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Geographical Indications in TTIP Negotiations

GEOGRAPHICAL INDICATION AS AN INTELLECTUAL PROPERTY RIGHT

The quality, reputation or other characteristics of many products may depend on where (geographically) they come from. When this is the case and it is positive, producers may consider emphasizing this fact by indicating the place of origin of the product, i.e. protect it by means of geographical indications (GIs).¹ Apart from distinguishing their goods from those offered by others, they are able to garner extra profits if consumers associate such an indication with better quality or some other desired trait. GIs are very often premium quality products, expensive to manufacture, produced locally by small and medium-sized firms and especially exposed to misuse and counterfeiting. Legal protection is therefore a useful tool for safeguarding producers' and consumers' interests.

According to the Agreement on Trade-Related Intellectual Property Rights (TRIPS),² GIs can be place names (e.g. Parma ham) or words associated with a place (e.g. 'oscypek' which is sheep milk cheese originating from the Podhale region in Poland).

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2 The TRIPS Agreement was negotiated during the 1986-94 Uruguay Round of the GATT trade negotiations. The Agreement was the first to introduce extensive intellectual property rules into the multilateral trade law system and the first to establish the legal definition of GI.

As WTO members both the United States and the European Union are obliged to provide protection for GIs as required by TRIPS. According to Article 22 of this agreement, all products can benefit from a standard level of protection, i.e. GIs have to be protected in order to avoid misleading the public and to prevent unfair competition.³ GIs are not protected when a name has become common (or 'generic'),⁴ or when a term has already been registered as a trademark.

Granting legal protection for GIs lies within the jurisdiction of separate domestic laws. Mechanisms of protection vary considerably, depending on whether a public or private legal system approach is adopted (FAO 2013). The first approach appears when public authorities enact legislation dedicated to the specific protection of GIs (*a sui generis*⁵ system).⁶ The second approach entails the use of laws against unfair competition and is connected with trademark laws such that protection is primarily based on private actions.⁷ The public approach is generally accepted in EU member states and the private approach in the United States (see Table 1).

As a result of these different approaches, the protection of GIs takes many forms. The United States is one of several countries⁸ that protect GIs through certi-

3 A higher level of protection is guaranteed by Article 23 for wines and spirits: in general, they have to be protected even if misuse would not cause the public to be misled. There are several exemptions to these rules (Article 24).

4 For example, 'bologna' in the United States refers to a particular type of meat not necessarily made in Bologna, Italy.

5 *Sui generis*, from the Latin meaning 'of its own kind', is a term used to identify a legal classification that exists independently of other categorizations because of its uniqueness or as a result of the specific creation of an entitlement or obligation (FAO 2013).

6 This approach generally consists of an official recognition of GIs by granting the status of a public seal of quality. Registration often does not carry an administrative fee and there is no need to renew it. The aim is to protect the authentic designation of a product.

7 Registration is the most common legal tool to define legitimate users and ensure protection for GI products. Registration must be periodically renewed. The aim is to certify the quality of the product.

8 These include Australia, Canada, Japan, parts of Africa and a number of Arab countries.



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Table 1

Key distinctions between trademarks and geographical indications

| Feature | Trademarks (private approach) | Geographical indications (public approach) |
|-----------------------|--|--|
| Ownership | Anyone. Typically, an individual entity or corporation, sometimes collective or government. | Producers or government. |
| Transferability | To anyone, anywhere. | Linked to origin. Cannot be de-localized. |
| Rights to origin name | First in time, first in rights principle. | Distinguishes legitimate rights to origin, not first to apply for a name. Registration confers rights to all legitimate producers. |
| Protection | Private. Burden entirely on the owner. | Public. Government responsible but some private burden to identify infringement. |
| Use | Trademark: typically private, can license. Collective mark: closed group. Certification mark: open according to set rules. | Collective, open to all producers that comply with the rules. |
| Quality | Private. Usually not specified except sometimes for certification marks. | Disclosed in standards or specifications and obligatorily linked to origin. |
| Name or brand | May be created. May or may not have geographic linkage. | Must exist already and must link to <i>terroir</i> . |

Source: Adapted from International Trade Center (2009).

fication marks, collective marks or trademarks;⁹ while the EU has a specific system of GI protection.

THE POSITIONS OF THE EU AND THE US IN THE TTIP NEGOTIATIONS ON GEOGRAPHICAL INDICATORS

The protection of GIs is one of the most disputed parts of the TTIP talks. The EU model of GI protection is very strong – it stands above the TRIPS standard level and corresponds to the one offered by TRIPS to wines and spirits. The United States protects GIs through trademark law. Due to the fact that a lot of names referring to European geographical areas are currently considered generic in the United States, they cannot be protected. This partly explains the US reluctance to extend GI protection. Some scholars even claim that the idea of protection of GIs is alien to American law and culture (Chen 1996).¹⁰

The high level of GI protection in Europe is largely determined by the commercial value of GI products. According to the Database of Origin & Registration (DOOR), there were 1,256 registered GI agricultural and foodstuff products in the EU in 2015, of which 1,237 registrations originated in the EU member states. Italy, France and Spain accounted collectively for 55 percent of a total of 680 registrations. Several Central European countries also ranked high: Czech Republic, Poland and Slovenia were among the 10 countries with the most number of registrations, i.e. 29, 27 and 19, respectively. Chevere *et al.* (2012) estimate that in 2010 the worldwide sales of GI agricultural products, foodstuff, wines and spirits registered in the EU amounted to 54.3 billion euros (representing about 5.7 percent of the total food and drink sector in the EU). About 60 percent of sales were in domestic markets, 20 percent was intra-EU trade and 19 percent (10.6 billion euros) was extra-EU. The largest non-EU importer of EU GI products was the United States (3.4 billion euros, which accounted for 30 percent of total US imports of food and beverages from the EU). Exported GI products came mainly from France, Britain and Italy, which together account for 86 percent of extra-EU sales of GI products.

Another reason for the high GI protection in the EU is that it is part of a much larger policy that seeks to preserve traditional production methods and ways of life in the face of globalization (Watson 2015). Commentators in America condemn European GIs as trade barriers, whereas trade agreements are supposed to reduce barriers to trade. US agricultural industrial lob-

bies are heavily against GIs.¹¹ EU commentators talk about inferior imitations of European GIs in the United States and vow to solve the problem through TTIP. The EU wants the United States to improve its system, notably by protecting an agreed list of EU GIs.

It is unlikely that TTIP negotiations over GI protection will result in an outcome that both sides find satisfactory and it is still unclear how the issue of GIs will be resolved in the TTIP talks; or even whether it can be resolved. There is pressure on the US negotiators to completely reject any EU calls for GIs in TTIP.

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9 GIs may be protected through a registration under trademark law, in the form of a trademark, a certification mark or a collective mark. A trademark is a distinctive sign that is used by a company to identify itself and its products or services to consumers. It cannot refer to generic terms or exclusively to geographical terms. A certification mark is a specific type of trademark that certifies that goods or services bearing the mark meet a certain defined standard or possess a particular characteristic. Such marks are usually registered in the name of trade associations, government departments, technical institutes or similar bodies. A collective mark is a specific type of trademark that indicates that a product bearing the mark originates from members of a trade association, rather than just one trader.

10 That is because American intellectual property law is built on the foundation of disseminating knowledge as widely as possible in order to spur innovation and favour new entrants to the market.

11 It is worth remembering that the United States is not demanding that the European Union allow the sale of American products as GIs.