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Two Continents, Divided by Deep Philosophical Waters? Why Geographical Indications Pose a Challenge to the Completion of the Transatlantic Trade and Investment Partnership

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I. Introduction

The May 2016 leak of draft texts produced within the context of the on-going Transatlantic Trade and Investment Partnership negotiations has provided an interesting insight into the positions of the EU and US with regard to different dimensions of regulatory cooperation, with some chapters being complete or near completion (as other articles in this mini-symposium discuss), and others still in a more rudimentary format. One such field of regulation, covered in the leaked ‘Tactical State of Play’ document, covers geographical indicators (hereafter GIs). However, this coverage is very brief, stating that ‘discussions focused on the preparation of an intersessional discussion prior to the next round’². GIs, marks identifying the geographical origin, and by extension (so the argument goes) quality of goods, have continued to be a source of consternation in international trade regulation, with states unable to see eye-to-eye on how they should be protected, if at all. The EU and US in particular reflect two very different philosophical approaches to the concept of a GI, and its application to foods in particular³. For the EU, cheeses such as *Feta* are culturally and geographically distinct, attributable to a certain region within Greece⁴, with a long, established history. For the US, feta is a generic type of ‘white’ cheese, and not deserving of special recognition. As this paper will demonstrate, the substantially different conceptions of GIs, combined with two distinct regulatory approaches being exported through other trade agreements by both the EU and US, appear to render the negotiating positions of the two regions incompatible. The impact of this

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² Greenpeace Netherlands TTIP Leak, ‘Note - Tactical State of Play of the TTIP Negotiations’ (2016) at p.21.

³ It must be stated that there are specific additional regimes for the protection of wines and spirits – in the interests of brevity, and to focus on this core issue of controversy, these additional regimes are not considered here.

⁴ *Feta* being the name for a traditional cheese produced in Greece since ‘ancient times’, using either ewe’s milk exclusively, or a mixture of ewe and goat milk, as per Regulation No 1829/2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name ‘Feta’

may be that GIs are excluded from the scope of TTIP, or that TTIP may fail to be concluded at all.

II. Geographical indications as a source of conflict between the EU and US

A GI is a *sui generis* form of intellectual property right, concerned with identifying a good as originating in a specific country, territory or locality⁵. First given specific definition in international trade rules under the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter TRIPS), this identification is of relevance 'where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'⁶. For Blakeney, the novelty of a GI comes in the explicit linkage of the concept of geography to that of quality⁷, the idea that a particular location, soil, climate or type of vine will influence the quality of produced agricultural goods, whether they be meats, cheeses or grains. Recognition of a GI, it would therefore follow, relies upon accepting the initial presumption that these geographical factors, as well as developed knowledge of techniques of preparation and production *do* indeed influence the quality of those goods. The idea of attaching specific qualities to produce of a particular region is by no means new, with examples dating back to Egypt's Old Kingdom and the Ancient Greek city-states⁸. Their inclusion within TRIPS as a form of intellectual property right, however, was. While reference to appellations of origin is made in the Paris Convention of 1883, and the Lisbon Agreement of 1958 does make specific reference to GIs⁹, it was only with TRIPS in the mid 1990s that the concept of a geographical indicator became recognised as a legal right with effective dispute settlement¹⁰. Yet when compared to the more considerable harmonisation of patents and trademarks, the TRIPS provisions on GIs dictate little substantively, allowing states to choose

⁵ Bernard O'Connor, 'The Legal Protection of Geographical Indications' *Intellectual Property Quarterly* (2004) pp.35 *et seqq*, at p.35.

⁶ TRIPS, Article 22(1)

⁷ Michael Blakeney, 'Geographical Indications: What Do They Indicate?' *6 WIPO Journal* (2014) pp.50 *et seqq*, at p.50.

⁸ Vadim Mantrov, *EU Law on Indications of Geographical Origin: Theory and Practice* (Berlin: Springer 2014) at p.32.

⁹ Although it must be stated that membership of this agreement is low, limiting upon its international impact, as indicated by Justine Pila and Paul Torremans, *European Intellectual Property Law* (Oxford: OUP 2016) p.469; William A Kerr, 'Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development' in William A Kerr (ed), *Conflict, Chaos and Confusion* (Cheltenham: Edward Elgar Publishing 2010) p.88.

