

Responding to the European Union's demands on Geographical Indications (GIs) for foods

Submission to the Department of Foreign Affairs and Trade regarding the food GI elements of the EU draft text for the proposed EU-Australia trade treaty

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Summary

Australia has many regional food specialties that are widely recognised throughout Australia and in overseas markets. Some were developed based on food cultures brought by migrants and these form an important part of our multi-cultural society. Since the development of fast cheap international transport European countries have sought to reclaim the names of some of these foods in the markets painstakingly built up by European emigrants.

Because intellectual property (IP) is implemented through domestic law, changes to domestic IP policy affect all other countries, not just a bi-lateral treaty partner. Such changes are thus poor bargaining chips in a bi-lateral context. Further, provisions which limit competition and restrain trade do not sit well with a free trade agenda designed to increase competition. TRIPS+ provisions in bi-lateral treaties are also contentious globally. As both Australia and the European Union (EU) claim to support a return to a multi-lateral trade negotiation environment they should eschew provisions which make this more difficult. A first-best option for both Parties would be to drop the IP chapter from the proposed EU-Australia treaty.

The EU first adopted GI policies in 1992 and has never been happy with the limited acceptance of these policies gained in TRIPS. On the other hand countries such as the USA, Australia and New Zealand (NZ) have never accepted GI privileges beyond those of TRIPS Article 22, which simply re-iterates Article 10bis of the Paris Convention. Nonetheless the EU has, since 2006, actively pursued the extension of TRIPS+ provisions for GIs. Their demands go well beyond TRIPS Article 23. Their biggest achievement to date is the 2015 Canada agreement (CETA) in which they achieved the co-existence of later GI names with earlier trademark names, undermining a fundamental principle of trademark law.

In their proposed treaty text, the EU pushes its GI agenda even further, backing this up with a series of events advocating EU-style GI policy. But there is no systematic evidence that EU-style GI policy either increases net producer incomes or enhances regional prosperity. The limited data show that some consumers will pay a higher price for GI labelled food, but it is unclear whether this is support for *local* producers or for the product itself. Further, there is little hard data on what proportion of consumers will pay what increased premium. Against this background there is no evidence that Australia would benefit from adopting EU-style GI regulations.

The EU approach proposed in the draft text is highly regulatory and cuts across some important principles in Australian society and our economy – multi-culturalism, a preference for minimal regulation and a strong user-pays philosophy.

Unless there are major concessions in access to EU markets, particularly markets for cheese and beef products, Australia should not agree to any of the EU's GI agenda. If there are sufficient offsetting benefits, then limited acceptance of their GI agenda *might* be worthwhile. Canada accepted two provisions which would not suit Australia – administrative enforcement and allowing later GIs to co-exist with earlier trademarks.

^{*} The views in this submission are my own, and while they are based on my academic work, they do not represent the views of any organisation or funding body. hazel.moir@anu.edu.au.

In respect of the EU* negotiating text on GIs, this submission argues that Australia should:

- require:
 - detailed information from the EU as to the actual geographic origin of all PGI names proposed for registration in Australia;
 - clear identification of proposed PDO names where the raw materials come from a different or wider region than that on the label;
 - a 6 month period for opposition to proposed names for protection in Australia (and use TMO expertise to alert trademark owners who may be affected);
 - full grandfathering for any accepted names which are currently in use for Australian products, along the lines of the provisions for the 5 cheeses in CETA;
 - that provisions to add GI names for protection in Australia do not allow names registered in the EU at the time of the treaty to be added under any circumstances;
 - that the current certification mark processes (where the ACCC can take representative action) fully meets any demands for administrative enforcement;
 - the EU to open its markets for cheese imports – currently the EU imports almost no cheese from outside Europe;
- refuse:
 - the proposed detailed approach to regulating names for regional specialties;
 - to accept any GI names which are not place names;
 - to include in the Annex any GI names already registered as certification marks in Australia;
 - privileges for agreed GI names that extend beyond TRIPS Article 23 standards;
 - co-existence of later GIs with earlier trademarks, noting that a GI consortium could propose buying out a trademark name;
 - any new administrative system for listed EU GI names – any names accepted through the treaty should be accepted as certification marks and treated as any other certification mark except that the opposition process would be deemed to have taken place;
 - the bid that there should be no charge for registering or maintaining GI names;
 - all proposed border measures in (as unnecessary and not proportional);
 - any joint working party to oversight implementation of any GI measures agreed;
 - to fund propaganda exercises that simply reflect the interests of IP rights-holders and do not represent the balanced interests of society as a whole
- propose:
 - an overhaul of Australian trademark legislation to ensure fewer marks are granted which incorporate geographic names;
 - that the EU amend its GI regulations to stop providing GI registration for names that are not place names;
 - a process to define names that are generic in Australia;
 - a program (which could be in active co-operation with the EU) to improve technological traceability systems to allow the provenance of foodstuffs to be traced along the full supply chain;

If there are *very significant improvements in access* to EU markets, *and* it is the sole sticking point, Australia could agree to set up a separate administrative system solely for GI names listed in trade treaties. Korea runs parallel systems – a trademark-based system for most registrations and a *sui generis* system only for EU names agreed by treaty (O'Connor and de Bosio, 2017). While messy, this is preferable to unnecessarily interfering with the current trademark-based system.

* A list of acronyms is on the last page.

1. Food and drink in Australia

Australia has many regional food specialties that are widely recognised domestically and in overseas markets. Our traditional wine regions were well known long before the bi-lateral wine agreement with the EU. But equally well known are Gippsland cheeses, Mareeba mangos, Riverland oranges, Huon Valley apples, to name but a few. Australia has consumer protection laws to prevent misleading labelling of products, though there has been little need to use these as there is little culture of fraud in the domestic food industry.

Australia also has a vibrant multi-cultural population with 28.5% born overseas¹ and 21% speaking a language other than English at home.² These migrants have brought with them their cultural traditions, including their food culture. Hence many names that were originally European place names are generic in Australia. They indicate a type of product and celebrate its origin. Consumers are quite clear that these products are made in Australia. Indeed the one common feature to the Török and Moir (2018) review of studies of willingness to pay a price premium for food, was that consumers wished to support **local** producers. Australian consumers are no different in this respect from European consumers.

However, since the development of fast cheap international transport European countries have sought to reclaim these names and access the markets painstakingly built up by European emigrants. As a successful multi-cultural nation, Australia celebrates the many cultures which now make up our society. Taking traditional names from these migrants would be a direct challenge to our multi-cultural heritage.

There is little, if any, history of fraud in food labelling in Australia. Reflecting this, geographic names for celebrated foods – Batlow apples, Gippsland cheeses – are not supported by any official regulatory system. Indeed Australia has a long history of rejecting unnecessary regulation,³ particularly heavy-handed regulation which focuses on input processes rather than desired outcomes.⁴

In their report for the then Rural Industries Research and Development Corporation, van Caenegem et al (2015) reported a few instances of alleged counterfeiting. There was little substantiation and the Department of Agriculture and Water Resources does not seem to have received many such allegations. At the recent GI Colloquium at Bond University,⁵ a speaker from the Tasmanian Whisky Producers Association reported two instances of Victorian producers using Tasmanian bulk product and on-selling their bottled whisky as Tasmanian. He also reported that as soon as they received letters objecting to this they were happy to cease the practice.

In contrast to the lack of counterfeiting in domestic markets, Australian food exporters do experience fraud in some overseas markets. As is well known Tasmania successfully sells a wide range of top-end food products in the demanding North-East Asian markets. In respect

¹ As at 30 June 2016. Of these 5.0% were born in the UK and 2.5% in New Zealand (Australian Bureau of Statistics, Migration, Australia, 2015-16, Catalogue No. 3412.0).

