

Understanding EU Trade Policy on Geographical Indications

Hazel V. J. MOIR^{*}

This article explores European Union (EU) policy on geographical indications (GIs) as expressed in the outcomes of EU trade negotiations. This empirical approach provides a factual basis about the GI deals which are acceptable to the EU. Across the EU's six recent Global Europe treaties the EU has achieved a good degree of success in obtaining strong-form GI rights (no use of -like, -style qualifiers on labels) for a number of specific products. The article also identifies GI outcomes in recent treaties driven by US negotiating demands. While US-driven treaties prioritize a trademark approach to GIs, they also allow for coexistence with EU-style strong-form GIs. Comparing these two sets of outcomes provides useful insights for future EU trade negotiations, such as the proposed Transatlantic Trade and Investment Partnership (TTIP) with the US or the proposed Free Trade Agreement with Australia and New Zealand. In particular the Canada-EU Comprehensive Economic and Trade Agreement (CETA) shows how the interests of domestic cheese and meat producers can be protected while allowing for strong-form GI privileges for a reasonable number (163 in CETA) of listed product names.

1 INTRODUCTION

While the European Union (EU) and the US are allies in most areas of intellectual property (IP) policy, they are sharply at odds when it comes to geographical indications (GIs). GIs were a critical area of dispute in the Uruguay Round negotiations, and have been one issue stalling Doha Development Round negotiations.

This article explores EU GI policy as expressed in the outcomes of EU trade negotiations. This empirical approach provides a factual basis about the GI deals which are acceptable to the EU. The article also identifies GI outcomes in recent treaties driven by US negotiating demands. Comparing these two sets of outcomes provides useful insights for future EU trade negotiations, such as the proposed Transatlantic Trade and Investment Partnership (TTIP) with the US or the proposed Free Trade Agreement with Australia and New Zealand.

^{*} Adjunct Associate Professor at the Centre for European Studies, College of Asia and the Pacific, The Australian National University, Australia. Email: hazel.moir@anu.edu.au.

Two of the three areas of trade conflict in respect of GIs are in relation to food products: the extension of strong-form GIs to all food products, and claw back of a small set of specific geographic names which have become generic in some countries. This article focuses only GIs for foods. It does not deal either with wine/spirit GIs,¹ or with GIs for non-agricultural products.²

Section 2 briefly reviews what GIs are and their stated rationales. Section 3 presents information on the use of GIs for agricultural products and foodstuffs in the EU, using data on major GI use, by country and by product type. The focus of section 4 is the outcomes the EU has achieved in its recent *Global Europe* trade treaties.³ To date treaties have been concluded with Korea, Central America, Colombia and Peru, Singapore, Canada and Vietnam.⁴ All include significant sections on GIs, and the EU has claimed precedent-setting wins in the Canada-EU Comprehensive Economic and Trade Agreement (CETA).

The GI outcomes in the recently concluded Trans-Pacific Partnership Agreement (TPPA) negotiations are considered in section 5. As the US was the major player in drafting this text, the GI policy expressed in the TPPA allows identification of key points of difference from the EU approach. Finally, in section 6, attention is turned to the implications for GI negotiations in future EU trade agreements, particularly TTIP and the potential agreement with Australia and New Zealand. These two proposed treaties will involve two different but strongly held approaches to the issue of GIs. The outcomes from existing EU treaties, particularly CETA, suggest that these differences can be overcome.

¹ The EU has achieved many of its wine/spirit GI objectives by trading improved market access for agreement that EU GIs will be recognized and respected. The EU website lists twenty-six bilateral wine agreements, including with all five of the major countries where, through previous emigration from Europe, a substantial wine industry has developed, using European traditions, techniques and terminology (US, Australia, New Zealand, South Africa and Chile) (http://ec.europa.eu/agriculture/wine/third-countries/index_en.htm). The issue of a compulsory register for wines and spirits is well covered by Das 1074–1075 (2015).

² The EU is clearly considering extending GI labelling to non-agricultural products (<http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/>) and France has already introduced such legislation (http://www.inta.org/INTABulletin/Pages/France_7015.aspx). Although GIs reward tradition and history and are a communal-based form of protection against competition, the apparent alignment of interest between many developing nations and the EU on GIs does not stand up to scrutiny. Hughes (2016) uses three case studies to demonstrate that GIs are of quite variable value in promoting agricultural products from lower income countries to overseas markets. Frankel (2011) shows that GIs are not effective in allowing indigenous communities to harness traditional knowledge innovatively for their own development.

³ These are the treaties negotiated after the European Commission (EC) announced a new approach to globalization (European Commission (2006)).

⁴ http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_other-countries.

2 GIS AND THEIR RATIONALE

To begin, a brief discussion of GIs is needed. This term is a new concept introduced in the Trade-Related Intellectual Property Agreement (TRIPS).⁵ It is a naming right that can be claimed for products where product characteristics derive from a specified geographic region. TRIPS provides two norms for GIs.⁶ The standard GI privilege (TRIPS Article 22) provides the right to exclude others from using the geographic name in a manner which misleads the public. Article 23 provides a stronger form of privilege for wines and spirits – qualifiers (like, type, style) are not allowed on labels. Thus, even if the public is not misled, under Article 23 a product may not be described as ‘burgundy-style wine, product of Australia’. Article 23 privileges are referred to here as strong-form GIs.

The stated economic rationale for GIs draws on economic theories about information asymmetries. Such theories were largely developed with respect to consumer durables (cars, fridges, etc.), where producers typically know far more about their product’s quality than do consumers.⁷ Consumer durables are infrequent purchases so information asymmetries can have a large impact on outcomes. For some such goods, a consumer can search existing information and end up well informed. But for experience or credence goods, search is less simple. Experience goods are those where the consumer actually needs to experience the product in order to be well informed. With credence goods, experiencing the good does not fully inform the consumer as to its provenance or quality. Credence attributes thus refer to qualities that cannot be directly observed, even during consumption.

