Geographical indications: EU policy at home and abroad

DRAFT

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Abstract

The European Union (EU) has been the principal driver of policy of geographical indications (GIs). This paper considers how GI policy is implemented within the EU and what are the key features the EU seeks in its trade treaties. Comparing EU demands and outcomes with the GI outcomes in the Trans Pacific Partnership Agreement (TPPA) provides some insights into this aspect of trade negotiations for the foreshadowed agreement between the EU and Australia and New Zealand.

This is still a draft. I plan to search for more data on traded GI products and on exactly how GI provisions work in CETA.

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1. Introduction

As is well known the European Union (EU) takes a substantially different approach to geographical indication (GI) policy than does the USA. This conflict is one reason why multi-lateral trade negotiations stall. This was a critical area of dispute in the Uruguay Round negotiations, and has also been one key issue stalling the Doha Development Round negotiations (Das, 2015). At some point it will be necessary to resolve these differences.

As a contribution to this goal, this paper explores the meaning and practice of GI policy as expressed through domestic EU policy and the EU's trade demands for GIs. This allows a clear consideration of where there are conflicts with the USA/Australian approach to indicating origin through the use of trade marks. The EU GI policy was introduced some 25 years ago, and there is now some information available about its positive and negative impacts. Based on available research and legal cases, it is possible to identify whether EU GI policy itself stands in need of reform. It is also possible to identify the issues where there is the greatest conflict between EU GI policy and the approach of countries such as the USA and Australia.

The EU experience with GIs needs to be separated into experience with wine and spirit GIs and experience with GIs for agricultural products and foodstuffs. By and large the EU has been able to achieve its GI objectives for wines and spirits by trading improved market access for agreement that EU wine and spirit GIs will be recognised and respected. The EU lists on its website 26 countries with which it has bilateral wine agreements.[1] These include all five of the major countries where, through previous emigration from Europe, a substantial wine industry has developed, using European traditions, techniques and terminology (USA, Australia, New Zealand, South Africa and Chile). Given that there are few remaining issues with respect to wine and spirit GIs, these are not further considered in this paper.

Another issue beyond the scope of this paper is GIs for products other than food and agricultural products. It is here where there is an alignment of interest between many developing nations and the EU. GIs differ from all other forms of "intellectual property". They do not reward creativity or inventiveness. They reward tradition and history. Further, they are a communal-based form of protection against competition, rather than one that is based on individual ownership. These characteristics suit many traditional products outside agriculture, and a number of countries thus see GIs as a means of protecting many types of traditional products from cheap imitations. The EU is clearly considering extending the GI system to non-agricultural products.[2] As there is as yet little actual experience of non-agricultural GIs, this is also beyond the scope of this paper.

The paper focuses on GIs for agricultural products and foodstuffs. This is where the greatest conflict lies between the EU policy approach and that of countries which prefer a trademark approach to indicating origin.

Section 2 presents information about how GI policy for agricultural products and foodstuffs has unfolded in the EU, since its first introduction in 1992. This section looks at where the major GI use occurs, by country and by product type. It also looks at the insights legal disputes

[1] http://ec.europa.eu/agriculture/wine/third-countries/index_en.htm (accessed 5 June 2016).

[2] http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/. France has already introduced legislation to create GIs for non-agricultural products – see http://www.inta.org/INTABulletin/Pages/France_7015.aspx.

have provided as to how European GI policy actually works. The 2008-10 evaluation of GI policy also throws light on how EU policy makers approach changes to GI policy.

In Section 3 attention is turned to the outcomes the EU has achieved in its *Global Europe* trade treaties.[3] To date treaties have been concluded with Korea (signed October 2010), Central America (June 2012), Colombia and Peru (July 2012), Singapore (October 2014), Canada (August 2014) and Vietnam (December 2015).[4]

Section 4 brings together the key information and analysis from Sections 2 and 3 to provide an overall assessment of EU GI policy for agricultural products and foodstuffs. This discussion focuses on areas where there is greatest conflict with a trade mark approach to indicating origin and areas where there are few issues.

Section 5 moves to consider the GI outcomes in the recently concluded Trans-Pacific Partnership negotiations. Given that the USA was the major player in this pluri-lateral agreement, the GI policy expressed in this treaty allows identification of key points of difference from the EU approach. It should be noted, however, that two TPPA members – Korea and Vietnam – have recent trade agreements with the European Union. This suggests that any apparent conflict between EU and US approaches in the TPPA must be manageable. The final issue considered here is the implications for the proposed trade agreement between the EU and Australia and New Zealand.

2. EU domestic policy on GIs

The EU framework for the protection of GIs for foodstuffs was established in 1992,[5] building on earlier systems in place in a few member countries. The system was revised in 2006 following a WTO dispute with Australia and the USA.[6] It was revised again in 2012,[7] following an evaluation of its impact.[8] There are two different types of designation:

- 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' (Evans, 2006); and

[3] The European Commission (EC) announced a new approach to globalisation in 2006 ({European Commision, 2006 #477}). In this the EC emphasised that it remained committed to multilateralism and the World Trade Organization (WTO) in trade treaties, but that it also needed to move forward with bilateral trade treaties in the absence of multilateral progress. These post-2006 treaties are referred to as the *Global Europe* treaties.

