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Restraining free trade? The EU's GI export agenda

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Restraining free trade: the EU's food export agenda

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Restraining free trade: the EU's food export agenda

Abstract

The European Union's Geographical Indications (GIs) policy is a substantial restraint on trade so actively works against the underlying principle of free trade agreements: that they promote competition and so enhance economic wellbeing.

There is no evidence that the GI system works to systematically increase producer income or regional prosperity in Europe (Török et al., 2020). Australia is far less densely settled and Australian dairies produce many cheese varieties not a single cheese type. Given these significant differences in production systems, importing ineffective European Union (EU) GI policy is unlikely to have any positive outcomes in Australia. Indeed the contrary is likely because of the restraint on trade and therefore competition.

Australia and the EU have been negotiating a bilateral trade treaty since 2018. As these negotiations draw to a close, it is timely to review critical GI issues.[1] Useful insights can be drawn from the outcomes in the EU's trade treaties with Canada and New Zealand.

Industry groups suggest costs to local producers range from a $220m fall in Gross Regional Product and an employment decline of 650-1,000 (McElhone, 2023) to re-labelling costs of up to $A2.9 billion for over 3,000 food products.[2] Simple consideration of the proposed restrictions indicates a substantial impact on domestic producers and a big impact on consumers, creating confusion if, for example, feta can no longer be called feta.

The evidence and analysis in this paper demonstrate that the Australian government should take a firm stand against privatising common food names such as parmesan, neufchatel and feta. In Australia these names refer to types of cheeses, not to places, and should remain available for all producers to use (in line with centuries old practice in trademark law). The government should also refuse to recognise as GIs names that are not geographic (feta, fontina etc). Nor should it approve names that are misleading as to the actual place of origin of the product (e.g. Bresaola della Valtellina, Prosciutto di Parma, Schwarzwälder Schinken). Transparent opposition processes, consistent with rights under trademark law, should be used for the 166 food GI names and 234 wine/ spirit names proposed by the EU.

Acceptance of an EU style GI registration system would impose small costs on taxpayers, but would not negatively impact Australian producers or consumers. Regional development efforts in Australia are best served by the existing certification mark system with broad product classes, consistent with to the distribution of Australian food producers. The existing system also ensures protection from anti-competitive elements through the role of the Australian Competition and Consumer Commission (ACCC).

Efforts to impose TRIPS-Plus[3] privileges for European producers – such as restrictions on packaging, evocation and bans on comparative advertising – should also be resisted. All have strong anti-competitive elements and thus go against important existing policies to promote competition in Australian markets.

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[1] This paper was written between the 14th and 15th rounds of trade negotiations between Australia and the EU (February 2023 in Canberra and April 2023 in Brussels). A short version (Europe's GI policy and New World countries) will be published in the *Journal of World Trade*, 57:6, December 2023 (Moir, forthcoming).

[2] https://www.afgc.org.au/news-and-media/2023/02/eu-fta-must-not-trade-away-australias-valuable-and-vital-food-manufacturers (all documents in this paper were accessed on or after 10 April 2023).

[3] Privileges beyond those in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

1. Introduction

Since 2006 the European Union (EU) has required that EU-style GI policy for foods be included in its bilateral trade treaties (European Commission, 2006; Engelhardt, 2015). All post 2006 EU trade treaties have substantial sections on GIs, but the content varies. GI negotiations with Asian countries are easy as there is no competition between the parties with respect to regional specialty names, so the EU has been successful in exporting its GI policies to these countries.

GI negotiations with countries such as Canada, New Zealand and Australia are more difficult, as emigrant Europeans have developed domestic markets for European style foods through the businesses they have built. Since 2015 the EU has ramped up its policy of exporting EU domestic policy through trade agreements (European Commission, 2015). The EU's GI demands in trade negotiations with Australia and NZ, commenced in 2018, are substantially greater than demands in earlier treaties and involve much greater restraints on trade. Acceptance of these EU demands would have a substantial negative impact on many Australian food producers.

The EU's GI demands are part of its push to use the powerful carrot of access to a market of nearly 450 million people[4] to export its domestic regulatory standards (Kerr, 2020). In 2018 the then EU President boasted that European trade agreements "help us export Europe's high [sic] standards for food safety, workers' rights, the environment and consumer rights far beyond our borders" (European Commission, 2018: 3).

GIs are about what things can be called. They are about *labelling, packaging and marketing*. Adopted when the EU's Common Agricultural Policy (CAP) was under severe criticism from its trading partners, the EU's GI agenda is designed to claw back food names that have become generic in countries with many European immigrants, such as Australia. This paper covers only GI names for foods as wine name issues were resolved through win-win negotiations in the 1980s.[5]

GIs are meant to be about the names of places from which specific products originate. Despite this, the EU GI Regulation allows registration **for names which are not geographic**. More importantly, the EU GI Regulation does not adequately oversight or monitor the relationship between the registered name and the place where the product is actually made – so many registered EU GI names actively mislead consumers (Gangjee, 2017). While EU officials and politicians often suggest that GIs are about food quality and safety, there is nothing in the GI regulation or its processes that is designed to achieve either goal, so such suggestions are misleading.[6]

This paper first describes how GI policy works in the EU, reviewing the size of the GI market and the available evidence on whether GI labels have any impact on producer income or regional prosperity (Section 2).

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[4] https://ec.europa.eu/eurostat/databrowser/view/tps00001/default/table?lang=en.

[5] GI negotiations over names for wines were not difficult for two reasons. The EU offered substantially increased access to European wine markets in exchange for changes to wine names. In addition names based on grape varieties were an obvious alternative. The EU is currently undermining this agreement with its determination to promote the grape variety name prosecco as a restricted GI name. Discussion of this unprincipled move is beyond the scope of this paper, but see Davison et al., 2019 and Battaglene et al., 2020. It should be noted that the GI registration system for foods includes beers.

[6] For example, the then EU Agricultural Commissioner Phil Hogan advised that registered GIs ensured high food quality and no harmful ingredients (Colloquium "Taking Provenance Seriously Will Australia Benefit from Better Legal Protection for GIs?", Bond University Centre for Commercial Law and Delegation of the European Union, Canberra, 12 February 2019). Section 5 of this paper discusses the limitations of the EU GI Regulation in ensuring truthful labelling. As regards food quality standards, it is producer associations who set all the standards for any GI – there is no GI regulatory requirement about food quality.

Against this factual background, Section 3 considers the key elements of EU's GI trade agenda and reviews its success in its post-2006 trade treaties. Section 4 then looks at differences in agricultural production systems between Europe and New World countries such as Australia to assess whether EU-style GI policy might be of benefit to Australian producers. This section also looks at the GI outcomes in the Canadian and NZ treaties with the EU, comparing these to the EU demand to Australia.

Section 5 addresses the issue of consumer information and clear product labelling. This section draws attention to inadequacies in EU GI policy – especially misinformation as to the actual origin of GI labelled products.

The final section of the paper assesses which elements of the EU's GI demands will damage Australia and which could be accepted without damage. As the benefits of any trade treaty will likely be small (and mostly in the unquantifiable services sectors), the risk of standing firm on basic principles of law and consumer protection, as well as protecting Australian producers from unnecessary restraints on trade seems low.

2. What does GI policy achieve?

How does GI policy work in Europe? The limited data on the volume of GI food production and consumption show that GI foods are only a very small proportion of the food market (some 7%). While some GI products increase net income for producers, many do not. There is no systematic analysis to determine the circumstances in which GI labelling will benefit producers and when it will not. Before addressing this issue in Section 2.3, brief information on the history of GI regulation in Europe is enlightening. So too is a consideration of any need for additional regulations to prevent fraud.

2.1 History and basis of EU GI regulations

The EU's GI system was adopted in 1992, towards the end of the Uruguay Round trade negotiations. At that time the EU's CAP was under attack by its trading partners because of its anti-competitive subsidies to producers for both domestic and export markets. It would also have, by then, been clear to EU negotiators that they would be unsuccessful in achieving their GI policy objectives in the TRIPS Agreement.[7]

EU GI policy for foods has two main components.[8] Protected Designations of Origin (PDOs) evolved out of the prior French and Italian wine registration systems.[9] The more informal Protected Geographical Indications (PGIs) concept was German in origin, with a strong reputational element but no specific link to *terroir* (Gangjee, 2006). The main users of EU GI policy today remain the original PDO system states, both in terms of the number of registered products and economic importance.[10]

The EU's GI program is managed by the Directorate-General, Agriculture and Rural Development (DG AGRI). The policy objectives of increasing net producer income and regional prosperity are aligned with this bureaucratic home. These are excellent goals,

[7] Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

[8] There is also a third – much less used category – Traditional Specialty Guaranteed (TSG). TSGs have no anti-competitive elements, so are not discussed further here. Any producer can use a registered TSG name, but must follow the registered traditional recipe. This protects food heritage without negative impacts on competition. Perhaps the most famous registered TSG is mozzarella.

