter.

³⁷ WTO, Agreement on Trade-Related aspects of Intellectual Property Rights. Available from https://www.wto.org/english/docs_e/legal_e/27-trips.pdf. Last accessed on 8 February 2021.

³⁸ Ibid.

(a) The use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin, in a manner which misleads the public as to the geographical origin of the good;

(b) Any other use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention for the Protection of Industrial Property (1967) done at Stockholm on 14 July 1967.

This paragraph sets out the level of protection that each party shall ensure through their domestic legislation.

2. For the geographical indications listed in Annex II, the Parties shall also provide the legal means according to its domestic legislation, for interested parties to prevent:

(a) any direct or indirect commercial use of a protected name for comparable products not complying with the product specification of the protected name, or that exploits the reputation of a geographical indication;

(b) the use of a geographical indication not originating in the place indicated by the geographical indication, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind,” “type,” “style,” “imitation” or the like;

(c) against any misuse, imitation or deceiving use of a protected name of a geographical indication; or against any false or misleading indication to a protected name of a geographical indication; or against any practice liable to mislead the consumer as to the true origin, provenance and nature of the product.

Paragraph 2(b) contains a TRIPS-plus protection as it reproduces the text of TRIPS Article 23 but excludes from it the reference to wines and spirits, thus extending the protection to the rest of the agricultural products.

Paragraph (c) is so broad that any form of evocation is considered an infringement.

In the cases of full protection for GIs listed in Annex II, subparagraph 2 will be the standard. However, many names in the EU list will not have full protection—those are the previously identified “special situations”; coexisting with previous trademarks, homonymous, customary in common language, customary name of a plant variety or an animal breed, and individual component of a multicomponent term.

The “special situations” are defined as follows:

3. Regarding the relationship between trademarks and geographical indications, the Parties agree on the following:

(a) Where a geographical indication is protected under this Sub-Section, the Parties shall refuse the registration of a trademark for the same or a similar product, the use of which would contravene this Sub-Section, provided that an application for registration of the trademark was submitted after the date of application for protection of the geographical indication on the territory concerned. Trademarks registered in breach of this subparagraph shall be invalidated according to the legislation of the Parties.

(b) For geographical indications listed in Annex II at the date of entry into force of the Agreement, the date of submission of the application for protection referred to in paragraph

3(a) shall be the date of the publication of the opposition procedure or public consultation in the respective territories.

(c) For geographical indications referred to in Article 34,³⁹ the date of submission of the application for protection shall be the date of the transmission of a request to another Party to protect a geographical indication.

(d) Without prejudice to paragraph 3(e), the Parties shall protect the geographical indications referred to in Annex II, also where a prior trademark exists. A prior trademark shall mean a trademark, which has been applied for, registered or established by use, if that possibility is provided for by the legislation concerned, in good faith in the territory of one Party before the date on which the application for protection of the geographical indication is submitted by the other Party under this Agreement.

Such trademark may continue to be used, renewed and be subject to variations which may require the filing of new trademark applications, notwithstanding the protection of the geographical indication, provided that no grounds for the trademark's invalidity or revocation exist in the legislation on trademarks where the trademark has been registered or established. Neither the prior trademark nor the geographical indication shall be used in a way that would mislead the consumer as to the nature of the intellectual property right concerned.

(e) The Parties shall not be obliged to protect a geographical indication in the light of a famous, reputed or well-known trademark, where the protection is liable to mislead the consumer as to the true identity of the product.

As stipulated in the text above, the coexistence of prior trademarks with GIs⁴⁰ is allowed under the conditions set out in paragraph (d), while well-known trademarks benefit from a special treatment. This provision will imply the amendment of MERCOSUR countries' national regulations since they do not currently contemplate such coexistence.

4. Nothing shall prevent the use by a Party, with respect to any product, of a customary name of a plant variety or an animal breed, existing in the territory of that Party as of the date of entry into force of this Agreement.

