

POSITION PAPER EUROCAMARAS BRAZIL

Intellectual Property Rights in the EU-MS FTA Negotiations

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BACKGROUND

EUROCAMARAS Brazil, founded in 1999 and headquartered in São Paulo, represents the interests and needs of more than 5.000 European industries and companies in the Brazilian business community. In 2001, EUROCAMARAS Brazil also incorporated its Chamber of Mediation and Arbitration (CAE) to secure trade and investment dispute resolution for Small and Medium Enterprises (SME) operating in Brazil. It is also the recognized Brazilian partner of Eurochambres (the European Association of Europeans Chambers of Commerce and Industry), which has National Chambers in 46 countries, as well as 2.000 local and regional based Chambers. Furthermore, EUROCAMARAS Brazil is a member of the EBO Network, which broadcasts to more than 35 countries over 5 continents (Asia-pacific, Europe and the Americas). EBO aims to provide advocacy, information and a networking platform for European businesses worldwide.

Taking into account the need to promote effective protection of intellectual property rights (IPR) and to ensure that measures to enforce them do not themselves become barriers to trade, on the multilateral level, WTO members put in force the Agreement Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995. The

Agreement sets out minimum standards of protection that each member should provide, and lays out procedures and remedies that must be available to ensure members' rights are upheld. TRIPS also recognizes public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.

In the EU-MS FTA context, we strongly salute all efforts to reach a relevant chapter of IPR, in line with TRIPS features and complementary improvements.

IPR encompasses a variety of subjects, including patents, industrial design, software protection, copyrights, trademarks, geographical indication (GI), and so forth.

In Brazil, the National Institute of Intellectual Property (INPI) is responsible for granting patents on inventions and registering trademarks and technology transfer agreements, all in accordance with Law 9.279/96, the intellectual property federal statute. In case of pharmaceutical patents, the National Health Surveillance Agency (ANVISA) also issue a prior approval in the administrative process of patent granting. MS, in turn, does not have communitarian levels of IP institutions and protection.

In the EU, at the Union level, the European Patent Office (EPO) and the European Union Intellectual Property Office (EUIPO) divide competences and regulate each type of IPR. National institutions also exist at Member States level.

As corporations occasionally dispute IPR, the existence of alternative dispute resolution (ADR) mechanisms and a robust legal system play a remarkable role in the functionality of IPR framework. Brazil has stood out with reforms in its arbitration system ([Law 13.129/15](#)) and the creation of a mediation statute ([Law 13.140/15](#)). The Brazilian Code of Civil Procedures has also been recently updated ([Law 13.105/15](#)) providing more clear and speedier procedures.

The FTA should provide ways for Brazilian and European entrepreneurship to improve matches on intellectual property issues and find ways to tackle challenges with the latest technological advancements. Both parties would benefit from an improved framework of IPR protection, since innovation affects the productivity of firms. This happens because process and organizational innovations amplify the efficiency with which inputs are converted into outputs, freeing resources that can then be used in the economy. Increased levels of access to qualified labor force in both regions, such as engineers and technicians, are crucial in this process.

In the following sections, our position paper addresses issues concerning patents, trademarks, transfer of technology agreements and enforcement mechanisms.

PATENTS

In general terms, one can apply to patent any invention or utility model, be it a product or process in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. From an economic perspective, patents create incentives for innovation and knowledge sharing. Access to new technology produces positive spillovers, helps to overcome human capital deficiencies, and generates steady gains that are well known in the specialized literature.

In 2016, the EU maintained its position as the second largest (35%) foreign origin of patent requests in Brazil with 8.012 filings, though we have seen a decrease of requests in absolute terms.

Patent Deposits at INPI

Origin	2015	2016
BRA	7.344	8.082
Foreign	25.699	22.838
EU	9.072	8.012
US	10.303	9.129
Other	6.324	5.797
Total	33.043	31.020

Source: INPI 2016 Statistics on Intellectual Property

In 2016, Brazil ranked 12th among EPO non-member states for patent requests at the EPO. The top three EPO non-members account for more than 80% of all non-member submissions. Brazil increased the number of filings by roughly 4%, reaching a total of 625. Despite the low number of filings,

Brazilian applications at the EPO were greater than 23 EU members in Brazil.