Much of the GI literature suggests that consumers cannot determine the quality attributes of agricultural products, particularly those at the high end of the quality spectrum.⁸ But unlike consumer durables most food and drink purchases are regularly repeated events. An initial purchase will move a food product out of any experience goods information asymmetry situation. If the quality and taste align, and the consumer has a preference for the product, s/he will seek it in future purchases. The consumer confusion argument for foodstuffs thus centres on whether GI products are experience goods – even after consumption the consumer remains confused.

⁵ Das (2008).

⁶ TRIPS Art. 24 provides a wide range of exceptions to both standard and strong-form GI privileges. These protect, in perpetuity, the labelling rights of existing trade mark owners. They also provide that new GI registrations cannot prevail where a name has become generic.

⁷ For a clear and succinct presentation of these economic theories see OECD (2000), Annex 1.

⁸ See e.g. Bramley, Biénabe & Kirsten (2009) and OECD (2000). An important exception is Teuber (2011) who also provides a sound analysis of the empirical economic literature on GIs.

Thus while one strand of the EU GI argument is that authentic GI products have taste characteristics that differ from closely similar products produced in a different region, the other strand is that consumers may not be able to taste this difference. This is a conundrum. If the consumer cannot taste the difference then this suggests that *the quality of a GI product does not noticeably vary* between the GI region and non-GI regions. While this suggests that standard form GI labelling can be helpful, it does nothing to support policies requiring strong-form GI labelling. Even if the taste experience is identical, it is unclear how consumers will be confused if their cheese is labelled 'feta-style cheese, product of New Zealand'.

A different line of argument supporting GI policy is based on protecting producers from counterfeit goods, a role traditionally played by trademarks. Trademarks were designed to protect both producers and consumers, so that producers did not lose business unfairly and consumers knew the provenance of their purchases. GI policy has aspects which relate to the reputation of a particular product, thus raising issues of producer protection. This viewpoint suggests that there may be issues of dilution of the value of the GI name or misappropriation of the benefits flowing from using the name. Das, for example, considers that the absence of strong-form GI protection for foods 'enables competitors from outside of the region identified by such a GI to usurp the reputation of the GI, thereby diverting a considerable share of the market away from the legitimate right holders of the GI concerned'.⁹ Handler, however, questions such producer protection-based arguments, noting the lack of empirical evidence to support a view that standard-form GI labelling has a harmful effect on GI producers.¹⁰

Turning to the key agricultural policy question of whether GI labelling has increased the prosperity of farmers and/or of rural areas, the evidence is both piecemeal and mixed. Both Bramley and colleagues and Teuber review the available evidence.¹¹ One of the challenges for such studies is specifying the market structure – almost every form of market structure can be found for some GI products. Nonetheless the essential question is whether the protection from competition adds more to rural incomes than it takes from the negative impacts on competitors and at least some consumers. Callois found the potential of GIs to induce rural development to be highly qualified, with potential exclusionary effects.¹² Case studies from the EU's DOLPHIN project

⁹ Das (2008), 484.

¹⁰ Handler (2016), 19–20.

¹¹ Bramley, Biénabe & Kirsten (2009); Teuber (2011).

¹² Callois (2004).

show ambiguous results about the impact of GIs on rural development.¹³ In sum, the effectiveness of GI labelling is variable and contingent.¹⁴

The other clear conclusion is that few consumers are willing to pay a premium for a higher priced product – GI markets are small.¹⁵

3 GIS IN THE EU

The EU framework for the protection of GIs for foods was established in 1992,¹⁶ building on earlier systems in place in a just a few member countries. The system was revised in 2006,¹⁷ and again in 2012, following an evaluation of its impact.¹⁸ There are two different types of designation.¹⁹

- (1) Protected Designation of Origin (PDO): must be produced, processed, and prepared within the specified geographical area, and the product's quality or characteristics must be essentially due to that area; and

¹³ Tregear, Arfini, Belletti & Marescotti (2004).

¹⁴ This result is confirmed for Australia by van Caenegem, Drahos & Cleary (2015).

¹⁵ The London Economics (2008) evaluation of the EU GI System found that retailers reported only a very small proportion of their revenue was derived from GI products. Studies on consumer willingness to pay a premium for a premium product also indicate that there is a very small market for such premium products (Bramley, Biénabe & Kirsten (2009)). Such studies use a variety of methodological approaches. All face challenges in separating out different quality indicators, including the separate impact of GI labelling and trademarks. Some are restricted to consumers who are already aware of GI products, thus raising issues about bias. Teuber (2011) notes that many consumer studies unrealistically assume a uniform distribution of consumers with respect to quality. This naturally raises questions as to their policy value. There are also some data suggesting that a proliferation of GI names can so confuse consumers that they turn to products from a different country where such labelling is less used. Broude (2005) points to the falling market share of French wines in the UK in the face of increasing numbers of AOC names, suggesting consumer confusion. He also gives an example of Italian winemakers totally sidestepping the GI system in order to make, and successfully market, a new wine.

¹⁶ Council Regulation (EEC) No. 2081/92 of 14 July 1992, (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992R2081&from=EN>).

¹⁷ Council Regulation (EC) No 510/2006 of 20 Mar. 2006, incorporated changes required following the WTO dispute with Australia and the US and also dropped the requirement for a published list of generic names (see Profeta, Balling, Schoene & Wirsig (2009), 633). (<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l66044&from=EN>).

¹⁸ Regulation (EU) No 1151/2012 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=en>) followed a rather poor quality evaluation of the GI programme, largely because of the absence of relevant data. The EU's Impact Assessment Board considered that the added value of the GI schemes had not been demonstrated (European Commission staff (2010), 6 and http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2010/agri_2010.pdf).