² Australian Bureau of Statistics, 2016 census, Multi-cultural media release, <https://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>

³ My first interaction with the Office of Regulation Review within the then Industry Commission was in the mid-1980s. It is now located in the Productivity Commission and known as the Office of Best Practice Regulation (<https://www.pc.gov.au/research/supporting/regulation-guide>, 3 June 2019).

⁴ Personal discussion, late 1990, with Dr Ted Emmett, the then head of the then National Occupational Health and Safety Commission (now Safe Work Australia - <https://www.safeworkaustralia.gov.au/about-us#establishment-of-safe-work-australia>, 3 June 2019). He was reviewing all health and safety regulations to ensure they focussed on the desired outcomes rather than specifying input conditions. The goal was to encourage innovation in best practice in achieving safe and healthy working environments.

⁵ Colloquium: 'Taking Provenance Seriously: Will Australia Benefit from Better Legal Protection for GIs?', hosted by the Centre for Commercial Law, Bond University and the Canberra Delegation of the European Union, Bond University, 12 February 2019.

of China this does lead to counterfeiting problems. Wine counterfeiting in China is widespread (Shen, 2019). I have also spoken with a Tasmanian fruit producer who sells into Chinese markets at eye-watering prices. Their packages are counterfeited in China and the counterfeit fruit (which is very seasonal) in most instances appears to come from South America. This producer has introduced technological protection measures (QR-codes) and regular changes to packaging to try to minimise this problem and is currently investigating newer technological measures for their packaging.

2. TRIPS, the Paris Convention and bi-lateral wine treaties

The term “geographical indication” (GI) was first introduced in the Agreement on Trade Related Intellectual Property (TRIPS). The earlier Lisbon Agreement on Appellations of Origin has very few signatories,⁶ and the definitions of origin labelling are different. Because of a profound disagreement between the EU and the USA two strands of protection for GIs are specified in TRIPS. Article 22 does little other than repeat the requirements of Article 10bis of the Paris Convention.⁷ Implementing this required no changes to Australian law. Article 23 specifies a higher standard of ‘protection’ but this applies only to wines and spirits, and does not cover any products existing at the time the Treaty came into effect (1 January 1995). The Article 23 standard prevents labelling with qualifiers, e.g. Burgundy-style, Chablis-like. Protection of course, in the context of TRIPS, means protection from competition.

Europe was able to get most New World countries to agree to implement the more restrictive labelling regime of TRIPS Article 23 for wines and spirits because it offered in exchange increased access to the heavily-protected European wine markets. In exchange for this ongoing benefit Australian producers agreed to bear the once-off cost of changing wine names in Australia – Burgundy is now pinot noir and Bordeaux is now shiraz, for example. Such treaties have now been implemented in 27 countries.⁸

Australia is a strong supporter of a multi-lateral trading system. Both the EU and the USA have also claimed over many years to be strong supporters of a multi-lateral system. Yet both have aggressively pursued bi-lateral trade treaties and each has brought their preferred approach to GIs into these treaties.

As TRIPS has a Most Favoured Nation (MFN) clause any new IP provisions in bi-lateral treaties are immediately extended to all World Trade Organization (WTO) members. Indeed as most IP policy is enshrined in domestic legislation and regulation, it is hard to envisage any aspect which could be offered preferentially to any single trading partner. IP provisions are thus very poor bargaining coin in trade negotiations so should have no place in bi-lateral treaties. Nor does their focus on monopolies and restraints of trade sit easily within the free trade agenda.⁹ If the longer-term goal is to return to a multi-lateral trading system, TRIPS+

⁶ As at 4 March 2019 there were 29 contracting parties (countries) to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (<https://www.wipo.int/treaties/en/registration/lisbon/>).

⁷ Paris Convention for the Protection of Industrial Property, Article 10bis covers unfair competition, mainly through misrepresentation (see https://www.wipo.int/treaties/en/text.jsp?file_id=288514#P213_35515).

⁸ https://ec.europa.eu/agriculture/wine/third-countries_en.

⁹ A point also made in the Business Council of Australia submission to DFAT on this proposed treaty. The Productivity Commission has recommended strongly against the inclusion of IP chapters in trade treaties. Recommendation 4 of their report on Bilateral and Regional Trade Agreements is that “The Australian Government should not include matters in bilateral and regional trade agreements that would serve to increase barriers to trade, raise costs or affect established social policies without a comprehensive review of the implications and available options for change. On specific matters, the Australian Government should: ... b) avoid the inclusion of IP matters as an ordinary matter of course in future [Bilateral and Regional Trade Agreements]. IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners; and ...” (Productivity Commission, 2010: 319).

provisions in bi-lateral treaties will impede this. Most TRIPS+ provisions benefit only owners of IP, often to the substantial detriment of users and follow-on innovators, so they are highly contentious.

Australia and the EU could show multi-lateral leadership by abandoning the proposed IP chapter in its entirety. Should the parties agree to any aspect of the EU's GI proposals, these could be accommodated in chapters on agriculture or in a stand-alone chapter.

Recommendation: The proposed treaty should not include any IP chapter.
If new provisions are agreed with respect to GIs these can be placed elsewhere.

3. EU GI background

The EU had no laws or regulations on GIs until 1992. It is interesting that it was only during the Uruguay Round negotiations that the EU first adopted GI policies. Part of this context is the pressure the EU was then under to reform the Common Agricultural Policy (CAP). The initial proposed GI regulation covered only Protected Designations of Origin (PDO) – at that time 5 of the then 12 Member States had domestic regulations around PDOs.¹⁰ PDOs are strongly linked to the *terroir* concept and originate from *Appellations d'Origine Contrôlée* (AOC) in France.¹¹ But then Germany drew attention to its system of Protected Geographical Indications (PGIs),¹² based on links between a producer's reputation and a region – a far looser geographic basis than that of PDOs. The two forms were both recognised in the resulting 1992 EU Regulation, and were provided with identical benefits. Revised twice – in 2006 and 2012 – the Regulations provide far stronger 'protections' than the wine and spirits (Article 23) standard in TRIPS. While TRIPS Article 23 prohibits the use of qualifiers (-like, -style, etc), the EU regulations *define* such uses as misleading consumers even if the product's origin is clearly stated on the label. Further, the EU regulations prevent both comparative advertising and 'evocation' – cross-marketing such as "the champagne of mineral waters". EU GI provisions are thus TRIPS+.

In discussing EU GI policy it is important to note that, despite significant reforms to the CAP, Europe still has substantial barriers to trade in agriculture, especially for dairy, beef and sugar.¹³ EU trade negotiators argue that the European Parliament will not agree increased access to EU food markets unless a country agrees to protect EU GIs. But the EU exports only 6% of its GI-labelled food output and its GI-labelled food exports are only 2% of its total food exports.¹⁴ Further, the EU has done little to evaluate whether its GI policy does anything to increase net producer income or regional prosperity, though it did establish that very small producers rarely used GI registration.¹⁵ The 2012 re-design of the GI regulations was largely aimed at improving access for very small producers, though there is as yet no apparent evaluation of whether this has been achieved. Nonetheless many members of the European Parliament appear to believe that the GI system benefits small producers and consider that trade treaty concessions on selling GIs in foreign markets are essential compensation for marginal decreases in general agricultural protection.

¹⁰ France, Italy, Spain, Portugal and Greece.

¹¹ The AOC regulations were introduced to prevent fraud in the French wine industry (van Caenegem, 2003).

¹² For an excellent discussion of this see Gangjee, 2006.

¹³ See, for example, Cockfield and Daugbjerg, 2019 (forthcoming) and Obadovic, 2018.

¹⁴ Moir, 2017: 1030, based on data from AND-International, 2012.