[9] Appellation d'Origine Contrôlée (AOC) and Denominazione d'Origine Controllata (DOC) systems. Meloni and Swinnen (2018) provide a detailed history of early French and Italian wine GIs and stress the important role of producers in developing these.

[10] At the end of 2017 Italy, France, Spain, Greece and Portugal had 76% of the 1,357 registered PDO and PGI food products (own estimates from eAmbrosia). 70% of the total sales revenue from GI products in 2017 were from these five countries (AND-International, 2019).

though the evidence (Section 2.2) suggests GI policy is ineffective in achieving them. The EU's proposition that GI policy is also about reducing consumer confusion is the basis for making the delivery instrument an "intellectual property" issue and thus exempting it from the EU's competition principles.

The consumer confusion proposition has little to no basis in fact. The information asymmetry theory on which it is based relates to the purchase of consumer durable goods, such as cars – purchases which are infrequent and thus more challenging in terms of accurate information before purchase. But food products are bought on a weekly or even daily basis. There is therefore substantial opportunity for consumers to identify their preferred products. Another strand of this argument is that GI products are credence goods, where experiencing the product still does not fully inform the consumer as to key qualities.[11] This suggests that GI products and similar products produced elsewhere are indistinguishable to the consumer. The aspects of EU GI policy which undermine clear consumer information are discussed in Section 5.

2.2 GIs as a fraud prevention tool: needed in Australia?

As discussed above, the origin of the GI system in Europe was for the prevention of fraud and misrepresentation. Based on the history of PDOs, this was clearly a problem in France, Italy and the other Mediterranean EU Member States. However there is no evidence that Germany had a registration system for PGIs prior to the introduction of EEC Regulation 2081/1992. The fact that, in 1992, the other six EU Member States had no systems to regulate the use of regional specialty names suggests that, to the extent there was any misrepresentation, this was adequately handled by consumer protection laws and domestic implementation of Article 10*bis* of the Paris Convention.

There is little to no evidence in Australia of misrepresentation in the provenance of foods, wines or spirits. In their exploratory 2015 study, van Caenegem and colleagues found respondents who alleged fraud,[12] but also collected a number of stories that when a letter was written, there was an apology and the behaviour ceased (van Caenegem et al. 2015: 43-45). This is consistent with a story told about Tasmanian Whisky at the 2019 Bond University GI Colloquium,[13] where a simple letter elicited the desired change in behaviour. There are cases where the ACCC has intervened,[14] but in general it appears that, within Australia, misrepresentation is rare, appears to be inadvertent and can be quickly and cheaply stopped.

Exporters, however, face more substantial problems with misrepresentation, often because packaging is re-used or imitated and sold with inferior products from a different location.[15] Addressing this issue, however, depends on the willingness of the overseas country to take action. Overall the available evidence suggests such a low level of misrepresentation in Australia that further regulatory action, beyond, perhaps, increased resources to the ACCC, is not needed. As regards products imported into Australia, Australia New Zealand Food Standard 1.2.11 imposes country of origin labelling requirements and Australian Consumer Law has a general requirement of accuracy (i.e, not misleading or deceptive).

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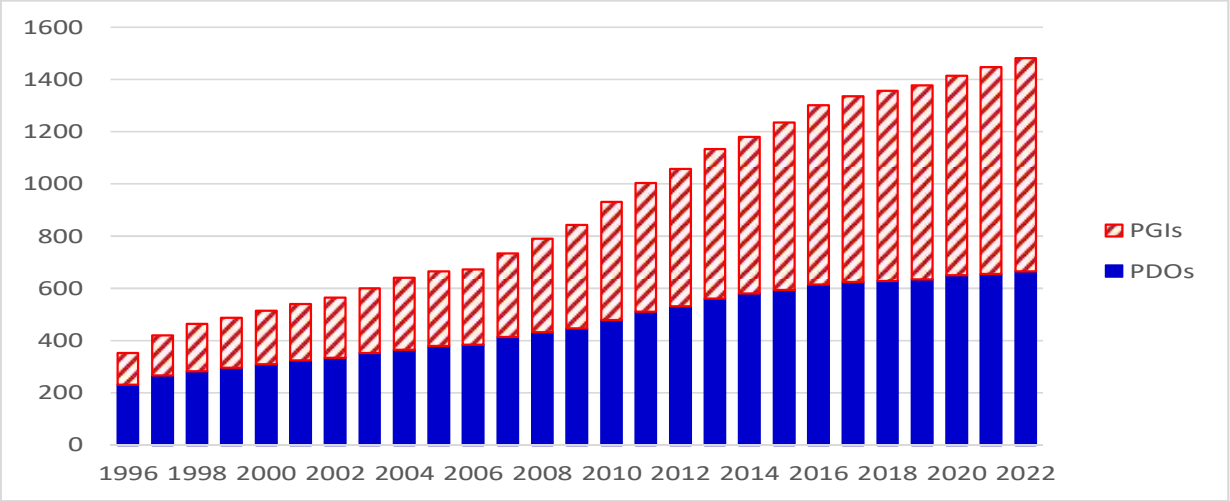
[11] Credence problems can be addressed by labelling such as 'feta, made in Australia'. For a fuller discussion of this weakness of the consumer confusion proposition for foods, see Moir, 2017: 1023-24.
[12] Though the report provides little specific detail and does not advise the proportion of respondents making such claims.
[13] See footnote 6.
[14] Maggie Beer Barossa case (ACCC undertaking D14/110666) and Byron Bay Lager case (undertaking D14/51628) (https://www.accc.gov.au/public-registers/undertakings-registers/general-undertakings-register.
[15] Van Caenegem et al., 2015: 57 and personal communications with a high end Tasmanian fruit exporter.

2.3 GI food production in Europe: how much and who benefits?

When the first EU GI regulation was adopted there were 12 member states, five of which had formal GI registration systems. While regional specialties were well known in the other member states, they did not manage these with regulation. There have been a number of initiatives to promote GI use within the EU,[16] and there have been impressive increases in the number of registered PDOs and PGIs (Figure 1). From 1996 to the end of 2012, PDOs increased by 130% and PGIs by 336%. From 2012 to end 2022 growth was slower, but off a larger base: PDOs increased by a further 25% and PGIs by 55%.

Figure 1 EU origin GIs by registration year and type: 1996 to 2022[17]



Despite the large number of GIs, sales of GI foods are only a small share of total EU foodstuff sales – 5.7% in 2010 rising to 6.8% in 2017.[18] Most GI production is consumed domestically – and for many smaller GI products most is likely consumed very locally. The share exported within the EU rose from 15% in 2010 to 18% in 2017, but the share of GI foods exported beyond the EU remained constant at 6%.[19] The 2019 AND-International report does not provide data on export destinations, but does comment that the structure of trade has been stable since 2010. In 2010 the major destination market was the USA, then Switzerland, Singapore and Canada. In 2010 only 2% of all foodstuffs exported from the EU were GI labelled. A very small number of products account for the bulk of this trade: Grana Padano, Alto-Adige apples, Modena balsamic vinegar, several German beers, Scottish salmon and Welsh lamb (AND-International, 2019: 45-46).

[16] A special fast-track registration system was initially used to encourage GI applications, but in 2003 this was abandoned in favour of financial incentives (Evans and Blakeney, 2006: 584). Some member states provide direct financial and administrative assistance for producer groups to establish GIs (London Economics, 2008: 118–19).

[17] Data are from the eAmbrosia database (https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/), downloaded on 12 February 2023. Excludes 122 registrations from countries outside the EU.

[18] At least part of this increase is due to the increased number of registered GIs. Between 2010 and 2017 there were 664 additional registrations – a 71% increase compared to the 19% increase in market share (from 5.7% to 6.8%). Market size data are from AND-International, 2012 and 2019.

[19] There is a dearth of systematic data on GI production for the EU as a whole. The EU GI databases (such as eAmbrosia) contain only administrative information – there are no data on the volume of production of each GI nor on the number of producers. The most useful sources are the two commissioned reports from AND-International (2012, 2019), though these provide very little data on the context of GIs within the food and drink industry. The 2012 report covered 27 member states (ie not Croatia, which joined in 2013). The 2019 report excluded the UK. For a more detailed critique of the lack of data to properly evaluate EU GI policy see Török and Moir, 2018: 9-12 and 30-32.