¹⁹ A third type – Traditional Specialty Guaranteed (TSG) – is little used and so is not discussed here (Trichopoulou, Soukara & Vasilopoulou (2007), 424). TSGs simply protect a recipe, e.g. mozzarella.

- (2) Protected Geographical Indication (PGI): requires production, processing, *or* preparation in the geographical area, and the quality, reputation, or other characteristics to be *attributable to* that area.²⁰

The privileges provided by PDOs and PGIs are identical – competitors from outside the designated region may not use the name, even with clear qualifiers. While trademarks indicate *who* the producer is, GIs indicate *where* the product originates. EU GI privileges are stronger than trademark privileges in two ways: no one may use the GI name even for comparative purposes;²¹ and a later GI application is allowed to coexist with an earlier trademark, unless the trademark is well-known.²²

PDOs and PGIs have different histories. PDOs derive from the French Appellation d'Origine Contrôlée (AOC) system, introduced in 1919 after massive fraud in the selling of wine.²³ Its origins lie in consumer protection. The PGI system is German in origin, based on unfair competition laws and the judicial development of product reputation protection.²⁴

Combining PDOs and PGIs into a single system attenuates the *terroir*-based justification for the GI intervention. The PGI system has only a loose link to location, despite the formality that products must have 'specific quality, reputation or other characteristics attributable to that geographical origin'.²⁵ This reputational character of PGIs indicates a rationale of defending producer interests rather than preventing consumer confusion. The PDO system remains strongly linked to specific regions, though the link allows both 'inherent natural *and human* factors'.²⁶ For pre-May 2004 PDOs, some raw materials may be brought from a wider region provided their production conditions are specified in the regulation.²⁷ The *terroir*-based rationale for PDOs is substantially undermined by this exception calling into

²⁰ Art. 2 in Regulation 2081/92 and Regulation 1151/2012, and Art. 1 in Regulation 510/2006, emphasis added. See Evans & Blakeney (2006) for a more detailed discussion of the required attributes, and Gangjee (2015) for a discussion as to whether the regulatory regime actually ensures a close territorial link.

²¹ E.g. the slogan that Perrier is the champagne of mineral waters is now considered to bring champagne's reputation into disrepute (Hughes (2006), 437).

²² Evans (2010), 257–258.

²³ van Caenegem (2003).

²⁴ Gangjee (2006).

²⁵ Regulations 2081/92 and 510/2006, Art. 2(1)(b). See also Gangjee (2015).

²⁶ Regulations 2081/92 and 510/2006, Art. 2(1)(a).

²⁷ E.g. for Parma ham, the pigs must be 'Large White, Landrace and Duroc breeds, born and raised by authorized breeding farms' in ten Italian regions (http://www.prosciuttodiparma.com/en_UK/prosciutto/pigs). This designated area covers most of central and northern Italy – a substantially larger area than implied by the registered name Parma ham.

question the justification for GIs and risking their use for anti-competitive purposes.²⁸

European GI policy is administered by the Directorate-General for Agriculture and Rural Development. The EU is a net exporter of food and drink. Within the framework of the Common Agricultural Policy, the EU provides a range of market support measures, including a quality policy. The core of the quality policy is GI policy, whose two objectives are to guarantee quality to consumers (reducing consumer confusion) and to obtain fair prices for farmers.²⁹

A common goal for many agricultural producers is de-commodifying their products and thus gaining a higher return through providing a higher quality product. GI policy is one approach to achieving this. Others are organic farming and direct selling through markets and to restaurants. Compared to total agricultural output the demand for organic, GI or fair trade products is small.

A late 2012 consultancy report for the European Commission (EC) provides estimates of the value of GI output in 2010. On the basis of wholesale values GI-labelled products represented just 5.7% of total EU food and drink sector output.³⁰ The share of GI output was substantially higher only for cheeses (10%) and meat products (6%).³¹ Much of the GI production was concentrated by product and country. Of total GI foodstuff sales:

In 2010 more than the half of EU sales value (58%) was accounted for by Italian cheeses, Italian meat products, German beers and French cheeses. At the European level, Italian cheeses under GI (36 GIs) accounted for 22% of the total sales value in agricultural products and foodstuffs scheme; it reached 35% including Italian meat products (32 GIs).³²

It is clear that GI policy impacts on only a minority of the output from the European food industry. Further, the impact is highly concentrated, with most of the effect being due to a very small number of products – Italian cheeses and meat products, and French cheeses.³³ The

²⁸ A point particularly emphasized by Calboli (2015a, 2015b).

²⁹ Preamble to Regulations 1151/2012 at item 18, and preambles to Regulations 510/2006 and 2081/1992. See also https://ec.europa.eu/agriculture/quality/policy_en.

³⁰ Such data are not readily available, and in many cases had to be estimated from 'expert sources'. The report covers the then twenty-seven members of the EU (AND-International (2012): 4). This report does not provide comparable data for food alone.

³¹ *Ibid.*, at 52–54.

³² *Ibid.*, at 61.

³³ Beers are included with foodstuffs in the European GI regulation. Germany is the main contributor to beers with GI labels.

dominance of a narrow range of products is even clearer when data are analysed by Member State.³⁴

A substantial proportion of the 1,199 registered EU GIs as at 26 October 2016 are from just five EU countries – the ‘southern’ Member States – Italy, France, Spain, Portugal and Greece (Table 1). This is particularly the case for PDOs. Registrations from their domestic systems were transferred to the EU register when it opened in the early 1990s. All five ‘southern’ countries have been adding new registrations in the period since then, as have some other Member States. Since 2007 – after the first revision to the GI regulation – the share of registrations from other Member States has increased substantially, particularly for PDOs.