¹⁵ The 2008 report by London Economics (a consultancy for the European Commission (EC)) pointed out the significant impediments posed for evaluation by the lack of systematic data on GIs (London Economics, 2008). The EC did commission estimates on GI output which cover the period 2005-2010 (AND-International, 2012). It undertook a very poor quality evaluation of the GI system in 2010 (the EU's Impact Assessment Board considered that the added value of the GI schemes had not been demonstrated, see European Commission staff, 2010b:6, European Commission staff, 2010a; and EU Impact Assessment Board, 2010).

Since the adoption of the new *Global Europe* approach to trade treaties in 2006 (European Commission, 2006), EU trade negotiators publicly advise that the EU will not conclude a trade treaty unless it contains concessions on EU GI policy. This has the potential to create further TRIPS+ provisions.

Against this background the Centre for European Studies at the ANU (ANUCES) obtained a grant to study the real-world impact of GIs – do they work to increase net producer incomes and increase regional prosperity?¹⁶ The underlying rationale was that if the EU would demand GI policy changes in the proposed Europe-Australia trade treaty then it would be useful to investigate whether this was a policy worth adopting. Despite a systematic review of more than 1,800 studies only 52 were identified addressing these issues.¹⁷ These were case studies scattered across different products and countries. Some of these case studies indicated that in some circumstances GIs did have positive effects, but others showed no such outcomes (Török and Moir, 2018). Based on this empirical evidence it is impossible to conclude that it would be in the interest of Australian primary producers to adopt EU-Style GI policy. Indeed it is also impossible to conclude that EU GI policy benefits EU primary producers.

Finding: There is no systematic evidence that EU-style GI policy would increase net producer incomes or enhance regional prosperity.

4. What is the EU demanding from Australia?

Since the failure of the Transatlantic Trade and Investment Partnership between Europe and the USA, and the significant civil unrest over aspects of that proposed treaty, the EU has adopted a more transparent approach to trade negotiations. In particular it has a new policy of publishing its initial negotiation ‘demands’ for each chapter.¹⁸ The initial EU bid for the IP chapter of the proposed treaty has been available from their website since July 2018.¹⁹

4.1 GIs in CETA

The EU-Canada Comprehensive and Economic Trade Agreement (CETA) entered into force provisionally on 21 September 2017.²⁰ This is the first EU treaty with a country which has traditionally opposed the EU’s GI approach. It is therefore useful for Australia to consider the outcomes in CETA as a basis for our own current trade negotiations. The EU claimed as a major victory Canada’s agreement that new GI names could co-exist with existing registered trademarks. This had always been opposed as undermining existing property rights. Canada agreed to recognise 171 EU GI names, but made substantial reservations in respect of 8 of these names. Canada has not, as yet, registered any Canadian geographic names in Europe. Canada also undertook to provide for administrative enforcement of registered GI names.²¹ This administrative enforcement provision means that Canadian taxpayers have agreed to enforce perpetual property rights for 171 EU geographic names.

¹⁶ See <http://politicsir.cass.anu.edu.au/centres/ces/research/projects/jean-monnet/understanding-geographical-indications> for full information on the outputs from the Jean Monnet Project, Understanding Geographical Indications. This Project was co-funded by the Erasmus + Programme of the European Union. EC support for this project does not constitute an endorsement of the contents – these reflect only the views of the researchers / authors.

¹⁷ A further 111 studies were identified assessing the willingness of consumers to pay a premium for higher-end agricultural products. Unfortunately, again, not all of these studies provided quantitative estimates, though most supported a widespread view that consumers were willing to pay more to support **local** producers.

¹⁸ ‘Demand’ is the standard trade negotiation terminology for the initial bid from a country. The EU does not publish updates to its negotiating text.

¹⁹ http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157190.pdf.

²⁰ <http://ec.europa.eu/trade/policy/in-focus/ceta/>.

²¹ Resulting in a substantial revision of its trademarks legislation.

Some of these outcomes would be problematic for Australia if they were adopted. It would be a substantial overturning of a fundamental principle of Australian trademark law to provide for co-existence of an identical GI name and an existing trademark. There is no evidence of any compensation payment in Canada for this reduction in value of what might be longstanding property rights. Similarly Australia takes a strong user pays philosophy in many areas of economic life, and requiring the taxpayer to pay to enforce new privately owned property rights would cut across this.

Recommendations:

- **Refuse both co-existence of later GIs with earlier trademarks and tax-payer funding of GI enforcement.**

4.2 Beyond CETA demands to Australia

The EU's demand to Australia on GIs is substantially more complex than the outcome in CETA and involves many more restraints on trade. These include:

- a requirement that Australia's GI system (certification marks) conform to the EU's (*sui generis*) regulatory approach for GIs (Annex XX-A, Section B);
- no "direct or indirect" commercial use of a protected GI name and no "evocation" of a protected name even where there are clear qualifiers (Article X.34), thereby preventing comparative advertising;
- limitations on packaging (Article X.34) – this is a completely new demand which is well beyond the CETA outcomes;
- no registration of users of GIs or further charges (Article X.35.2) or fees of any kind (Article X.38.8) – this cuts completely across Australia's strong user pays philosophy and would preference producers selling under a GI label compared to those selling under a trademark;
- registration of GI names even where prior trademark exists (X.36.5); and
- bureaucratic oversight and approval processes allowing foreign nationals a voice in domestic policy (matters arising from product specifications of GIs to be dealt with by a joint working party (Article X.38.5).

The whole section is badly drafted using a heavy-handed prescriptive input-focused approach. Examples are the completely unnecessary prohibition on misleading consumers (such unfair trade is prohibited by TRIPS, to which all WTO members are signatories); the complexity of the drafting on the co-existence of later GIs and earlier trademarks which implies something immoral about the earlier trademark (Articles X.36.5, X.36.6); and the long and bureaucratic process for opposing a proposed GI registration (Annex XX-B). Indeed the whole of Article X.38 (general rules) shows the extent to which the EU proposes significant interference in Australian domestic policy. Procedures for adding new EU GI names are to be included (Article X.65), but as yet there is no draft text.

There are also omissions – for example the requirement for administrative and judicial enforcement has no requirement for credible evidence (Article X.37). The sections on protected names – names of plant varieties, animal breeds (Article X.38) and personal names (Article X.34) are not well drafted. The only mention of generic names is the prohibition on registered GI names becoming generic (Article X.34).

4.3 Agreed list of GI names for protection in Australia and the EU

One absolute requirement by the EU for agreement to a trade treaty is protection in the other country of a long list of EU registered GI food names. The length of this list has crept up over time – from 60 in the 2010 agreement with Korea, to 171 in CETA to 205 names in the 2019 Japan agreement. As at July 2019, the proposed EU names for registration in Australia have

not yet been published. Recent news commentary by the Trade Minister suggests that GI negotiations will not begin until market access issues are settled.²²

4.3.1 Protecting EU GIs in Australia

In 2017 Australia imported US\$ 576 million of cheese, with 33% coming from Europe.²³ Over the past 5-10 years there have been substantial improvements in the displays of cheeses in both large and small supermarkets, with a wide range of domestic and imported cheeses available. The increase in the range of high-end domestic specialty cheeses is particularly noticeable.

The EU is a major food exporter, but GI labelled foods form only 2% of the value of its food exports (AND-International, 2012). A very large share of the value of GI labelled EU food exports comes from a small range of products, with Grana Padano and Parmigiano Reggiano being stand-outs. In the Australian market there are both Italian and domestic versions of parmesan readily available.²⁴ There are already 3 registered certification marks for Grana Padano and 4 registered certification marks for Parmigiano Reggiano, so these two dominant cheese imports are already fully protected in the Australian market. Given this, and the fact that the EU already has a 33% market share of imported cheeses, it is hard to see how much the EU stands to benefit from having such names registered in Australia through the proposed treaty. Indeed there is a case to be made that if a name is already protected by a certification mark it should not also be protected through a treaty annex.

