



The Australian National University,
1 Liversidge Street,
Acton
ACT 2601

Department of Foreign Affairs and Trade,
RG Casey Building
John McEwen Crescent
Barton ACT 0221 Australia

Objections to proposed GI names

Hazel V J Moir,^{*}
Adjunct Associate Professor
11 November 2019

Background

The Department of Foreign Affairs and Trade (DFAT) has called for public objections to names proposed by the European Union (EU) for Geographical Indication (GI) “protection” in Australia in the context of the proposed free trade agreement between Australia and the EU. The proposed process is onerous and is based on procedures for objecting to proposed trademark name registrations. As a consequence I lodge this overall objection on a range of grounds which extend beyond those specified for the formal objections process.

What the EU is asking for with its list of 172 food names and 236 spirit names – as well as prosecco and vittoria – goes far beyond the TRIPS Article 22 standard of protection for GIs currently available in Australia through certification trademarks.¹ A broader form of objection process is therefore necessary.

In bilateral treaties with other countries the EU has gained “protection” for listed GI names at the higher TRIPS Article 23 standard which prevents the use of geographic names with qualifiers such as kind, style or like. The EU’s proposals in the current context go much further in terms of the proposed restraints to trade.

TRIPS+ standards

In their negotiations with Australia the EU is proposing a much higher standard of “protection” – no direct or indirect commercial use or “evocation” of a protected name and restrictions on packaging (Article X.34).

^{*} The views in this submission are my own. While they are based on my academic work, they do not represent the views of any organisation or funding body. Any comments can be directed to hazel.moir@anu.edu.au.

¹ TRIPS is the Agreement on Trade Related Intellectual Property Rights (Annex 1C of the [Marrakesh Agreement Establishing the World Trade Organization](#), signed in Marrakesh, Morocco on 15 April 1994).

“Protection” in this context means a restraint of trade, and sits uneasily in the context of what is meant to be a free trade agreement. Further, TRIPS + proposals are highly contentious globally and act as an impediment to a return to a multilateral trading environment. There is no economic, social or cultural basis for this greater restraint on trade. It would prevent comparative advertising and, as Australian producers do not generally use GIs,² would act solely to advantage EU producers compared to domestic producers, thus potentially operating against the National Treatment principles of the World Trade Organization (WTO).

Objection 1: The proposals for TRIPS+ levels of “protection” (no “direct or indirect” commercial use or “evocation” of a protected name and restrictions on packaging – Article X.34) should be rejected.

The 2006 revisions to the EU’s GI regulations (Regulation 510/2006) introduced various changes which undermine the integrity of EU GI policy and pose significant problems for trade partners in dealing with names proposed for GI “protection”. The two relevant here are:

- i) the use of non-geographic names as GIs (eg feta, fontina); and
- ii) allowing the raw materials for certain Protected Designation of Origin (PDO) names to come from a region well beyond that of the name on the label.

These new rules result in EU GI labels either contravening TRIPS principles or misleading consumers.

Non-geographic names

The essence of the TRIPS GI provisions is that protected names are names for geographic places – hence the identity of TRIPS Article 22(2)(b) with Article 10*bis* of the Paris Convention (1967). Names such as feta and fontina should be rejected as being outside the terms of TRIPS. Yet there is no provision in the formal objections procedure for such objections. There appear to be a number of non-geographic names in the EU’s proposed list of 172 food names:

- feta is a Greek/Italian word meaning slice
- fontina is not a place. The cheese actually comes from Aosta and should more properly be labelled “fontina d’Aosta”
- grana padano originating from the Chiaravalle Abbey (now in Milan), the production area is now the whole Po river valley – “the provinces of Alessandria, Asti, Biella, Cuneo, Novara, Torino, Verbania, Vercelli, Bergamo, Brescia, Como, Cremona, Lecco, Lodi, Mantova on the left bank of the Po, Milano, Monza, Pavia, Sondrio, Varese, Trento, Padova, Rovigo, Treviso, Venezia, Verona, Vicenza, Bologna to the right of the Reno, Ferrara, Forlì Cesena, Piacenza, Ravenna and Rimini, as well as the following municipalities of the province of Bolzano: Anterivo, Lauregno, Proves, Senale-S. Felice and Trodena” (from production specifications: p 3).
- montasio is hard to find on a map. Is it a place name or not? The origins of the cheese, in the 1700s, are the San Gallo Abbey in Moggio Udinese in the Fella River Valley (Udine province). It is now produced in Friuli-Venezia Giulia, Belluno, Treviso and parts of Padua and Venice provinces (production specification, Section 4).