[4] http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_other-countries, for agreements with Korea, Columbia and Peru and Central America; http://ec.europa.eu/trade/policy/in-focus/ceta/ for Canada, http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/ for Singapore and http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409 for Vietnam.

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

[6] *Council* Regulation *(EC)* No 510/2006 of 20 March 2006, also incorporated some other changes, including dropping the requirement for a published list of generic names (see {Profeta, 2009 #197}: 633). (http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/l66044_en.htm).

[7] 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 program, 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 #224}: 6 and http://ec.europa.eu/agriculture/quality/policy/quality-package-2010/ia-gi_en.pdf).

[8] XXX quality of evaluation.

- 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 (Evans and Blakeney 2006).[9]

While the privileges provided by PDOs and PGIs are identical – in neither case may a competitor from outside the designated region use the name, even with clear qualifiers – the registration requirements are very different. The privileges granted are that the registered name may only be used for products produced with the process specified as part of the registration. As expected this specification also includes where production takes place. This sounds very like the privileges granted by trademarks. However GI privileges go much further than trademark privileges in two ways. First, no-one may use the GI name even for comparative purposes – such as "Perrier is the champagne of mineral waters". Second, the GI name trumps the trademark, expropriating the trademark owner. I return to these important differences later.

PDOs and PGIs have different histories. PDOs derive from the French AOC system, introduced in 1919 after massive fraud in the selling of wine (van Caenegem, 2003). It's origins lie in consumer protection. The PGI system is German in origin, based on unfair competition laws and on judge-made development of product reputation protection, where production is linked to place (Gangjee, 2006).

Combining PDOs and PGIs into a single system attenuates the regional (*terroir*) based justification for the GI interventions. The PGI system has only a loose link to region, despite the formality that products must have "specific quality, reputation 1or other characteristics attributable to that geographical origin".[10] The distinguishing character of PGIs is that they bring ***reputation*** into play.[11] This reputational character indicates a far stronger basis in defending producer interests compared to reducing potential consumer confusion. While the PDO system remains strongly linked to specific regions, the link allows both "inherent natural ***and human*** factors".[12] For pre-May 2004 PDOs, some raw materials (live animals, meat or milk) may be brought from a wider region provided this is specified along with their production conditions and inspection arrangements.[13] The *terroir*-based rationale for PDOs is substantially undermined by this exception. The *terroir*-based rationale for PGIs is very limited.

The economic rationale for GIs

The alleged economic rationale for GIs is that consumers are not able to determine quality well. The economics literature on information asymmetries was largely developed with respect to consumer durables, where producers typically know far more about their product's quality than do consumers. For some 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.

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[9] A third type - Traditional Specialty Guaranteed (TSG) – is little used ({Trichopoulou, 2007 #170}: 424) and so is not discussed in this paper. Production originally had to have been established over at least 25 years (a requirement dropped in 2012). There must also be a geographic affiliation, but production need not take place in the specified locality. Effectively TSGs simply protect a recipe ({Giovannucci, 2011 #57}), for example mozzarella.

[10] Regulations 2081/92 and 510/2006, Article 2(1)(b).

[11] For a detailed discussion of the incorporation of the concept of reputation into the TRIPS definition of GIs and the implications for consistency with the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration see {Gervais, 2009 #194}.

[12] Regulations 2081/92 and 510/2006, Article 2(1)(a).

[13] For example, for Parma ham, the pigs must be "Large White, Landrance and Duroc breeds, born and raised by authorised breeding farms" in 10 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.

With credence goods, however, even experiencing the good does not fully inform the consumer as to its provenance or quality.[14] Drawing on this literature, the existing research on GIs is often based on the argument that consumers are not well placed to determine the quality attributes of agricultural products, particularly those at the high end of the quality spectrum.

Most food and drink purchases are regularly repeated events, a characteristic not always noted in the GI literature.[15] It may be the case that for some food and drink products consumers initially have little knowledge. But an initial purchase and trial will move that product out of the 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. In other situations consumers are well-informed through search – this is particularly likely to be the case with expensive wines and spirits, where there is an active market producing information for consumers, through wine reviews and general articles and books on food and wine.

The argument that these high-end products remain credence goods is based on the view that deception may well occur, *despite the lack of experienced difference in quality*. This argument applies to situations where the quality of a GI product does not noticeably vary between the GI region and non-GI regions. It also presumes that products will be labelled poorly, in such a way that their origin is unclear. The core of the EU argument on GIs is thus that even if the taste experience is identical, consumers will be confused if their cheese is labelled "brie-style cheese, product of Australia."

There are three different standards for GIs. The main type of GIs specified in the Trade-Related Intellectual Property Rights (TRIPS) Agreement are referred to here as "standard GIs". Standard GIs can co-exist easily with trademarks. Further, standard GIs allow the use of GI names for produce from other regions provided there are clear qualifiers such as "fetta-style cheese, product of Australia". TRIPS specified more stringent GI standards for wines and spirits. These are referred to here as GI-Plus – qualifiers such as -style, -like are not allowed. In the EU the privileges for GIs are even stronger than the GI-Plus standard. No "evocations" of the registered word are allowed in any circumstances. This type of GI is referred to here as GI-Super-Plus.