For producers to benefit, there must be a price premium for the GI product. And that price premium must be high enough to cover higher production costs.

A number of studies funded by the European Commission (EC) focus on price premiums for GI products.[20] But none provide any data on the likely higher production costs of GI products, so they cannot be used to estimate the impact of GI labelling on net producer returns.[21] However, the analysis in the 2019 AND-International report identified five clusters for GI foods and wines combined, based on the combination of price premium and sales value. This identifies that just 16% of GIs had both a high price premium and a high sales volume, and a further 40% had high price premiums but low sales volumes. The report does not define the high price premium used in developing these clusters.[22] nor does it provide separate data for foods. Assuming the cut-off premium is set at a reasonable level, the results suggest that 56% of food and wine GIs may *potentially* provide a higher return to producers, depending on how the price premium relates to higher production costs. Assuming the proportions are the same for foods as for wines,[23] this estimate, together with the very small market share for GI foods, suggests that, at best, some 4% of EU food production is associated with an increase in net income from GI labels. This is very much an upper limit due to the 40% cluster with low sales volumes, and the fact that premiums for GI foods are much less than for GI wines.

To fill this data gap, the Australian National University's Centre for European Studies (ANUCES) obtained a grant to review all available empirical studies on the economic impact of GIs and assess their impact on net producer income and on regional prosperity.[24] This work (Török and Moir, 2018) is, to the best of our knowledge, the first evidence-based synthesis of the available empirical evidence on the economic impact of GIs. It has been summarised and updated by Török et al., 2020, who conclude that:

> "there is considerable heterogeneity between different GI products and between the outcomes for similar GI products in different regions. Consequently, it is difficult to determine if there are specific types of product, or specific places, where GI labelling is more likely to achieve a price premium. This hinders the effective development of GI policy on the ground. Based on the available data it is not possible to recommend where an investment in GI labelling will generate a good return." (p 18)

It is, of course, complex to try to separate out the influences of product quality, product origin, a GI label and a trademark label on producer incomes. When one then notes that GI policy applies across a vast range of different foodstuffs, with very heterogeneous characteristics, trying to find patterns in how GI policy works is challenging.

A final issue regarding the impact of GIs on net producer income is that of where in the value chain any net increase in income falls. For more processed products there are many actors involved, and in some cases it is clear that those further down the value chain benefit

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[20] London Economics reported extreme variability in price premiums (London Economics, 2008). AND-International reported an average price premium for foods of 48% in 2010 and 50% in 2017 (AND-International, 2019: 102). Areté (2013) found remarkable price premiums for most of their 13 case studies, though with extreme variability. As the Areté report provides few quantitative data, rigorous analysis of its findings is not possible.

[21] Production costs for GI products are likely higher (European Commission staff, 2010a: 20), both to achieve higher quality and to conform to GI labelling regulations.

[22] More detailed data are provided in a subsequent report to the EC, and this shows that 34% of food GIs had price premiums of 101% or more, with another 22% having price premiums between 51 and 100% (AND-International, 2020: 106).

[23] In fact premiums are likely to be much lower for foods than for wines, so this gives an over-estimate.

[24] Understanding Geographical Indications, research project co-funded by the Jean Monnet Erasmus+ Programme and the ANUCES. For details and outputs see https://ces.cass.anu.edu.au/research/projects/jean-monnet/understanding-geographical-indications.

most. But there is also conflicting evidence as to whether less or more processed products gain better premiums from GI labels. This apparent conflict in outcomes may simply reflect differences between specific GI products.

Turning to regional prosperity, this is a complex issue and successful regional development depends on a nexus of factors, of which food labelling is only a very minor part. Indeed the Australian certification mark system – which allows regional branding across a wide variety of food and drink products – is likely far more useful. Nonetheless, while there are examples where an iconic wine has been a focus for successful regional promotion, identifying plausible non-wine products that could achieve this iconic status and regional impact is difficult (van Caenegem et al., 2015: 26).

It is very hard to find clear evidence that GI policy promotes rural or regional development in Europe (European Commission staff, 2010a: 19). One fact that is clear, however, is that when one steps back from GI policy and considers the general issue of regional development, the critical issue is a multi-faceted / "basket of goods" strategy. Participants in the ANUCES Understanding GIs Workshop[25] identified examples of multi-faceted regional policy which have very positive results, for example Alto Adige in Italy and Brand Tasmania in Australia.

After 30 years of GI policy in the EU it is disappointing to find so little systematic evidence as to when, where and how GI labels work best to enhance producer income. Despite the lack of supporting evidence, the EC perpetuates a series of myths about the economic benefits of GI policy: that it increases farmer income and that it supports regional development.[26] A further myth is that it provides clear information for consumers. As will be seen in Section 5, the outcomes in terms of clear and truthful labels for consumers are poor. These myths underlie the EU demand that GIs must be included in trade treaties. The myths also inhibit effective evaluation of the policy – in the 2010 evaluation a critical policy option was not investigated as it did not fit within the parameters of the official storyline. That "evaluation" was criticised as being of very poor quality.[27] The 2020 evaluation was little better. In general there was almost no assessment of the situation or outcomes for foodstuff GIs – data were almost always combined with data on wine GIs (AND-International, 2020; European Commission staff, 2021).

3. The EU's GI agenda: demands and successes

The EU's principal goals in its GI trade negotiations with other countries have been a *sui generis* (unique or tailor-made) registration system with administrative enforcement; recognition of specific listed EU names, with strong-form protection; and recognition of GI names despite prior trademark registrations. These elements are explored further in this section, with a focus on demands and successes before the EU's ramped up GI agenda in 2015. The stronger demands on Australia and NZ are discussed in Section 4.

[25] This 2018 intensive workshop involved economists, policy makers and a lawyer (https://ces.cass.anu.edu.au/events/geographical-indications-what-do-we-know-and-what-should-we-know).
[26] There is also clearly a concern that it reach smaller producers, but this is not formally stated. There many references to smaller producers in the 2010 GI evaluation and some assessment of the cost to small producer groups in the 2020 evaluation (European Commission staff, 2010a, 2021).
[27] The summary report assessing the evaluation states that "The conclusions are established in a general manner and are not always sufficiently substantiated by evaluation findings or linked thereto. Due to the methodological design, which was not fully adapted to all issues of the evaluation, such as economic impacts of the scheme, and consequently affected the analysis and its results, **the validity and usefulness of conclusions is limited**" (European Commission staff, 2010a, emphasis added). Further detail is in the full report (European Commission staff, 2010b).

The EU had little difficulty in reaching agreement on its GI demands with East Asian countries. In large part this is due to the fact that these countries were not settled by Europeans. Asian food names are thus not in competition with European food names. Indeed many of these countries, particularly those of north-east Asia have their own tradition of recognised regional specialties (Cheng, 2023: chapter 2).

3.1 Sui generis registration systems and administrative enforcement

GIs are a new form of so-called intellectual property (though they do not require any creativity or innovation). They emerged during global negotiations on the TRIPS Agreement. TRIPS GI obligations on WTO members do not exceed obligations against unfair trading in Article 10*bis* of the 1967 Paris Convention.[28] The GI system is loosely modelled on trademark systems, though the privileges provided are collective privileges which cannot be sold. As noted earlier GIs are about labelling, packaging and marketing so that consumers may clearly identify producers. In assessing GI registration system demands it is therefore relevant to compare these to those of long-established trademarks systems.[29]

The EU has a tailor-made (*sui generis*) GI registration system. While it provides for objections, the basis for successful objections is much narrower than the basis for objections to the EU's Community Trade Mark (CTM) system. This is probably a major reason that the EU pushes for tailor-made systems. The privileges conferred are greater than those of trademark owners, going beyond the issues of confusing or misleading names, and greatly exceeding anything in the TRIPS Agreement. These additional privileges benefit producers, not consumers, making EU GI policy less balanced than trademark policy. Another difference is that the EU's tailor-made system shifts the costs of enforcing the restraint on trade from the beneficiaries to taxpayers.[30]

New World countries such as Australia, Canada, NZ and the USA have typically registered GIs through their trademark systems. Trademark registration systems are open and transparent, providing avenues for others to object to the registration of any given name. They embody a strong principle that the first owner to register a name has rights that take precedence over later requests to register similar names.[31] GIs are generally registered as certification marks, and in Australia proposed certification registrations are reviewed by the Australian Competition and Consumer Commission (ACCC) to ensure that they are "not to the detriment of the public".