Objection 2: All non-geographic names should be refused as they contravene the fundamental principles of the TRIPS Agreement, to which Australia is a signatory. There may be additional non-geographic names in the list of 172 food names.

² As at July 2019 only two Australian regions (Mornington Peninsula and Northern Rivers) have registered food GIs under the certification trademark system.

Misleading labels

Similarly, allowing raw materials to come from outside the region on the product label directly misleads consumers. Here it is important to note that new EU regulations on labelling the origin of the primary ingredient in food³ will be voluntary *and will not apply to foods with a GI registration*. Given that the essence of the GI system is identifying the place of origin this seems extraordinary. However, once one realises that the origin rules for all Protected Geographical Indications (PGIs) are minimal, and that raw materials for PDOs can come from a broad area, it is clear that this exemption is designed to protect the markets of registered GI products, notwithstanding the consequent deceit with respect to consumers. Examples of products which fall into this category and which are proposed for “protection” in Australia are:

- Bresaola della Valtellina the raw material is from Brazil not Italy⁴
- Prosciutto di Parma the pigs can be bred up to 600 kms away⁵
- Schwarzwälder Schinken the product specifications do not specify the origin of the pigs, though the wood used for smoking must be from the Black Forest
- Lübecker Marzipan there is nothing in the product specification as to where production takes place
- Jijona ingredients are from Alicante, Castellon and Valencia, though production and packaging takes place in Jijona (product specification)
- Asiago product specifications say milk comes from, and production takes place in the mountain areas of the provinces of Vincenza, Trento, Padua and Treviso. Asiago is a small town in Vincenza
- Taleggio Taleggio is a commune in the province of Bergamo. The production specifications identify production as coming from the “provinces of Milan, Pavia, Lecco, Como, Lodi, Novara, Bergamo, Brescia, Cremona and Treviso”. The production area thus extends from west and north of Milan through to Treviso, just north of Venice – a very extensive area compared to the small commune of Taleggio, with its population of under 600.
- Gorgonzola Gorgonzola is a small metropolitan town outside Milan. Approved production area is broad - 15 provinces (see production specification).
- Queso Manchego Production specifications do not specify where production should take place, instead focusing on the type of sheep (Manchego breed) from which the milk should come. La Mancha is a very large area. There does not seem to be a place called Manchego – a basic requirement for a GI. Indeed it is highly questionable whether this name should be allowed as a GI, as Manchego is an animal breed name.

³ https://ec.europa.eu/info/news/commission-adopts-new-rules-labelling-origin-primary-ingredients-food-2018-may-28_en;https://www.lexology.com/library/detail.aspx?g=14bccb9c-00bf-452e-93b7-78d5824495a3; and European Parliamentary Research Service, 2018, *Mandatory origin-labelling schemes in Member States*, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKewjChe3br971AhUPbn0KHUv9CnYQFjAEegQIAxAC&url=http%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2FBRIE%2F2018%2F625182%2FEPRS_BRI\(2018\)625182_EN.pdf&usg=AOvVaw1TRYZHedgdgQgLpBxKn4yl](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKewjChe3br971AhUPbn0KHUv9CnYQFjAEegQIAxAC&url=http%3A%2F%2Fwww.europarl.europa.eu%2FRegData%2Fetudes%2FBRIE%2F2018%2F625182%2FEPRS_BRI(2018)625182_EN.pdf&usg=AOvVaw1TRYZHedgdgQgLpBxKn4yl).

⁴ See Zappalaglio, A., 2018, *The why of geographical indications: the transformation of the link between the product and its place of origin in Europe*, PhD thesis, Somerville College, Oxford: pp 263-4.

⁵ Own calculations, using Rome2Rio.com and Consortium production specifications.