GIs as agricultural policy

European GI policy is administered by the Directorate-General for Agriculture and Rural Development. There are two stated objectives.[16] One sits firmly within EU agricultural policy – contributing to farmer and rural prosperity. The other is to reduce consumer confusion. As noted above the consumer confusion argument does not stand up to even the most basic scrutiny. Indeed, given that raw materials for certain PDO products can come from well outside the named region, there is an issue for these products as to whether the labelling is actually deceptive (Calboli, 2014). The fact that no minimum quantum of materials for a PGI need be from the region also suggests that the labelling may be deceptive.[17]

Why then are GIs designated as "intellectual property" policy rather than as agricultural policy? Certainly one can sympathise with agricultural producers faced with the large and increasing buying power of large distributors. Anything that will distinguish their products and allow them

[14] For a clear and succinct presentation of these economic theories see {OECD, 2000 #229}: Annex 1.
[15] See, for example, {Bramley, 2009 #81} and {OECD, 2000 #229}. An important exception is {Teuber, 2011 #121}, who also provides a sound analysis of the economic literature to date.
[16] Expressed both in the 1992 and 2006 Regulations (XXX add Article references).
[17] In Germany national courts raised concerns about the small proportion of local activity included in registration applications for PGIs, but the European Court of Justice (ECJ) did not responded to these concerns. The ECJ simply looked at whether correct procedures had been followed and did not address the content of the referral. XXX add citation XXX

to obtain a premium price for a premium product would be welcome. GI policy falls into such a category.

Studies on consumer willingness to pay a premium for a premium product indicate that there is a very small market for such premium products (Bramley, 2009). This is confirmed in the London Economics evaluation of the EU GI System which found that retailers reported only a very small proportion of their revenue was derived from GI products (London Economics, 2008).

This does not mean that GIs are have no role. For certain products and producers GIs can play an important role and increase revenue and returns. But Callois (2004) found the potential of GIs to induce rural development to be highly qualified, with potential exclusionary effects. Case studies from the EU's DOLPHIN project show ambiguous results about GI impact on rural development (Tregear, 2004). Whether GIs are effective as agricultural policy depends on market conditions and consumer preferences. Further, GIs appear to work effectively only once a product's reputation has been established. Using a case study approach van Caenegem and colleagues demonstrate that, under the right conditions, GIs can be used to establish regional benefits, giving the example of the Queensland Granite Belt (van Caenegem, 2015). But they question whether GIs are effective in achieving such outcomes except in particular conditions.

A substantial proportion of the 1,188 registered EU GIs as at 6 July 2015 are from just five EU countries – the five "southern" member states, Italy, France, Spain, Portugal and Greece (Figure 1). 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. Newer registrations of PDOs have led to a fall in the southern countries' share of all EU PDO registrations, but not for PGIs.

Figure 1 Registered GIs over time: total and the 5 "southern" countries

XXX insert graphic - totals registered over time and share of 5 southerns.

Source: Calculated from data downloaded from DOOR on 6 July 2015. Includes all registrations from EU members filed by the end of 2012 and having "registered" status. This excludes 29 registrations filed in 2013 and granted unusually quickly and 17 from non-EU countries.

When these registration data are assessed in terms of relevant benchmarks – such as share of EU agricultural output, GDP or EU population – the dominance of some of these countries gains perspective. Italy, France and Spain together have 55 per cent of GIs and 48 per cent of agricultural value added. The three right-hand columns of Table 1 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.

On an agricultural value added basis, 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 per cent higher than expected. Italian GI ownership is 50 per cent greater than would be expected on the basis of the size of its agriculture sector, and 90 per cent higher than expected based on population or GDP share (Table 1).

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.

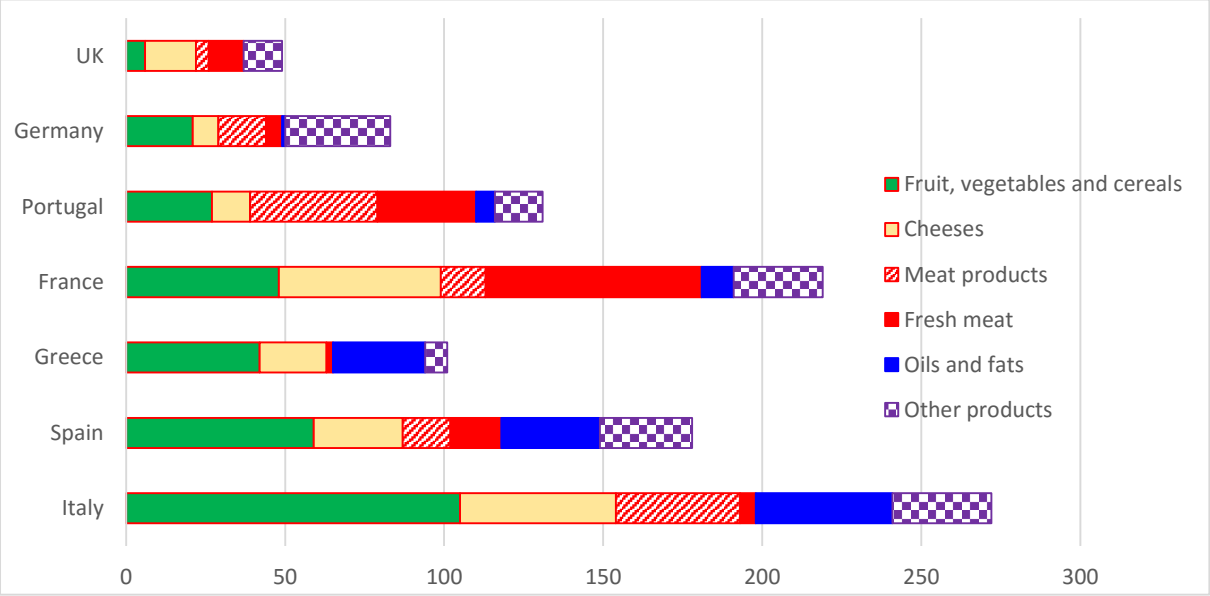
Table 1 Percentage shares of GIs, GDP, population and agricultural value added