Other EU GI products with Australian certification marks are Parma ham (5 marks), Mortadella Bologna, Pecorino Toscana, Gorgonzola, Raddichio Rosso di Treviso and Aceto Balsamico di Modena.²⁵ The listing of these products in a trade treaty is redundant.

In the 2006 amendments to its GI Regulation, the EU allowed Protected Geographical Indications (PGI) registration for names that were not geographic. Feta is the most famous example. Because of this, and issues such as lack of clarity as to the actual origin of PGI-labelled foods, Australia should ask some questions about the proposed names.

Among the products listed for possible registration in NZ, the following potentially mislead consumers:

- Bresaola della Valtellina: the raw material is from Brazil
- Prosciutto di Parma: the raw material can come from well outside Parma
- all PGI names: the proportion from the specified region is unknown.

If Australia agreed to ‘protect’ such names in Australia it would potentially be complicit in misleading Australian consumers. The EU should be asked to provide detailed evidence as to the proportion of the product coming from the specified region for all proposed PGI names. The EU should also be asked to advise which PDO names allow raw material input to come from outside the specified region (e.g. Parma ham) and Australia should refuse to register such names, unless the actual origin is disclosed on the label.

²² <https://www.abc.net.au/radio/canberra/programs/am/australian-prosecco-and-feta-at-risk-amid-eu-trade-talks/11303564> (ABC radio AM program, 13 July 2019).

²³ Australia exported US\$ 717 million of cheese in 2017, of which 91% went to Asia. Only 0.34% went to Europe, about evenly split between two of the smaller economies – the Netherlands and Malta (https://atlas.media.mit.edu/en/visualize/tree_map/hs92/export/aus/show/0406/2017/).

²⁴ There do not appear to be any Australian versions of Grana Padano, and all 4 registered Grana Padano trademarks are owned by the Consorzio Per La Tutela Del Formaggio Grana Padano.

²⁵ As at 6 December 2018. There is an application for a certification mark for Asiago, but it is being opposed by the US Dairy Export Council. There is an ordinary trademark for Asiago registered, owned by the Consorzio per la Tutela del Formaggio Asiago.

Recommendations:

- **Require:**
 - detailed information from the EU as to the actual geographic origin of all PGI names proposed for registration in Australia;
 - clear identification of proposed PDO names where the raw materials come from a different or wider region than that on the label;
 - that any names accepted through the treaty should be accepted as certification marks and treated as any other certification marks except that the opposition process would be deemed to have taken place
- **Refuse to accept:**
 - any names which are not place names;
 - any names already registered as certification marks in Australia.

4.3.2 Opposition processes

A list of 172 proposed names for NZ was published in late 2018 with a period of 3 months allowed for objections. The NZ government plans to publish a summary of objections, including the basis for the objections. The grounds for objecting to EU GIs proposed for protection in NZ were:

- the name is identical, or confusingly similar, to a trade mark or GI that is the subject of a pending application or registration under either the Trade Marks Act 2002 or the Geographical Indications (Wine and Spirits) Registration Act 2006;
- the name is identical, or confusingly similar, to a trade mark or GI currently in use in New Zealand, the rights to which have been acquired through good faith use in NZ;
- the name is homonymous with a GI that is the subject of a pre-existing good faith pending application or registration under the Geographical Indications (Wine and Spirits) Registration Act 2006 and that has a different geographical origin;
- the name is used in New Zealand as the name of a plant variety, including a wine grape variety, or an animal (including fish) breed;
- the name is used in New Zealand as the common name for the relevant good; and
- use or protection of the name in relation to the relevant good would likely offend a significant section of the community, including Māori.²⁶

As yet there is no publically available information on objections received.

It is likely that there will be a similar process in Australia. The grounds for objection in NZ are differently worded from the proposed grounds in draft Annex XX-B of the EU negotiating text. The allowed opposition period is very short. Annex XX-B suggests a period of 2 months; the NZ process seems to have allowed 3 months. Yet Australian agricultural and foodstuff producers are unfamiliar with the details of trademark law or the complexities of EU-style GIs. It may well take longer than 3 months for information about proposed GIs to reach those who might be affected.

Many of the names in the GI lists attached to EU treaties are highly specific – Azafrán de la Mancha, Brie de Meaux, Bresaola della Valtellina, Azeite de Trás-os-Montes – for example. Such highly specific compound names are unlikely to cause problems for local producers. But the NZ list includes some names which are far more general – Gruyère, Munster, Roquefort, feta, fontina, Gorgonzola and Scotch beef for example. Scotch beef could well be confusing in Australia because the term ‘Scotch’ is used for a particular cut of beef rather than as a designation of origin. Others may well cut across names used generically in Australia or NZ, particularly feta (which, of course, is not a place name). Other names are simply surprising, especially in the NZ context – Kiwi Latina.

²⁶ <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/geographical-indications>

Because of the time it can take for information like the proposed register and its opposition process to filter through the agricultural and food producing community it would be advisable to allow at least 6 months for oppositions to be lodged. It would also be useful for the Trade Marks Office (TMO) to run a cross-check of proposed names for Australia with registered or filed trademark names and to alert those potentially affected to the process and their rights under it.

Recommendations:

- **Require a 6 month opposition period for proposed EU names for protection in Australia, and use TMO expertise to alert trademark owners who may be affected.**

4.3.3 Grandfathering names in common use in Australia

Certainly Australia should seek to grandfather all proposed names if there are Australian producers currently using those names. The outcome in CETA for 5 cheeses was that all current Canadian producers could continue to use the name in perpetuity²⁷ (alongside the registered EU GI name), and if they sold their business the new owner would also have these rights. For new producers there would be a right to use the name with a qualifier – e.g. feta-style or feta-like. Feedback from marketers, however, suggests that such a qualifier is often interpreted as an indicator of lower quality and is not be a useful provision. At a minimum Australia should seek similar provisions to those in CETA with respect to current producers.

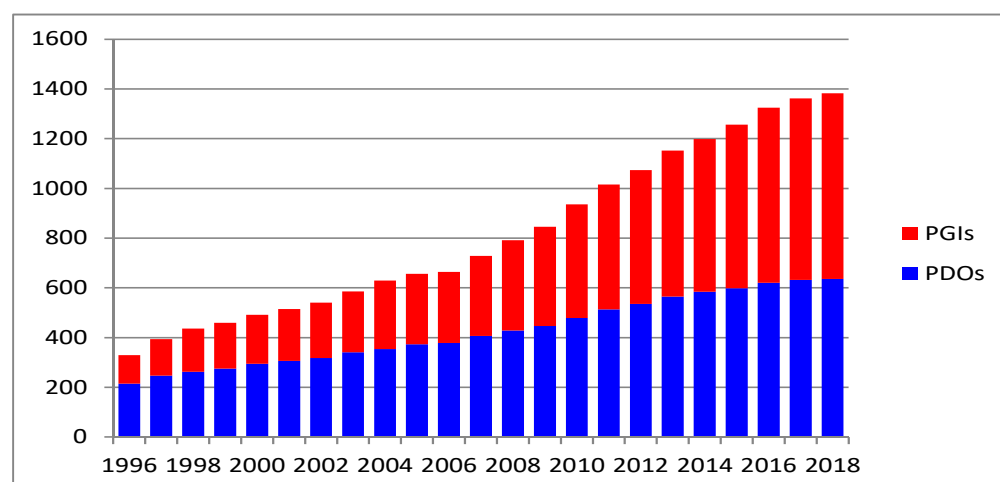
Recommendations:

- **Require full grandfathering for any accepted names which are currently in use for Australian products, along the lines of the provisions for 5 cheeses in CETA.**

4.3.4 Adding new GI names

Despite the lack of any systematic evidence that GIs promote either producer prosperity or regional development, the EU strongly promotes this policy. As a result there are an ever-increasing number of food GIs registered in the EU. Table 1 shows the number of registered GIs (both PDOs and PGIs). The data shown are by year of registration. While it would be preferable to show the data by year of application, for the years from 1996 to 2007 most registrations do not show an application date. It is clear that there are an ever-increasing number of EU registered GIs. By the end of 2018 there were 1,383 registered PDOs and PGIs in the EU with a further 234 applications pending as at the end of 2018.