Paragraph (4) refers to existing customary names of plant variety or animal breeds, which can continue to be used unconditionally. This was one of the most contentious aspects of the negotiation since EU required exclusivity (, i.e., full protection) for several names of plant varieties, as can be seen in the footnotes to the EU listing in Annex II (Prosecco, pruneaux d'Agen, Tokaj, among others).

5. Nothing shall prevent the use by a Party of an individual component of a multi-component term that is protected as a geographical indication in the territory of that Party if such individual component is a term customary in the common language as the common name for the associated good.

³⁹ Additional geographical indications, Article 34, Intellectual Property Chapter.

⁴⁰ Incorporated into European legislation after WTO GI panel EC – Trademarks and Geographical Indications WT/DS/290-23A3.pdf.

This paragraph refers to the possibility of using individual terms, which are customary in common language, if they are part of a compound GI name, for example, “mortadella Bologna,” in which protection for “mortadella” is not sought.⁴¹

6. Nothing shall require a Party to protect a geographical indication that is identical to the term customary in common language as the common name for the associated good in the territory of that Party.

This paragraph refers to cases such as “flores,” “iglesia,” “la cruz,” “la paz,” and “las violetas.”⁴²

7. If a translation of a geographical indication is identical with or contains within it a term customary in common language as the common name for a product in the territory of a Party, or if a geographical indication is not identical with but contains within it such a term, the provisions of this Sub-Section shall not prejudice the right of any person to use that term in association with that product.

8. Regarding homonymous geographical indications, the Parties agree on the following:

a) In the case of existing or future homonymous geographical indications of the Parties for products falling within the same product category, both will coexist per se, and each Party shall determine the practical conditions under which the homonymous indications in question shall be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

b) Where a Party, in the context of negotiations with a third country proposes to protect a geographical indication from that third country, and the name is homonymous with a geographical indication from the other Party, the latter shall be informed and be given the opportunity to comment before the name is protected.

This paragraph refers to homonymous GIs. The Agreement addresses only two cases, which are Rioja (European Union GI) and La Rioja Argentina (Argentinian GI) Rivera del Duero (European Union GI) and Rivera (Uruguayan GI). The *sui generis* solution achieved on this issue is reflected in the footnotes to the EU GIs in Annex II Part A.

9. Without prejudice to paragraphs 1 to 8 of article X.35 for particular cases of geographical indications listed in Annex II and indicated below, a specific level of protection is defined, applying only to the cases listed under this point:

Paragraph 9 lists the “particular cases” where a specific level of protection is defined (full protection is not given in MERCOSUR countries), and the continuity of use of the term for prior users is guaranteed but subject to certain conditions. It is important to point out that some of these “particular cases” have a regional character (they involve the four MERCOSUR countries). In other cases, it applies to two and in most cases, only to the prior users of a single country.

⁴¹ See the complete list in the Appendix to Annex II, paras. 1 and 2.

⁴² See the complete list in the Appendix to Annex II, para. 3.

As previously mentioned, MERCOSUR was able to successfully include “particular cases” (see Box below) in Article 35 in relation to the level of protection for GIs agreed upon, thereby avoiding defining them as “exceptions” to the rule of full protection and the respective legal connotations.

Particular cases:

Genièvre/Jenever: Prior users of “Ginebra” in the territory of Argentina and “Genebra” in the territory of Brazil may continue using those terms.

Queso Manchego: Prior users of “Queso Manchego” in the territory of Uruguay for cheeses elaborated with cow’s milk may continue using the term.

Grappa: Prior users of “Grappamiel” or “Grapamiel” in the territory of Uruguay may continue using those terms.

Steinhäger: Prior users of the term “Steinhäger” in the territory of Brazil may continue using it.

Parmigiano Reggiano: Prior users of “Parmesão” in the territory of Brazil and “Parmesano” in the territories of Argentina, Paraguay, and Uruguay may continue using these terms. Prior users of the term “Reggianito” in the territories of Argentina, Paraguay, and Uruguay may continue using it.