	Share of EU total (percent)				Over-under representation of GIs vis-à-vis indicator		
	GIs by 2012 %	Population, 2012 %	GDP (PPP) 2012 %	Agricultural value added, 2000-07, %	pop	GDP	Ag VA
Germany	6.8	16.0	20.0	10.6	0.4	0.3	0.6
France	18.1	13.1	14.0	18.3	1.4	1.3	1.0
UK	4.6	12.7	13.4	7.6	0.4	0.3	0.6
Italy	22.3	11.9	11.9	14.9	1.9	1.9	1.5
Spain	14.9	9.3	8.6	13.3	1.6	1.7	1.1
Poland	2.2	7.7	5.0	4.7	0.3	0.4	0.5
Greece	8.5	2.2	1.6	3.9	3.9	5.3	2.2
Portugal	11.0	2.1	1.5	2.0	5.2	7.1	5.6

Sources: GI data from DOORS (see notes to Figure 1), GDP and population figures from http://knoema.com; agricultural value added figures (for 2000-07 in €millions) from London Economics, 2008: 52.

The most important food types covered by registered EU GIs are fruit, vegetables and cereals (28 per cent), cheeses (19 per cent), meat products and fresh meat (24 per cent combined) and oils (10 per cent). Other product classes together form 19 per cent of registered GIs. As would be expected with a program based on agricultural products, there are some distinct national patterns to the types of products covered by registered GIs (Figure 2).

Figure 2 National differences in product type of registered GIs



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.[18] There are few data on the value of output,[19] and often output values are given without any context. Data on millions of PDO output are not useful without comparative data on total agricultural (and food processing) output.

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 two percent of certified production was by small producers (Rangnekar, 2004: 5).

Returning to the question of why GIs have been allowed to fall under the heading of "intellectual property", a likely answer is that they would not otherwise survive competition challenges. "Intellectual property" is excluded from the key competition policy articles of the European Union.

The European Union GI experience: insights from case law

As the EU GI system for foodstuffs has now been in place for over 20 years, disputes over the underlying policy have occurred and these provide some insights into tensions between GI and other public policies, incuding trademark policy and that fundamental driver of the EU□s existence □ free trade and competition.

Trademark policy

Although the Community Trade Mark (CTM) policy was introduced just four years before GI policy, the safeguards of the CTM policy are not present in GI policy. Under the CTM policy any member state can object to a proposed registration, including on the grounds that the name has become common or generic in that country (Gangjee, 2007: 178). The CTM registration will then fail. However a registered GI trumps pre-existing trademarks, as the *Feta* case shows. Although feta is not a geographic name, the European Court of Justice (ECJ) upheld GI registration for feta in the face of evidence that, at least in some countries, it was a generic name. Long-standing producers in at least two other European countries, where feta ws a generic name, had to transition out of using the name feta on their equivalent product. Had such an impact occurred under the North American Free Trade Agreement, there would have been strong grounds for challenging the new policy on the grounds of investor expropriation using Investor-State Dispute Settlement mechanisms.

It is here that the EU approach and the US-style approach have the greatest conflict. The US-Style approach refuses to allow expropriation of trademark owners. But in the EU approach GIs trump trademarks. The issue of whether pre-existing trademark owners can be expropriated by the registration of a generic name is important in trade negotiations. As will be seen in Section 3 below, most EU bilateral trade treaties do allow for pre-existing trademarks to co-exist with subsequently registered GIs.

[move to ftnote: The initial EU GI regulation (2081/92, Article 3(3)) required the EU to publish a non-exhaustive list of generic names. While the Commission tried to produce such a list, it proved impossible to gain agreement. It was so contentious that the requirement for such a list was dropped from the 2006 regulations

[18] {London Economics, 2008 #225}: 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.

[19] Key additional data needed are the number (and percentage) of producers involved wholly or partly in GI production, the size of such producers and the value of GI output (not only in absolute terms but also as a proportion of the relevant output base). Even more important are data on the impact of GIs on profitability, and identification of the conditions under which GIs do or do not act as a catalyst for broader regional development.