Table 1 EU registered GIs: PDOs and PGIs by year of registration.



Source: Own calculations from data downloaded from DOOR, 20 June 2019
<http://ec.europa.eu/agriculture/quality/door/list.html>

²⁷ They would, of course, have to renew their trademark registration(s) in the normal manner.

In CETA currently registered EU GIs which were not listed in the Treaty Annex were excluded from GI protection in Canada. However Article 20.22 of CETA qualifies this exclusion as being “in principle”. Any GI sections in an EU-AU treaty should include the same provision as in CETA – but the exclusion of other registered GIs should be absolute and the words “in principle” should be dropped.

Recommendations:

- **Require that provisions to add EU GI names for protection in Australia do not allow names that were already registered in the EU when treaty negotiations commenced to be added under any circumstances.**

4.3.5 Names to be protected in the EU

Except for the countries of East Asia, the Annex for listed GI names for the other treaty party is blank.²⁸ So far, for example, Canada has proposed no names for recognition in the EU. Australia has only two listed certification marks for geographic regions.²⁹ These registrations are for broad classes of foods unlike the EU’s highly product specific registration system (a single style of cheese, for example). It seems likely that the EU would refuse to recognise these names, given the heavy-handed detail about processes to be used for GI registration systems in draft Annex XX-A, Section B.

Further, many countries in Europe simply do not import any cheese from outside Europe, though they trade cheese extensively among themselves.³⁰ Almost none of Europe’s cheese imports come from outside Europe. In respect of cheese imports from outside Europe, the largest market share – just 0.2% – is in Germany. This is followed by the UK at 0.06%, Greece at 0.04% and Poland at 0.02%. There is absolutely no cheese from outside Europe imported into France, Italy, Spain or Portugal.

For several years now the EU Delegation in Australia has been sponsoring a series of events to promote their GI policy and to encourage Australians to adopt EU-Style GI policy.³¹ No mention is made at these events of the very different approaches Australia and the EU take to regional specialties for foods. Nor is there any recognition of the reality that agriculture in Australia does not usually involve the dense concentrations of small producers found in Europe. There is implicit encouragement for Australian producers to consider developing GI names and registering these in the proposed treaty,³² but there is no discussion of the major barriers to the import of cheese into Europe.

As the major value in GI foods which travel globally is in cheeses and meat products, one has to question the value to a partner country of the EU’s proposition that the trade partner list geographic names for protection in Europe. As European nations are all signatories to the Paris Convention, such names should be protected from unfair competition without the need

²⁸ The one exception is South Africa, which lists 2 teas and 1 meat product in Section A.1 of Annex 1 to Protocol 3 of the EU - SADC Economic Partnership Agreement (the EU lists 105 food products) (<http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>).

²⁹ Mornington Peninsula Produce and Northern Rivers Food.

³⁰ Of the \$UA29.6 billion global cheese market in 2017, 82% of exports came from Europe and 69% of imports went to Europe (<https://atlas.media.mit.edu/en/profile/hs92/0406/>).

³¹ See footnote 5 for details of the 12 February 2019 Bond University Bond Colloquium. A similar event was held at Margaret River on 18 March 2019 and one is scheduled for the Barossa Valley on 13 September 2019. In their *Your @EUinAus Update Q2, 2019*, the Delegation said “The EU’s system of identifying and protecting food products based on origin - Geographical Indications - is a driver of rural jobs and sustainable growth. Australia is considering extending the protection of European food and spirit product names to its own market as part of the FTA. [sic] Australia could also expand the geographical indications system already in place for wine to its own products. The EU Delegation to Australia is discussing the benefits of GIs with *local food producers*, business and government around the country” (emphasis added).

³² And in personal discussions with EU GI negotiators, I have been told to “watch this space” with respect to the registration in the EU of food GIs from Canada, Australia and New Zealand.

for GI registration. But if the products cannot get access to the market, any form of protection is entirely irrelevant.

Recommendations:

- **Require the EU to open its markets for cheese imports**
– **currently the EU imports almost no cheese from outside Europe.**

4.4 *Proposed regulatory system*

As noted above, Australia has a culture which encourages market-based solutions and light-handed regulation. At least with respect to GIs, the EU appears to favour detailed regulation which focuses on input processes rather than desired outcomes. This may reflect their history of GIs, where the PDO form derives from the French AOC regulations designed to prevent fraud (see Section 4 above). However, as noted earlier Australia has little experience of misrepresentation in the domestic food industry and current consumer protection laws fully implement Article 10bis of the Paris Convention.

Against this background Australia's certification marks and collective marks allow for the protection of GIs and for regional branding. Such regulations are quite light-handed, but they do include an important step missing from the EU's GI system – the rules for such collective marks are screened by the Australian Competition and Consumer Commission (ACCC) to ensure that they “not to the detriment of the public”.

There is no such vetting in the EU system – the Parma ham case is illustrative. Parma ham cannot be called Parma ham if it is bought as a leg of ham and then sliced and packaged outside Parma.³³ The Consortium wrote its own rules, which allow the pigs to be bred and raised across most of Central and Northern Italy, but unless the hams are sliced and packaged in Parma, the resulting product cannot be called Parma ham. While the intrinsic nature of all forms of intellectual property is to reduce competition or restrain trade, this example suggests that a greater degree of scrutiny of proposed GI names in Europe would better balance the conflicting goals of competition and restraint of trade.

A further problem with the EU GI system is that some PDO products, like Parma ham, are exempted from the requirement that the product come from the named place (the *terroir*). This raises issues about misleading labelling. In Europe a challenge to the truth in labelling of Parma ham would likely be dismissed as registered GI rules, being a form of intellectual property, are not subordinated to other Treaty Articles. This may not be the same in Australia or Canada, though no such case has been brought.

For EU PGI products, there is no requirement that a minimum value of the product come from within the region named on the label (Gangjee, 2017, Zappalaglio, 2018). This raises even greater concerns about misleading labelling. While there are, as yet, only two Australian regions with certification marks for foods, the rules for both are strict with regard to product origin.

The draft EU negotiating text naturally proposes the adoption of the EU's detailed regulations. But these will not suit Australian producers. Under the 2009 Australian-EU bi-lateral wine agreement, Australia simply requires 85% of the grapes for a wine with a GI label to come from the specified region.³⁴ As a result of this parsimonious approach, no additional enforcement resources were required.³⁵ In contrast the production specifications for an EU PDO wine can run to many pages.

³³ Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd & Hygrade Foods Ltd, ECJ, Case C-108/01, (20 May 2003).

³⁴ Article 24, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:028:0003:0087:en:PDF>.

³⁵ See Moir, 2015: 27.

Australia should reject any move to alter the current arrangements for protecting geographic names in Australia. Firstly, there is no evidence that the EU GI system systematically raises producer incomes (Török and Moir, 2019). Secondly, there is no evidence that the certification mark system is ineffective. A number of European producers are using it. There is capacity within the certification mark system for the ACCC to bring representative action, which should satisfy any EU demand for administrative/judicial action.