¹⁰ See Kerr (n 6) p.88.

for themselves the specific means of protection under Article 22(2)¹¹. Described by Ganjee as constituting an ‘unstable compromise’¹², the minimally harmonised nature of GIs at the international level is the result of significant conflicts between states regarding the legitimacy, and indeed necessity, of their protection. Whereas much of the discussion of TRIPS relates to the ‘global North-global South’ conflict¹³, particularly as concerns issues such as access to medicines¹⁴, the protection of GIs can be conceptualised as a conflict between the ‘Old World’ and ‘New World’¹⁵. As Sanders puts it, there ‘is not a single IP right that has so consistently led to heated debates in international trade other than GIs’¹⁶; this debate can be understood in terms of the significant divergences in perception of the role of GIs in international trade, and subsequently the ways in which they are protected in the IP system. In order to demonstrate how this may negatively impact upon the likelihood of successful TTIP negotiations, it is necessary to consider the competing narratives over GIs in the EU and US.

GI protection has been afforded a key role in the EU’s agricultural policies¹⁷, particularly as they relate to external market relations with other states and their respective consumer bases¹⁸. GIs are perceived to promote the cultural heritage of the EU Member States, linking issues of trade to issues of authenticity and traditional knowledge¹⁹, as well as serving an additional goal of promoting the EU’s agricultural regions economically, penetrating new

¹¹ On this point see Gail E Evans, ‘The Protection of Geographical Indications in the European Union and the United States under Sui Generis and Trade Mark Systems: Signs of Harmonization?’ *Intellectual Property Quarterly* (2013) pp.18 *et seqq.*, p.20; Antony Taubman, Hannu Wager and Jayashree Watal (eds), *A Handbook on the WTO TRIPS Agreement* (Cambridge: Cambridge University Press 2012) pp.77–78.

¹² Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge: Cambridge University Press 2012) p.184.

¹³ See for example Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Abingdon: Earthscan 2002); Carlos María Correa and Abdulqawi Yusuf (eds), *Intellectual Property and International Trade: The TRIPs Agreement* (Aalphen aan den Rijn: Kluwer Law International 2008).

¹⁴ FM Scherer and Jayashree Watal, ‘Post-TRIPS Options for Access to Patented Medicines in Developing Nations’ 5 *Journal of International Economic Law* (2002) pp.913 *et seqq.*

¹⁵ Taubman, Wager and Watal (n 8) p.77.

¹⁶ Anselm K Sanders, ‘Geographical Indications of Origin: When GIs Become Commodities, All Gloves Come off’ 46 *International Review of Intellectual Property and Competition Law* (2015) pp.755 *et seqq.*, p.755; see also Meir Perez Pugatch, ‘Intellectual Property Policy-Making in the 21st Century’ 3 *WIPO Journal* (2011) pp.71 *et seqq.*, p.72; Tim Josling, ‘The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict’ 57 *Journal of Agricultural Economics* (2006) pp.337 *et seqq.*, pp.339–340.

¹⁷ O’Connor (n 2) p.35; Luisa Menapace and others, ‘Consumers’ Preferences for Geographical Origin Labels: Evidence from the Canadian Olive Oil Market’ 38 *European Review of Agricultural Economics* (2011) pp.193 *et seqq.*

¹⁸ Andreas Dür, ‘Bringing Economic Interests Back into the Study of EU Trade Policy-Making’ 10 *The British Journal of Politics & International Relations* (2008) pp.27 *et seqq.*, p.35.

¹⁹ Tesh W Dagne, ‘Beyond Economic Considerations: (Re)conceptualising Geographical Indications for Protecting Traditional Agricultural Products’ 46 *International Review of Intellectual Property and Competition Law* (2015) pp.682 *et seqq.*, pp.684–685; Matteo Ferrari, ‘The Narratives of Geographical Indications’ 10 *International Journal of the Law in Context* (2014) pp.222 *et seqq.*, p.225.

markets for EU produce²⁰. For the EU, goods protected by a GI constitute a useful ‘value-added’ regime, with the consumer perceptions of increased quality through originality and speciality²¹ meaning that higher prices can be afforded to such products²². According to a 2012 report commissioned by the European Commission, the value of sales of GI-protected foodstuffs (excluding wines and spirits) was €15.8 billion with an increase in sale value between 2005 and 2010 of 19%²³. Due to their value (and indeed the EU’s prime position to maximise the international recognition of foods such as *mozzarella di bufala* and *jamón de serón*) EU protection afforded to GIs is particularly broad. The 2012 Quality Schemes Regulation²⁴ reflects these perceptions regarding the role of GIs, stating their existence is necessary to both raise commercial awareness of these high-quality products, as well as achieve rural development policy objectives²⁵. To gain Protected Geographic Indicator (PGI) status, Article 5(2) states that only the one of the production steps for that good²⁶ need take place in that geographical area²⁷, allowing for a broad range of products to be afforded protection. While Article 6 specifies that a term that is considered generic cannot receive protection, jurisprudence of the Court indicates that this is a comparatively low barrier to surmount, with *Feta* cheese gaining protected status, contrary to arguments that the name was considered generic by consumers in the EU, in addition to the fact that the name *Feta* refers to a cutting technique rather than a geographical location²⁸.