(Profeta et al. 2009: 633). But it is interesting to note that the majority of member states proposed the name feta during the process of attempting to produce a list of generic names (Gangjee, 2007: 175).] XXX plus add feta citations XXX

Competition policy

The OECD interprets EU GI inspection rules as pro-competitive (OECD, 2000: 20). This is questionable. Inspection is about compliance with producer-drafted regulations, not whether these have unnecessary anti-competitive effects. In the GI context, producers association set the production rules for the proposed PDO or PGI. There appears to be no process of oversight or scrutiny, certainly none at the EU level. If there is competitive scrutiny at the national level before applications are forwarded to Brussels it is not evident. This applies to both the stages of production covered by the production rules and how the boundaries are set. The Parma ham and Melton Mowbray pie cases illustrate these issues.

Producers set the regional boundaries for a PDO or PGI. The UK Melton Mowbray pork pie case shows the lack of competition considerations in how regional boundaries are set. Melton Mowbray is a small English town and a particular style of pork pie has long been known as a Melton Mowbray pork pie. A group of five producers fairly broadly scattered around this town formed a producers' association and applied for a PGI. They specified a large area of central England, though this excluded those parts of the Midlands where another producer having some 28 per cent of the market was located. Naturally this excluded producer, Northern Foods, objected to the registration. The UK High Court rejected Northern Foods objection on the grounds that "European case law indicates that when considering the grant of a defined geographical area, the size of the area is immaterial". Indeed, if one reviews the EU GI regulations there are no criteria set out for drawing such regional boundaries it is simply up to the producers association to define these. ftnote: *Northern Foods Plc v DEFRA, Melton Mowbray Pork Pie Association* [2005] EWHC 2971. See {Evans, 2006 #73}: 588.

The losing party in the Melton Mowbray case, Northern Foods, has now built a new production facility within the designated region (London Economics, 2008: 81-82). The main losers from this decision may well be previous employees in the towns of Market Drayton and Trowbridge. On its face, the boundary-drawing exercise appears to have been specifically designed simply to exclude one major competitor from the market. The EU regulations do not require any check for such actions, leaving this matter entirely to member states. But as this case indicates, the UK appears to have no checks on potential anti-competitive impacts of proposed GIs. Perhaps it is time Member States considered introducing some economic screening for PDO or PGI registrations?

In the Parma ham case the *Consorzio Del Prosciutto Di Parma* (the Consortium) challenged the UK supermarket ASDA over the final stages in preparation of Parma ham for the market. ASDA argued that slicing and packaging was a trivial stage in production with no effect on the authenticity of the product. They argued that the claim was a restrictive trade practice and a quantitative restriction of exports prohibited under Article 29 EC (Rangnekar, 2004: 25-26). The Consortium argued that while the impact of PDO specifications might be equivalent to quantitative restrictions, this was justified in order to preserve the reputation of Parma ham. The ECJ agreed with the Consortium, noting that export restrictions based on protecting industrial and commercial property are justified. The Court did not assess whether slicing and packaging were legitimate parts of the registered process.

ftnote: *Consorzio del Prosciutto di Parma v Asda Stores Ltd* (C-108/01) [2003] 2 C.M.L.R. 21.

This is a major change in EU law since the *Sekt* case in 1975, when Germany s restriction of the names Sekt and Weinbrand to German sparkling wine and German brandy was held to

contravene Articles 28 and 30 of the EC Treaty. Gangjee reports that "the court suggested as obiter that *reputation-based indications of source did not fall within the industrial property exception*" (Gangjee, 2006: 305, emphasis added). This perspective was over-turned in 1992 in the *Exportur* decision, when the court found against French manufacturers who were using the Spanish names Alicante and Jijona for particular styles of confectionery. Because they were reputation-based products linked to a place of origin, the court held that use of these names fell within the safe-harbour provisions of Article 36.

The change in law is entirely attributable to the introduction of the GI regulations *and the classification of GIs as "intellectual property" rather than agricultural policy*. Achieving "IP" status for a policy instrument allows the policy to slip under the radar as far as competition policy is concerned. While the essence of the patent privilege is the grant of a strong anti-competitive policy power, other "IP" policy instruments are quite different in their nature. Trademarks, for example, have no anti-competitive impacts and hence have no need for exemption from competition principles. Perhaps it is time to review and modernise the blanket exemption from competition laws of "IP" policies?

Returning to the ECJ□s Parma ham decision, from an economic perspective, this is challenging. The ECJ largely looked at formalities issues, and in this case the formality was the disputed production stages specified in the PDO registration. Given this, they automatically fell under EU safe harbour provisions. But this leaves a major competition gap in the system □ an application for a GI contains no scrutiny process to ensure there are no unnecessary anti-competitive elements. In this case the Consortium has both been allowed to define an exceedingly large area from which to source its pigs, and an extension down the production chain which can have a major cost impact, as well as substantially lessening competition. Is such a sweeping monopoly necessary or justifiable? As the EU does not perform these checks, paerhaps Member States should?

3. EU demands in Global Europe treaties

It is with respect to GIs that the EU's IP trade demands differ most from the USA (Moir, 2015). 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 per cent of the length of the IP chapter.

The EU's principal goals in GI negotiations with other countries are:

- *sui generis* register-based systems;
- strong-form protection for all GIs (i.e. GI-Plus standards for all agricultural products and foodstuffs); and
- administrative enforcement.

