

The Macrotheme Review

A multidisciplinary journal of global macro trends

Intellectual Property Protection in TTIP Negotiations

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Abstract

A major objective for the Transatlantic Trade and Investment Partnership (TTIP) is the elimination of regulatory differences that make cross border trade difficult and costly. That task is relatively easy in cases where regulations impose different requirements in pursuit of the same goal. But in situations where the United States and the European Union have very different goals, achieving regulatory reform through trade negotiations may prove to be very difficult or even impossible. The protection of geographical indications (GIs) seems to be one of the most contentious parts of the TTIP negotiations. The essential difference is in how GIs should be protected, if they should be protected at all. The US considers that they can be protected as a subset of Trade Marks. The EU considers that GIs are a distinct form of Intellectual Property requiring a distinct system of law. The main aim of the paper is to describe and compare the different systems of GIs protection in the USA and the European Union. It also tries to show the negotiation process. It is unlikely that TTIP negotiations over GI protection will result in an outcome that either side finds satisfactory but it is worth to understand the roots of problems.

Keywords: intellectual property rights protection, free trade agreements, TTIP

1. INTRODUCTION

This paper outlines some of the issues related to intellectual property rights (IPRs), mainly geographical indications (GIs) and their role in currently being negotiated Transatlantic Trade and Investment Partnership (TTIP). It provides a short overview of IPRs current state of knowledge, the significance of IP protection in free trade agreements and the importance of TTIP. Paper shortly describes and compare different systems of GIs protection in the EU and the US.

2. INTELLECTUAL PROPERTY

Intellectual property (IP) is an asset, developed by inventive or creative work, to which rights to exclude its unauthorized use have been granted by law. World Intellectual Property Organization (WIPO) defines intellectual property as creations of the human mind (inventions, literary and artistic works, and symbols, names, images, and designs) used in commerce. In literature IP is divided into two main categories: industrial property and copyright. Intellectual property has three customary legal domains: copyright (author's rights), patent, and trademark. Intellectual property rights (IPRs) are the formal mechanisms by which property is established in intellectual

assets. IPRs define the extent to which their owners may exclude others from activities that infringe or damage property. Intellectual property rights are usually defined in economic terms as the rights to sell and use mentioned above creations of human mind. They are treated as the important intangible assets together with customer goodwill, specific skills of employees, knowledge imbedded in the organization or good management practices [United Nations Economic Commission for Europe 2011, p. 7].

Intellectual property rights can be protected both by internationally-based legislations and nationally-based legislations. It is worth to notice that internationally-based legislations can be divided into agreements signed by many countries (multilateral agreements) and agreement between a few countries (mainly regional bilateral free trade agreements).

Over the years, there has been a long tradition of international IPRs harmonization in order to ensure that rights protected by IPR is respected globally. The following international agreements contain elements of protection for GIs:

- Paris Convention for the Protection of Industrial Property (1883)
- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891)
- General Agreement on Tariffs and Trade (GATT) (1947)
- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994)

The following are some regional and multilateral agreements governing the protection of certain GIs:

- Agreement between the European Community and the United Mexican States on the mutual recognition and protection of designations for spirit drinks, OJ No. L 152, 11/06/1997
- Agreement between the European Communities and Australia on trade in wine, OJ No. L 86, 31/03/1994,
- General Inter-American Convention for Trade Mark and Commercial Protection (1929)
- Andean Community Decision 486 (Common Intellectual Property Regime) (2000)
- Council Regulation (EC) No. 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed, OJ No. L 93, 31/3/2006, Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ No. L 93, 31/3/2006, at 12–25; Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ No. L 208, 24/7/1992,
- Economic Partnership Agreement (EPA) between the CARIFORUM States and the European Community and its Member States (15 October 2008)

Among other important international agreements there are: the Universal Copyright Convention (UCC)¹ and the TRIPS Agreement² under the patronage of the World Trade Organization. TRIPS has established homogeneous minimum standards of protection among all WTO members, introducing two basic principles in IP management: the national treatment and the most favored nation treatment³. [Coriat, Primi, Cimoli 2008]. Internationally-based legislation can help to clarify cross-border issues, as well as develop global IPR standards.

Also bilateral agreements are important in protection of IPRs but nowadays these agreements seem not to be sufficient to ensure the right protection of intellectual property rights unless they are signed by countries which share in global trade is significant. Especially the existence of internet and digitalization possibilities cause that national rules do not necessarily provide satisfactory protection. The United States and the EU have also brought IP protection into bilateral trade agreements with many nations, securing “TRIPS Plus” agreements, with IP protection more demanding than the minimum standards of TRIPS. [Vivas-Eugui 2003].