Fontina: Prior users of the term “Fontina” in the territories of Argentina, Brazil, Paraguay, and Uruguay may continue using it.

Gruyère: Prior users of “Gruyère” and “Gruyere” in the territories of Argentina, Brazil, Paraguay, and Uruguay and prior users of “Gruyerito” and “Gruyer” in the territory of Uruguay may continue using those terms.

Grana Padano: Prior users of “Grana” in the territory of Brazil may continue using this term.

Gorgonzola: Prior users of “Gorgonzola” in the territory of Brazil may continue using this term.

The phasing-out solution

The list of “particular cases” is a positive list, so the names not included in Article 35.9 but used in the territories of MERCOSUR countries shall be abandoned (phase-out solution) by prior users if conflicting with protected GIs. The footnotes to the list in Annex II Part A identify the phasing-out cases.⁴³

Both the particular cases (when not applicable in all MERCOSUR countries) and the phasing-out solutions show that “free circulation” within MERCOSUR, an essential characteristic of free trade areas, will be excluded for the listed products. This is one of the major disruptions that the intellectual property negotiation with the EU will entail in terms of intra-zone trade.

⁴³ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>. See annex with the complete list.

Considering the concessions made by MERCOSUR in this area of critical interest for EU, what has been agreed upon in terms of cooperation for the development of “alternative names” may be of particular importance.

(d) cooperating on the development of alternative names for products that were once marketed by producers of a Party with terms corresponding to geographical indications of the other Party, especially in cases subject to phasing out.

Patents⁴⁴

Subsection 5 on patents contains a single provision (Article 40) concerning the Patent Cooperation Treaty, to which the parties only commit their best efforts to adhere. Brazil is the only member of MERCOSUR that has joined this treaty. For the European Union, this provision can be fulfilled through the adherence of its Member States.

This subsection on patents had a long negotiating history, as EU in its proposed text at the beginning of 2017⁴⁵ included several TRIPS-plus commitments that MERCOSUR never even agreed to discuss. EU agreed to abandon them only by the end of the negotiation. One draft provision was particularly controversial:

- An effective mechanism to compensate the patent owner for the reduction in the effective patent life resulting from unreasonable delays in the granting of the first marketing authorization.

The absence of this obligation in the Agreement has been a significant negotiating achievement for MERCOSUR because apart from one exceptional case,⁴⁶ no free trade agreement (FTA) signed by EU after the TRIPS Agreement contains this kind of obligation.

Plant varieties⁴⁷

MERCOSUR also obtained a remarkable negotiating outcome on this subject since its countries are members of the UPOV 1978 Act, while EU sought an obligation to join UPOV as revised in 1991. The agreed upon text provides as alternatives to comply with the UPOV Acts of 1978 or 1991.⁴⁸

Each Party shall protect plant varieties rights, in accordance with the International Convention for the Protection of New Varieties of Plants adopted in Paris on 2 December 1961, as revised in Geneva on November 10, 1972, and on October 23, 1978 (1978 UPOV ACT) or on March 19, 1991 (1991 UPOV ACT), and shall cooperate to promote the Protection of Plant Varieties.

Protection of undisclosed information⁴⁹

⁴⁴ Article 40, Intellectual Property Chapter.

⁴⁵ European Commission, EU proposal for a legal text on Intellectual Property Rights in the Trade Part of the EU-Mercosur Association Agreement. Available from https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155070.pdf. Last accessed on 8 February 2021.

⁴⁶ Economic Partnership Agreement between the CARIFORUM States and the European Community (2008).

⁴⁷ Article 41, Intellectual Property Chapter.

⁴⁸ UPOV, International Convention for the Protection of New Varieties of Plants. Available from https://www.upov.int/upovlex/en/upov_convention.html. Last accessed on 8 February 2021.

⁴⁹ Article 42, Intellectual Property Chapter.

The Agreement includes a text regarding undisclosed information framed under TRIPS Article 39, which requires the protection of undisclosed information under Article 10bis of the Paris Convention for the Protection of Industrial Property (unfair competition). It determines the scope of protection for trade secrets, defines which conduct is to be considered dishonest commercial practices and provides remedies in case of violations. The agreed text is largely based on the European Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use, and disclosure.

