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Who moved my (Cheddar) cheese? Brexit and Geographical Indications

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If you discovered that your bottle of champagne was not sourced from the vineyards of Champagne, France, or the Cornish pasties you love were not from Cornwall, how would you feel? Geographical indications (“GIs”) are a form of intellectual property designed to stop this from happening. Simply put, GIs are indications that identify a good as originating from a specific geographic place intrinsically associated with a given quality or reputation. GI protection are most commonly associated with food or agricultural products and spirits. This post looks at Brexit-related GI concerns which have emerged as a key bone of contention.

Only a narrow group of countries have traditionally actively protected GIs, with the EU being one of its biggest proponents. Others, especially “New World” countries like the US, Canada and Australia, have been opposed to GI protection. This has a historical background. Frequently, producers in New World countries use the names that their immigrant forebears brought with them to describe traditional foods that they have continued to produce in their new homes. The problem, of course, is that these new foods are not quite the same as the originals. In a very real sense, GIs pit the “new” against the “old”.

The TRIPS Agreement codifies the WTO’s intellectual property regime, and has a specific provision on GIs which is binding on all WTO members. However, it is a broad framework with in-built flexibilities. Article 22.2 requires Members to afford a standard level of protection for GIs so as to avoid misleading the public, and to prevent unfair competition. Article 23 requires a higher level of GI protection for wines and spirits. Article 24 provides exceptions for GI protection, including generic and “grandfather” exceptions for existing practices. This leaves scope for a wide divergence of practices in protection of GIs across TRIPS-compliant jurisdictions. For example, “feta” and “parmesan” are considered generic cheese names in the US. Additionally, champagne in the US can be sourced from California despite a 2006 bilateral agreement between the US and EU protecting against the generic use of the term “champagne”, since American producers who at that time were already using the term champagne were permitted to continue using the term due to the “grandfather” exception.

The EU has one of the most advanced GI protection regimes in the world, covering wines, aromatised wines, spirits and agricultural products and other foodstuffs (Regulation No. 1308/2013, Regulation 251/2014, Regulation No. 110/2008 and Regulation No. 1151/2012 respectively). The US, on the other hand, protects GIs as a subset of trademarks, usually through certification and collection marks, since it considers that both trademarks and GIs have similar function from the consumers’ and the producers’ perspective, that is, as source identifier, quality indicator, and protection of business interests. Therefore, consumers and

producers, are not left unprotected in such a regime, however they may not have additional rights in comparison to trademark holders. The US does not take the view that there is necessarily a quality dimension to the territorial origin of a product (also known as the terroir factor), and views the EU's GI regime as protectionist, favouring traditional producers who initially produced that product through communal rights, at the expense of innovation and competition (Cato Institute, 2016). The 2018 Special 301 Report issued by the USTR identifies the EU's GI approach as causing negative market access for US producers or traders, especially those having prior trademark rights or using common names.

The UK currently has 86 GIs registered under the EU GI system, accounting for a quarter of UK's food and drink exports in terms of value. A significant portion (comprising 14 GIs) are Scottish GIs, including Scotch Whisky, Scotch Lamb, and Scottish Wild and Farmed Salmon. Voices from the Scottish Government have urged to the UK to ensure EU-wide protection of Scottish GIs, warning of catastrophic consequences for Scotland's economy if this is not achieved.

Brexit has brought GI into the ambit of UK trade policy. As in other areas, a strategic choice could be made either to align with the US stance on GI protection through trademarks (providing less stringent protection) or continuing to align itself with the EU, possibly involving mutual recognition of registered GIs. In this case, it seems that the government has opted to maintain the status quo.

The Withdrawal Agreement would require the UK to maintain protections for existing EU GIs until this aspect of the Withdrawal Agreement is superseded (if at all) by the future economic partnership.

Whilst at this stage it is unsure whether the Withdrawal Agreement will enter into force, the UK government has confirmed in its "no-deal" planning notice dealing with GIs that it will establish its own GI rules that will "broadly mirror the current EU regime" and which will be no more burdensome to producers. All 86 of the UK's GIs currently protected within the EU regime would be automatically protected in the UK. The government is also contemplating developing a UK logo to replace the EU logo for UK GI products. However, whether it would provide recognition for EU's registered GIs, and also provide mutual recognition for future GI registrations, is not yet certain. In the event of a "no-deal" Brexit, UK GI producers may also not be protected within the EU, and in order to regain protection within the EU market, the producers would have to refile new applications as "third country" producers.

A loss of recognition of protected GIs would undoubtedly have significant impact for both UK and EU GI holders. Although UK is poised to enforce TRIPS-plus GI protection, both the US and EU will be keen to see the domestic framework it adopts. On one hand, the EU would prefer recognition of its existing GIs in UK, and mutual recognition for future registrations. On the other hand, the current approach of UK may have an effect on negotiations for a UK-US free trade agreement, since the US may view the adoption of a domestic GI protection regime by UK that mirrors the EU system as less than ideal.