- Roquefort The production specifications state that the milk can come from 560 departments of France. Clearly the idea that the cheese comes from Roquefort is misleading.
- Parmigiano Reggiano The defined geographic origin is “the Provinces of Bologna to the left of the Reno River, Mantua to the right of the River Po, Modena, Parma and Reggio in the Emilia Region” (production specification, Section 4). The name Reggiano is therefore misleading as the cheese does not come from the town of Reggio Emilia but from the very large region of Emilia-Romagna.

Objection 3: All names that mislead consumers as the product does not come from the place on the label should be refused – the Australian government should not be complicit in misleading Australian consumers. There may be additional listed names to those identified above. The EU should be asked to check the production specifications carefully and advise all other names where the labels are inaccurate and thus misleading.

Generic names

The original 1992 EU regulation (Regulation 2081/92) on GIs required the EC to develop a register of generic names. This requirement was dropped in the 2006 revisions to the regulations. Although in 1992 there were only 12 member states, there was no single name that all member states agreed was generic. However, a majority of members did agree that feta was a generic name.⁶

Since then the Korean government issued a side-letter (in 2011) about the EU-Korea FTA in which they re-assure the US government that a non-exclusive list of generic names contains at least the names grana, parmigiano, provolone, romano (“including their translation or transliteration”), as well as camembert, mozzarella, emmental, brie and cheddar.⁷ In 2013 a side-letter between the Singapore Minister for Trade and Industry and the European Commission indicated, inter alia, that “feta from other origins can coexist in perpetuity with the EU Feta geographical indication” clearly indicating that feta is a generic name.⁸

The list of names published by DFAT indicates that some names are already agreed as generic, including brie, camembert, edam, gouda and provolone. Common names – in a variety of languages – for cheese, meat, types of meat and some fruits are also agreed as generic, though farmhouse is not yet agreed as a common name. Some omissions are surprising. Kiwi – as in kiwifruit – is listed by Italy, but not yet agreed as a generic name, despite the fact that this Chinese-origin product has been marketed by New Zealand as Kiwifruit for decades. Other plant variety / animal breed names that are not yet agreed as generic are: moutarde (mustard), thym (thyme), mortadella, parmesan (parmigiano), reblochon and Manchego.

Cookbooks are an excellent source for identifying generic food names. Margaret Fulton’s 1983 *Encyclopedia of Food and Cookery*, for example, uses parmesan as a standard ingredient. For reblochon, even French recipes use reblochon as a variety name.⁹

Another important source on generic names are the EU’s Customs Tariff Schedules. While the EU argues that these should not be used as evidence of generic names, the fact that these specific tariff lines, and associated names, are designed to allow (in theory) the import into the EU of

⁶ Dev Gangjee, 2007, “Say cheese! A sharper image of generic use through the lens of Feta”, pp172-179, *European Intellectual Property Review*, 29(5): 175.

⁷ <https://ustr.gov/sites/default/files/uploads/pdfs/PDFs/December%202012/062011%20Kim-Kirk%20Letter%20on%20GIs.pdf>

⁸ https://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151779.pdf

⁹ See, for example, <https://www.recettes-gourmandes-de-joce.com/pages/sauces-chaudes-et-froides/sauce-au-reblochon-sauce-chaude.html> or <https://recettes.de/sauce-au-reblochon>.

such products, they clearly indicate that the names are for *types* of product, i.e. are generic names. Australia's tariff descriptors and previous bi-lateral trade treaties are a further source of information on generic names.

The EU Common Customs Tariff sets out duty rates for the import of different categories of cheeses.¹⁰ The list contains 10 names which are in the list of 172, but for which the EU has already agreed that the names are common / generic names.¹¹ But it also contains 14 names in the list of 172, which the EU has not agreed as generic names. We should accept this customs tariff evidence as sufficient to demonstrate that the following names are generic: Roquefort, Gorgonzola, Gruyère, Feta, Grana Padano, Parmigiano Reggiano, Asiago, Montasio, Fontina, Saint-Nectaire, Taleggio, Cantal, Kefalograviera and Kasserli. We should refuse to recognise these names as protected GIs.

Determining when a name is generic

In considering the generic names included in the published list, a comment on how to determine when a name is generic is essential. The EU has changed its own rules on this issue and now tries to significantly restrict the approach taken in other sovereign nations.