The subsection presents procedural commitments for MERCOSUR countries which will need to adapt their domestic laws to incorporate the agreed definitions and disciplines, including to implement the civil judicial procedures contemplated in the text.

The EU actively sought to incorporate into the Agreement a proposed provision to create exclusive rights in respect of test data for pharmaceuticals and agrochemicals, a clear TRIPS-plus obligation as article 39.3 of the TRIPS Agreement only requires protection against unfair competition. The EU aimed at preventing third parties from relying on undisclosed tests or data without the permission of the person who submitted the data first, in support of an application for marketing approval during a reasonable period, which would normally mean not less than five years for pharmaceuticals and not less than ten years for agrochemicals.

Importantly, the Agreement does not incorporate—as has been the standard in other FTAs entered into by the EU—such exclusive rights. This was another major achievement for MERCOSUR negotiators, who were able to preserve a competitive space for the local pharmaceutical and agrochemical industries.⁵⁰

5. Enforcement⁵¹

This section includes standards regarding civil and administrative enforcement: general obligations, persons entitled to initiate procedures, evidence, right of information, provisional and precautionary measures, remedies, injunctions, alternative measures, damages, legal costs, publication of judicial decisions, presumption of authorship or ownership, and public awareness.

MERCOSUR maintained a strong opposition to include TRIPS-plus obligations in this regard. Notwithstanding this, a section was incorporated but with a reservation to safeguard national legislation:⁵² *“enforcement of intellectual property rights shall be in accordance with its [the party’s] domestic law and within its own legal system and practice”*. Moreover, the Agreement does *“not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general and according to domestic law, nor does it affect the capacity of the Parties to enforce their law in general.”*

Without prejudice to this, the text mainly adopts the European approach on intellectual property enforcement as contemplated in the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. For MERCOSUR countries, this represents new procedural commitments on the

⁵⁰ As for other standards accepted in a FTA, under the TRIPS Agreement the same protection would have to be extended

⁵¹ Articles 44 to 59, Intellectual Property Chapter.

⁵² Article 44, Intellectual Property Chapter.

matter and, regarding some particular topics the need to eventually adapt their domestic laws regarding evidence, provisional and precautionary measures, remedies, and injunctions.

Border enforcement⁵³

On this subject, the parties reaffirmed the commitment to keep their regulations consistent with GATT and the TRIPS Agreement in implementing border measures by custom authorities. Nevertheless, with respect to the scope of goods subject to border measures, MERCOSUR could not avoid, despite its initial opposition, a highly significant TRIPS-Plus rule extending the application of such measures to the infringement of GIs.⁵⁴

[E]ach Party shall adopt or maintain procedures under which a right holder may submit applications requesting customs authorities to suspend the release or detain goods suspected of, at least, trademark counterfeiting, copyright and related rights, piracy on a commercial scale or infringement of geographical indications . . .

The agreed text largely reflects the EU position on customs' intervention to deal with the infringement of intellectual property rights, as regulated under the Council Regulation (EC) No. 1383/2003 concerning actions against goods suspected to infringe such rights.

The Agreement includes provisions addressing the exhaustion of intellectual property rights in cases of the importation of goods put in another country's market with the consent of the right holder (parallel imports). This wording opens a question about the admissibility of imported goods put on the market in the exporting country under a compulsory license, that is, without the right holder's consent.

6. Final provisions and cooperation⁵⁵

The Agreement contains several provisions relating to cooperation, such as the exchange of information and experiences, coordination to prevent exports of counterfeit goods, technical assistance, capacity-building, exchange and training of personnel, promoting awareness and education of the general public on policies concerning intellectual property rights, cooperation in the application of the Convention on Biological Diversity (CBD) and related instruments, domestic frameworks on access to genetic resources, associated traditional knowledge innovations and practices, and the exchange of information related to public domain in the territories of the parties, among others.