Rather than promoting luxury agricultural products, however, critics of the EU GI regime, and in particular ‘New World’ producers such as the US and Australia, consider it to be a form of market protectionism²⁹, or in the words of one US Commerce Department official, ‘nothing

²⁰ Ferrari (n 16) p.225; O’Connor (n 2) p.36.

²¹ For more on this see Menapace and others (n 14).

²² Arete Research & Consulting in Economics, ‘Study on Assessing the Added Value of PDO/PGI Products’ (Commissioned by the European Commission 2013) pp.5–6.

²³ Tanguy Chever and others, ‘Value of Production of Agricultural Products and Foodstuffs, Wines, Aromatised Wines and Spirits Protected by a Geographical Indication’ (European Commission 2012) p.16.

²⁴ Regulation No 1151/2012 on quality schemes for agricultural products and foodstuffs

²⁵ *Ibid*, Article 1

²⁶ Defined in Article 3(7) as processing, production and packaging

²⁷ Although for the stronger Protected Designation of Origin (PDO) protection, all three steps must take place within that area.

²⁸ Joined cases C-465/02 and C-466/02 *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities* EU:C:2005:636

²⁹ Kal Raustiala and Stephen R Munzer, ‘The Global Struggle over Geographic Indications’ 18 *European Journal of International Law* (2007) pp.337 *et seqq*, p.351.

less than a subsidy of European agriculture interests through claw back of generic terms'³⁰. Furthermore, critics in the US dispute the inherent linking of geography with quality, noting that waves of immigration to the US from Europe resulted in the 'know-how' of many of these traditional foods being transferred and applied in US territory, resulting in the same processing and production methods³¹. Instead of a broad *sui generis* regime, the US protects GIs generally as a discrete subcategory of its trademark laws³², as certification or collective marks under the Lanham Act³³. A certification mark allows for a certain mark to be used subject to certain specifications, which can include production methods and places of origin³⁴, or even as a trademark where the geographic terms used have acquired distinctiveness through consumer identification of those terms with a particular company or producer³⁵. Furthermore, the US is stricter than the EU when it comes to determining whether a particular product is generic, and so ineligible for trademark, certification or collective mark protection³⁶; whereas *parmigiano reggiano* is a protected GI in the EU, 'parmesan' is considered a generic in the US, referring to a hard, aged cheese³⁷. The US considers the EU approach to GIs to be unnecessarily broad, arguing that trademark law is sufficient to protect these goods, while preventing overreach when considering generic terms³⁸. US agricultural producers in particular are opposed to the EU *sui generis* system, considering it a potential threat to their own business interests³⁹. The US is particularly concerned that the EU grants priority to the *sui generis* GI over trademarks, preventing the registration of a trademark that may conflict with a pre-existing GI⁴⁰, and being permitted to co-exist with a pre-existing trademark in the event that the application for a GI is filed subsequent to a successful, good-

³⁰ As quoted in Molly Torsen, 'Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications Is at a Standstill' 87 *Journal of the Patent and Trademark Society* (2005) pp.31 *et seqq*, p.52.

³¹ Blakeney (n 4) p.52.

³² Evans (n 8) p.23.

³³ The Lanham (Trademark) Act 15 USC § 1054

³⁴ Josling (n 13) p.347.

³⁵ *ibid.*

³⁶ Evans (n 8) p.26.

³⁷ *ibid.*

³⁸ Michael Blakeney, 'Scope of the Intellectual Property Chapter of the Trans-Pacific Partnership Agreement (TPPA)' 21 *International Trade Law & Regulation* (2015) pp.14 *et seqq*, p.16; see also Dwijen Rangnekar and Sanjay Kumar, 'Another Look at Basmati: Genericity and the Problems of a Transborder Geographical Indication' 13 *The Journal of World Intellectual Property* (2010) pp.202 *et seqq*.