A final important difference is that GIs in the EU are registered for very specific product classes – for example, specific types of cheese or specific fruits or vegetables. In contrast trademark product classes are much broader – for example class 29 covers meat, fish, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, jellies, jams, compotes, eggs, milk, cheese, butter, yogurt and other milk products, edible oils and fats for food.[32] Given Australian agricultural production geography, a certification mark for trademark class 29 for a region (e.g. Barossa, Gippsland) will be of value to producers,

[28] Paris Convention for the Protection of Industrial Property, first adopted in 1883 (see https://www.wipo.int/treaties/en/ip/paris/).
[29] For a useful discussion of *sui generis* systems versus certification trademarks for GIs see Gangjee, 2007a.
[30] Trademark owners are responsible for enforcing their privileges through the courts. Under the EU's GI system government agencies have the enforcement responsibility and costs.
[31] Though these principles have been undermined in recent decades by new privileges for owners of so-called "well known" trademarks. For an excellent discussion of some of the economic problems arising out of newer changes to trademark systems – particularly undermining the role of trademarks in providing clear signalling to consumers as to the origin of products – see Greenhalgh and Webster, 2015.
[32] https://www.ipaustralia.gov.au/trade-marks/what-are-trade-marks/classes-of-goods-and-services.

while a GI for Barossa feta or Gippsland brie simply would not align with the distribution of dairies, and there would likely be no Australian take-up of such an option. This issue is discussed further in Section 4.1.

Nonetheless, because of the EU's ban on evocation (Section 3.3), the name registered for a narrow product class also prevents its use for any other good, making EU-style GIs a powerful restraint on other producers' naming and marketing freedoms.

In trade negotiations, the EU has successfully achieved tailor-made registration systems in some countries, though prior collective trademark systems also remain in place. For example Korea runs parallel systems – a trademark-based system for most registrations and a tailor-made system only for EU names agreed by treaty (O'Connor and de Bosio, 2017). Following the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Canada provides both geographical indications registration and certification trademarks. Six of 2,055 registered certification marks as at 8 March 2023 are owned by non-Canadian entities. In contrast of 850 registered geographical indications only 28 were owned by Canadian entities.[33] Administrative enforcement has been achieved in both Korea and Canada, but the EU has claimed neither as a precedent-setting win.

3.2 Specifically listed GI products and recognition of generic names

Much of the dispute between the EU and New World countries is about a very limited number of product names where the names are generic in New World countries but are privileged in Europe. Even more specifically, the dispute is about whether such products should have "strong form" naming privileges – that is bans on qualifiers such as –like, -kind or –style (the TRIPS Article 23 optional standard for wines). This is the aspect of the EU's GI demands which has strong negative impacts on New World producers.

In 2003 the EC tabled at the WTO a list of 41 key GI names, of which 19 were for foods (European Commission, 2003). The 19 foods comprise 13 cheeses, four meats, a Spanish saffron and a Spanish nougat. Of the 13 cheese names, feta, fontina and reblochon are not names of geographic places. Feta simply means "slice" in Italian and Greek.

With the adoption of the Global Europe policy in 2006, the EU started demanding that trading partners recognise many more than these 19 food GI names. East Asian regional food specialities are very different from European specialities, so the EU had little difficulty in gaining "strong form" privileges for proposed EU GI names in the partner country (Table 1). Indeed East Asian countries also listed their own regional food specialties. It is noticeable that no partner country food GIs were listed for Singapore, Canada or New Zealand.

However the terms of these agreements changed with the CETA. Canada agreed to provide "strong form" protection for listed GI food products (Article 20.19), but demanded and achieved important exceptions and limitations to protect their own producers. Existing commercial naming rights were retained for all existing producers, and limited rights for new producers, for six cheeses and two meat products listed in the treaty Annex. For these products – asiago, feta, fontina, gorgonzola, beaufort, munster, nürnberger bratwürste and jambon de bayonne – all existing producers retained all existing rights in perpetuity, including the right to sell their business with these perpetual naming rights. New producers are allowed to use these registered names, but have to use qualifiers, such as asiago-like. Vietnam copied these provisions, protecting existing rights for commercial

[33] Certification mark data are from http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/home?lang=eng and geographical indications data are from http://www.ic.gc.ca/cipo/listgiws.nsf/gimenu-eng?readForm.

enterprises for five of the agreed GI names – asiago, fontina, gorgonzola, feta and champagne (Article 12.28).

Table 1 Number of GIs listed in EU post-2006 trade treaties

Partner country	Negotiations commenced	Treaty signed	Treaty in force	# listed EU food GIs	# listed partner food GIs	# listed EU wine & spirits
Korea (KR)	2007	2010	2011^	60	63	99
Canada (CA)	2009	2016	2017^	171	0	---
Singapore (SG)	2010	2018	2019	84	0	112
Vietnam (VN)	2012	2019	2020	62	38	109
Japan (JP)	2013	2018	2019	74	51	138
Australia (AU)	2018	---	---	(166)*	---	(234)*
New Zealand (NZ)	2018	2022	---	163	0	1,813

Notes: ^ provisional;
* Number of EU GIs listed in initial, published, EU demand schedule, but excluding 6 UK food names and 1 UK spirit name.

Japan took a different approach. It agreed to strong form privileges, but for specified names, this would be phased in over a period of seven years, with existing operators retaining the right to produce (asiago, fontina, gorgonzola) and/or slice and package (comté, grana padano, queso machego, mozzarella di buffalo campana, parmigiano reggiano, roquefort) during the phase-in period. The Japanese treaty also specifies two names which remain in public use – grana and parmesan – and several names which are registered for private use only in their full compound form (mozzarella di buffalo campana, pecorino romano, mortadella bologna).

In Korea, side-letters between Korean and US Ministers establish that GI names in the EU-Korea treaty annex are protected only in their full compound form and spells out that individual components of compound terms, e.g, grana, parmigiano, provolone, or romano (including translations) do not have GI protection under the Korea-EU FTA. The letter goes on to specify other generic cheese names – giving a non-exhaustive list of camembert, mozzarella, emmental, brie and cheddar.[34]

3.3 New EU demands: TRIPS-Plus privileges – packaging and evocation

The EU GI Regulation is TRIPS-Plus. That is, it provides more privileges for GI owners than are provided in the TRIPS Agreement. The additional privileges go well beyond the trademark privileges, which simply prevent misleading or confusing marks. In the EU GI system, use of national colours, flags or other national symbols is defined as evoking the registered GI name and is not allowed.[35] Nor is comparative advertising.

The EU has commenced trying to export these TRIPS-Plus privileges in its trade negotiations with Australia and New Zealand. The standard text in earlier post-2006 treaties states that parties will prevent "the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin or nature of the good". However the qualifier "in a manner

[34] Letter of 20 June 2011 from Korean Minister for Trade to US Ambassador Kirk at https://ustr.gov/sites/default/files/uploads/pdfs/PDFs/December%202012/062011%20Kim-Kirk%20Letter%20on%20GIs.pdf.
[35] For an insight into the anti-competitive effects of the ban on evocation, see the 2019 European Court of Justice interpretation denying the right to use the cheese name Quesos Rocinante as it evokes the image of the registered GI name Queso Manchego via the novel Don Quixote and Don Quixote's horse Roccinante (Gibson, 2019). Note that as Manchego is the name of a sheep breed, the GI name Queso Manchego should never have been allowed.

which misleads the public as to the geographical origin or nature of the good" means that this provision is far more limited than it is in the EU, where specific types of packaging are prohibited ***whether or not*** they mislead the public.

As discussed in the next section, the demand to Australia and NZ goes much further. The basic privilege demanded is to prevent "any direct or indirect commercial use" adding "any misuse, imitation or evocation, ***even if*** the true origin of the product is indicated …".[36] This goes well beyond the equivalent wording in CETA. While CETA Article 20.19(2)(c) is the standard catch-all prevention of any other unfair use (like Paris Convention Article 10*bis*), the final NZ text adds wording about exploiting the reputation of a GI. The demand was for wording specifying "any other practice liable to mislead the consumer as to the true origin of the product". On its face this seems unexceptional, but one wonders why the change in wording from the Article 10*bis* standard. A further privilege in the demand, not present in either CETA or the final NZ treaty is to prevent "any other false or misleading indication as to the origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents".