Table 1 European Foodstuff GI Registrations: Total and the 5 ‘Southern’ Countries

<i>Submission Date</i>	<i>PDOs</i>			<i>PGIs</i>		
	<i>Total</i>	<i>5 ‘Southern’</i>	<i>% ‘Southern’</i>	<i>Total</i>	<i>5 ‘Southern’</i>	<i>% ‘Southern’</i>
Pre-1993	370	322	87	281	212	75
1993–2006	116	97	84	155	102	66
2007–2012	96	11	11	181	85	47
All registrations	582	430	74	617	399	65

Source: Calculated from data downloaded from DOOR on 26 October 2016. Includes all registrations filed by the end of 2012 and ‘registered’. Excludes 17 non-European registrations.

These raw data need to be considered in perspective. Relevant benchmarks are the share of EU agricultural output, Gross Domestic Product (GDP) or EU population. The three right-hand columns of Table 2 provide summary indicators of whether a country has more or fewer GIs than would be expected simply on the basis of population, GDP or agricultural valued shares. A value over 1 indicates more registered GIs than would be expected, while a value under 1 indicates fewer registered GIs than expected.

³⁴ For France, GI production and export is dominated by wines and spirits, with GI foodstuffs forming only 15% of GI sales value (*ibid.*, at 28). For Italy, foodstuffs were 51% of GI sales in 2010 (principally cheeses and meats, *ibid.*, at 29). For Germany 39% of GI sales was beers and a further 20% from other foodstuffs, though total sales (EUR 5.7 billion) were small compared to France with EUR 20.9 billion).

The proportion of GIs owned by France is what one would expect if GI ownership were based solely on agricultural value added. Similarly Spanish GI ownership is only 10% higher than expected. Italian GI ownership is 50% greater than would be expected on the basis of the size of its agriculture sector, and 90% higher than expected based on population or GDP share (Table 2).

Table 2 Percentage Shares of GIs, GDP, Population and Agricultural Value Added

	Share of EU Total				GI Share of Food & Drink Industry, 2010 (%)	Over–Under Representation of GIs vis-à-vis Indicator		
	GIs by 2012 (%)	Population, 2012 (%)	GDP (PPP) 2012 (%)	Agricultural Value Added (Ag VA), 2000–2007 (%)		pop	GDP	Ag VA
Germany	7.0	16.0	20.0	10.6	3.8	0.4	0.3	0.6
France	18.0	13.1	14.0	18.3	14.5	1.4	1.3	1.0
UK	4.8	12.7	13.4	7.6	6.2	0.4	0.3	0.6
Italy	22.1	11.9	11.9	14.9	9.5	1.9	1.9	1.5
Spain	14.8	9.3	8.6	13.3	5.7	1.6	1.7	1.1
Poland	2.0	7.7	5.0	4.7	na	0.3	0.4	0.5
Greece	8.6	2.2	1.6	3.9	9.5	3.9	5.3	2.2
Portugal	10.9	2.1	1.5	2.0	8.3	5.2	7.1	5.6

Sources: GI data from DOORS (see notes to Figure 1), GDP and population figures from <https://knoema.com/> (accessed 7 July 2015); agricultural value added figures (for 2000–2007 in EUR millions) from London Economics, 2008: 52; share GIs in food and drink industry from AND-International, 2012: 24.

It is Portugal and Greece that are truly over represented in terms of GI ownership. These small economies have relatively large agricultural sectors, but even in terms of agricultural value added their share of GIs is high. The proportion of GIs owned by Greece is more than twice what one would expect based on the size of the agricultural sector; in Portugal it is over five times what one would expect. In contrast Germany, the UK and Poland are all substantially under-represented in terms of the share of registered names.

Given its large size and long tradition of using GIs, the proportion of food and drink industry sales from GI-labelled products is much larger in France than in any other country. In France 14.5% of food and drink sales is from GI-labelled products. This compares to 9.5% in each of Italy and Greece, the countries with the next largest food and drink GI sales.

What these data do not tell us is how important GI products are and to whom. There are few data on the number of producers involved in any registered GI.³⁵ While much of the literature and policy discussion on GIs implies that most GI producers are small, it is clear that for some product lines very large producers play an important role. Rangnekar, for example, points out that in a case study of Tuscan extra virgin olive oil less than 2% of certified production was by small producers.³⁶

Given the very small market share of GI products, why then are GIs such a salient trade issue for the EU? The vast bulk of GI foodstuffs are either consumed domestically (78%) or within Europe (16%).³⁷ With just 6% of GI foodstuffs selling on the international market – a mere 2% of European global foodstuff exports – the make-it-or-break it approach by EU trade negotiators to GI policy for food and agricultural products is hard to understand.

4 EU DEMANDS IN GLOBAL EUROPE TREATIES

It is with respect to GIs that the EU's IP trade demands differ most from the US. Within the IP chapters of the six *Global Europe* treaties, the length of the sections on GIs is second only to the length of the sections on IP enforcement. With the exception of the Central America treaty – which is far less prescriptive than the other five treaties – the GI sections are between 22% and 24% of the length of the IP chapter.

The EU's principal goals in negotiations on GI labelling of foodstuffs are:

- *sui generis* register-based systems;
- administrative enforcement; and
- strong-form protection for GIs for foodstuffs, with a particular emphasis on specific registered names (listed GIs).

³⁵ London Economics (2008): 107 provides data for total producers involved in all registered names for only six countries, and some of these data are partial. The *proportion* of all producers/processors involved in GI products is available only for France and Italy.

³⁶ Rangnekar (2004): 5. The AND-International study identifies that a small number of GIs contribute a large share of value – Champagne, Cognac, Scotch Whisky, Grana Padano and Parmigiano Reggiano (*ibid.*, at 19). These are all GIs where there are very large producers which may coexist with some smaller producers.

³⁷ *Ibid.*, at 62.

Of these, the most important appears to be strong form protection for foodstuffs.³⁸

Two of the EU's *Global Europe* treaties appear to require *sui generis* register-based systems.³⁹ Three have clauses specifying systems which sound like *sui generis* register-based systems. But the legal language used in treaties can mislead. From the treaty text it sounds like Korea agreed to such a system,⁴⁰ but the Korean Intellectual Property Office website clearly states that in Korea GIs are registered under the trademark system as collective marks.⁴¹ Canada also retains its trademark-based system for GIs.