It is worth to notice that while most third countries' legislation regarding intellectual property rights protection may be considered to be in line with the international standards required by the World Trade Organisation (with exceptions), the real effectiveness of the enforcement of these rights is much more variable. The shortcomings or deficiencies which may be noted in many third countries' enforcement systems may be seriously influence foreign companies facing infringements of their rights. This is why the inclusion of adequate enforcement provisions in free trade agreements is often crucial.

3. IP PROTECTION IN FREE TRADE AGREEMENTS

The main aim of free trade agreements is to reduce import tariffs, remove non-tariff barriers and grant companies better effective access to each other's markets. Therefore a free trade area is defined as a group of countries that have few or no price controls in the form of tariffs and quotas between each other. Free trade areas allow the member nations to focus on their comparative advantages and to produce the goods they are comparatively more efficient at making, thus increasing the efficiency and profitability of each country

¹ The Universal Copyright Convention of September 6th 1952 as revised at Paris on July 24th 1971.

² “The Agreement on Trade Related Aspects of Intellectual Property Rights” is part of the final act of the Uruguay Round of multilateral trade negotiations which took place in 1994. According to the TRIPS Agreement, all WTO countries are obliged to adhere to the rules and principles of the Berne Convention and the fundamental rules of the Rome Convention (The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organizations, signed at Rome on October 26th 1961). Since the creation of the World Trade Organization (WTO), global intellectual property rules have been governed by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property. More about the TRIPS Agreement can be found at: <http://www.wto.org>

³ TRIPS setting mandatory minimum standards for national protection of intellectual property requires states to implement a common and often expanded set of intellectual property protections. It also imposes enforcement measures, including potential trade sanctions against nations that do not comply with these standards. According to these principles, each member of WTO is required to treat nationals of other member states at least as well as its own nationals, and to treat all other member states on an equivalent basis in relation to the protection of intellectual property.

But more openness means more uncertainty and requires a basic set of common rules to provide for a level playing field and prevent abuses. Given the importance of adequate protection and enforcement of intellectual property rights, new agreements also include rules on the protection of intellectual property rights such as patents, trademarks, designs, copyrights and geographical indications. [European Commission 2012]

WTO members (as, previously, GATT contracting parties) are bound to notify the regional trade agreements (RTAs) in which they participate. Nearly all of the WTO's Members have notified participation in one or more RTAs (some Members are party to twenty or more). In the period 1948-1994, the GATT received 124 notifications of RTAs (relating to trade in goods), and since the creation of the WTO in 1995, over 400 additional arrangements covering trade in goods or services have been notified. [WTO 2016]. Many others are currently negotiated. One of the most important is the agreement which can establish free trade between the US and the EU.

The European Union (EU) concluded the greatest number of trade agreements among all of the WTO members. Unlike other Members, such as the US, these agreements vary over time, scope and nature. The EU concludes regional trade agreements (RTAs), which cover not only trade in goods and other trade related issues such as technical barriers to trade or sanitary and phytosanitary measures, but also number of other areas. Among them are areas covered by the World Trade Organization (WTO) mandate, such as services and trade related intellectual property rights, and these lying outside the WTO legal system, such as investment (aspects not related to trade), free movement of capital, but also environmental protection or human rights [Słok-Wódkowska M. 2015]

4. THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND GEOGRAPHICAL INDICATIONS

The Transatlantic Trade and Investment Partnership (TTIP) is a free trade agreement currently being negotiated between the European Union and the United States. The main aim of it is to create growth and jobs on both sides of the Atlantic by removing trade barriers. Talks started in June 2013. So far there were 10 negotiating rounds to clarify goals and exchange proposals. TTIP is perceived not as a standard free trade agreement but a “new-style”, comprehensive 21st century trade agreement that goes beyond traditional market access issues (mainly tariffs) and could set new standards for future trade agreements. Besides eliminating tariffs on goods and services traded between the EU and the US, it also focuses on aligning regulatory regimes and creating a rules-based international framework. Economic ties between the EU and the US are broad and deep and can be expanded further through this Agreement. Given that tariffs between the EU and the US are nowadays already quite low, negotiations will mainly focus on reducing the regulatory barriers to trade that exist between both sides of Agreement. This shift from tariff-only agreements to include regulatory and behind-the-border barriers, and rules, is an important innovation. There is more and more evidence that differences in regulatory regimes can significantly increase operating costs in different markets, and therefore eliminating bilateral trade. Decreasing regulatory differences will allow for cost reductions for all economic units. It means that TTIP will not be subject to the same economic dynamics as tariff-only agreements [World Trade Institute 2016, p.10].