4. GIs in Australia, Canada and New Zealand

There are two main issues to consider in respect of EU style GIs in New World countries. Firstly, the geographic conditions for agricultural production are radically different between New World countries and Europe, making EU style GIs unsuitable in New World countries. Secondly, since 2015 the EU's GI demand on trading partners has been ramped up. In its negotiations with Australia and NZ, the EU has adopted a harder line on the recognition of generic names. Further it has sought to prevent so-called "evocative" packaging and comparative advertising – the TRIPS-Plus privileges provided in Europe.

The EU has recently adopted a policy of increased transparency in trade negotiations by placing many of its initial negotiating drafts on its website, so one can readily see its GI agenda as represented in its 2018 demand to Australia and New Zealand. Useful insights can be drawn from the outcomes in the EU's trade treaties with Canada and New Zealand and the EU demand to Australia and NZ.[37]

4.1 Differences in agricultural production

Europe is far more densely settled than New World countries such as Australia, and there are many more producers of specific cheese types than there are dairies in Australia. For example there are over 300 producers of Parmigiano Reggiano compared to only 126 dairies in the whole of Australia, of which only 31 produce parmesan.[38] There are 4.3 Parmigiano Reggiano producers per 100 square kilometres (km^2) in Parma province, 3.8 in Reggio Emilia province and 2.2 in Modena province. In contrast, the Australian state with the greatest density of dairy producers is Victoria, where there are just 0.02 dairies per 100 km^2 (Table 2). Further, Australian dairies do not generally specialise in a single variety of cheese.

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[36] EU demand to Australia, Article X.34(1(a)). Emphasis added.

[37] The EU GI demand was identical for Australia and NZ, except for the very much larger list of wine and spirit names listed for recognition in NZ. For the text of the NZ-European Union Free Trade Agreement (NZEUFTA) text see https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/nz-eu-free-trade-agreement-by-chapter/ and for the Canada (CETA) see https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en. For the GI demand to Australia see https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/0549e6d9-dc57-425e-8cfa-6f264039e9e1/details.

[38] See sources for Table 2. Data on the number of Australian dairies producing parmesan are from McElhone, 2023.

These data on cheese producers make it very evident that an EU style GI system would not work in Australian conditions. There are simply not enough producers of any specific product within a reasonable sized area to form an appropriate producers' collective. This point was also noted by van Caenegem et al. (2015: 37), with specific respect to dairies.

Table 2 Comparative density of dairies: Australia and Italy (Parmigiano Reggiano), 2021

Location	# dairies	km^2	dairies/100 km^2
Australian dairies			
Victoria	52	237,659	0.022
South Australia	11	1,043,514	0.001
Tasmania	14	68,401	0.020
Italy: Parmigiano Reggiano producers			
Parma province	147	3,449	4.262
Reggio Emilia province	87	2,291	3.797
Modena province	59	2,688	2.195

Source: Data retrieved, in January 2021, from https://www.dairyaustralia.com.au/manufacturing-support/australian-dairy-manufacturers#.ZC0Kh_ZByUl, https://www.parmigianoreggiano.com/dairies-find-dairy/ and https://en.wikipedia.org/wiki/States_and_territories_of_Australia.
Note: excludes States/provinces with very low producer densities.

4.2 Negotiation outcomes in Canada and New Zealand

CETA was the first post 2006 trade treaty between the EU and a country which until then had rejected any extension of TRIPS Article 23 GI privileges. In CETA the EU gained a precedent-setting co-existence of a later registered GI with an earlier registered trademark. In large part this was due to the unique Canadian situation where a trademark had been registered for Parma ham. Canada also agreed to a tailor-made registration system (which runs side-by-side with the pre-existing certification trademark system). Effectively the EU gained administrative enforcement for GIs.

New Zealand, like Canada, agreed to register later GIs even if there was a pre-existing identical or very similar trademark, though to my knowledge there is no registered NZ trademark akin to the Canadian Parma ham trademark. There is no mention of any compensation for any confusion or economic loss that may arise between a pre-existing trademark and a subsequently registered GI.

CETA was also the first treaty with a low-density agricultural producer country that recognised "strong-form" GI privileges. Such privileges are, however, only for 163 products – mainly with compound names posing no challenges for Canadian producers. The treaty specifically excludes GI privileges for translations of common names or for commonly used individual components of compound names; agrees in principle that other EU GI names registered at the time of the treaty cannot be added; and limits what kinds of GI names can be added.[39] Of the 31 listed names which are not compound names, 24 are cheese names. As noted above CETA fully protects the commercial rights of existing producers of six of these cheeses and two meat products. In addition CETA specifically recognises continuing trademark rights to five product names.

[39] They cannot be identical to existing trademark nor customary names of plants or animal breeds.

CETA agrees no TRIPS-Plus privileges. Legal commentators have noted that there is no prohibition of comparative advertising, provided this is not on the label or packaging.[40] Following CETA, strong-form (TRIPS Article 23) privileges apply in Canada to 163 listed food products, but not to other food products.

New Zealand and Australia have however, been faced with stronger demands than Canada, including demands for TRIPS-Plus privileges regarding packaging, evocation and comparative advertising. In the NZ treaty Article 18.34 (1)(c) varies the CETA Article 20.19 (2)(c) text by adding possible prohibition of "commercial use of a geographical indication that exploits the reputation of that geographical indication, including when that good is used as an ingredient" if this is deemed an act of unfair competition.

The NZ system for registering wines and spirits will be extended to cover other agricultural products, so the GI registration system for EU food products appears to be tailor-made and outside of the existing certification mark system. No NZ food names have been proposed for GI registration in Europe. New Zealand has agreed to administrative enforcement.

The wording on the GI registration system (Article 18.40) in the NZ treaty is very general. It requires what appears to be a sound opposition process. Inter alia, it also requires a process to verify the link between the place name and the proposed product name. As will be discussed in Section 5, this process is so poor in Europe that many GI names are only very loosely connected with name on the label. Compliance with this requirement might require a substantial revision to the EU's regulatory system for GIs.[41]

In all, New Zealand agreed to provide "strong form" privileges for 163 food names and 1,813 wine and spirit names.[42] Full CETA-style protection for existing NZ producers was obtained for only two product names: gruyère and parmesan. Existing producers of these products can continue to use the name but the place of origin must be clearly indicated. These protections for existing producers are in footnotes 9 and 14 of Annex18-B, rather than in the treaty text. Limited protection for existing producers was obtained for feta (continued use for nine years, Annex footnote 5) and gorgonzola (continued use for five years, Annex footnote 12). The treaty also specifies that registration of roquefort as a GI does not prevent the use of the term "penicillium roqueforti" (Annex footnote 10).

New Zealand appears to have achieved worse outcomes than Canada in respect of other issues besides very poor protection for existing dairy businesses. In Canada translations of listed GI names remain available for public use, but not in New Zealand. In principle, the many other EU GI names registered at the time of the treaty cannot later be protected in Canada. New Zealand does not have this safeguard, though their treaty specifies that a maximum of 30 GI names can be added in any period of three years.

The specification of the GI system in the NZ treaty (Article 18.34) appears to provide for exclusion of customary names of plant varieties or animal breeds – yet the accepted list of names includes at least one animal breed name (manchego for a cheese) and one plant variety name (prosecco as a wine). The article also clarifies that individual components of compound names (such as provolone in provolone valpadena) are not protected if they are the customary name of a plant variety or animal breed or of that type of product. Oddly, the treaty suggests that NZ producers may not only continue to use the term parmesan, but

[40] https://www.nortonrosefulbright.com/en/knowledge/publications/51e8cb44/say-cheesebut-not-taleggio-cheese-cetas-impact-on-geographical-indications-in-canada.

[41] See, for example, Gangjee, 2017 and Moir, 2023.

[42] These are not the same 163 names as are provided strong-form protection under CETA – there are 90 foodstuff product names in CETA which are in the final EU-New Zealand treaty annex.

may also use the more specific name Parmigiano Reggiano provided the origin is also clearly stated (Annex 18-b footnote 14).[43]

Opposition processes for additions to listed GIs are clear, and include the right to object to customary names as understood in the country (Article 18.33). Thus if New Zealanders understand a proposed name to be customary for the product – for example feta – then the treaty texts indicates this would be grounds for a successful objection. The treaty specifically excludes overseas evidence in determining objections in either country, which suggests an EU agenda opposed to a global register of generic food names. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which New Zealand is a signatory, also focuses on national sources, but allows for recognised international standards to be used as well. It remains to be seen whether such international standards would be accepted as domestic evidence by the EU.

