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The EU-Mercosur Trade Agreement

Known as the "Common market of South America," the region encompasses around 260 million people. The members of Mercosur are Argentina, Brazil, Paraguay and Uruguay. They represent the fifth largest economy in the world outside the EU, with a gross domestic product per year of 2.2 trillion euros. The European Commission states that "[t]he current EU bilateral trade with Mercosur already totals €88 billion a year for goods and €34 billion for services. The EU exports to Mercosur goods worth €45 billion a year and imports Mercosur products of nearly the same value (€43 billion). When it comes to services, the EU exports more than twice as much as it imports: €23 billion of services supplied by EU firms to clients in Mercosur versus €11 billion in services delivered to EU clients by firms from Mercosur countries." Cecilia Malmström as "Commissioner for Trade" affirms that with this Trade, EU companies will save over 4 trillion euros in duties at the border. After more than 20 years of discussions, what is the current state of this agreement? Discussions began on June 28th of 1999 and two decades later, in 2019, a political agreement was reached between the EU and Mercosur members. Now the parties must edit the text and it must be translated into all EU languages and ratified by each member state. This agreement is only available in English, Spanish, Romanian and Portuguese languages. The political agreement contains 17 chapters. Some of the most relevant ones are:

Trade in goods

Overall market access

The European Commission describes what happens today between the EU and Mercosur *without an agreement:* Cars (taxed today at 35%), car parts (taxed at 14 to 18%), machinery (taxed at 14 to 20%), chemicals (taxed up to 18%), clothing (taxed at up to 35%), pharmaceuticals (taxed at up to 14%), leather shoes (taxed at up to 35%) and textiles (taxed at up to 35%).

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With the agreement states the European Commission the consequences for the parties*:*
Mercosur: Liberalization of their imports from the EU up to 91% and tariff lines up to 91% over a transition period of up to ten years for most products. For some more sensitive Mercosur products is this liberalization reserved up to 15 years.
EU: Liberalization of its imports from Mercosur up to 92% and tariff lines up to 95% over a transition period of up to ten years.

Market access for industrial goods

EU: The elimination of tariffs on 100% of industrial use products over a transition period of up to ten years.
Mercosur: The elimination of rights on key offensive sectors such as automobiles, auto parts, machinery, chemicals, and pharmacological products.
EU-Mercosur: Liberalization of most tariff lines for auto parts within ten years.

Market access for agricultural goods

Mercosur: Gradually reduction for EU agricultural and food exports on 93% of tariffs lines.
EU: Liberalization of 82% of agricultural imports from Mercosur.

In addition, the European Commission states that the agreement will also progressively eliminate tariffs on EU exports of the following food and beverages: Wine (current tariff 27%), chocolate (current tariff 20%), whiskey and other spirits (current duty 20% to 35%), cookies (current duty 16 to 18 %), canned peaches (current duty 55%) and soft drinks (current duty rate 20 to 35%).

Import and Export Licensing Procedures

The general rules of the World Trade Organization (WTO) will apply, where the licensing procedures must be transparent. There are issues dealt by this agreement such as national treatment, prohibition of subsidies and maintenance of the status quo.

Rules of origin

The chapter consists of general provisions divided into three sections, being the first the properly *Rules of origin*, where some of the most important points being developed are concerning the fully received products, the absorption rule, and the territoriality principle. Regarding the *origin procedure,* applications for preferential tariff treatment must be based on a declaration of origin by the exporter (with a maximum transition period of five years for Mercosur). In the EU, exporters must register in the Registered Exporter system (REX). There are also *miscellaneous issues,* with specific rules of origin for products applied for San Marino and Andorra.

Trade remedies

The first possibility refers to WTO trade defence instruments remaining at disposal of the Parties against dumping, subsidy, and other practices. The second possibility is the bilateral safeguard clause limited up to 18 years from the date of entry into force of the agreement for the establishment of preferences that produces economic damage.