The Andean treaty does not directly touch on this issue: it is far shorter and less prescriptive than the other five treaties and is silent regarding much of what is specified in the other treaties. The other five *Global Europe* treaties specify a range of requirements for transparent processes similar to the TRIPS approach. The remaining elements are all also very process oriented,⁴² a characteristic of most IP regulations. As such they are ideally suited to delivery of GIs through a trademark system.

Another EU GI priority is administrative enforcement – this shifts enforcement costs from individual rights-holders to the overseas taxpayer. A possible interpretation of some treaty text is simply that GI owners may use administrative processes to resolve disputes rather than requiring official authorities to enforce GI names. Thus while administrative procedures appear to have been achieved in both Korea and Canada, the EU has claimed neither as a precedent-setting win. In the Europe GI owners do not have to incur the expense or effort of enforcing their registered names. But an administrative enforcement process can simply mean a non-judicial process where it is still up to the rights-holder to take action.

Perhaps the most important EU goal in GI negotiations is strong-form GIs for foodstuffs, particularly for a small set of food names. The EU has gained strong-form protection for specific GI names listed in all six treaties. Except for Korea, and to a lesser extent Vietnam, the lists of protected names are much longer for the EU than for the other party (Table 3). The lists include names deemed to be generic in some countries. The EU has also gained recognition that later GIs can coexist with earlier registered trademarks, for GIs listed in treaty annexes. This has been particularly important in Canada where the registration of certain names as

³⁸ See Engelhardt (2015) for a further discussion of GIs in EU treaties.

³⁹ Central America and Singapore.

⁴⁰ Art. 10.18.6.

⁴¹ 'In the Republic of Korea, geographical indications have been protected as a collective mark under the Trademark Act (Act No. 7290) since July 1, 2005.' (http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=930002&catmenu=ek04_01_01#a3_2).

⁴² E.g. alignment of name and product standards, handling homonymous names, 10bis unfair competition protections.

trademarks had been a market impediment to firms such as the producers of Parma ham.⁴³ In this respect the EU has claimed a strong precedential victory in CETA.⁴⁴

But the outcome in CETA is, in fact, more nuanced. Certainly Canada undertakes to provide strong-form protection for most of the 171 foodstuffs listed in Annex 20-A, and indeed to provide for administrative action in respect of complaints for these names (Article 20.19.5). The protection does not extend to translations (Article 20.21.7). Strong form GI protection applies only to the listed GIs. While there are agreed procedures for adding new GI names to the protected list (Article 20.22.1), the 1,051 other currently registered EU GIs can probably not be added later (Article 20.22.2).⁴⁵ GI names cannot be added if they are identical to a registered trademark for a similar product, if they are customary names of plants or animal breeds or customary names for such products. The listed names have been examined, but it is unclear whether has been an opposition process.

Table 3 Global Europe Trade Treaties: Number of Listed GI Names

	<i>Korea</i>	<i>Colombia /Peru</i>	<i>Central America</i>	<i>Singapore</i>	<i>Canada</i>	<i>Vietnam</i>
EU wines	80	63	110	90	—	86
EU spirits	19	21	25	22	—	23
All EU wines/ spirits	101	82	135	112	—	109
All partner wines/spirits	1	1	2	0	—	0
EU foods	60	34	88	82	171*	62
Partner foods	63	3	8	0	0	38

Source: Treaty documents from EU website.

* The December 2015 CETA draft listed 173 names. Annex 20-A of the 5 July 2016 Council Proposal for the agreement lists only 171 names.

CETA excludes a small number of the listed GI names from strong-form protection. The cheese names Asiago, feta, fontina, Gorgonzola and Munster can continue to be used indefinitely by those using these names at 18 October 2013. These

⁴³ Das (2015), 1081. Das indicates that similar problems have also been found in other countries.

⁴⁴ European Union (2014), 14–15.

⁴⁵ The text says such GIs shall not ‘in principle’ be added.

rights are transferable to new owners (Article 20.21.2). Businesses not using these names at 19 October 2013 have a perpetual right to use the names, provided appropriate qualifiers are attached (-like, -style, etc.) (Article 20.21.1). In regard to the meat product Nurnburger bratwürste, similar provisions apply to those using the name before 18 October 2008, including transfer of these rights on sale. But for those using the name after 18 October 2008, there will be a five-year period after which use of the name will cease (Article 20.21.3). For Jambon de Bayonne and Beaufort similar exceptions apply for those using the names before 18 October 2003 (Article 20.21.4). For a further five product names,⁴⁶ there are continuing rights to register trademarks using the names. Thus of the 171 listed names, only 163 have full EU-style strong-form protection.

Overall the CETA outcome seems a pragmatic exchange of increased GI protections for a limited number of names in exchange for improved agricultural access to the European market. In general Canadian trademark owners are protected, especially with regard to a small number of important cheese and meat product names. There are similar carve-outs in the Vietnam agreement. The limited number of GIs for which strong form protection was granted confirms that in fact, for trading purposes, only a small number of names are important in EU trade negotiations.⁴⁷

The US claims that normal registration and opposition processes do not occur with respect to lists of GI names agreed in EU trade treaties.⁴⁸ This does not appear to be consistent with the texts as regards examination. As regards opposition, it is unclear whether such processes have been applied to listed names, though they clearly apply to any subsequent application by a registered GI organization. The only treaty with a significant number of partner names is the Korean treaty. Here the EU did institute opposition processes before the treaty was signed.⁴⁹

For all the *Global Europe* treaties new trade mark applications will not be approved if they use the same name as a registered GI. But they all include protections for existing trademarks, including trademarks that had been applied for before any newly agreed GI regulations come into effect. Canada has also specified that *any new GI names cannot be the same as existing trademarks*, so the agreed coexistence in the CETA is limited to the listed GI names.

