

## EXECUTIVE SUMMARY - OBJECTIVE 1 - FIC AND IDEC

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*IDRC Grant/ Subvention du CRDI: 108644-002-Enabling consumer-friendly front-of-package nutrition labelling in MERCOSUR countries*

Research Report

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## **Promotion of food labeling policies in Brazil and Argentina**

This report, prepared by *Fundación Interamericana del Corazón Argentina* (FIC Argentina) and the *Instituto Brasileiro de Defesa do Consumidor* (Brazilian Consumer Defense Institute - IDEC), is part of the research project “Front-of-package labelling (FOP): a collaborative regional study with country members of the Common Southern Market (MERCOSUR)” (IDRC-Canada 108644-001). The main goal of this study is to generate evidence to promote an effective front-of-package nutrition labeling policy in Brazil and Argentina and to encourage political dialogues in other member countries of the Southern Common Market (MERCOSUR).

This document presents clear and precise legal arguments that support the promotion of a front-of-package labeling policy for foods and non-alcoholic beverages, in accordance with international standards in this matter. It summarizes the analysis of legislation that regulates food labeling and packaging in force in Argentina and Brazil as well as in MERCOSUR, including the World Trade Organization regime. Thus, it seeks to identify the possibilities, limits and consequences of the promotion of changes in the internal regulations of the member countries of the MERCOSUR, even if it means breaking the regional harmony.

### **Introduction**

Front-of-package (FOP) nutrition labeling is a type of warning that seeks to inform about the high content of critical nutrients associated with health problems (sugars, fats and sodium), and which has been recommended as an effective measure for consumers to understand the content of foods and beverages.

In late 2017, after three years of discussions in a Working Group on Nutrition Labeling, the Brazilian Health Regulatory Agency (Anvisa), the country's authority in health issues, began a regulatory process in which changes in the nutrition labeling regulation are discussed, with an interest in adopting the FOP labeling system.

In Argentina, the Ministry of Health and Social Development has held meetings within the framework of the Advisory Committee on Healthy Eating in order to advance with FOP labeling.<sup>1</sup> In addition, several representatives have presented law bills on this matter before the National Congress.<sup>2</sup>

Within the MERCOSUR, of which both Argentina and Brazil are members, a commitment was made to implement FOP nutrition labeling to improve the information on packaged foods, in order to help stop the growing obesity and overweight epidemic in this subregion.<sup>3</sup>

The current regulation regarding nutritional information, in force both in Argentina and in Brazil<sup>4</sup> and at the MERCOSUR level, is not effective for consumers to make healthy decisions. The absence of clarity and readability of the information in the nutrition facts label adds to the inclusion of nutritional claims that promote certain health and nutritional characteristics without indicating nutritionally negative ingredients with equal emphasis.

## **Approaches and results**

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<sup>1</sup> FUNDEPS. "First meeting of the National Commission on Healthy Eating and Obesity Prevention." Available at: <http://www.fundeps.org/en/first-meeting-of-the-national-commission-on-healthy-eating-and-obesity-prevention/>. Last accessed: May 27, 2019.

<sup>2</sup> See <https://www.diputados.gov.ar>.

<sup>3</sup> World Health Organization and Panamerican Health Organization Argentina. "OPS celebra la decisión del Mercosur de implementar el etiquetado frontal en los alimentos" (PAHO celebrates MERCOSUR decision to implement front-of-package nutrition labeling). Available at:

[https://www.paho.org/arg/index.php?option=com\\_content&view=article&id=10238:ops-celebra-la-decision-del-mercursosur-de-implementar-el-etiquetado-frontal-en-los-alimentos&Itemid=234](https://www.paho.org/arg/index.php?option=com_content&view=article&id=10238:ops-celebra-la-decision-del-mercursosur-de-implementar-el-etiquetado-frontal-en-los-alimentos&Itemid=234) (in Spanish). Last accessed: May 27, 2019.