The changing world requires a new approach to world trade and free trade agreements. The new elements of free trade agreement that reveal in TTIP come from a stronger focus on regulatory alignment and a rules based interpretation of international trade. Analysis of the differences in

“regulatory philosophies” across the Atlantic between the EU and US have highlighted in particular the supposed diverging approaches to risk analysis and the application of the precautionary principle. The EU and the US have sought to overcome these differences in regulatory philosophies through various mechanisms that promote cooperation and understanding. These efforts date back to 1990, at which time the EU and the US issued the “Transatlantic Declaration”⁴. But not all problems can be solved easily. One of the most disputable parts of the TTIP talks is the protection of geographical indications (GIs).

Geographical indications are defined by WTO as place names (in some countries also words associated with a place) used to identify the origin and quality, reputation or other characteristics of products. European Commission describes GIs as distinctive signs used to identify a product as originating in the territory of a particular country, region or locality where its quality, reputation or other characteristic is linked to its geographical origin. The Agreement on Trade-Related aspects of Intellectual Property Rights contains a specific section on geographical indications. It enhances their protection and expands it to a significantly higher number of countries than previous international agreements. The EU is negotiating GIs protection under two different frameworks: specific Stand Alone agreements on GIs (e.g. China) and broader trade agreements (Free Trade Agreements) such as: Negotiations for an EU-Canada Comprehensive and Trade Agreement or TTIP.

The TRIPS Agreement does not specify any formalities as a condition for GI protection. Accordingly, countries approach this issue differently. In some jurisdictions, no formal procedure is required to acquire the right to use a GI, and the right to prevent false or misleading uses of that GI can be exercised by any interested party. In other jurisdictions, a GI must be registered in order to be protected.

The TTIP negotiation position of the EU states that the future Agreement shall aim to provide for enhanced protection and recognition of the EU GIs with the aim of solving existing conflicts in satisfactory manner. The US position is different. United States Trade Representative (USTR) in 2014 claimed that they seek new opportunities to advance and defend the interest of US farmers and producers, with respect to strong protection and effective enforcement of intellectual property rights, including their ability to compete in foreign markets. The history of negotiations revealed the lack of possibility to reach the compromise. The Report of the Eleventh Round of Negotiations for the Transatlantic Trade and Investment Partnership (Miami, 2015), indicated many unsolved issues in negotiations. For instance, the EU side recalled that the protection of GIs constitutes a key EU priority in TTIP. The EU also wanted the US to improve its system in several ways, mainly by protecting an agreed list of EU GIs (as it was agreed in EU-Canada Comprehensive and Trade Agreement or EU-Korea Free Trade agreement). The EU tried to explain the shortcomings of the US trademark system but the US negotiation position remained unchanged. The US constantly claimed that trade agreements were supposed to tear down barriers to trade and commerce – not erect new ones. The Report of the TTIP Advisory Group Meeting (May, 2016) noted continued disagreements in area of GIs. This Report suggested that inter-sessional work might help find a way forward [European Commission 2016].

⁴ The declaration promised that the EU and US would inform and consult each other on important matters of common interest, both political and economic, with a view to bringing their positions as close as possible, without prejudice to their respective independence [Hamilton D.S. ,Quinlan J.P., 2015].

A major objective for the TTIP is the elimination of regulatory differences that make cross border trade more difficult. This task may be relatively easy in cases where regulations impose different requirements in pursuit of the same goal. But in situation where the US and the EU have significantly different approach, achieving regulatory reform through trade negotiations may even prove to be impossible. Especially that the problem also touches on cultural and ideological differences between the US and the EU regulatory framework.

The EU has developed specific (*sui generis*) system to register and protect geographical indications. This system is built around the three main elements: a public register listing GIs protected in the territory, open to domestic and foreign GIs; and an administrative process verifying that geographical indication identifies a good as originating in a territory, region or locality, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin; and then a requirement that a registered name shall correspond to a specific product or products for which a product specification is laid down, which can only be amended by due administrative process. Europe's GI protection scheme is part of a much larger policy that seeks to preserve traditional production methods and ways of life in the face of globalization [Watson W., 2015]. The European model of GI protection is extremely strict and it is justified in theory by strong belief that the link between place and quality is an objective creation of traditional culture and practices. It means that when others use place names in a generic way, they are unfairly using the value created in that name by generations of local manufacturers. Supporters of this point of view claim that strong GIs protection is needed to prevent fraud, ensure fairness, and promote economic development both in developing and developed countries. It is easy to understand why emotions are aroused if the EU producers feel that the value inherent in a GIs is appropriated by a competitor making use of the same designation (however, most the EU GIs are unknown outside their region of origin).