⁴⁶ Valencia Orange (also Orange Valancia and Valencia), Black Forest Ham (and Jambon Forêt Noire), Tiroler Bacon (and Bacon Tiroler), parmesan and St George cheese (and Fromage St-George(s)).

⁴⁷ See the Attachment for the names listed in Annex 20-A of CETA. The differential treatment of listed names and other registered EU GIs potentially raises equality problems, 'one of the fundamental constitutional principles of the EU' Engelhardt (2015), 794.

⁴⁸ Das, e.g. claims that mutual recognition of GI lists creates 'automatic' recognition beyond TRIPS requirements, implying that examination processes are not invoked (2008).

⁴⁹ As at late Oct. 2016 the GIs in *Global Europe* treaties for partner countries do not appear in the DOOR register. This raises the question of how partner countries can ensure that their GIs are respected in Europe.

Other safeguards that appear in most treaties are that:

- there is no obligation to register a GI if, given a reputed or well-known mark, it would be misleading;
- customary and generic names can continue to be used, although an identical GI can also be registered;
- plant variety or animal breed names cannot be registered as GI names; and
- personal names can continue to be used.⁵⁰

As most registered GI names are unrecognized outside their region of origin,⁵¹ unwitting future trespass is unlikely given that geographic names are generally not allowed for trademarks.

Data on GI production and export for 2010 show that GI foodstuffs are only 2% of total European foodstuff exports.⁵² Indeed the vast bulk of GI food is consumed domestically and most of the rest is exported only within Europe.

The major disagreement between the EU and the US over GIs is in respect of a very limited number of names – in 2003 the EC tabled a list of forty-one key GI names, of which nineteen were for foods. These nineteen products, shown in Table 4, comprise thirteen cheeses, four meats and two miscellaneous products.⁵³ CETA saw the EU claiming victory in regard to GIs, yet Canada retained perpetual name use rights for makers of certain cheeses and meat products, including four cheeses on the EU's key GI list. These four cheeses gained only standard GI protection in both Canada and Vietnam. A further seven names from the EU's key GI list did not gain any GI protection in Canada (see Table 4).

As one might expect from any negotiation, the final outcomes are compromises. For CETA, the gains in agricultural market access were quite limited.⁵⁴ For GIs the outcomes were also a compromise. The EU gained strong form protection for 163 GI names, while Canada retained perpetual rights over a small number of critical names for cheese and meat products. Over 1,000 registered EU GI names are excluded from strong form protection. The GI gains need to be assessed against the continuing quota limits for trade in cheeses.

Considering all six of the recent EU treaties, the EU is progressing well in its GI agenda. All the agreements include key processing elements. All provide

⁵⁰ All the *Global Europe* treaties require continued registration in the home country, for GI protection to continue in the overseas country. All provide for the continuation of all existing trademarks.

⁵¹ Josling, e.g. finds that '[m]any names protected by GIs would not be recognised in other parts of the same country, let alone in other member states of the EU'. (Josling (2006), 360).

⁵² AND-International (2012), 19.

⁵³ European Commission (2003).

⁵⁴ 'Nowhere in the agreement is there any significant dismantling of protectionist measures in agriculture.' Kerr & Hobbs (2015), 446.

strong-form GI protection, though only for a limited list of agreed names. The EU has gained strong form protection for all nineteen key food names in both Singapore and Korea. But in Vietnam only fifteen of the key names gained strong form protection, and in Canada only eight.

The EU has also gained at least some form of administrative enforcement in all these treaty partners. How this will work in practice remains to be seen.

Table 4 The EU's Key GI List: Outcomes in Korea, Canada and Vietnam

<i>GI Name</i>	<i>Degree of 'Protection' Provided to European Registered GI</i>			
	<i>Singapore</i>	<i>Korea</i>	<i>Canada</i>	<i>Vietnam</i>
Asagio	SF	SF	LF	LF
Comté	SF	SF	—	SF
feta	SF	SF	LF	LF
fontina	SF	SF	LF	LF
Gorgonzola	SF	SF	LF	LF
Grana Padano	SF	SF	SF	SF
(Queso) Manchego	SF	SF	—	SF
Mozzarella di Buffala Campana	SF	SF	SF	SF
Parmigiano Reggiano	SF	SF	SF	SF
Pecorino Romano	SF	SF	SF	SF
Queijo São Jorge	SF	SF	—	SF
reblochon	SF	SF	—	SF
Roquefort	SF	SF	—	SF
Mortadella Bologna	SF	SF	SF	SF
Prosciutto di Parma	SF	SF	SF	SF
Prosciutto di San Daniele	SF	SF	SF	SF
Prosciutto Toscano	SF	SF	SF	SF
Azafrán de la Mancha	SF	SF	—	SF
Jijona y Turrón de Alicante	SF	SF	—	SF

Notes: LF – limited (i.e. standard) protection (existing users exempted, new producers can use name with qualifiers);

SF – strong form GI protection (cannot be used even with qualifiers)

– not mentioned in list of GIs to be protected.

5 GI POLICY AS EXPRESSED IN THE TPPA

While GI issues are – if measured by the length of the articles – the second most important issue in EU treaties, this is quite different in the TPPA. In the six *Global Europe* treaties, the average length of the GI text is 22% of the ‘IP’ total – only the enforcement sections are longer at 27% of the text. The officially released TPPA IP chapter runs to 25,510 words – two and a half times longer than the average in EU IP chapters. Again enforcement is the dominant issue, taking 34% of the TPPA IP text. But GIs take only 9.5% of the text.