Patent Deposits at the EPO

Origin	2015	2016
EPO member	96.797	97.167
EU - 28	86.414	85.961
EPO non-member	182.205	199.060
BRA	603	625
US + Japan + China	148.448	164.224
Total	279.002	296.227

Source: EPO 2016 Annual Report

In 2012, with the goal of supporting innovation through improved use of the patent system, the INPI and the EPO signed a bilateral co-operation agreement. Under the agreement, the exchange of patent documents in Portuguese and English is intended to facilitate the filing of patent applications for Brazilian companies in Europe and for European companies in Brazil.

Moreover, the implementation of Patent Prosecution Highways (PPH) is noteworthy. PPHs aim at providing channels for applicants to use positive examination results from one patent office to streamline prosecution in a second patent office. INPI has been developing pilot PPH projects within the context of Latin America (Project Prosul) and also with developed economies such as the US (INPI-USPTO), Japan (INPI-JP), and more recently with the EPO itself. In turn, the EPO is already part of the "IP 5 PPH", comprised of the Chinese (SIPO), Japanese (JPO), Korean (KIPO), and the United States (USPTO) patent offices.

Operational PPHs reduce costs related to patent registration and speed up the process of substantive examination. They play a definitive role on reducing backlogs (currently in Brazil, patent requests on pharmaceutical and telecommunication products take on average 11 and 15 years respectively to be analyzed).

The Brazilian government has also taken important administrative steps to reduce examination time of patents. INPI has just increased the number of patent officers staff by 50% and a new administrative procedure (the [ANVISA-INPI Joint Ordinance 01/2017](#)) clarified the role of each agency on pharmaceutical patents. It would be useful if these steps took place alongside further enhancements on e-filing and fee payment procedures (GRU emission and types of acceptable payments methods).

Another important issue regarding patents refers to the so-called "second use patents". In short, it means the possibility of granting patents on substances and compositions for novel uses different from the first use. The practice at the EPO (the "Swiss formula") allows this mechanism and the Brazilian IP Law does not prohibit it, though INPI and ANVISA have different views on this topic.

As interested parties occasionally dispute patent violations, the existence of alternative forms of dispute resolution and a robust legal system play a remarkable role over the functioning of the patent framework. Nonetheless, as to judicial procedures, the Brazilian Code of Civil Procedures demands security deposits from non-

residents, which is not required from resident litigants.

Last but not least, as the digital transformation and use of disruptive technologies advances (bots, drones, robots, sensors and the internet), in a process called the "fourth industrial revolution" (Industry 4.0) or the "industrial internet", relevant opportunities surface. New business dynamics in both regions will have to find an environment that offers suitable protection of intellectual property, especially considering industry 4.0 patents.

EUROCARAMAS Brazil recommends:

- the inclusion of tangible commitments to quicker and less bureaucratic procedures for patent registration, including accessory obligations (e-filing, payment), with indicators to be mutually reported in standard forms.
- the continuous evolvement of the INPI-EPO PPH project, in tandem with the FTA negotiations and implementation.
- the possibility of granting patents to agriculture and pharmaceutical products for use in diagnostic, therapeutic and surgical methods whenever their use is not encompassed under the state of the art.
- the application of national treatment principles in patent related litigation providing that no guarantees, bonds, or other securities will be demanded in judicial proceedings from non-residents.
- the elaboration of provisions that foresees IP protection under the so-called industry 4.0 pattern.

TRADEMARKS

Trademarks are any sign or combination of signs capable of distinguishing goods or services in markets. From an economic perspective, trademarks are a mechanism for providing information, such as quality to consumers, reducing search costs and avoiding errors. For this reason, businesses invest large amounts of money to have easily recognizable trademarks associated with their products and services. Unlike patents, trademarks do not primarily concern innovation, but rather the credibility of products and services.

In the last two years, more than 82% of trademark filings in Brazil were of domestic origin. In 2016, the EU maintained its position as the primary foreign applicant of trademarks in the country (37%), with 10.666 requests, a 3,8% increase from 2015 figures.

Trademarks Filings at INPI

Origin	2015	2016
BRA	130.720	137.878
Foreign	27.989	28.490
EU	10.049	10.666
USA	8.858	8.450
Other	9.082	9.374
Total	158.709	166.368

Source: INPI 2016 Statistics on Intellectual Property

Regarding trademarks filed in the EU, more than 68% originated from within the EU-28. The top foreign origin (US) accounts for 40% of all foreign filings. Brazil ranks 18th among EU non-member states, with 235 applications in

2016. However, the sum of trademark applications in the EU from Brazil was greater than the filings of 21 EU members in Brazil.