It is clear, however, that the process used for objections to the names listed in the treaty annex (Article 18.32) was opaque and fell far short of the rigour of opposition processes normal for trademarks or proposed for subsequently listed GIs. Oppositions were requested before the treaty was concluded. There is no evidence of any outcome from this process by an authorised decision-maker, such as a Trademark Examiner, and there was no process for an opponent to challenge the outcome. It appears that this non-transparent process will be the sole process for dealing with objections to listed GI names. It is clear from the official press release on the treaty outcomes that amendment of the GI registration legislation is an event future to finalising the treaty,[44] so just who was legally authorised to make decisions about the proposed GIs before signing the treaty? Overall, it appears that the objections process was a mockery, side-stepping the provisions of the CPTPP, where Article 18.31 specifically provides for opposition processes where GIs are registered through an administrative process.[45] Nor did it reach the Article 18.33 standards for opposing additions to the list. If these far more acceptable standards had been used, then there would be evidence of opposition and appeal hearings for names such as feta and prosecco. In the event only one proposed food name – Kiwi Latina – was not included in the final set of listed names.[46]

Why did New Zealand not follow the Canadian precedent in allowing some EU GI demands, but simultaneously protecting the current rights of existing producers? In the CETA, the overall trade gains in agricultural market access were quite limited – "nowhere in the agreement is there any significant dismantling of protectionist measures in agriculture" (Kerr and Hobbs, 2015: 446). There is, as yet, no independent assessment of the market access outcomes for New Zealand in the EU treaty.

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[43] "The protection of the geographical indication "Parmigiano Reggiano" shall not prevent prior users of the term "Parmesan" in New Zealand from continuing to use that term, if the prior user has used the term in good faith for a period of at least five years before the date of entry into force of this Agreement. Any such use of the term "Parmigiano Reggiano" after the date of entry into force of this Agreement must be accompanied by a legible and visible indication of the geographical origin of the good concerned" (https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Text/List-of-Geographical-Indications.pdf).

[44] https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/NZ-EU-FTA-Key-Outcomes.pdf.

[45] In the CPTTP the main GI focus is processes for opposing and cancelling potential GI names. Major grounds for opposition are existing trademarks and customary names for relevant goods (Article 18.32). There is a substantial Article on the basis for determining customary names, focusing on consumer understanding, but taking into account newspapers, websites and marketing materials. The CPTTP also specifies that individual components of compound GI names – such as Camembert de Normandie – are not protected.

[46] Though all six names proposed by the UK were dropped (because of Brexit) and two Czech beer names disappeared (Budějovické pivo and Budějovický měšťanský var).

5. Consumer information: when GI labels mislead

The EU's regulatory system for GIs has a number of embedded problems which undermine the stated goal of ensuring good consumer information. These problems relate to where the food is actually produced and where the raw materials come from.

It is also important to note the heart of EU GI regulation is a legal fiction. Labels such as "feta, made in Australia" are declared to be misleading, though they clearly are not. Labels with qualifiers are also declared to constitute misleading use of a GI name "even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method'… " (Article 13(2), EU regulation 1151/2012). In fact such labels provide clear product information and are usually accompanied by a statement about place of origin.

Article 13 provides the basis for TRIPS-Plus privileges by defining "any direct or indirect use" of the registered name as disallowed "insofar as using the name exploits the reputation of the protected name". Perrier was previously advertised as "the champagne of mineral waters" – which most would take as a compliment. Under Article 13, such advertising became unlawful as it "evokes" the image of champagne when referring to a different product (Hughes, 2006: 385). Article 13 states that such uses are misuse "even if the true origin of the product is indicated".

From the beginning, the EU has specifically allowed the use of non-geographic names as registered Geographical Indications.[47] Another legal oddity.

Boundary requirements for production of GI products differ for PDOs and PGIs. In theory, PDOs have a very strict relationship to *terroir* and both key ingredients and processing must take place within the designated area. In contrast, PGIs are far more flexible in terms of the sourcing of inputs, and some seem able to have very limited association with the designated region. An early report commissioned by the EC raised the flexibility in the origin of materials for PGI products as potentially making such labels misleading for consumers (London Economics 2008: 86–91). This consultancy group has not subsequently been re-hired to do any work on EU GIs.

The following sections discuss the problems in identifying the origin of products which are registered either as PDOs or as PGIs. There are significant problems with both parts of the GI food registration system in allowed divergence between the name on the label and the origin of the product. As Calboli points out,

> "it is only when the GI-denominated products entirely originate from the GI-denominated regions that GIs can perform their functions as incentive[s] for local development and **vehicles of accurate information** regarding the origin, quality, and characteristics of the products." (Calboli, 2015b: 769, emphasis added).

5.1 PDOs – missing links to *terroir*

As noted above the original draft of the EU GI regulation referred only to PDOs, which then existed in five of the 12 Member States. Much is made of such products having characteristics that are "essentially or exclusively due to a particular geographical environment" (2081/1992 Article 2.2(a)). However the regulation immediately undermines this essential link to *terroir* by allowing PDO registration for selected products

[47] The TRIPS Agreement is silent on whether a geographical indication should be a geographic name though there is an implicit assumption that a geographical indication will be a place name. The original EU regulation 2081/92 allowed non-geographic names only for PDOs. In 2006 (EC regulation 510/2006) this privilege was extended to PGIs.

(where the raw materials are live animals, meat or milk) to source their raw materials from well beyond the designated geographic environment.

This exception initially covered only products already registered or in common use within the country of origin in 1992 and registered at the EU level within two years. The exemption was extended to PDOs registered nationally by 2004 when the regulation was revised (EC 510/2006). This allowed a further 40 PDO products to potentially source their raw materials from beyond the designated area.

This exception constitutes a substantial ongoing deception for consumers. Around 68% of the 37 registered meat product PDOs and 71% of the 199 registered cheese PDOs are potentially exempted from the strict terroir requirement.[48] It could have been corrected with the 2011 origin of primary ingredients regulation, but GI products were exempted from this new regulation.[49]

There are 106 PDOs in the list of food names in the EU's demand to Australia. Of these, 57 are meat or milk-based products, potentially exempted from the *terroir* requirement. This leaves 49 PDO products on the EU demand list where Australia can be reasonably certain that the label clearly indicates the place of origin. Checks on the production specifications for some of the products where the origin is dubious are shown in Table 3.

Table 3 Examples of misleading PDO labels

• Prosciutto di Parma	the pigs can be bred up to 600 kilometres distant from Parma, but slicing and packaging must take place in Parma
• Asiago	Asiago is a small town in Vincenza. Milk comes from, and production is in, Vincenza, Trento, Padua and Treviso provinces.
• Taleggio	Taleggio is a small commune (population 600) in Bergamo. Specifications identify production as from the provinces of Milan, Pavia, Lecco, Como, Lodi, Novara, Bergamo, Brescia, Cremona and Treviso, that is from west and north of Milan through to Treviso, just north of Venice – a very extensive area compared to Taleggio.
• Gorgonzola	Gorgonzola is a small metropolitan town outside Milan. Approved production area is broad - 15 provinces.
• Pecorino Romano	Despite its origins in Lazio province, where Rome is, most production now takes place in Sardinia.
• Brie de Meaux	The specified production area ranges from slightly NW of Meaux to the western edge of the Meuse department, almost 200 kilometres away, and covering mainly rural parts of six departments.[50] Meaux itself lies in the NW part of this large area.
• Roquefort	The specifications allow milk for this cheese to come from 560 French communes across five departments.[51]

[48] That is, 25 meat products and 141 cheese products. Data based on EU level registration by end 2004. Before the 2006 exemption extension, potentially non-terroir PDOs were 16 meat products and 117 cheeses (registered at EU by end 1996, the earliest date provided in the official GI database eAmbrosia).

[49] For further discussion, including the additional 2018 regulation on implementing Article 26(3) of EU Regulation 1169/2011 see Moir, 2023. The EC statement that "the origin of primary ingredient must be indicated if different from the origin of the food **in order to not deceive consumers**" (https://commission.europa.eu/news/commission-adopts-new-rules-labelling-origin-primary-ingredients-food-2018-05-28_en, emphasis added) is interesting, given the exemption of all GI foods from such labelling.

[50] The abbreviated production specifications provided as part of the EU bid do not mention this, but see map in https://ec.europa.eu/geographical-indications-register/eambrosia-public-api/api/v1/attachments/59466.

[51] https://ec.europa.eu/geographical-indications-register/eambrosia-public-api/api/v1/attachments/59837.