While it now appears that the TPPA may not proceed,⁵⁵ the fact that it was principally drafted by the US provides the most up-to-date insight into US demands with respect to GIs. The TPPA specifically allows that GIs can be protected either through a trademarks system or a *sui generis* system.⁵⁶ It specifies various procedural issues, including for direct applications, to ensure transparent and clear rules and provide for processes to check the status of an application. Strongly emphasized are processes for opposition, cancellation and revocation. In fact the bulk of the GI text is about opposition processes. Objection/opposition must be allowed if the proposed GI is likely to cause confusion with a pre-existing pending or registered trademark, or if it is a customary term (i.e. is a common name in the country) (Article 18.32). Interested parties must also be allowed to seek cancellation on these grounds. The applications processes must not be ‘overly burdensome’ (Article 18.31). Countries must allow the possibility of cancellation if the GI no longer meets the required conditions for registration. Where there is a *sui generis* system, judicial competence to deny registration on the same grounds as required for opposition must be allowed. Equivalent objection processes are required if GIs are allowed on transliterations. There are guidelines for determining when a term is customary (Article 18.33), including when the GI is a multi-component term. GI protection cannot be earlier than the filing date. If GIs are recognized under an international agreement, there must be procedures for publication and for oppositions (Article 18.36). Other TPPA signatories must also be informed.

Agreed GIs lists in earlier international agreements are not subject to the above procedures. Nor are any wine or spirit GIs. In respect of later international

⁵⁵ Given the withdrawal of the US, the TPPA cannot proceed – Art. 30.5 clearly states that entry into force is dependent on original signatories forming at least 85% of combined GDP in 2013. Without the US, this condition cannot be met. Nonetheless, the other eleven participants are actively seeking a path to implementation.

⁵⁶ Art. 18.30. But it also requires that GIs must be able to be protected as trademarks (Art. 18.19). In fact some of the treaties seem to have quite different systems and standards of ‘protection’ for listed GIs and for other GIs, which may explain the apparent conflict.

agreements, a minimum requirement is allowing for oppositions, including on translations and multi-component terms.

The TPPA procedures thus allow for coexistence with provisions in bilateral EU treaties. While they clearly specify the priority of pre-existing trademark rights, they do not absolutely rule out the coexistence of later GIs and earlier trademarks.

6 IMPLICATIONS FOR THE NEXT GENERATION OF EU TREATIES

The EU's major current trade negotiation is the proposed TTIP with the US.⁵⁷ The EU has also approved negotiations for a treaty with Australia and New Zealand. As the US, Australia and New Zealand all currently take a highly sceptical approach to GIs, the negotiations might be expected to be difficult. US interests, in particular, have been highly critical of the outcomes in the CETA.

The prohibition on the use of qualifiers attached to registered names (the essence of strong-form GIs) lies at the heart of the disagreement between the New and Old Worlds on GIs. In this respect the EU can clearly point to a victory in Canada. But it may not be able to gain a similar victory in the TTIP negotiations with the US. Calboli suggests that standard GIs could be a driving force for increased innovation and value-adding in agricultural products. By allowing comparative marketing, standard form GIs create an environment that encourages competition – a major driving force for innovation. Strong-form GIs do not generate such a competitive environment. Further there is potential for strong-form GIs to operate in an anti-competitive manner.⁵⁸ Calboli suggests that strong-form naming prohibitions may contravene international human rights norms (freedom of expression) and important US legal principles regarding freedom of commercial expression.⁵⁹

The core issue for negotiation for countries such as the US, Australia and New Zealand is thus whether the anti-competitive elements of strong-form GIs for a limited number of products are a make or break issue. Canada has used exceptions for the most critical of these names to reduce the impact of strong-form GIs on its domestic producers. Canada has also ruled out strong form GI recognition for over 1,000 registered EU GIs. The EU has proposed a similar approach for the TTIP.⁶⁰

If one considers names from CETA's Annex 20-A – names such as Bremer Klaben, Sierra Mágina, Bleu d'Auvergne, Cotechino Modena, Lentille verte du Puy, Lardo di Colonnata, Queijo Serra da Estrela or Gouda Holland – does a prohibition on using these names with qualifiers really amount to a significant

⁵⁷ Though as of early 2017 this appears indefinitely stalled.

⁵⁸ Moir (2015).

⁵⁹ Calboli (2015b), 407–408.

⁶⁰ European Commission (2015).

commercial disadvantage for domestic producers in the US, Australia or New Zealand?

Some names are specifically identified in CETA as having only standard protection – Asiago, feta, fontina, Gorgonzola, Munster, Nurnberger bratwürste, Jambon de Bayonne and Beaufort. But the treaty is silent on other important names – names that are seen as generic in other countries. These include names such as Gouda, Edam, Roquefort, parmesan, mozzarella and Brie. Such names thus remain open for general use in Canada, despite the fact that most of them are place names.

The CETA outcomes thus suggest that, if the issue is approached pragmatically, the EU can achieve strong-form protection for a number of specified names – between 100 and 200 based on recent treaties. CETA also suggests that names which have become generic can be treated in a manner that does not conflict with existing trade mark practices – for example they can simply not be mentioned in the treaty. The perpetual right to use names such as feta for existing businesses and feta-style for new businesses is an important safeguard for domestic producers. Overall, then the issue of GIs should not be a significant impediment to concluding the proposed new treaties.

But to further facilitate the success of GI negotiations between the EU and New World countries, two important principles need to be re-emphasized. The importance of not granting trademarks for geographic names has been clear since the entry into force of TRIPS. While generally upheld, there have been exceptions such as the Darjeeling lingerie brand in France and the King Island Dairy mark in Australia. Equally important, however, is that GIs not be registered for names that are not geographic. The best known example of this is feta – an Italian word meaning slice. It is not reasonable to ask countries without GI traditions to minimize potential trespass unless GI names are limited to geographic names.