The EU demand also proposes that later GI registrations should be allowed notwithstanding an earlier registered trademark. The registered trademark system was developed in 1857 by the French and this model has been successfully exported globally (Kingston, 2010: 31-32). Fundamental to the system is the rule that a later application cannot succeed if the name is already registered. To allow co-existence of later GIs and earlier trademarks would undermine this fundamental principle of trademark law – “first in time first in right”. Any such proposal should be rejected.

The EU negotiating text effectively calls for the expropriation of the property rights of trademark owners, but does not propose any form of compensation. It claimed a significant victory in Canada’s agreement to allow such co-existence. But in Canada a trademark had been granted for the name “Parma ham” which effectively prevented the *Consorzio del Prosciutto di Parma and Salumificio* from selling their product in Canada as Parma ham. To my knowledge there are no such special circumstances in Australia.

Recommendations:

- **Refuse the proposed detailed approach to regulating names for regional specialties;**
- **Propose the current certification mark processes (where the ACCC can take representative action) as fully meeting the demand for administrative enforcement.**

4.4.1 An Australian agenda on trademark and GI names

Another issue is raised by the GI controversy – the frequent willingness to grant trademarks for geographic names. Instead of simply responding to the EU’s demands, Australia should develop an offensive agenda calling for greater care in allowing such trademarks.³⁶ The recent King Island lobster case illustrates the issue.

While there are at least a dozen lobster fishermen on King Island, one had applied for a trademark and the Trade Marks Office (TMO) had accepted this *as the words were embedded in a logo*. But the ordinary producer or trader does not understand such subtleties. In the event the King Island Council opposed the grant and the applicant allowed the proposal to lapse. In another Tasmanian case the Hill St grocery developed into a small chain and registered the name ‘hill street grocer’. The trademark was granted despite the likelihood of many Hill Streets and the principle that any trader in any Hill Street should be allowed to use the name. The hill street market trademark owner then put considerable pressure on the nearby Hill Street butcher to change his name.³⁷

Australia should offer to overhaul its trademark legislation to severely reduce the circumstances in which a geographic name can be registered as a trademark. And given that ordinary traders do not read the trademark journal the legislation should allow for a perpetual right (or at least a right over a 5-10 year period) to challenge a geographic trademark as negatively affecting an existing business also using that name.

³⁶ In trade negotiation terminology a pro-active agenda is called ‘offensive’. To date Australia has never developed an offensive agenda on IP matters. It has simply taken the position that it will accept any proposal from any other party as long as this does not require changes to Australian legislation or regulations.

³⁷ Personal communication, Tasmanian Chamber of Commerce and Industry.

But Australia should also demand that the EU cease granting GIs for names that are not geographic. This possibility was introduced in the 2006 changes to the EU GI regulation. At the same time the requirement for a register of generic names was dropped. Feta is a word meaning slice in both Greek and Italian. There is no such place, certainly not in Greece. Fontina cheese comes from the Aosta Valley, not from any place called Fontina.

Australia should also pursue an agenda to define and protect generic names to ensure that our multi-cultural society is not undermined. The original EU GI legislation required the European Commission (EC) to draw up a register of GI names. Although there were at that time only 12 Member States, there were no names where all MSs agreed. The requirement was quietly dropped and the approach to defining generic altered when the regulation was amended in 2006. Australia has a greater interest in protecting generic names and should urgently develop a register of such names, preferably in co-operation with NZ, the USA and Canada.

Another issue that Australia could usefully put on the table is the use of technological protection measures to allow traceability. An underlying concern with IP protections such as trademarks and GIs is the possibility of counterfeit products reaching the market. Heavy-handed regulations do little to prevent this. However, with new technologies there are developments such as smart trademarks, QR codes and so on. Such measures could provide a break-through in ensuring consumers are able to ensure the correct place of origin if this is of concern to them. There would be substantial synergies with the interests of large food retailers who have already put in place significant measures to ensure food traceability. Co-operation to develop and improve such measures would be in the interests of all parties.

Recommendations:

- **Propose:**
 - **an overhaul of Australian trademark legislation to ensure fewer marks are granted which incorporate geographic names;**
 - **that the EU amend its GI regulations to stop providing GI registration for names that are not place names;**
 - **a process to define names that are generic in Australia; and**
 - **a program (which could be in active co-operation with the EU) to improve technological traceability systems to allow the provenance of foodstuffs to be traced along the full supply chain.**

4.4.2 Fees, charges, enforcement and oversight

For many decades Australia has had a strong user-pays culture. There are fees for trademark registration and for the renewal of trademark registrations. Trademark owners bear the full cost of enforcing these private property rights granted through legislation. While the ACCC can take representative action, it is still possible for the owner of a certification mark to take individual action for any infringement.

The EU demand proposes that there be no fees for GI registration. There is no justification for allowing a large number of foreign producers to be exempted from normal user-pays requirements for obtaining IP privileges. There should be a charge for initial registration and a requirement for periodic renewal, as for other forms of trademarks.

The EU demand proposes that there be administrative and judicial processes for enforcement (Article X.37). As is typical of EU and US IP demands in trade treaties, this includes all the features of interest to IP rights holders and none of the protections essential for consumers or the public generally. Article X.37 does not, for example, require that credible evidence be produced.

Articles X.61 and X.62 cover border protection measures. Traditionally such measures are only needed with respect to suspected counterfeits for goods with trademark or copyright

privileges. EU GI names registered as certification marks have such privileges now. Article 61.X is detailed and prescriptive – indeed it includes some of the worst features of the proposed Anti-Counterfeiting Trade Agreement (ACTA) which was roundly rejected by the European Parliament in 2012.³⁸ These are the destruction of alleged counterfeit goods without prior administrative or judicial review and that taxpayers bear the burden of IP enforcement. The Article also includes oversight by a working party including EU nationals. Article X.62 simply repeats GATT and TRIPS requirements so is redundant. The proposed destruction of goods without judicial review is unreasonable and disproportionate, as were most of the ACTA proposals (Moir, 2012).

A further article on enforcement (X.64) encourages co-operation between stakeholders, but as always with IP provisions the focus is entirely one-sided – on the rights of those to whom monopoly and restraint of trade privileges have been granted by society.

In line with a number of other IP chapters in recent treaties, there is a proposed oversight committee to ensure that the agreed provisions are implemented (Article X.65, currently blank). Such lack of trust does not augur well for good bi-lateral relations. Nor is it appropriate, in regard to domestic legislative and regulatory policies, for a sovereign government to agree to joint oversight by a foreign power.

Beyond this the EU demand proposes 11 “modalities of cooperation” in Article X.63. At least five of these require propaganda promoting the views of IP rights-holders.

Recommendations:

- **Refuse:**
 - **the bid for no charges for registering or maintaining GI names;**
 - **all proposed border measures in Articles X.61;**
 - **any joint working party to oversight implementation;**
 - **to fund propaganda exercises that simply reflect the interests of IP rights-holders and do not represent the balanced interests of society as a whole**

4.5 GI privileges

In general the privileges granted through specific forms of IP are quite extensive. Privileges for trademark owners are less extensive than those for copyright and patent holders. However, trademark privileges have grown significantly in recent years with the proliferation of marks which identify brands not producers. As Greenhalgh and Webster (2015) point out, this reduces the benefit to the consumer, which principally lies in knowing who the producer is.

Under the EU’s GI system, those entitled to use registered GIs have been granted privileges which go well beyond the privileges granted to trademark owners. The EU thus prevents any direct or indirect commercial use of a protected GI name. It also prevents “evocation” of a protected name. Decades ago Perrier used to market its product as “the champagne of mineral waters”. This is no longer allowed under the evocation privileges as it allegedly brings the name “champagne” into disrepute. Such privileges prevent comparative advertising.