³⁹ Dermot J Hayes, Sergio H Lence and Bruce Babcock, 'Geographic Indications and Farmer-Owned Brands: Why Do the US and EU Disagree?' 4 *EuroChoices* (2005) pp.28 *et seqq*.

⁴⁰ Regulation No 1151/2012, Article 14(1)

faith trademark registration⁴¹. As well as representing a substantial incompatibility in economic interests, the conflict between the EU and US also reflects an incompatibility in the philosophical and legal approaches to the protection of GIs⁴², which may have considerable implications for TTIP.

III. International manoeuvring and norm exportation: divergences in the protection of geographical indicators in regional trade agreements

The EU and US have been engaged in the formulation of other trade agreements in addition to the TTIP negotiations, in which they have sought to implement their respective norms and legal approaches to GIs, creating an atmosphere of regulatory competition. The US has recently agreed the final text of the Trans Pacific Partnership, a comprehensive trade agreement between the US, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Chapter 18 of this agreement concerns intellectual property rights, including trademarks and GIs. The position of the US is made clear by the chapter summary provided by the Office of the United States Trade Representative, which states that the intention of TPP in this regulatory sector is to ‘address the potential for inappropriately “overprotecting” GIs in ways that shut out US agricultural and food producers, including [...how to] determine whether a term is generic in its market’⁴³. The US preference for protection within the context of the trademark system is apparent under Article 18.19, which concerns collective and certification marks. This Article states that each party ‘shall also provide that signs that may serve as GIs are capable of protection under its trademark system’. While Article 18.30 states that GIs may also be protected through a *sui generis* system, in comparison to the EU regime, strict limitations are placed upon its operation. Article 18.32(1) outlines the grounds of opposition to a grant of a GI, which can take place if it would cause confusion with a trademark that is the subject of a pre-existing application or registration, it would cause confusion with a pre-existing mark granted, or the GI is a ‘term customary in common language as the common name for the relevant good’ in that territory.

⁴¹ Ibid, Article 14(2); see also WTO Disputes WT/DS/174 and WT/DS/290 *EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (2005)

⁴² See also Cerkia Bramley, Delphine Marie-Vivien and Estelle Biénabe, ‘Considerations in Designing an Appropriate Legal Framework for GIs in Southern Countries’ in Cerkia Bramley, Estelle Bienabe and Johann Kirsten (eds), *Developing Geographical Indications in the South* (Berlin: Springer 2013); Stephan Marette, Roxanne Clemens and Bruce Babcock, ‘Recent International and Regulatory Decisions about Geographical Indications’ 24 *Agribusiness* (2008) pp.453 *et seqq.*

⁴³ Office of the United States Trade Representative, ‘Intellectual Property Chapter Summary’ (2015) p.3.

Article 18.32(2) states that these grounds for opposition can also be used as the grounds for the *cancellation* of an existing GI, indicating that the position of the US is that trademarks have prime position in the intellectual property regime⁴⁴. Calboli has referred to this as a ‘first in time, first in right’ approach to registration, in which a new GI cannot be used to supplant a pre-existing trademark⁴⁵ – however, the fact that a GI can be *cancelled* on the grounds of a competing mark suggests this goes beyond ‘first in time, first in right’ to afford trademarks a higher standard of protection than GIs. The approach in TPP mirrors that of the US-South Korea Free Trade Agreement, which specifies at Article 18.2(2) that GIs are to be protected as trademarks, and that trademark holders can prevent the use by other economic actors of ‘identical or similar signs, including GIs’ at Article 18.2(4). It becomes quickly apparent that the US position is that GIs should be protected at the international level as a category of trademark, rather than under a *sui generis* system.

The EU, in comparison, is rapidly exporting its norms and laws through its own trade agreements. In the finalised Comprehensive Economic and Trade Agreement (CETA) negotiated with Canada, the EU has ensured that its definition of GIs as part of a *sui generis* system of protection is reproduced in Article 20.16, including a list of protected EU-based GIs in Annex 20-A. Furthermore, CETA grants priority to the *sui generis* GIs over trademarks, stating in Article 20.19(6) that any trademark applications that contains elements of the protected GI shall be refused, and that pre-existing trademarks can be invalidated at the request of an interested party. Interestingly, the list in Annex 20-A includes cheeses that are the source of EU-based frustration (to say nothing of US concerns) such as *Feta*, in addition to *parmigiano reggiano* and *mozzarella di bufala*. The EU-South Korea Free Trade Agreement contains similar terms, albeit allowing for the co-existence of a prior trademark under Article 10.22, but preventing the registration of a trademark incorporating an element of a GI under Article 10.23. As with CETA, Annex 10-A of the Agreement includes protection for products argued by the US to be generic, such as *Feta*. According to Engelhardt, DG Agriculture and Rural Development considers protection of GIs under a *sui generis* system in trade agreements as a ‘must-have’⁴⁶, with the EU pursuing (somewhat successfully) a policy of

⁴⁴ A view supported by Blakeney (n 35) p.16.