These product names have featured in annexes to other EU trade treaties.[52] The Parma ham example, where pigs come from up to 600 kilometres away, is an interesting comparison to Scotch Beef. In the UK there was a scandal in 2002 when it was disclosed that Scotch Beef (a PGI so with a looser link to *terroir*) came from cows raised largely in Ireland. The Scotch Beef consortium changed the rules so that beef cannot be labelled Scotch Beef unless it is born, raised and killed in Scotland.[53] Parma ham pigs still come from a long way away.

5.2 PGI: producer vs consumer interests in labelling

The basis for PGIs is the prohibition of deceptive statements about the origin of goods under the German Unfair Competition Act. Blakeney argues that German case law indicates that the principal intent of the judge-made law on PGIs is to eliminate deceptive practices, not to confer private proprietary rights (Blakeney, 2001: 634-5). Under the EU's GI regulation, there is only a very loose link between the registered name and the location for PGIs – products must have a "specific quality, reputation or other characteristics attributable to that geographical origin", but only one of the production steps needs to take place within the designated area.[54]

European GI litigation provides virtually no examples proving the relationship between the geographic origin of goods and their quality. Litigation does indicate that locations for registered GIs can be based on political rather than geographic areas – German Spreewald style pickled gherkins are from a designated economic zone rather than a biological region (Blakeney, 2014: 50).

The fact that no minimum quantum of materials for a PGI need be from the specified region strongly suggests that some PGI labels may be deceptive (Calboli, 2014; Gangjee, 2017; Zappalaglio, 2018). Typically with IP litigation important public policy questions are not litigated, as rights holders have an active interest is such questions not being asked. Further, litigation at the EU level deals only with formalities. Matters of substance are left to member states.[55] Empirical analysis shows considerable flexibility within the certification process, permitting a loosening of linkages to a region and diluting the certification guarantee (Gangjee, 2017: 1). Gangjee concludes that greater attention needs to be paid to individual product specification design.

Of the 166 products for which the EU seeks GI privileges in Australia, 60 are PGIs. Without further information, it is not possible for consumers to know where these products come from. Examples of problem PGIs in the EU demand to Australia are provided in Table 4, but in reality the EU should be asked for full disclosure on all these proposed products because of the limited requirements in their GI regulation.[56]

The attenuation of the link between the place on the product's label and the actual place of production undermines the argument about the special contribution of geography to a

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[52] For example, of the 57 potentially dubious origin PDO products, 23 have GI privileges in Korea and 36 in Canada.

[53] Personal communication in discussions with the UK Food and Drink Federation. See also https://www.heraldscotland.com/news/12508446.brussels-blamed-for-delay-in-scotch-beef-achieving-pgi-status/

[54] EU Regulation 1151/2012 Article 5(2) (previously EC 2081/92 and 510/2006, Art. 2(1)(b)). Regulation 1151/2012 is at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=en; Regulation 510/2006 is at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l66044; and Regulation. 2081/92 is at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992R2081&from=EN.

[55] See, e.g., C-269/99 - *Carl Kühne GmbH & Co. KG* and others *v. Jütro Konservenfabrik GmbH & Co. KG.*

[56] The published demand list (https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/geographical-indications/list-of-eu-requested-geographic-indications-gis#foodstuffs) provides links to abbreviated production specifications (clickable from the item number), but, as in the case of Brie de Meaux, this abbreviated specification can be much less informative than the full specification from eAmbrosia (see footnote 50).

product's quality. It directly challenges the truth of many GI labels as well as calling into question the basis for GI protection, especially the shielding of such protected names from legitimate competition. Indeed Calboli suggests that, in their current form GIs are simply a tool for gaining greater market share for certain food products (Calboli, 2015a, 2015b). Rovamo suggests that the qualities and characteristics of many food products "are more likely to be related to transportable skill and manufacturing methods than the actual geographical location of production" (Rovamo, 2006).

Table 4 Examples of misleading PGI labels

• Bresaola della Valtellina	The raw material is from Brazil not Italy (Zappalaglio, 2018).
• Schwarzwälder Schinken	The specifications do not cover the origin of the pigs, though the wood used for smoking must be from the Black Forest.
• Mortadella Bologna	The specifications do not cover the origin of the pigs. Production is allowed across a wide area – Emilia-Romagna, Piedmont, Lombardy, Veneto, Province of Trento, Marche, Lazio and Tuscany provinces.

Overall, a consequence of the exceptions to a strict *terroir* requirement is that consumers do not really know where their products come from. Academics, however, know that Parma ham ceases to be Parma ham if it is sliced and packaged outside Parma. This issue of how producer interests dominate GI policy and the implications for competition policy are drawn out in the next section.

5.3 Producer interests and competition policy

Free and fair competition is a foundation stone of the EU project. In 1975 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.[57] The EU court "suggested as obiter that *reputation-based indications of source did not fall within the industrial property exception*" to competition rules (Gangjee, 2006: 305, emphasis added).

However, once EU regulations on GIs were introduced, and GIs classified as intellectual property, all GIs were exempted from competition rules. Producer interests dominate the EU GI naming system. The original 1992 regulation set up the fiction that clear product names (such as "feta, made in Australia") either misled or confused consumers. It also allowed exemptions from the *terroir* requirement for sourcing raw materials for many products already registered in the original five PDO system countries. It allowed very loose geographical requirements for the sourcing and production of PGIs. It allowed non-geographic names for PDOs. The revisions in the 2006 regulation added to these producer privileges. They removed the obligation for a register of generic names, even though most Member States had nominated feta for such a register (Gangjee, 2007b: 175). It radically changed the basis for objecting to the registration of a GI food name, in sharp contrast to the objection process for a Community Trade Mark.[58] It extended the PDO raw material

[57] Sekt/Weinbrand Decision of the European Court of Justice, Commission of the European Communities v the Federal Republic of Germany. Indirect appellation of origin. Case 12-74, 20 February 1975 (at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61974CJ0012).

[58] Both CTMs and GIs provide privileges across the EU as a whole. CTMs cannot be registered if registration is refused in any one Member State. But, following the 2006 regulatory revisions, a view that a name is non-generic in one Member State over-rides views in other Member States that the name is generic (Gangjee, 2007b, citing rulings in the case of feta). In other words, if GI registration is accepted in just one Member State, the GI is registrable for privileges across the whole of the EU.

sourcing exemption for a further decade, allowing up to 40 more PDO products to source materials from beyond the *terroir*. It extended the use of non-geographic names to PGIs.

These various provisions all provide important privileges for producers – privileges which allow untruthful labelling and/or restrict competition unnecessarily. This bias towards producer interests has been extended through the courts. In reviewing EU case law on trademarks and GIs, Heath and Marie-Vivien find that:

> "Time and again … the position taken by the administration and the courts that *exceptions to intellectual property rights should be interpreted narrowly and require proof by the party relying thereupon*. This is questionable because the rule should not be proprietary rights, but free competition. Those who want to obtain a property right should demonstrate that they are entitled thereto." (2015: 829, emphasis added)

The consequence is that not only are some GI labels misleading, but that the balance between the regional development objectives of GI policy and the broader EU interest in promoting competitiveness is compromised.

Producer associations write the production specifications and there is little evidence of national processes for interrogating these or the proposed geographical boundaries from a competition or public interest perspective. The EU GI regulations simply allow producers association to take the leading role. Such national inspection as exists is about compliance with producer-drafted regulations, not whether these create truthful labels or have any unnecessary anti-competitive effects (OECD, 2000).

Producer associations can draft geographical boundaries to attempt to exclude certain competitors and the UK Melton Mowbray case clearly indicates such anti-competitive behaviour (Gangjee, 2006). In the case of Parma ham, the PDO raw material exemption originally meant that pigs were sourced from four provinces around Parma. However, by 1993 this area had been expanded to most of central and northern Italy (Zappalaglio, 2018: 265). Despite the lax sourcing of the raw materials, the consortium rules stated that slicing and packaging must take place in Parma. Following a dispute with British supermarket ASDA, the European Court of Justice ruled that if a leg of Parma ham is removed from Parma and then sliced and packaged, it can no longer be called Parma ham/Prosciutto di Parma.[59]

This suggests a "pick and choose" approach to regional sourcing – with producer associations making all the rules. The only limit seems to be that, once rules are registered, other producers can successfully object to changes. In September 2020 the highest German civil court – the Federal Supreme Court of Germany (BGH) – ruled that Black Forest Ham may be sliced and packaged outside the Black Forest without losing the right to use the registered PGI name.[60] The producer association had sought to alter the production specifications to include slicing and packaging, but producers in Lower Saxony objected.