The case of feta clearly illustrates the problems with adopting the EU's approach. In the 2006 changes to the EU GI regulations, the requirement that registered names be geographic was dropped and the approach to determining when a name was generic was changed. Before this the European Court of Justice (ECJ) had refused to confirm feta as a registered GI name (Gangjee, 2007). The ECJ then decided that if some consumers considered the name not generic this trumped other consumers who considered the same name generic. The fact that feta was a generic name in the UK, Denmark, France and Germany was set aside, as was the long tradition of producing feta in those countries. Indeed feta was imported into Greece until 1987 (Gangjee, 2007: 175). These pieces of evidence are not mentioned in the second ECJ case. The data used by the ECJ emphasised the large quantities of feta consumed daily in Greece, and referred to the very low average daily feta consumption in the rest of Europe. Yet Greece forms only a very small fraction of the European population and it may well be that consumption outside Greece outstripped consumption in Greece – not a matter considered by the ECJ. Nor did the ECJ consider the fact that a majority of EU member states had proposed feta as a generic name. This decision was contentious when it was made and remains contentious now.

Overall the EU and its institutions take a very expansive approach to GIs. Yet as GIs are a restraint on trade, it is more appropriate to minimise their reach. Australia places a strong emphasis on the importance of competition as a key driver of a thriving economy, and an expansive approach to IP privileges undermines this. Australia should therefore set its own standards for determining when a name is a common (generic) name, recognising the role European immigrants have played in developing Australian markets for products that originated from countries such as Italy and Greece.

The EU is asking Australia – as it did Singapore – to consider only whether a name is generic within national boundaries. This is one approach, but should not limit the evidence as to generic names in today's globalised world. A clear source of evidence on common names is Customs Tariff Schedules. So too are the international codes and standards. All this evidence must be used to assess what names are generic. Too low a standard will compromise Australian consumer choices and preference by anti-competitive bids from foreign producers.

¹⁰ EU Official Journal L282 (31 October 2017), <https://op.europa.eu/en/publication-detail/-/publication/fc31c796-bdcf-11e7-a7f8-01aa75ed71a1>

¹¹ Mozzarella, Emmentaler, Cheddar, Edam, Pecorino, Provolone, Gouda, Camembert and Brie.

There are also international codes and agreements setting out common names – the 1951 Stresa Convention and the Food and Agriculture Organization’s Codex Alimentarius. Although listing of parmesan in the Codex has been prevented by Italian/EU objections, side-letters to bilateral treaties confirm that parmesan is a common name.

A special mention must be made here of feta – to which I have objected above as not being a geographic name and thus as not meeting the TRIPS Article 22 requirement. In Australia consumers are used to a wide variety of types of feta – both in terms of the milk used and in terms of the national style. So in Australia, Greek feta is simply a style of cheese. South Cape dairies, for example, produce both Danish style and Greek style fetta as well as marinated and other specialty fettas.¹² Every supermarket of any size offers Danish and Australian feta in its delicatessen counter, and sometimes Bulgarian feta as well. There are distinct consumer preferences for different types of feta.¹³

Objection 4: All names of plant varieties (mustard, thyme, kiwi(fruit), prosecco) or animal breeds (Manchego) should be refused. In addition parmesan has been generic for many decades as a name for a *type* of cheese, reblochon and other cheese names listed on page 5 are also *types* of cheeses. Mortadella is well-known as a *type* of sausage/salami.

Trade treaties and consumer choice

The objective of trade treaties is to remove barriers to trade, thus increasing competition and expanding consumer choice. In contrast the objective of intellectual property restrictions is to reduce competition thus reducing the options available to consumers.

There are some listed names where acceptance of the EU’s proposals would severely reduce choices for Australian consumers. The most egregious of these is feta.

Australians currently have a wide variety of types of feta available to them. Indeed Australia is one place where EU member states can still sell their feta products as feta, rather than having to re-label it, to the confusion of consumers.¹⁴ Australians are used to having access to Danish fetta,¹⁵ Bulgarian feta, Persian feta and Australian feta as well as feta from Greece. Indeed any shop of any size selling cheese will always have Danish feta in the delicatessen counter attesting to its popularity among Australian consumers.

This full range of choices must continue to be available to Australian consumers after the conclusion of any treaty. Any provisions to provide “protection” for the word feta/fetta must not only exempt all current Australian producers from their impact, but they must also exempt all importers so that Australian consumers are not made worse off.