<sup>4</sup> Relatório Preliminar de Análise de Impacto Regulatório sobre Rotulagem Nutricional. Available at: [http://portal.anvisa.gov.br/documents/33880/2977862/An%C3%A1lise+de+Impacto+Regulat%C3%B3rio+sobre+Rotulagem+Nutricional\\_vers%C3%A3o+final+3.pdf/2c094688-ae44-441d-a7f1-218336995337](http://portal.anvisa.gov.br/documents/33880/2977862/An%C3%A1lise+de+Impacto+Regulat%C3%B3rio+sobre+Rotulagem+Nutricional_vers%C3%A3o+final+3.pdf/2c094688-ae44-441d-a7f1-218336995337) (in Portuguese). Last accessed: May 27, 2019.

MERCOSUR<sup>5</sup> has the power to approve general rules to facilitate trade among members. For this purpose, all country members implement the regulations approved by the bloc at the national level. The Resolutions of the *Grupo Mercado Común* (Common Market Group - GMC), the bloc's executive body, are binding on member states, and the way in which each country incorporates them into its normative plexus depends on its legal system. This practice is known as "harmonization of law."

In Brazil, harmonization is within Anvisa's competences, and the agency has to approve it by decision of the majority of the members of its Board of Directors. Harmonization is sought through autonomous standards, called *Resolução da Diretoria Colegiada* (Resolution of the Collegiate Board of Directors - RDC). Argentina harmonizes these rules through the incorporation of GMC Resolutions into the *Código Alimentario Argentino* (Argentine Food Code - CAA). The CAA is updated and modified by the *Comisión Nacional de Alimentos* (National Food Commission - CONAL), an eminently technical body that advises, supports and monitors the National Food Control System.<sup>6</sup>

Although it is expected for any norm approved in the scope of MERCOSUR to be adopted with no local regulations that could pose a barrier to trade, experience shows that there is a certain degree of normative autonomy in these countries. This happens both when countries do not harmonize a new regulation and when their congresses approve laws that impose new obligations, including those regarding food labeling. This is the case of the regulations on gluten-free foods and genetically modified organisms (GMOs), which are not harmonized with MERCOSUR.

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| Country | Normative instrument          | Object               | Impact on labeling                     |
|---------|-------------------------------|----------------------|--|
| Brazil  | Law No. 10674/03 <sup>7</sup> | Gluten-free labeling | "CONTÉM GLÚTEN"<br>("CONTAINS GLUTEN") |

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<sup>5</sup> South American economic bloc also formed by Paraguay, Uruguay, Bolivia and Venezuela. The Bolivarian Republic of Venezuela is suspended from all rights and obligations inherent to its status as a member state, in accordance with the provisions in the second paragraph of Article 5 of the Protocol of Ushuaia.

<sup>6</sup> See Decree 815/1999. Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/55000-59999/59060/norma.htm> (in Spanish). Last accessed: May 27, 2019.

<sup>7</sup> Law No. 10674/03. Available at: [http://www.planalto.gov.br/ccivil\\_03/leis/2003/l10.674.htm](http://www.planalto.gov.br/ccivil_03/leis/2003/l10.674.htm) (in Portuguese). Last accessed: May 27, 2019.

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|---|--|--|---|---|
|   |  |  | “NÃO GLÚTEN” (“GLUTEN FREE”)  | CONTÉM (“GLUTEN FREE”)  |
|   | Law No. 11105/05 <sup>8</sup> and Ordinance No. 2658/03 <sup>9</sup>   | Safety regulations and control mechanisms for activities involving genetically modified organisms (GMOs) and their derivatives | Yellow triangle with a T inside it indicating that the product contains GMOs. |  |
| Argentina                               | Modification of Article 1383 of the Argentine Food Code <sup>10</sup> and Joint Resolution 201/2011 and 649/2011 <sup>11</sup> | Labeling of products without wheat, barley, rye nor oats   | “Sin TACC” (No wheat, barley, rye or oats) and symbol                         |  |
| Argentina does not have a GMO standard. |  |  |   |   |

In Brazil, most of the labeling rules, including the examples above, are based on the protection of health and consumers’ right to information.<sup>12</sup> In Argentina, on the other hand, health criteria is not used as a justification or foundation of the CAA provisions, despite the fact consumers’ health and right to access to information are legislated in the National Constitution, the Consumer Defense Law and the CAA itself.