In the case of strong GIs protection the United States takes a very different approach. With some exceptions for wine and spirits, the US protects GIs through trademark law. The main policy goal is to prevent consumer confusion, so unlike the European model, the US does not protect marks that are generic terms for the product. As a result, many European GIs receive no protection in the United States. That also partly explain the US reluctance to extend GIs protection. It looks like that the idea of protection of geographical indications is alien to American law and culture. 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 favor new entrants to the market. The European system of geographical indications deters (or even sometimes eliminates) innovation in favor of traditional production.

The issue of GI protection causes strong feelings and uncompromising rhetoric on both sides of the Atlantic. Commentators in America condemn European GIs as trade barriers. The US agricultural industrial lobbies are heavily against GIs. At the same time, the EU talks about inferior imitations of European GIs in the United States and vows to solve the problem through TTIP.

5. CONCLUSIONS

The economic relationship between the EU and the US is by far the largest between any two trading blocs in history. Today, the EU and the US are responsible for almost half of world GDP. The United States and the EU have the world's most successful creative industries, and

intellectual property protection and enforcement are essential for encouraging innovation in new technologies, stimulating investment in research and development.

The first round of the Transatlantic Trade and Investment Partnership (TTIP) talks took place in Washington, D.C. between 8 and 12 July 2013. Negotiating groups have set out respective approaches and ambitions in twenty various areas that the TTIP is set to cover. Negotiators identified certain areas of convergence across various components of the negotiation and - in areas of divergence – begun to explore possibilities to bridge the gaps. The EU and the US wanted to reach a deal in 2015. But politicians and the media might have been too optimistic in 2013 when claiming that a Transatlantic Trade and Investment Partnership (TTIP) should be done “on one tank of gas” (US-Vice President Joe Biden). In 2016, after three years and numerous rounds of negotiations, it has become obvious that concerns about the agreement have grown. It is unlikely that TTIP negotiations over GI protection will result in an outcome that both the US and the EU sides find satisfactory. Additionally 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 a pressure on the US negotiators to reject completely any the EU calls for GIs in TTIP. Some commentators suggest to exclude issues connected with GIs protection from the negotiations. So it is unlikely that TTIP negotiations over GI protection will result in an outcome that either side finds satisfactory. There is more and more evidence that differences in regulatory regimes can’t be easily solved. TTIP is still considered as a “new style” free trade agreement and a model for future. But without bilateral agreement concerning the protection of intellectual property it’s role in global order will be changed.

REFERENCES

- Aichele, R., Felbermayr, G., Heiland, I. (2014), *Going Deep: The Trade and Welfare Effects of TTIP*, Munich: CESifo Working Paper 5150.
- Coriat B., Primi A., Cimoli M. (2008), *Intellectual Property and Industrial Development: A Critical Assessment*, Initiative for Policy Dialogue Working Paper Series
- European Commission, (2016), *Transatlantic Trade & Investment Partnership Advisory Group Meeting Report of 19 May 2016*, available at http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154553.pdf
- European Commission, (2016) *The European Commission Paper on Geographical Indications (GIs) in the EU-US Transatlantic Trade and Investment Partnership*, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1477>
- European Commission, (2015), *Report of the Eleventh Round of Negotiations for the Transatlantic Trade and Investment Partnership (Miami, 19–23 October 2015)*, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf
- European Commission (2013), *Impact Assessment Report on the future of EU-US trade relations*, Strasbourg: Commission Staff Working Document.
- European Commission, (2012), *Protection of Intellectual Property in Free Trade Agreements*, available at http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150081.pdf
- Hamilton, D. S., Quinlan, J. P., (2015), *The Transatlantic Economy 2015*, Washington DC: Trans-Atlantic Business Council, Center for Transatlantic Relations, AmCham EU

Słok-Wódkowska M. (2014), Architecture of the EU regional trade agreements – are they still about trade? Available at http://grape.org.pl/rit/wp-content/uploads/sites/69/2014/08/Architecture-of-the-EU-regional-trade-agreements_slok.pdf

Vivas-Eugui D. (2003), Regional and Bilateral Agreements and a Trips-Plus World: The Free Trade Area of the Americas (FTAA), available at [http://www.geneva.quno.info/pdf/FTAA\(A4\).pdf](http://www.geneva.quno.info/pdf/FTAA(A4).pdf)

United Nations Economic Commission for Europe, (2011), Intellectual Property Commercialization. Policy Options and Practical Instruments, New York

World Trade Institute, (2016), TTIP and the EU Member States, World Trade Institute, University of Bern

Watson W., (2015), *Geographical Indications in TTIP: An Impossible Task*, <http://www.cato.org/publications/cato-online-forum/geographical-indications-ttip-impossible-task>

World Trade Organisation, (2016), Regional Trade Agreements: Facts and Figures 2016, available at https://www.wto.org/english/tratop_e/region_e/regfac_e.htm