Objection 5: Any provisions to “protect” any name must not reduce the range of choices available to Australian consumers. That is, if “protection” is agreed there must be exemptions for not just for producers (as in CETA) but also for importers.

¹² <http://www.southcape.com.au/>

¹³ See *Choice*, 2014 (<https://www.choice.com.au/food-and-drink/dairy/butter-and-cheese/articles/feta-cheese-guide>).

¹⁴ Since the ECJ decision that feta was not a generic name in Europe, non-Greek producers have had to refer to it by other names, of which the basic descriptor is “white cheese in brine” – hardly an attractive marketing proposition. In Denmark, Danish feta is sold as “salad cheese”.

¹⁵ Spellings vary between feta and fetta.

Cost-shifting

Australia has a perfectly good system for protecting GI names – certification trademarks. This system is used by a number of EU consortia with registered GI names. The EU’s negotiating demand to provide GI “protection” with no fee payment and no collection of data is unreasonable. The bid for no fees simply shifts costs from foreign producers to domestic taxpayers and should be resisted. Requiring no data for a privilege which constitutes a restraint of trade is at complete odds with Australia’s National Competition Policy¹⁶ principles and our long-standing pro-competition culture as evidenced by the Productivity Commission.

The following names are some of those where the relevant producer consortium already has, or sought, trademark protection in Australia and where the bid for special “protection” therefore simply constitutes cost-shifting:

- Gruyère certification mark application filed May 2017 (in addition Gruyere is a place in Victoria)
- Asiago Consortium has a certification mark and a regular trademark; it has applied for a second certification mark for the word Asiago, and this is currently being opposed
- Grana Padano Consortium has 4 certification marks, 2 collective marks and 2 individual trademarks.
- White/Blue Stilton Consortium has a certification mark for Stilton
- Pecorino Romano Consortium has a certification mark
- Pecorino Toscano Consortium has a certification mark
- Mozzarella di Bufala Campana Consortium has a certification mark
- Piave Consortium has a certification mark
- Provolone Valpadana Consortium has allowed its certification mark to lapse
- Taleggio Consortium has an individual trademark
- Montasio Consortium has a certification and collective mark
- Gorgonzola Consortium has 2 certification marks
- Roquefort Confederation has an individual trademark
- Parmigiano Reggiano Consortium has 4 certification marks and one individual trademark
- Prosciutto di Parma Consortium has 11 registered marks (certification, collective and individual)
- Prosciutto di San Daniele Consortium has an individual trademark
- Prosciutto Toscano Consortium commenced process for a certification mark but never completed it

Objection 6: All names where the producer association has or has attempted to obtain a relevant certification or individual trademark should be rejected as simply trying to obtain Australian subsidies for their business operations.

Miscellaneous objections

Gruyère: Gruyere is a small town in country Victoria. While there is currently no cheese produced there commercially, the request to “protect” Gruyère per se should be refused. Requests to “protect” French Gruyère or Swiss Gruyère as compound names could be considered.

Reblochon / Reblochon de Savoie: reblochon should be agreed as a generic name (see above), but there are no reasons to object to the compound name Reblochon de Savoie.

¹⁶ <http://ncp.ncc.gov.au/pages/about>

Vacherin du Haut-Doubs / Mont d'Or: there is an Australian trademark for Le Duc Vacherin and this should not be compromised.

Καλαμάτα (Kalamata): there are a range of existing trademarks with the name Kalamata.

Scotch Beef: in Australia there is a cut of beef referred to as Scotch fillet. Registration of the name Scotch beef would cause confusion and should be rejected.

A final comment

Although the EU claims GI “protection” for the listed names on the grounds of protecting consumer interests, it is clear that the actual motivation is commercial advantage. Comparing listed GI names between EU treaties indicates a “pick and choose” attitude demonstrating that the EU’s fundamental goal is to take a greater share of the markets so painstakingly built up by European emigrants over past decades. Australia places far fewer limits on EU agricultural exports to Australia than the EU does on Australian agricultural exports to the EU. So EU producers are already able to gain a substantial share of Australian cheese and meat product markets. Providing anti-competitive privileges to allow them to compete on privileged terms compared to domestic and third country producers runs directly contrary to Australia’s strong beliefs in competition principles.