Two of the EU's *Global Europe* treaties appear to require *sui generis register-based systems*. These are Central America and Singapore.[20] 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,[21] but the Korean

[20] Singapore has passed legislation which will come into force when the Treaty with the EU commences (http://www.wongpartnership.com/index.php/files/download/1259). At present the Intellectual Property Office of Singapore (IPOS) advises that GIs can either be protected as GIs or under the Trade Marks Act (http://www.ipos.gov.sg/AboutIP/TypesofIPWhatisIntellectualProperty/Whatisageographicalindication.aspx).Th is parallels the EU, with regulations governing both GIs and Community Trade Marks (CTMs). For a useful discussion of the relative merits of EU GIs or EU CTMs see Evans 2010.

[21] Article 10.18.6, http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/.

Intellectual Property Office website clearly states that in Korea GIs are registered under the trademark system as collective marks.[22] 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. As such, the Andean treaty is silent regarding much of what is specified in the other treaties. The Andean treaty does however cover a number of issues not mentioned in the others. These include extension of GI arrangements to non-agricultural products (two non-agricultural products are among the agreed protected names). The Andean treaty also specifies that there should be no misleading advertising, packaging or other practices, that there shall be no prejudice to rights already granted in other trade agreements, and details on co-operation on technical information and the publication of product specifications. The system agreed in the Andean treaty therefore sounds much more like EU domestic policy than that specified in the other five treaties, despite the far less proscriptive language.

The other five *Global Europe* treaties specify a range of requirements for transparent processes. Important among these are includes opposition and appeal procedures. This is similar to the TRIPS approach. The remaining elements are all also very process oriented,[23] a characteristic of most intellectual property regulations. As such they are ideally suited to delivery of GIs through a trademark system. The Korean and Singaporean agreements have the largest number of EU-specified elements in the agreed GI procedures.

All treaties, including the Andean one, list names that are to be recognised as GIs in the other jurisdiction (see Table 2).[24] These lists were subject to examination and opposition procedures in each country.[25] In all cases the lists of names are much longer for the EU than for the other party, and over time the EU lists have expanded. In the 2011 Korea agreement the EU listed 60 foods; in the 2013 Singapore agreement they listed 82 foods; and in the 2014 CETA the EU has listed 173 foods (see Table 5). However in the most recent treaty, with Vietnam, the EU lists only 62 food products. All six treaties include procedures for adding new GI names.

Table 2 GIs proposed in *Global Europe* trade treaties by each party

	Korea	Colombia /Peru	Central America	Singapore	Canada	Vietnam
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
EU foods	60	34	88	82	173	62

[22] "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, dated 20 February 2013 and accessed 22 February 2015).

[23] For example, alignment of name and product standards, handling homonymous names, 10bis unfair competition protections.

[24] Though the documents available as at December 2015 do not yet show GI name lists for Singapore or Canada.

[25] In general the treaties specify that opposition and examination procedures for listed GIs have already been completed or will be completed by the time the treaties come into force. As at late December 2015 no GIs listed in *Global Europe* treaties for partner countries appear on the DOOR register.

Partner foods	63	3	8	*	**	38
Total EU GIs	**161**	**116**	**223**	**194**		
Total partner GIs	**64**	**5**	**10**	*****		

* Despite completion in December 2012 and initialling in September 2013, as at late December 2015 Singapore had not yet tabled any GIs.

\# The EU-Canada Wine Agreement will apparently be rolled into CETA. Annex X.05 – Amendments to Wines and Spirits Agreements does not list any changes to already agreed wine and spirit GIs.

** None listed in the available draft.

Most agreements specify GI-Plus standards for the protection of listed names. That is qualifiers such as –like, -style may not be used. Canada has agreed to allow co-existence of EU GIs with pre-existing Canadian trademarks. The EU claims this as a strong precedential victory, as it "establishes for the first time in a "common law" country like Canada a deviation from the principle "first in time first in right"".[26] Das (2015:1081) indicates that prior to CETA, Italian producers of Parma ham could not sell Parma ham in Canada under that name as the trademark was owned by a Canadian company. This example shows why the EU has claimed a victory in allowing GI names to be registered even though similar trademarks already exist. But the conflicting GIs do not over-ride the trademarks as they do in the EU. In particular, Canada has grandfathered certain GI names, providing for perpetual rights for existing users of the names feta, asiago, gorgonzola, fontina and munster. New producers will also be able to use these names, but with qualifiers.[27] There are similar carve-outs in the Vietnam agreement.[28]

The US claims that normal registration and opposition processes do not occur with respect to lists of GI names agreed in EU trade treaties. xxx add ref xxx This does not appear to be consistent with the texts. It does however raise the issue of how agreement to allow GI names which are similar to existing trademarks has been achieved in CETA. This is an important issue - it lies at the heart of the dispute about different claims to "property" that can be valuable in marketing. All EU treaties provide safeguards with respect to well-known or reputed marks - GIs cannot be registered where these create opposition.

For all agreements 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 the 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 co-existence in the Canada EU Comprehensive Economic and Trade Agreement (CETA) treaty is quite limited in scope.

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; that customary and generic names can continue to be used, although an identical GI can also be registered; that plant variety or animal breed names cannot be registered as GI names; and that personal names can continue to be used. The Singapore agreement alone, specifies that if there is insufficient commercial activity, a GI can be cancelled. All require continued registration in the home country, for protection in the overseas country. All provide for the continuation of all existing trademarks.