There is nothing in the CETA which prevents evocation, so in proposed Article X.34 the EU is demanding far greater privileges for GI users than it obtained in Canada. Further, the EU is also demanding limitations on forms of packaging, again a privilege which goes beyond those granted in Canada.

Certainly it is the case that Australian producers of products such as parmesan and feta use package colours which reflect the national flag of countries where such products originated.

³⁸ With 478 Members of the European Parliament voting against ACTA and only 39 in favour (<http://www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta>). Re-raising this proposition in a bi-lateral negotiation shows extreme disrespect for the views expressed by the European parliament.

But the migrants who brought their European food (and wine) cultures to Australia were always clear that these were traditional products.³⁹ In the packaging they developed they sought to honour this heritage.⁴⁰ Such packaging pre-dates modern cheap transport. The EU needs to develop a fuller understanding of Australia's multi-cultural make-up. Australians from specific European countries often maintain a close relationship with extended family members at the other side of the world. And this relationship can and does extend into business interactions. There is a very positive aspect to this make-up as it means we Australians can understand and appreciate the many different cultures in the EU. But the EU also needs to understand that they should not attempt to upset the current positive appreciation of different European cultures by heavy-handed intervention into long-established domestic regulations.

Recommendations:

- **Ensure that privileges for agreed GI names do not extend beyond TRIPS Article 23 standards.**

5. Recommendations

My recommendations as to Australia's response to the EU GI demand are based largely on an intensive study of the EU's GI system over the past 3 years. This included a systematic search for all literature on the real-world impact of GIs in regard to net producer income and regional prosperity. The conclusions I have reached are my own, and do not reflect those of any institution or funding body.

My first recommendation is to **drop the proposed IP chapter in its entirety**. The essence of free trade is increased competition. Policies and regulations designed to introduce monopolies and restrain trade have no place in free trade agreements, a point also made in the Business Council of Australia submission about this proposed treaty. Further because of the MFN clauses in TRIPS, any 'benefits' conferred through an IP chapter in a bi-lateral or regional trade agreement are conferred on all WTO members. This makes IP chapters very poor negotiating coin. Finally the TRIPS+ provisions pushed by the USA, the EU and Australia through such bi-lateral IP chapters are highly contentious globally and make the path back to a multi-lateral trading forum more difficult.

It is unclear just what trade impediments there are between Australia and the EU except for the EU's significant barriers to agricultural imports. There is no evidence that the EU is willing to make many concessions on the entry of Australian agricultural products into the EU. Certainly there was no such outcome in CETA (Kerr and Hobbs, 2015). There is much talk of improvements in services trade, but little specification of what impediments currently exist. Tariffs on merchandise trade are already low. So it seems that the main benefit from the treaty would be an end to preferential tariffs on vehicles. This is something Australia could offer unilaterally. It does not need to trade this for the EU's GI trade agenda.

Should the EU surprise us all and offer much better access to its agricultural markets, especially dairy and meat markets, then it would be reasonable for Australia to make some concessions in regard to their GI demand. We could agree to list a certain number of names as protected GIs in Australia. It is hard to see what benefit this would provide to the EU, but as

³⁹ Indeed there is evidence that, in some circumstances, emigrants hold more tightly to tradition than do residents in the country of origin.

⁴⁰ As they did in naming places (the township of Campania and the vineyard Provence in Tasmania, for example) and products such as parmesan. The Provence vineyard case is interesting – in 1994 the French National Institute of Appellations of Origin ordered the owner to change the name as they wanted to be sure, *36 years after the vineyard had been planted*, that consumers wouldn't misunderstand and think that the wines were from Provence in France. Although the new owner reluctantly changed the name to Providence, in the end all costs in the case were awarded against the French (<https://www.wineaustralia.com/tasmania>).

long as there were CETA-style reservations on all listed names that are currently used by Australian producers, it is also hard to see what harm this would do. We should not, however, change our basic approach to GIs – certification marks. If it was essential, we could set up a parallel *sui generis* system solely for GI names agreed through trade treaties. This would prevent contamination of our current system, with its protections for the interests of the public, by the excessively detailed European regulatory approach. It has been done in Korea (O'Connor et al., 2017). China also runs parallel *sui generis* and trademark-based systems.⁴¹ Running such parallel systems satisfies demands from two major trading partners – the EU and the USA.

What we absolutely should not do is accepted the detailed regulatory approach proposed in the EU GI demand. We should not agree to limits on evocation or packaging (that is, the privileges we grant to any listed names should not exceed TRIPS Article 23 standards), we should refuse proposed border protection, infringement and oversight measures and proposed “co-operation” which simply consists of propaganda. We should make sure no owners of registered trademarks have their property expropriated. And we should maintain our general approach to user pays.

Finally we should carefully vet the proposed list of names to ensure no possibility of deception for Australian customers. This is particularly important for all PGI products, where there is no assurance that they come from the place on the label. And we should carefully scrutinise PDO products where the input materials are not from the place on the label, such as Parma ham. Our government should not be complicit in potentially misleading Australian consumers.

Beyond this, it is time for Australia to develop a pro-active agenda on GI issues. We have a large number of well-recognised regional specialties many of which attract high price premiums both domestically and overseas. Our regulatory approach is light-handed leaving agricultural and food producers to focus on their business not on regulations. We have good consumer protection laws and the back-up of potential ACCC intervention in the event of any failure in these. One area where our legislation falls short, however, is the extent to which we are willing to approve trademarks for place names especially when these are embedded in a logo. This creates difficulties for other Australian producers and we need legislative or regulatory amendments to wind back such approvals. We should also propose to the EU that they amend their GI regulations and cease granting GI privileges for names that are not geographic.

But our producers do face counterfeiting problems in some overseas markets. The smart approach to this is to use technology not regulation. We should therefore develop a significant investment program in further developing such technologies, and could invite the EU to partner with us on these.

⁴¹ See Appendix for a recent submission lodged by Moir and Cheng on proposed changes to GI regulation in China and the importance of maintaining parallel administrative systems to meet the needs of different trading partners.

Appendix – Comments on Measures to Protect GI Products from Foreign Countries (Call for Comments on Amendments)

Dear China National Intellectual Property Administration (CNIPA):

Introduction

As researchers interested in policies in relation to geographical indications, we have completed an EU (Jean Monnet) co-funded project on Understanding Geographical Indications (GIs).² This focussed on the role of GIs in promoting increased farmer income and regional prosperity.

As GI policy is usually implemented by intellectual property offices, we notice that policy design for GIs sometimes misses important agricultural and rural development goals. We also note that policies to manage the use of geographic names – especially how to prevent mis-use – is controversial in trade negotiations. Further, we note that China has more geographic names registered, either under a sui generis system or under a trademark system, than most of its trading partners. These parallel systems have clearly provided for the needs of all China's WTO partners regardless of the approach they follow.

It is against this background that we would like to provide the following comments on Measures to Protect GI Products from Foreign Countries (Call for Comments for Amendments) released by the CNIPA on February 28, 2019:

1. Article 9: add dispute history as part of the application portfolio;
2. Article 12: extend the opposition period;
3. Article 16 and 35: add a procedure of judicial review of the administrative adjudication;
4. Add an article introducing penalties for submitting incorrect information or concealing information that should be included in the application portfolio.

Detailed comments

1. Add the following provision to Article 9.7:

"Where the proposed geographical indication has been involved in administrative or judicial dispute(s) concerning eligibility for protection as a Geographical Indication in any country or region, the final decision (if the dispute has been concluded) or procedural update (if the dispute is ongoing) should be provided as part of the application portfolio."