As regards evidence – or the lack thereof – of the economic value of GI labels it is interesting to speculate as to the relative costs of seeking trademark registration in major markets compared to the cost of negotiating GI provisions in a series of bilateral trade treaties. Given the low value of global trade in GI-labelled foods, the whole exercise of seeking treaty recognition for a limited number of such products appears an expensive endeavour. Perhaps GI negotiations would be facilitated if some real data on the costs of alternative approaches to protecting the EU's key food names were available. Perhaps New World national dairy associations should offer to assist European dairy exporters to register trademarks as an alternative to fighting over GIs? Perhaps New World cheese producers should place increased emphasis on developing their own specialty cheeses?

ATTACHMENT: GI NAMES IN CETA ANNEX 20-A

(sorted by product class and country)

Cheeses: (50)

Denmark: Danablu; **Germany:** Hessischer Handkäse, Hessischer Handkäs; **Greece:** feta*, Kefalograviera, Graviera Kritis, Graviera Naxou, Manouri, Kasseri, **France:** Brie de Meaux, Emmental de Savoie, Morbier, Epoisses, Beaufort***, Maroilles, Marolles, Munster*, Munster Géromé, Fourme d'Ambert, Abondance, Bleu d'Auvergne, Livarot, Cantal, Fourme de Cantal, Cantalet, Petit Cantal, Tomme de Savoie, Pont-L'Évêque, Neufchâtel, Chabichou du Poitou, Crottin de Chavignol, Saint-Nectaire, **Italy:** Provolone Valpadana, Taleggio, Asiago*, fontina*, Gorgonzola*, Grana Padano, Mozzarella di Bufala Campana, Parmigiano Reggiano, Pecorino Romano, Pecorino Sardo, Pecorino Toscano, **Portugal:** Queijo Serra da Estrela, Queijos da Beira Baixa, Queijo de Castelo Branco, Queijo Amarelo da Beira Baixa, Queijo Picante da Beira Baixa, **Netherlands:** Gouda Holland, Edam Holland

Fresh and processed meats (35)

Germany: Nürnberger Bratwürste**, Nürnberger Rostbratwürste, Schwarzwälder Schinken **Spain:** Guijuelo, Jamón de Huelva, Jamón de Teruel, Salchichón de Vic, Llonganissa de Vic, **France:** Canards à foie gras du Sud-Ouest: Châlosse, Canards à foie gras du Sud-Ouest: Gascogne, Canards à foie gras du Sud-Ouest: Gers, Canards à foie gras du Sud-Ouest: Landes, Canards à foie gras du Sud-Ouest: Périgord, Canards à foie gras du Sud-Ouest: Quercy, Jambon de Bayonne*** **Italy:** Cotechino Modena, Zampone Modena, Bresaola della Valtellina, Mortadella Bologna, Prosciutto di Parma, Prosciutto di S. Daniele, Prosciutto Toscano, Prosciutto di Modena, Speck Alto Adige, Südtiroler Markenspeck, Südtiroler Speck, Culatello di Zibello, Garda, Lardo di Colonnata, **Hungary:** Szegedi téliszalámi **Portugal:** Chouriça de carne de Vinhais, Linguiça de Vinhais, Chouriço de Portalegre, Presunto de Barrancos, Salpicão de Vinhais

Oils and fats (23)

France: Huile d'olive de Haute-Provence **Greece:** Kalamata olive oil, Kolymvari Chanion Kritis Olive Oil, Sitia Lasithiou Kritis Olive oil, Olive Oil Lakonia, Baena **Spain:** Sierra Mágina, Aceite del Baix Ebre-Montsía, Oli del Baix Ebre-Montsía, Aceite del Bajo Aragón, Antequera, Priego de Córdoba, Sierra de Cádiz, Sierra de Segura, Sierra de Cazorla, Siurana, Aceite de Terra Alta, Oli de Terra Alta, Les Garrigues, Estepa **Italy:** Veneto Valpolicella, Veneto Euganei e Berici, Veneto del Grappa

Fruits, nuts, vegetables and cereals (including olives) (22)

Greece: Elia Kalamatas, Konservolia Amfissis (olives), Fassolia Gigantes Elefantes Kastorias, Fassolia Gigantes Elefantes Prespon Florinas (vegetables)

Germany: Spreewälder Gurken (vegetables) **France:** Lentille verte du Puy (vegetables), Pruneaux d'Agen, Pruneaux d'Agen mi-cuits (fruits) **Italy:** Arancia Rossa di Sicilia, Capperio di Pantelleria, Kiwi Latina, Mela Alto Adige, Südtiroler Apfel, Pesca e nettarina di Romagna (fruits), Lenticchia di Castelluccio di Norcia, Pomodoro di Pachino, Radicchio Rosso di Treviso (vegetables), Riso Nano Vialone Veronese (cereals) **Portugal:** Pêra Rocha do Oeste, Ameixa d'Elvas, Ananás dos Açores/S. Miguel, **Romania:** Magiun de prune Topoloveni (fruits)

Confectionery and baked products (7)

Cyprus: Loukoumi Geroskipou **Germany:** Aachener Printen, Nürnberger Lebkuchen, Lübecker Marzipan, Bremer Klaben **Greece:** Masticha Chiou **Italy:** Ricciarelli di Siena

Miscellaneous other products (11)

Czech Republic: České pivo (beer), Žatecký Chmel (hops) **France:** Huile essentielle de lavande de Haute-Provence (essential oils), Huîtres de Marennes-Oléron (fish) **Germany:** Hopfen aus der Hallertau, Tertiärnanger Hopfen (hops) **Greece:** Krokos Kozanis (spices) **Sweden:** Kalix Ljörom (fish) **France:** Piment d'Espelette (spices) **Italy:** Aceto balsamico Tradizionale di Modena, Aceto balsamico di Modena (vinegar)

Source: CETA, Annex 20-A available at <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-5/en/pdf#page=2> (accessed 11 October 2017)

Note: There are special arrangements for items with ★ ★★ or ★★★ – these all involve reduced levels of 'protection'.

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