Technical barriers to trade

There is an agreement of the parties on closed definitions of international standards, such as the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC) the International Telecommunication Union (ITU) and the Codex Alimentarius (food products and safety guidelines of United Nations).

Dispute Settlement

The EU-Mercosur agreement holds the idea to embrace an appropriate Dispute Settlement (DS) among the parties involved. For this purpose, there is a general mechanism (DS), a specific mechanism (Trade and sustainably development DS) and a non-explained mechanism for investors. The title XXX enables a procedure in their chapter II to avoid disputes through two mechanisms: consultation and mediation.

Dispute avoidance

The first way for it is through **consultations**, which will allow the parties to find a friendly mutually agreed solution to a specific problem, through a confidentially written request that must be in 30 days answered and in specific emergency cases in 15 days, being it a good faith mechanism. The second way is through **mediation**, which can be initiated by the mutual agreement of the parties.

Dispute settlement procedure

If the problem remains unsolved through consultations, then there is access to the **arbitration panel proceedings**, where a *Trade Committee* will establish a list of 32 arbitrators with experience in law and international trade, divided in three categories: twelve persons will be proposed by the EU, another 12 from Mercosur and 8 more agreed by both parties, which are non-national of neither of them and will be acting as a chairperson. However, the panel itself will be only composed through common agreement of the parties and by a subsequent acceptance of the nominated individuals, by just three arbitrators, one of each category. The phases are:

1. Initial submissions: They must be delivered in no more than 30 days after the establishment of the arbitration panel, in which the complaining party must state the issue (s), including relevant facts with the possibility of including evidence. The defending party will also have 30 days to deliver a written counter submission. Notifications at this point and further will be addressed for Mercosur to the Pro Tempore Presidency or to the National Coordinators of the Common Market Group and in the case of the EU to the Directorate-General for Trade European Commission or direct to their representatives, if they were already appointed.

2. Hearings: The chairperson will fix the date and these meeting will be not restricted to just one hearing, with previous agreement from the parties. If the defending part is the EU, the hearings will take place in Brussels, if the defending party is Mercosur, will be in Asunción (Paraguay) and for one or more members of Mercosur, in the place they state.

3. Arbitral award: It shall be delivered generally in 90 days. They must describe the issue, arguments of the parties, a factual and legal description, and the decision they determined, among other details. The parties may request a written clarification of their award and the defending part must comply immediately with it or in a reasonable time, which is 30 days. The arbitral award is not subject to appeal.

Dispute Settlement in specific: Trade and sustainable development (TSD)

The scope of these chapter is to establish general principles and actions regarding environmental and labour law and for that they created their own dispute settlement procedure for matters of these chapter. There are many similarities with the normal procedure, such as the possibility of consultations among the parties, considering the 30 days period to answer to it, hearings, costs, general proceedings, and rules of proceeding and others. However, a difference relays on the so called *TSD Subcommittee* which will nominate just 15 individuals: 5 proposed by the EU, 5 from Mercosur and 5 from non-national of the parties, qualified into the scope before referred. From those lists will be as usual just 3 serving as part of the panel of experts. Also, the Panel has 90 days period to issue an interim report after its constitution and when delivered, 60 days more for a final report.

Dispute Settlement (DS) for investors

The EU- Mercosur agreement does not address a specific DS for investors for both parties, which means that they will follow the rules of the State to State DS. Traditionally countries celebrate bilateral investment treaties (BITs), where they indicate the use of the Investor-State DS, mainly as a protection for investors in dubious countries, so they can make a treaty claim directly. This type of DS today is supported by the US but severely criticized by the EU and countries of Latin America, because of several reasons: high damages can be expected to be payed from the host country, an ad hoc “tribunal” is constituted, lack of transparency itself and the incapability of these countries to properly regulate human rights, environmental issues, public health and

others, because doing so they might affect investors, being understood as an indirect expropriation.