⁵³ Articles 57 and 58, Intellectual Property Chapter.

⁵⁴ Article 58, para. 1, Intellectual Property Chapter.

⁵⁵ Article 59, Intellectual Property Chapter.

III. CONCLUSIONS

The above preliminary analysis shows that the Intellectual Property Chapter of the Agreement signed between MERCOSUR and EU is relatively balanced for both blocs.

The Chapter contains provisions under the heading “Principles” that balance the protection of intellectual property rights while safeguarding policy objectives such as sustainable development, public health, the Development Agenda in WIPO, the protection of biodiversity traditional knowledge, and plant genetic resources for food and agriculture, as well as a balance between intellectual property rights and the society’s right to access health, food security, and knowledge.

From the MERCOSUR perspective, importantly, its member countries will not need to significantly change the level of protection currently provided by their domestic legislation. This applies even in cases where the commitments will imply amendments to national legislation in relation to substantive disciplines (e.g., trade secrets) or enforcement procedures. This is a significant MERCOSUR achievement since EU expected to incorporate many TRIPS-plus commitments as “trade-offs” for market access.

The protection of GIs constitutes, however, a major exception since the outcome of the negotiations was clearly favorable to EU. As a component of “intellectual property”, GIs have played a key role in trade negotiations between EU and other countries.⁵⁶ As noted, GIs, from the EU perspective, are “a market access issue” and part of the common agricultural policy (CAP) which aims, *inter alia*, to protect the names of specific products to promote their unique characteristics, linked to their geographical origin as well as traditional know-how.⁵⁷

The “trade-off” argument raised by EU during the negotiating process is understandable. MERCOSUR is a significant exporter of agri-food products, and the exclusive use of iconic names at the European Community level is part of the “agricultural package” with which the European Commission can compensate farmers for opening the community market to MERCOSUR exports. The negotiating strategy of EU substantially focused on the opening of the EU market for agri-food products from the South American bloc while opening the MERCOSUR market for their higher-value-added products. The equation is not highly beneficial for MERCOSUR countries such as Argentina, which seeks, through its public policy, to be the “world’s supermarket”.

The protection of GIs was, to a great extent, the crucial issue in the EU negotiating strategy in the chapter on intellectual property. The commitments regarding the phasing out of particular names were finally made bilaterally with each MERCOSUR country; as noted this will disrupt the free circulation of some products within the Latin American bloc. Few products maintained their right to continue using their prior names. For example, in the case of “Parmesano”, producers of each country can only use this designation in their respective domestic market: “Parmesaõ” in Brazil and “Parmesano” in Argentina, Paraguay, and Uruguay, while the latter three countries will be unable to continue exporting “Parmesano” to Brazil.

⁵⁶ European Commission, Geographical Indications. Available from <https://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/>. Last accessed on 9 February 2021.

⁵⁷ European Commission, Quality Schemes explained. Available from <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained>. Last accessed on 9 February 2021.

An open question is whether this significant cost for MERCOSUR industries could be compensated by the access of the 220 MERCOSUR GIs to the EU market. It is difficult, however, to expect names such as “Yerba Mate Argentina,” “Norte Pioneiro do Paraná,” “Miel Negra de caña paraguaya,” or “Tacuarembó wine” to conquer the EU market and somehow compensate the phasing out of names that are already generic in South America.

MERCOSUR countries can also add value to their local productions via other differentiation strategies. To this end, it will be essential to effectively implement the cooperation stipulated in the Agreement. Such cooperation could be directed to small businesses, small farmers, and family farming in MERCOSUR countries, so as to increase the value-added in regional productions and contribute to the socio-economic development in those countries.

ANNEX :PHASE-OUT SOLUTION

“Φέτα (Feta)”: Maximum of 7 years from the entry into force of this Agreement in the territories of Argentina, Brazil, and Uruguay. Entry into force in Paraguay.

“Jijona”: Maximum of 5 years from the entry into force of this Agreement in the territories of Argentina and Paraguay. Entry into force in the rest of the MERCOSUR countries.