Importantly, the rules included in the agreements signed by the Member States of the World Trade Organization (WTO)<sup>131415</sup> establish certain obligations for states to prevent

<sup>8</sup> Law No. 11105/05. Available at: [http://www.planalto.gov.br/ccivil\\_03/ato2004-2006/2005/lei/l11105.htm](http://www.planalto.gov.br/ccivil_03/ato2004-2006/2005/lei/l11105.htm) (in Portuguese). Last accessed: May 27, 2019.

<sup>9</sup> Ordinance No. 2658/03. Available at: [http://portal.anvisa.gov.br/documents/33916/393963/Portaria\\_2685\\_de\\_22\\_de\\_dezembro\\_de\\_2003.pdf/54200bc1-8c57-4d36-bf1e-2045fcff1919](http://portal.anvisa.gov.br/documents/33916/393963/Portaria_2685_de_22_de_dezembro_de_2003.pdf/54200bc1-8c57-4d36-bf1e-2045fcff1919) (in Portuguese). Last accessed: May 27, 2019.

<sup>10</sup> Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/180000-184999/184719/norma.htm> (in Spanish). Last accessed: May 27, 2019.

<sup>11</sup> Available at: [http://www.anmat.gov.ar/webanmat/Legislacion/Alimentos/Resolucion\\_Conjunta\\_201-2011\\_y\\_649-2011.pdf](http://www.anmat.gov.ar/webanmat/Legislacion/Alimentos/Resolucion_Conjunta_201-2011_y_649-2011.pdf) (in Spanish). Last accessed: May 27, 2019.

<sup>12</sup> For example, the legality of those that were questioned before the judiciary -such as the case of gluten and allergens labeling- was recognized in view of their intended purpose.

<sup>13</sup> Agreement on Technical Barriers to Trade (TBT), incorporated to MERCOSUR normative body by Common Market Group (GMC) Resolution 58/00. Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf). Last accessed: May 27, 2019.

<sup>14</sup> Food and Agriculture Organization. The Agreements on the Application of Sanitary and Phytosanitary Measures and Technical Barriers to Trade. Available at: <http://www.fao.org/3/x3452e06.htm>. Last accessed: May 27, 2019.

<sup>15</sup> General Agreement on Tariffs and Trade (GATT 1947). Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf). Last accessed: May 27, 2019.

the imposition of barriers to trade between countries and to promote international trade. In this context, sectors related to the food industry have argued<sup>16</sup> that a country's FOP nutrition labeling system could be considered as a barrier to international trade by imposing conditions not mandatory in other countries.

However, the WTO recognizes the right of states to legislate and take all necessary steps to protect their citizens' health and lives, even when such regulations could represent some kind of barrier to international trade.<sup>17</sup><sup>18</sup><sup>19</sup> In this framework, countries are authorized to adopt measures that restrict trade rights granted in the treaty but which represent a higher level of health protection ("flexibilities").<sup>20</sup>

In this context, two scenarios become possible: on one hand, the international community has recognized the states' sovereignty over public health legislation, thus restricting economic rights, even in a trade protection frame. On the other hand, the WTO has acknowledged that policies that establish special requirements for the labeling of unhealthy products, such as tobacco products, do not imply a barrier to trade.<sup>21</sup> Accordingly, the possibility of advancing with FOP labeling is protected by two ways

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<sup>16</sup> "Etiquetados de alimentos podrían calificarse como obstáculos al comercio por la OMC" (Food labeling could be considered as a barrier to trade by the WTO). *Diario Gestión*. Available at: <https://gestion.pe/economia/etiquetados-alimentos-calificarse-obstaculos-comercio-omc-227667> (in Spanish). Last accessed: May 27, 2019.

<sup>17</sup> "Gobierno busca con etiquetas de alimentos reducir ciertos sabores, pero privados advierten posible uso de químicos" (Government seeks to reduce certain flavors with food labels, but private sector warns about possible use of chemicals). *Diario El Observador*. Available at: <https://www.elobservador.com.uy/nota/-como-las-empresas-uruguayas-le-haran-frente-al-nuevo-etiquetado-de-alimentos--2018911918> (in Spanish). Last accessed: May 27, 2019.