For that reason, there is also another traditional mechanism called “State to state DS” used by Mercosur in a Protocol for investments from 2017, where the countries represent the interests of the investors that were affected, as a more benevolent way in comparison. This means however more compromises for the investors with their host country and dependence of the BITs celebrated from each country, if so.

An alternative seen in the CETA (Comprehensive Economic Trade Agreement) between EU and Canada could be accomplished and added into this agreement. It means basically an Investment court system integrated by nationals of both parties and independent ones, with the possibility to appeal (which does not happen in the ISDS), maintaining and endorsing more guaranties for investors but at the same time, more agreeable for the states.

Intellectual property rights

Issues such as copyright and related rights, trademarks, patents, among others, will play a fundamental role in the way the market will be distributed. It is estimated that this chapter of the agreement will not show any substantial changes upon ratification.

Copyrights and related rights

It is established that there will be a copyright protection for the life of an author of their artistic or literary works, for not less than 50 years after his death, with the possibility to extend it up to 70 years but through domestic legislation. This period it is considered also for anonymous or pseudonymous works and performances and producers of phonograms (Art. 15.1, 15.3 and 15.5). Photographic and cinematographic protection will be regulated domestically. A remark to consider is Uruguay. They were the last country to increase the protection period for artistic or literary works. They reformed their old IP Law (Law no. 9739, enacted in 1937) with the one of 2019 (Law no. 19857) up to 70 years. Nevertheless, every country from the Mercosur regulates it differently. Considering Phonograms, Argentina already protects it up to 70 years, cinematographic rights for 50 years and photography for 20 years. Uruguay protects phonograms also for 70 years and Brazil protects photography for 70 years. Rights for broadcasting organisation are at least 20 years under this agreement (art. 15.6). A highlight in this agreement is the addition of the “making available” right as settled by the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty, for authors, performers, producers of phonograms, broadcasting organisations, etc. (Arts. 10.4, 11.5, 12.3 and 13.3). Another important topic are the exceptions and limitations for what it is understood as reproductions rights, being relevant the exclusion of “streaming” and similar (art. 18).

Trademarks

The Parties must comply with the Nice Agreement concerning the international classification of goods and services for the purposes of registering marks (just Argentina and Uruguay from Mercosur comply) and make efforts to comply with the Madrid Protocol for the international registration of trademarks (just Brazil complies until today).
Also, a registration procedure for trademarks shall be adversarial, public, and electronically available (art. 22). These introduces the possibility for the Parties to invalid a registration if it was made in bad faith (art. 25). This interesting idea might be detailed and explored furthermore through dispute settlement procedures.

Designs

It is stated on art. 27 that Parties shall make their best efforts to comply with the so-called Hague System (in which no Mercosur country is a Party). Registered and unregistered designs are also mentioned but their protection is different. For registered designs and its protection shall be consider at least 15 years from the application filing, not so the unregistered designs, which is left out to be regulated by every domestic law (arts. 28-30).

Geographical indications (GI)

Both the EU and Mercosur discussed and agreed into three Annexes that contain the list of GIs, legislation applicable and other data. The only products that are regulated through this subchapter are those concerning agricultural foodstuffs products, wines, spirit drinks or aromatised wines (art.33). There will be 355 EU GI names and 220 GI from Mercosur protected. The European Commission extrapolates two principles from this: the first one is considered the “grandfathering” principle. This means that a grace period will be granted to sellers that before the entry into force of the Agreement, already sold products with at least one of the names that are in the GI List. This exception will be conceded up to 5, 7 or 10 years, depending on each case. The second principle is called “open lists”, which is the possibility to increase the number of names protected by this Agreement, through the Sub Committee on Intellectual Property, following furthermore steps (art. 34).

However, this subchapter also considers prohibitions. The scope of protection for names shall be addressed domestically. The purpose is avoiding the mislead of the place of origin of a product, unfair competition, no compliance with the product specifications, exploiting the reputation of a GI or even using the words: "kind, type, style, imitation“ etc. General rules shall be observed by homonymous geographical indications, where both might coexist under specific rules. Additionally, apart from the Annexes there is a specific level of protection being granted to a list of products such as Genièvre / Jenever, Queso Manchego and more.