⁴⁵ Irene Calboli, ‘Geographical Indications of Origin at the Crossroads of Local Development, Consumer Protection and Marketing Strategies’ 46 International Review of Intellectual Property and Competition Law (2015) pp.760 *et seqq*, p.765.

⁴⁶ Tim Engelhardt, ‘Geographical Indications under Recent EU Trade Agreements’ 46 International Review of Intellectual Property and Competition Law (2015) pp.781 *et seqq*, p.783.

‘securing protection of EU-based GIs through bilateral and regional general trade agreements’⁴⁷. In the case of South Korea, however, the adoption of two trade agreements that present radically different approaches to the issues of GI creates the potential for significant regulatory clashes⁴⁸, as well as demonstrating the seemingly incompatible positions of the EU and US.

IV. What does this mean for TTIP?

It is clear that the regulatory approaches taken by the EU and US to GIs in trade agreements differ in substance and underlying rationale. This does not bode well for future negotiations on this chapter of TTIP. The EU has made it clear that it considers GI protection, including of some foodstuffs that the US considers generic, as constituting its ‘offensive trade interests’⁴⁹, including in Annex I of its textual proposal products such as *Feta* and *parmigiano*. The EU is making its position clear regarding negotiations, and indeed prospects for a successful deal. Commissioner for Agriculture and Rural Development Hogan has stated that unless the US gives satisfactory protection for EU GIs, ‘there will be no deal’⁵⁰, and that there will be no sacrifice of GIs ‘for the sake of a deal with the US or anyone else’⁵¹. This causes considerable difficulties for the realisation of a successful deal – in response, US negotiators have stated that the EU ‘has aspirations for changing the U.S. system that are not going to be met in TTIP’⁵². These views are supported by those in the US agricultural community, including the president of the US National Milk Producers Federation, who stated that the GI issue ‘is a horrific overreach by the EU that undermines the entire EU interests in these negotiations [...] there won’t be a TTIP agreement passed by the Congress that is detrimental to U.S.

⁴⁷ *ibid* p.816.

⁴⁸ Billy A Melo Araujo, ‘The EU’s Deep Trade Agenda: Stumbling Block or Stepping Stone Towards Multilateral Liberalisation?’ in Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law 2014* (Springer: Berlin 2013) p.281.

⁴⁹ European Commission, ‘Follow Up to the Strategy for the Protection and Enforcement of IP Rights in Third Countries - GIs’ (2015) 2; Alan Matthews, ‘Geographical Indications (GIs) in the US-EU TTIP Negotiations’ <<http://capreform.eu/geographical-indications-gis-in-the-us-eu-ttip-negotiations/>> accessed 19 May 2016.

⁵⁰ Hans von der Burchard, ‘POLITICO Pro’s Morning Trade: EU Flexes Muscles on Food Protection in TTIP — Wallonians Reject CETA’ (*POLITICO*, 29 April 2016) <<http://www.politico.eu/newsletter/morning-trade/politico-pros-morning-trade-eu-flexes-muscles-on-food-protection-in-ttip-wallonians-reject-ceta/>> accessed 19 May 2016.

⁵¹ *ibid*.

⁵² Hans von der Burchard and Emmet Livingstone, ‘Transatlantic Trade Deal Could Be Bugged down ... by Feta Cheese’ (*POLITICO*, 12 May 2016) <<http://www.politico.eu/article/transatlantic-trade-deal-could-be-bugged-down-by-feta-cheese-ttip-champagne/>> accessed 19 May 2016.

agriculture'⁵³. As argued above in the previous section, the incompatibilities between the EU and US on this issue are not 'merely' economic, but represent two distinct legal and philosophical conceptualisations of the role and function of GIs. Given such divergences, GIs may end up excluded from the scope of TTIP, or potentially result in its abandonment. Given the desire for regulatory harmony as a facilitator of increased trade between the two regions, neither result is particularly auspicious.

And, to conclude, what was one of the key products causing such consternation? *Feta* cheese.

⁵³ *ibid.*