Trademarks Filings at the EUIPO

Origin	2015	2016
EU - 28	89.329	93.116
Foreign	41.118	42.213
BRA	260	235
US	16.906	15.437
Total	130.447	135.329

Source: EUIPO Statistics of EUIPO (SSC 009, 2017)

To tackle cross-border protection of trademarks, the World Intellectual Property Organization (WIPO) administers the Madrid system of international registration of trademarks. The centralized registration has several advantages for the owner of the trademark, such as the procedural simplicity and the financial savings made. Though all members of the EU are part of it, no MS members have acceded to the system, particularly the so-called Madrid Protocol (1989). MS does not currently offer a regional mechanism for trademark deposit in the line of the EUIPO.

Brazil, however, has been improving administrative processes and guidance to trademark applicants; after a public consultation, INPI published the [second edition of the trademark manual in 2017](#). The number of trademark staff also increased to 147 members, a 53% increase compared to 2016. The current backlog of trademarks has been decreasing at an average rate of 4% per annum since 2013, though a backlog of 400.000 applications still remains.

Concerning substantial legal changes, Bill of Law 86/2015 is under discussion in Brazil. Once approved, it will enhance special protection of highly renowned trademarks (art. 125 of [Law 9.279/96](#)). This category of trademarks is eligible for protection whenever it distinguishes products and services beyond the scope of classes defined in the international level (Nice Classification). Though INPI has been editing ordinances in order to assure their recognition, the amended statute will provide more certainty for the protection of renowned trademarks.

As to the EU, on 23 March 2016, [Regulation 2015/2424](#) amended its trademark regulation, with a number of provisions applying from 1 October 2017. Among the new additions, the concerned regulation eliminates the possibility of filing EU-level trademark applications at national offices. The regulation also codified the current practice with regards to invalidity proceedings based on absolute grounds, limiting its examination to the arguments and the grounds provided by the parties.

Finally, corporations and individuals occasionally dispute trademark infringements. It is necessary to assure the effectiveness of ADRs and the elimination of security deposits that are not required from resident litigants.

EUROCARAMAS Brazil suggests:

- ☒ the inclusion of tangible commitments to quicker and less bureaucratic procedures for trademark registration with indicators to be mutually reported in standard forms.
- ☒ the allusion, in the FTA, of the willingness of Brazil and MS members to adhere to the Madrid Protocol, within a reasonable time, such as during the implementation of the FTA or earlier.
- ☒ the adoption of regional trademark filings at the MS level.
- ☒ the advancement of mechanisms designed to give effective protection to renowned trademarks.
- ☒ the possibility to search publicly available trademark databases on regional levels in accordance with the Nice Agreement.
- ☒ the application of national treatment principles in trademark related litigation providing that no guarantees, bonds, or other securities will be demanded on judicial proceedings from non-residents.

TECHNOLOGY TRANSFER AGREEMENTS

Holders of IPR can exploit such property and prevent its unauthorized use. Holders exploit their rights by third parties licensing or cession. Within the larger category of these contracts, Technology Transfer Agreements (TTA) concern those that effectively involve the transfer of technology.

From an economics standpoint, TTAs can improve efficiency as they reduce duplication of R&D and disseminate technology. From a public policy perspective, countries sometimes require the registration of TTA for the control of royalties remittances, collection of taxes and/or promotion of innovation, though the welfare effects of these policies are disputed in the international literature.

In Brazil, art. 211 of [Law 9.279/96](#) requires the registration of some types of TTAs at INPI, such as: (i) Services Supply of Scientific and Technical Assistance ("SAT") and Technology Supply Agreements ("FT"). In the last two years, the majority of filings for TTAs registration were of domestic origin. The EU was the second largest origin of foreign filings.

TTA Filings for Registration at INPI
(all categories, including tm and franchising)

Origin	2015	2016
BRA	1.274	867
Foreign	126	160
EU	25	27
USA	73	77
Other	28	50
Total	1,400	1.027

Source: INPI 2016 Statistics on Intellectual Property

In the EU, one of the aspects about TTAs regards their potential effects in anti-competition practices; for example, when an important license holder excludes competing technologies from the market (restrictive clauses). Therefore, statistics based on registration origins are limited.

Both the EU and Brazil are aligned with the TTA x competition interrelation. The EU has recently adopted Regulation [316/2014](#), which replaced the 2004 regulation. In 2010, INPI and the Brazilian Administrative Council of Economic Defense (CADE) signed a joint MoU to coordinate efforts to tackle TTA restrictive competition clauses.