<sup>18</sup> "(...) no country should be prevented from taking measures necessary for (...) the protection of human, animal or plant life or health, of the environment." Agreement on Technical Barriers to Trade. World Trade Organization. Available at: [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbtagr\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm). Last accessed: May 27, 2019.

<sup>19</sup> "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human (...) life or health." WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Article 2. World Trade Organization. Available at: [https://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm). Last accessed: May 27, 2019.

<sup>20</sup> "(...) nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...) necessary to protect human (...) life or health." The General Agreement on Tariffs and Trade, Article XX, subsection b. Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](https://www.wto.org/english/docs_e/legal_e/gatt47.pdf). Last accessed: May 27, 2019.

<sup>21</sup> An example of this is the case of Australia's tobacco plain packaging law, in which the WTO Dispute Settlement Body ruled out the tobacco industry complaints considering that the costs of compliance with plain packaging are not trade restrictive themselves, and pointing out that the law that requires tobacco products to be sold in generic packages to protect public health does not violate Australia's obligations under the WTO. A summary of the litigations and publicly available documents are available in the Australia's Department of Foreign Affairs and Trade website <https://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/wto-disputes-tobacco-plain-packaging.aspx>. Last accessed: May 27, 2019.

<sup>22</sup> The implementation of a FOP labeling measure would not be trade restrictive since it could be easily enforced through the use of stickers. This was the interpretation in the case of Australia's tobacco plain packaging law, in which the WTO considered that the costs of complying with the norm would not affect imports nor limit trade.

within international trade regulation: the jurisprudence of the WTO and the flexibilities within the Agreements.

## Conclusions

One of the main conclusions of this analysis is that both the Argentine and the Brazilian State have the power to enforce regulations regarding food labeling and packaging without prior approval of a MERCOSUR norm. Similarly, states are also empowered to implement laws with criteria different from those sanctioned by MERCOSUR. Therefore, we conclude that there are no regulatory impediments for Argentina and Brazil to regulate nutritional labeling autonomously.

According to the rules of the WTO and MERCOSUR<sup>2223</sup>, the protection of people's health and access to accurate information are potential windows of opportunity for the adoption of autonomous regulations in Brazil and/or Argentina, without prior discussion and regulation in the scope of MERCOSUR.

Countries have already exercised their sovereignty to legislate independently from MERCOSUR on different occasions, with labeling systems that are specific to Brazil and others only in force in Argentina, including visual warnings -as is the case of the triangle indicating the presence of GMOs in Brazil and the warning on products without wheat, barley, rye or oats in Argentina.

FOP nutrition labeling is not only a public health measure, but is also directly linked to the consumers' right to access to accurate information, the states' duty to protect said right, and the prohibition of misleading advertising, all guaranteed by national regulations -such as the *Código Brasileiro de Defesa do Consumidor* (Brazilian Consumer

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<sup>22</sup> "(...) the State Parties to MERCOSUR have the right to take sanitary and phytosanitary measures necessary for the protection of human life or health." MERCOSUR, Decision No. 06/93, Sanitary and Phytosanitary Agreement between the State Parties to MERCOSUR, Article 2.

<sup>23</sup> "State Parties to MERCOSUR may establish or maintain sanitary or phytosanitary measures that represent a higher level of sanitary or phytosanitary protection than that which would be achieved through measures based on relevant international standards, guidelines or recommendations, if there is a scientific justification or if it is a consequence of the level of sanitary or phytosanitary protection that the Member concerned determines to be adequate in accordance with the relevant provisions in Article 5." MERCOSUR, Decision No. 06/93, Sanitary and Phytosanitary Agreement between the State Parties to MERCOSUR, Article 3. For its part, Article 5 establishes that sanitary and phytosanitary measures may be higher if the state in question considers this as adequate based on the evaluation of the circumstances and the risks for people's lives and health.

Defense Code - CDC); and the National Constitution, the Consumer Defense Law and the CAA in Argentina.<sup>24</sup>

In conclusion, it is recommended that both the Argentine and Brazilian states advance in the promotion and implementation of FOP labeling regulations for foods and non-alcoholic beverages that meet international standards in this matter, in order to protect their citizens' right to health.

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<sup>24</sup> Argentine Food Code (CAA), Chapter V, Annex I; Paragraph 7.