[26] {European Union, 2014 #247}: 14-15.

[27] The Agreement also contains similar protections for the names of three meat products (Article 7.6).

[28] Asiago, Fontina and Gorgonzola can continue to be used by those using these names commercially before 2017. Similar arrangements apply to Feta, but only in respect of cheeses made from sheep's milk or sheep and goat's milk. For the name Champagne there is a transitional period of 10 years from the entry where the name can continue to be used by persons, including their successors, who used the name Champagne commercially.

The third EU GI priority is administrative enforcement – this shifts enforcement costs from individual rights-holders to the overseas taxpayer. This appears to have been achieved in both Korea and Canada, but as the EU has claimed neither as a precedent-setting win, there may be escape clauses.[29] Again there may be a difference in interpretation. In the EU GI system GI owners to not have to incur the expense of enforcing their registered name. But in countries such as Australia and Canada an administrative enforcement process can simply mean a non-judicial process where it is up to the rights-holder to take action.

4. Assessment of EU GI policy

In its 2008 evaluation, the EU side-stepped the issue of the potential anti-competitive effect of GIs. The Explanatory Memorandum provided to the European Parliament in the context of what became the revised 2012 regulation simply stated:

> "The policy also is in line with the priorities for the European Union … in particular the aims of promoting a more competitive economy, as quality policy is one of the flagships of EU agriculture's competitiveness" (European Commision, 2010: 4).

The line of this "logic" starts by positing that food quality policy is part of agricultural competitiveness policy. Different elements of food quality policy may, if combined with effective production and marketing processes, assist in competitiveness but there is not an automatic identity between food quality and agricultural competitiveness. The second element of the EU "logic" is that, as a consequence of the first presumption, GI policy contributes to promoting a more competitive European economy. The Parma ham and Melton Mowbray cases show that one cannot make such a presumption.

There are no safeguards within EU GI policy to ensure that the impact of any proposed GI will minimise any anti-competitive effects. It therefore cannot simply be assumed that the GI program promotes competitiveness. Such logic abounds in the IP field, but has little place in evidence-based policy. It should be noted that the EU's own Impact Assessment Board considered that the added value of the GI schemes was weak.[30] That is, no substantial evidence has yet been produced that GI policy is effective.

Indeed the staff paper accompanying the Explanatory Memorandum considers a number of options for reform, some of which are dismissed because one group or another objects. The most important option – one that would ease trade negotiations – is that of using Community Trade Marks. A down-side of this option is noted as being that CTMs would allow competitors to use the registered name "provided he [sic] uses them in accordance with honest practices in industrial or commercial matters" (European Commision staff, 2010: 33). Other important reasons for dismissing this option include complexity (i.e. trademark registration would be needed in each country), cost (of trademark registration and enforcing such trademarks) and the lower degree of privilege. Essentially the lower degree of privilege would mean that potentially infringing practices would not actually infringe if consumers were not mislead and the indication was used honestly.

While the legal cases considered above show clearly that current EU GI policy can have anti-competitive effects, the costs imposed on competing producers are marketing and re-labelling costs. These can be substantial, but they are also one-off, and systems for compensation could readily be designed. From a consumer perspective there are many alternative products, and if the price of a particular brie is too high, there are many alternative bries, or other cheeses, on

[29] The CETA wording is ambiguous and may simply allow GI owners to use administrative processes to resolve disputes rather than requiring official authorities to enforce GI names (Article 7.4).
[30] European Commision staff, 2010 : 6. See also EU Impact Assessment Board, 2010.

the market. As most registered GI names are unrecognised outside their region of origin, unwitting future trespass is unlikely given that geographic names are generally not allowed for trademarks.[31] Thus unlike other cases of anti-competitive conduct there is little negative impact on consumers but the possibility of a substantial negative impact on a small number of producers. These could be minimised by building into the registration process procedures to identify and exclude unnecessary anti-competitive impacts.

In Australia, for example, the processes for approving certification marks ensure that potential anti-competitive effects can be identified and rejected. The Australian Competition and Consumer Commission (ACCC) is required to examine the rules for a proposed certification mark "to ensure they are not to the detriment of the public, or likely to raise any concerns relating to competition, unconscionable conduct, unfair practices, product safety and/or product information".[32] Only after an application has passed ACCC scrutiny can it be granted an Australian certification mark.

Does Australia's certified mark system provide an effective means of providing reasonable protection for rural producers while not unduly limiting legitimate competition? Of the 474 registered certified marks at 18 December 2015, 116 were exclusively for agricultural products and a further 47 covered both agricultural and non-agricultural classes of goods. Another 41 certified marks for agricultural products were pending. Twenty-one of the registered certification marks and three of the pending applications were for wines. Very few of the registered marks for foodstuffs indicate a geographical area, and all of these are foreign registrations. Thus there are 12 Italian geographic marks registered, two each from India, Jamaica and the USA and one from the UK. There are no Australian registered certification marks for foodstuffs, though there are two pending – one from the Mornington peninsula and one from Hinchinbrook shire. Clearly overseas GI producers are using the system. Equally clearly there is – as yet – little demand from Australian producers. While there seems to be little interest among Australian producers in registering geographical indications, overseas producers are successfully using this process. In addition the registration processes ensure that unnecessary anti-competitive effects can be avoided.