As per TTAs simplification measures, INPI has been actively working on further improvements. [Resolution 156/2015](#) wavered the registration of many subtypes of SAT agreements that did not effectively imply technology transfer; for example, contracts related to preventive maintenance, mechanical repair and calibration of machines and equipment. Moreover, important steps were taken in relation to remittances of currency abroad. In the past, INPI used to analyze the conditions of the terms

for royalties and payments along the registration process of the TTA contract (in accordance with Ordinance 436/1958 of the Minister of Finance concerning thresholds for income tax deductibles among related companies). Through Normative Instruction 70/2017, INPI limited its role to the formal administrative act of registering, leaving the fiscal/tax elements of the contract to the appropriate monitoring authorities.

EUROCAMARAS Brazil supports:

- ☒ the coherence, within the FTA, between the transfer of technology and competition issues.
- ☒ the opportunity to explore situations where TTAs registration can be waived for procedural simplification, in line with INPI Resolution 156/2015.
- ☒ the reinforcement of private parties' autonomy to remit royalties abroad reducing limitation in value, specifically within the same economic groups, and regardless of the technology field.

ENFORCEMENT MECHANISMS

The protection of IPR is essential in any country. Tolerated infringements on patents, copyright, and trademarks undermine all the benefits associated with IPR. Moreover, products can risk consumer safety and health.

A robust system of norms would be useless without a comprehensive system for protection. The topic has been growing in importance, since technologies facilitate infringements more and more often.

In general, measures against potential IP involve intelligence monitoring, consumer education and repressive actions. In the latter case, administrative, civil and criminal law should provide ways to prevent IP violations and enforce IP rights. Thus, systems of mediation, conciliation, arbitration and actions before an IP office and courts are highly necessary for a comprehensive system of IP protection.

Both Brazil and the EU have been active in the nurture and enhancement of their systems.

In Brazil particularly, efforts against counterfeiting products are under the umbrella of the National Council against Piracy and Infringements of Intellectual Property (CNCP), at the Ministry of Justice since 2004. Two years later, the National Forum Against Piracy and Illegality (FNCP) was also inaugurated, and has been articulating initiatives among businesses, governments and civil societies against counterfeiting.

Another relevant IP issue related with trade and enforcement is the so-called “parallel importing”. A parallel import is not, strictly speaking, the import of counterfeit products. These products are marketed with the owner’s permission in one country. Then they are exported to another country, for instance, by a distributor, without the approval of the IP owner. As the later has no contractual connection with the importer of the third country, but only with its distributor, imported goods are referred to as “grey-market goods”. As explained, the goods are original, but the distribution channels fall outside the control of the IP owner.

EUROCARAMAS Brazil recommends:

- the improvement of cooperation and enforcement mechanisms, such as electronic communication between customs authorities.
- the establishment of joint task-forces to prevent the dispatch of counterfeiting products from ports, enhancing border enforcement.
- the inclusion of specific provisions related to the enforcement of IPR on the digital society.
- the consolidation of provisions limiting the scope of parallel importing.

FINAL REMARKS

Though TRIPS has stated long ago the minimum levels of protection and enforcement of IPR, on the multilateral level, the FTA can lead to great improvements, taking into account the complementarity and specificity of each region. With a full chapter on IPR, the EU-MS FTA will help producers and users to reap benefits in a manner conducive to social and economic welfare.

EUROCAMARAS Brazil particularly supports:

1. On Patents:

- a. Expedited procedures for patent granting, including its accessory obligations;
- b. The continuous evolvement of the INPI-EPO PPH project;
- c. The granting of second use patents;
- d. The application of national treatment principles in patent related litigation.

2. On Trademarks

- a. Expedited procedures for trademark registration, including accessory obligations;
- b. Adhesion, by Brazil and MS members, of the Madrid Protocol;
- c. The implementation of regional level trademark filing on the MS level;
- d. Effective protection to renowned trademarks;
- e. The availability of search mechanisms of trademarks at the MS level;

- f. The application of national treatment principles in trademark related litigation.

3. On TTAs:

- a. The maintenance of alignment between transfer of technology and competition issues;
- b. Inclusion of waivers on TTAs registration;
- c. Stronger deference to party autonomy on the remittance of royalties.

4. On enforcement mechanisms:

- a. Continuous progress on cooperation and enforcement mechanisms between customs authorities, including joint task-forces, to prevent the dispatch of counterfeit products;
- b. enforcement of IP considering the digital society;
- c. Limitations on parallel importing.

Finally, EUROCAMARAS Brazil also makes available the CAE for IPR mediation and arbitration, in order to collaborate with the larger framework of ADR in Brazil.

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