“Turrón de Alicante”: Maximum of 5 years from the entry into force of this Agreement in the territories of Argentina and Paraguay. Entry into force in the rest of the MERCOSUR countries.

“Jerez-Xérès-Sherry”: Maximum of 7 years from the entry into force of this Agreement in the territory of Argentina. Entry into force in the rest of the MERCOSUR countries.

“Comté”: Maximum of 5 years from the entry into force of this Agreement in the territories of Brazil and Uruguay. Entry into force in the rest of the MERCOSUR countries.

“Pont-l’Évêque”: Maximum of 5 years from the entry into force of this Agreement in the territory of Brazil. Entry into force in the rest of the MERCOSUR countries.

“Pruneaux d’Agen”: Maximum of 10 years from the entry into force of this Agreement in the territory of Argentina. Entry into force in the rest of the MERCOSUR countries.

“Reblochon”/“Reblochon de Savoie”: Maximum of 5 years in the territory of Argentina and Brazil, and for a maximum of 7 years in the territory of Uruguay. Entry into force in Paraguay.

“Roquefort”: Maximum of 7 years from the entry into force of this Agreement in the territories of Brazil and Uruguay. Entry into force in the rest of the MERCOSUR countries.

“Saint-Marcellin”: Maximum of 5 years from the entry into force of this Agreement in the territories of Brazil and Uruguay. Entry into force in the rest of the MERCOSUR countries.

“Bordeaux”: Maximum of 7 years from the entry into force of this Agreement in the territory of Brazil. Entry into force in the rest of the MERCOSUR countries.

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“Chablis”: Maximum of 7 years from the entry into force of this Agreement in the territory of Argentina. Entry into force in the rest of the MERCOSUR countries.

“Champagne”: For the terms “Champagne,” “Champaña,” and “Método/Méthode Champenoise,” a maximum of 10 years from the entry into force of this Agreement in the territories of Argentina, Brazil, Paraguay, and Uruguay.

“Margaux”: Maximum of 5 years from the entry into force of this Agreement in the territory of Brazil. Entry into force in the rest of the MERCOSUR countries.

“Cognac”: Maximum of 7 years from the entry into force of this Agreement in the territory of Argentina and Brazil. Entry into force in the rest of the MERCOSUR countries.

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“Asiago”: Maximum of 5 years from the entry into force of this Agreement in the territories of Brazil and Uruguay. Entry into force in the rest of the MERCOSUR countries.

“Gorgonzola”: Maximum of 5 years from the entry into force of this Agreement in the territories of Argentina, Paraguay, and Uruguay.

“Grana Padano”: Maximum of 7 years from the entry into force of this Agreement in the territory of Argentina. Entry into force in Paraguay and Uruguay.

“Mortadella Bologna”: Maximum of 10 years from the entry into force of this Agreement in the territory of Brazil. Entry into force in the rest of the MERCOSUR countries.

“Pecorino Romano”: Maximum of 7 years from the entry into force of this Agreement in the territories of Argentina and Uruguay. Entry into force in the rest of the MERCOSUR countries.

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“Taleggio”: Maximum of 5 years from the entry into force of this Agreement in the territories of Argentina and Brazil. Entry into force in the rest of the MERCOSUR countries.

“Asti”: Maximum of 7 years from the entry into force of this Agreement in the territory of Brazil. Entry into force in the rest of the MERCOSUR countries.

“Marsala”: Maximum of 7 years from the entry into force of this Agreement in the territory of Argentina. Entry into force in the rest of the MERCOSUR countries.

“Prosecco”: Maximum of 5 years from the entry into force of this Agreement in the territory of Argentina and Paraguay and for a maximum of 10 years from the entry into force of this Agreement in the territory of Brazil, Argentina, and Paraguay. Entry into force in Uruguay.

“Grappa”: Maximum of 7 years from the entry into force of this Agreement in Argentina and Brazil. Entry into force in Paraguay.

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