Patents

The EU proposed back in 2017 extensions to the period of protection for patents on medicinal or plant protection products and furthermore (arts. 8.3 and 8.5). Therefore, civil organizations predicted a negative impact in the Mercosur area, that could provoke price increases and hindering their production caused by a data exclusivity provision of at least 5 years, among others. For that reason, the Agreement from 2019 remains short stating only that the parties shall make their best efforts to adhere to the Patent Cooperation Treaty (art. 40) in which only Brazil is a member. However, previous proposals might be still considered into the final text.

Protection of Undisclosed Information

This subchapter is strongly influenced by EU legislation. There is a description of what a trade secret and trade secret holder are, emphasizing in their commercial value. Furthermore, there is a non-limitative list of conducts that constitute dishonest commercial practices (art. 42.3) being the lack of consent for trade secrets acquisition, use or disclosure, one of the most important ones. An interesting add is not only to know but the ought to have known that a trade secret was obtained directly or indirectly unlawfully (art. 42.3.c). The civil judicial procedure against mentioned activities shall be addressed domestically (art. 43).

Enforcement of IP

The Parties recognize three persons entitled to apply for IP procedures: holders of intellectual property rights, exclusive licensees, and intellectual property collective rights management bodies (art. 45). In regards on trademark counterfeiting or copyright piracy on a commercial scale, the Parties shall provide mechanisms for the judicial authorities to proceed against possible offenders (art. 46.3). For that reason, the way of collecting evidence promoted domestically may include the physical seizure of infringement goods, including documents, but observing data protection rules (art. 46.2).

It is important to note that in the event of the revocation or expiry of these precautionary measures, or through the exoneration of the defendant, the party suffering such impairment shall be entitled to appropriate compensation in respect of the damage caused by the implementation of such measures (art. 46.5). In connection with *remedies*, the Parties shall ensure that the competent judicial authorities have the right to order the destruction or at least the definitive removal from the channels of commerce, of goods that they have found to be infringing (art. 49). There is also the possibility of issuing *injunctions* aimed at prohibiting the continuation of the infringement (art. 50).

Worth to be observed is an alternative to both previous mechanisms: the authority may order pecuniary compensation instead, in three cases: a) the defendant was acting unintentionally and without negligence, b) the measures above mentioned might cause the defendant a disproportionate harm, **or** c) if the claimant just agrees.

Critics

The biggest critic towards this agreement is the ambiguity of the compliance of the report by the Dispute Settlement. The Sub-Committee on TDS will just monitor if the defending party implemented no later than 90 days the report and its recommendations. Because of it, can be understood why countries such as France, Ireland, Poland, Belgium and recently Germany, manifested their concerns about the non-effective compromise of countries like Brazil, to protect the environment, regarding the rainforest of the Amazonas, among other particular issues. There is also concern about the possible damage to the bovine meat market by the EU due to the possible imminent flooding of these Latin American products. A final issue to be addressed is the lack of labour regulations that this agreement should require and effectively enforce, especially in relation to child exploitation.

Conclusion

This agreement offers a unique opportunity for investors, entrepreneurs, and exporters in general to expand their markets towards new horizons, without fear of losing competitiveness. The agreement establishes highly competitive export percentages for the blocs, which will be progressively modified to further eliminate tariff restrictions. There is also an effective dispute settlement mechanism, which is not unknown to the Mercosur countries, whose political sanctions will have an extremely important impact. The agreement offers solid legal protection for all authors' works, as well as for trademarks, patents, designs, etc. The commitment of the parties to observe international agreements that help to give legal certainty to the acts in question is reiterated. Both, the treatment of commercial secrets and the effective implementation by member countries of procedures to provide for, or if necessary, compensate for damages caused by the violation of intellectual property rights, are some of the benefits established for the proper commercial exploitation of all members of the new market.

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