The reason is that protecting geographical names as geographical indications is controversial in some cases. Some famous GIs have been disputed at the European Court of Justice, such as feta and Parmigiano Reggiano. If the eligibility of a name as a GI has previously been challenged, it indicates concerns that this name may be generic name elsewhere. Including information about such disputes will allow CNIPA decision-makers to reach sounder decisions.

2. Extend the opposition period

Article 12 provides 60 days to lodge an opposition. This is too short for interested stakeholders who, in most cases, are farmers and small businesses in China or overseas. These stakeholders do not monitor IP office publications. We recommend extending the period to 180 days. As a further measure to ensure that stakeholders are able to oppose problematic GI name registrations we also recommend that consideration be given to developing a program to encourage trade mark and GI attorneys to pro-actively contact parties who might be affected by proposed GI registration.

3. Judicial review.

Article 16 provides administrative reconsideration of oppositions, and Article 35 provides administrative adjudication on the revocation of a GI. Article 41.4 of TRIPS Agreement provides that "parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case". For the purpose of TRIPS compliance, on the basis of this provision, we recommend that judicial reviews should be added for both provisions. One example for such an arrangement is Article 46.2 Patent Law (2008), which provides: "a person that is dissatisfied with the patent review board's decision on declaring a patent right invalid or its decision on affirming the patent right may take legal action before a people's court, within three months from the date of receipt of the notification."

4. Penalties for dishonest information in application process

It is assumed that most applicants will provide information honestly in the application. However, as some may not, we recommend a penalty to prevent dishonesty in the application process. We suggest rejection of the application (during formal examination) or revocation (after GI protection in China is granted) where there is evidence of misrepresentation or concealment in the application documentation.

Summary

In addition to the specific comments on the proposed measures, we also have a general concern about measures for foreign entities to register their geographical names as certification marks or collective marks in China. Many of China's trading partners (e.g. the USA, Australia and New Zealand) only use the trademark system to protect geographical names. These countries are important food suppliers to China and it is crucial to maintaining a trademark system for GIs so that businesses from these countries remain willing to supply goods to China knowing that there are regulations in place to deal with counterfeits. We note that China has successfully maintained trademark and sui generis systems for many years and that other countries have followed this example, adopting parallel trademark and sui generis registration systems for GIs. It is also important that a proper rule of coexistence in the Chinese market is developed for names that are used in some countries as generic names and in other countries as geographical indications.

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1. For more information, refer to <http://politicsir.cass.anu.edu.au/centres/ces/research/projects/jean-monnet/understanding-geographical-indications>.

* The views of this submission are those of the authors.

关于《国外地理标志产品保护办法（修订征求意见稿）》的意见

尊敬的中国国家知识产权局：

引言

作为对地理标志相关政策感兴趣的研究人员，我们完成了欧盟让·莫内（Jean Monnet）项目资助的“理解地理标志”研究项目¹。该项目侧重于理解地理标志在增加农民收入和促进区域繁荣方面的作用。

由于地理标志政策通常由各国的知识产权局实施，我们注意到地理标志的政策设计有时会忽视重要的农业和农村发展目标。我们也注意到，管理地理名称使用的政策（特别是如何防止误用的政策）在国际贸易谈判中存在争议。此外，我们还注意到，无论是在特殊制度（sui generis）下还是在商标制度下，中国注册的地理标志都比其绝大多数贸易伙伴要多。商标和特殊制度并行的体系明确地满足了中国所有WTO合作伙伴的需求，无论这些国家本身遵循何种制度。

在这种背景下，我们想对国家知识产权局于2019年2月28日发布的《国外地理标志产品保护办法（修订征求意见稿）》（《办法》）提出以下意见：

1. 第9条：将争端历史作为申请文件的一部分；
2. 第12条：延长异议期；
3. 第16条和第35条：对行政裁决加入司法审查程序；
4. 加入一条，引入对申请文件中虚假陈述或隐瞒必要信息的罚则。

具体意见：

1. 加入如下内容，作为第9.7条：

“如果拟提交的地理标志产品曾在任何国家或地区涉及有关地理标志保护资格的行政或司法争端，这些争端的最终判决（如果争端已经结束）或最新进展（如果争端正在进行）应作为申请文件的一部分提交。”

¹有关该项目的详细信息，参见

<http://politicsir.cass.anu.edu.au/centres/ces/research/projects/jean-monnet/understanding-geographical-indications>.

其原因是在一些案件中，将地名作为地理标志保护是有争议的。一些著名的地理标志曾在欧洲法院受到质疑，例如feta和Parmigiano Reggiano。如果某一地名作为地理标志保护的资格曾被质疑，则表明此名称可能在其他地方被用作通用名称。将此类争端信息作为申请文件的一部分将使国家知识产权局的决策者做出更明智的决定。

2. 延长异议期

《办法》第12条规定提请异议的时间是60天。这对于利益相关方来说太短了。在大多数情况下，与地理标志申请有关的利益相关方是中国或海外的农民和小企业。这些利益相关方不会实时监测知识产权局的公告。我们建议将异议期延长至180天。作为确保利益相关方有能力对存在问题的地理标志名称的注册采取进一步措施，我们还建议考虑设立项目，以鼓励商标和地理标志律师积极联系可能受提请地理标志注册影响的各方。

3. 司法审查

《办法》第16条规定了对异议的行政复议，第35条规定了撤销地理标志的行政裁决。《与贸易有关的知识产权协议》（TRIPS协议）第41.4条规定：“诉讼当事方应有机会要求司法机关对最终行政裁定进行审查，并在遵守一成员法律中有关案件重要性的司法管辖权规定的前提下，至少对案件是非的初步司法裁决的法律方面进行审查”。为了符合TRIPS协议的这一规定，我们建议对上述两个条款添加司法审查程序。例如，相关安排已经体现在《专利法》（2008）第46.2条。该条规定：“对专利复审委员会宣告专利权无效或者维持专利权的决定不服的，可以自收到通知之日起三个月内向人民法院起诉。”

4. 对申请过程中提供不实信息的惩罚

虽然可以假定大多数申请人将在申请中诚实地提供信息，但是有些人可能不会这样做。我们建议在申请过程中采取惩罚措施以防止不诚信的申请行为。如果有证据表明在申请文件中有虚假陈述或隐瞒必要信息的行为，我们建议驳回申请（在形式审查期间）或撤销授权（在中国获得地理标志保护之后）。

结语

除了对《办法》的上述具体意见，我们还普遍关注外国实体在中国注册其地名作为证明商标或集体商标的措施。中国的许多贸易伙伴（例如美国，澳大利亚和新西兰）仅使用商标制度来保护地名。这些国家是中国重要的食品供应国。维持商标作为保护地名的一项制度至关重要，这会使得这些国家的企业愿意继续向中国供应商品，因为他们知道可以依照现有的法规来处理假冒产品。我们注意到中国多年来成功地维持了通过商标和特殊制度并行来保护地理标志的模式，其他一些国家也开始借鉴和跟随中国的模式，同时采用商标和特殊制度保护地理标志。另一个重要议题是，建立适当规则处理外国地名在中国市场上共存的问题，即如果同一地名在一些国家作为通用名称使用而在另一些国家作为地理标志使用，如何处理二者在中国市场上的关系。

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Acronyms

ACCC	Australian Competition and Consumer Commission
ANUCES	Australian National University Centre for European Studies
AOC	<i>Appellations d'Origine Contrôlée</i>
CAP	Common Agricultural Policy
CETA	EU-Canada Comprehensive and Economic Trade Agreement
EC	European Commission
EU	European Union
GI	Geographical Indication
IP	Intellectual Property
MFN	Most Favoured Nation
NZ	New Zealand
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
TMO	Trade Marks Office
TRIPS	Agreement on Trade Related Intellectual Property Rights
WTO	World Trade Organization