The consumer confusion argument provides a rationale only for weak-form GI privileges – similar to those granted for trademarks, except that geographical names are specifically allowed. The producer reputation rationale is unconvincing as a justification for strong-form privileges. Further as actual EU GI policy allows substantial exceptions to the *terroir* rationale, one simply needs to recognise that the GI privileges are about agricultural policy. The intellectual property rationales do not hold up under scrutiny.

The ECJ GI cases also call into question the blanket exemption of "intellectual property" instruments from the core provisions designed to create a single market and prevent anti-competitive practices. At a minimum such provisions should extend only to uses of "IP" clearly directed to over-riding goals. But a further provision should require that such goals cannot be achieved in a less anti-competitive manner. The 2008-10 "evaluation" of GI policy totally side-stepped this issue. The almost complete lack of relevant or useful data allowed hypotheses – such as that a trademark approach would be more expensive – to be presented as fact. This complete unwillingness to undertake evidence-based assessment of a policy which the EU has placed at the centre of its trade negotiations is unthanks fortunate.

[31] Though there are exceptions. More importantly the EU GI regulations now allow the use of non-geographic names for both PDOs and PGIs.

[32] https://www.accc.gov.au/business/applying-for-exemptions/certification-trade-marks

The EU, in its current consideration of extending the GI system to non-agricultural products, might usefully focus on the two areas of major concern: potential anti-competitive effects and the breadth and strength of GI privileges. GI privileges for non-agricultural products that included absolute prohibition of name use, even with modifiers, might raise substantial marketing costs for existing producers. Similarly anti-evocation privileges extended over a wide array of products might increase rather than reduce consumer information.

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 percent of the "IP" total – only the enforcement sections are longer at 27 percent of the text. The officially released TPPA IP chapter runs to 25,510 words – two and a half times longer than the EU IP chapters. Again enforcement is the dominant issue, taking 34 percent of the TPPA IP text. But GIs take only 9.5 percent of the text.

The TPPA specifically allows that GIs can be protected either through a trademarks system or a *sui generis* system. 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. It requires that these application procedures not be "overly burdensome". Also required 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." Countries must allow the possibility of cancellation if the GI no longer meets the required conditions for registration. Where there is a *sui generis* sytem, 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 recognised under an international agreement, there must be procedures for making such proposed registrations public, and for oppositions. Other TPPA signatories must also be informed. If GIs have been recognised through a prior international agreement, then countries are not required to apply these procedures.

The TPPA procedures thus allow for co-existence with provisions in bi-lateral EU treaties. At the same time they clearly specify the priority of pre-existing treademark rights.

Turning to the vexed question of GIs in trade negotiations, the major disagreement between the EU and the USA over GIs is in respect of a limited number of names – 13 cheeses, four meats and two miscellaneous products. The recent Canada EU Comprehensive Economic and Trade Agreement (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. Other *Global Europe* treaties show that the EU has settled for more modest outcomes, though its CETA successes suggest it might now have a higher compromise point. Certainly CETA suggests that grandfathering provisions can be agreed for key GIs. But a critical issue for other New World countries who are considering preferential agreements with the EU will be the exact implications of Canada's agreement to "strong-form" privileges for foodstuffs, and just what are the implications of allowing GI registration where there are exiting trademarks.

A 2012 study of the GI market (European Commission, 2012) confirms that the majority of GI products are sold nationally. Of the total 2010 GI output of EUR 54.3 billion (5.7% of food

and drink sector output), 60% is sold domestically. A further 20% is intra-EU trade, leaving just 20% sold outside the EU. Wines and spirits dominate sales outside the EU. As there are already wine and spirit agreements with many major non-EU markets, again it seems that the real area of dispute affects only a small proportion of trade. Exports beyond the EU are largely from France, the UK and Italy, with wines and spirits dominating exports from France and the UK. For Italy, however, the main GI export earners outside the EU are Grana Padano and Parmigiano Reggiano. It is surely not beyond possiblity that, by focusing on the specific products at issue some sensible compromise could be reached.

The core of the New World objection to GI-Plus privileges could also be reduced by limiting EU GI privileges to those of Community Trade Marks. If EU GI policy followed Community Trade Mark procedures, the feta dispute would never have arisen, as the majority of member states consider feta to be a generic name. The EU has to date been unwilling to consider such an option, and indeed in the rather poor quality evaluation of their GI policy in 2008, dismissed this option on a range of political grounds. An interesting substantive comment in this rejection was that global TM registration would be too costly. This could be subjected to empirical evaluation. It seems likely that only a small number of GI products are traded globally. Do these involve large or small suppliers, and have these producers already taken out trademark protection in the countries to which they export? Empirical data on these questions might suggest that much of the disagreement has little real business impact.

The disagreement over GIs does however emphasise the importance of rejecting geographical names as trademarks. This is implicit in TRIPS Article 22(2)(a), but bears re-emphasis as some exceptions slip through. An interesting example is Australia's King Island Dairy, a trademarked name indicating a specific geographic provenance but one where, after a change in ownership, local farmers no longer receive a premium for their higher quality product (van Caenegem, 2015).

6. Implications for an EU/Australia/New Zealand treaty

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