At the EU level, consideration of issues about GI registration is restricted to formalities. There do not appear to be effective national pre-registration screening procedures to ensure truth in labelling in any Member State. Unlike Australia's certification mark system, there are no embedded procedures to ensure a balance between promoting regional development and minimising anti-competitive abuses. The EU has systematically side-stepped the issue of potential anti-competitive effects. Following an extremely low quality evaluation in 2008,[61] the Explanatory Memorandum provided to the European Parliament

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

[60] Judgment of 3/09/2020, file number: I ZB 72/19. See also https://www.erlburg.law/en/protected-geographical-indications-germanys-highest-civil-court-rules-on-black-forest-ham/.

[61] The EU's own Impact Assessment Board considered that the added value of the GI schemes was weak (EU Impact Assessment Board, 2010). See also the European Commission staff paper which did not investigate a major policy alternative – Community Trade Marks used "in accordance with honest practices in industrial

for what became the revised 2012 GI regulation implied that this restraint of trade policy actually promoted competitiveness:

> "[GI] 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 Commission, 2010: 4)

In 2021 the EC again "evaluated" GI policy, but again the evaluation was very poor quality and did not address critical issues. A major failing was that almost all the data used combined wine and foodstuff GIs. Wine markets are quite different from foodstuff markets and the role GIs play in wine markets is very different from the role it can play in foodstuff markets. As a consequence there is almost no usable evaluation data on foodstuff GIs in either the evaluation study (AND-International, 2020) or the formal evaluation report (European Commission staff, 2021). This is unfortunate as this exercise fed into a yet another revision of EU GI policy.

Another case challenges the probity of EU GI policy and adds to the evidence that the policy is pure mercantilism. While wine GIs are beyond the scope of this article, Prosecco is a significant exception as the EU has ***changed the name of the grape variety***. When the EU signed bilateral wine treaties with New World countries (e.g. Canada 1989; Australia 1994), Prosecco was recognized as a grape variety name and available globally for all to use. In 2009 the Italian government changed the grape variety name to Glera, a term little used before 2009, even in the main region where Italian prosecco wine is made (Davison et al., 2019: 111-112). On the basis of this legal fiction, endorsed at the EU level, Prosecco was then registered as a protected EU GI wine name, creating problems for Croatian Prošek producers and for Prosecco producers globally.[62]

The EU presents its GI policy as part of a broader food quality initiative. It is hard to find any elements in the scheme which support their view. As noted above, there is little if any regulatory oversight of the specifications developed by producer associations.

The EU and its spokespeople also often claim GIs as important representations of heritage. But production specifications can readily be changed. In an analysis of the 1,276 food GIs registered at 30 October 2016, Ruiz and colleagues (2018) found that 17% had had their production specifications amended at least once. This is not necessarily a bad thing, but it does undermine the patrimony argument that has been increasingly used over the past two decades (AND-International, 2019: 24). An example of such abandonment of heritage is Camembert de Normandie, where only two producers still use raw milk from pasture-raised cows (Pantzer, 2019).

In contrast to Europe, Australian processes for approving certification marks are designed to ensure that potential anti-competitive effects can be identified and eliminated. 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,

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or commercial matters" – as on their face they were too complex and costly (to producers) and provided fewer privileges (European Commission staff, 2010b: 33).

[62] "Whereas Italy's current territorial claim to Trieste and the town of Prosecco is legitimate, Veneto's wine producers have relatively recently been allowed to usurp a territory and name that has no historical connection with its sparkling Prosecco other than that wine made of prosecco grapes was once traded into Venice from elsewhere, and that later its local product used this grape variety to produce a sparkling [wine]. As result, the Veneto Prosecco GI producers have rewritten history in an attempt to safeguard their economic interests to the detriment of a product that has been legitimately produced in another EU Member State for over 2000 years" (Sanders, 2015: 758). See also Battaglene et al., 2020, Davison et al., 2019; and https://www.thewineandmore.com/stories/articles/prosek-vs-prosecco/

unfair practices, product safety and/or product information".[63] This ensures a better balance between public interests and proprietary privileges.

A final issue in the question of food labels to indicate geographic names is when the registered name is not a place name. TRIPS does not specify that the geographical indication should be a place name. The EU has allowed a word meaning slice to be registered as a name exclusive to certain Greek cheese producers. Feta cheese is widely produced throughout eastern Europe and the Middle East and there were major manufacturers in Denmark, France, Germany and the UK prior to the registration of feta as an EU PDO (Gangjee, 2007b).

The use of non-geographic names as GIs is one of the EU's TRIS-Plus privileges. Article 2(3) of the 1992 GI regulation simply stated that certain non-geographical names could be considered PDOs in the same way as geographic names. This privilege was extended to PGIs in the 2006 regulation (Article 2(3)). Under the 1992 regulation feta was refused registration as a GI name. But the 2006 regulation changed the basis for determining if a name is generic, effectively moving away from the basis on which a Community Trade Mark would be refused. Priority was thus given to the fact that feta was considered non-generic in Greece and the views in other member states that it was a generic name were no longer relevant under the revised regulation (Gangjee, 2007b). In the second ECJ decision on feta the court held that "a time-honoured association between an expression and a region is sufficient to "charge" it with geographical salience".[64]

A number of the names in the list that the EU has proposed for registration as GIs in Australia are not place names. Beyond feta, there appear to be no places named fontina, montasio, manchego, reblochon or finocchiona.

From the earliest development of trademark systems it has been acknowledged that names in common use should not be privately appropriated. When trademark registration was introduced in the late 1800s, only "fancy" (made-up) words could be used a trademarks (Kingston, 2010: 32). Since then producer interests have substantially undermined the balance of public versus private interests (Greenhalgh and Webster, 2015). Within the list of names put forward by the EU for exclusive private use in Australia are many common names. The listing on the Department of Foreign Affairs and Trade (DFAT) website indicates that a number of these common names have been recognised as remaining in the public space.[65] But some have not. These include: ajo (garlic), balsamico (a type of vinegar), bergamot (a species of citrus fruit), cream, kiwi (as in kiwi fruit), manchego (a sheep breed), mortadella (a type of sausage), moutarde (mustard, a condiment), thym (a herb), and parmigiano (parmesan, a type of cheese).

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

[64] *Kingdom of Denmark, Federal Republic of Germany and French Republic v Commission of the European Communities* (Joined Cases C-289/96, C-293/96 and C-299/96).

[65] https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/geographical-indications/list-of-eu-requested-geographic-indications-gis#foodstuffs.

6. Conclusions: where should Australia draw the line?

The EU has persuaded a number of countries to adopt aspects of its GI policy in exchange for improved access to EU markets. There is limited evidence that the benefits to the partner countries outweigh the costs. For example, for CETA Kerr and Hobbs (2015) examine the impact on agri-foods and conclude "little in the way of agricultural trade liberalization was achieved and protectionist interests were maintained." New Zealand has made great concessions on GIs, but as yet the net outcome is unknown.[66]

Agreeing to implement a tailor-made GI registration system would have small costs for Australian taxpayers, but would be unlikely to have any other adverse impact. The costs to taxpayers could be offset by requiring the likely agricultural beneficiaries from any trade agreement (beef and sheep exporters) to fund the cost of establishing and maintaining the registration system. Or Australia could reject the proposition that there be no fees, and fees could be set to cover costs. Because of the significant differences in the geography of agricultural production between Europe and Australia, Australian food producers are unlikely to use the new system. Indeed regional development in Australia is far better served by certification marks, and there is evidence of a few regions starting to use these (Moir, 2020: 12-13). The lack of any significant misrepresentation as to the origin of foods in the Australian market indicates no need for further regulation.

Australia should think carefully about aspects of agreeing to GI protection in Australia for specific products set out in an annex to the treaty. In particular Australia should:

1. Insist on proper rule of law procedures for examining and allowing oppositions to proposed GI names;
2. Refuse to agree any names that mislead consumers;
3. Recognise generic names and provide for CETA-style grandfathering for existing producers of key products with names that are generic in Australia;
4. Refuse any non-geographic names;
5. Reject any aspect of TRIPS-Plus privileges (packaging and evocation); and
6. Require compensation by the GI consortium where a newly registered GI name conflicts with an already registered trademark name.

6.1 Maintain rule of law

The proposed treaty provides for proper transparent legal processes for registering GI names agreed after the treaty has been adopted. However such procedures are not proposed for the list of 166 names put forward for immediate recognition. Australia is on the public record, repeatedly, in arguing that proper rule of law processes should always be followed in registering GI names. It is clear that New Zealand has been persuaded to ignore the need for transparent rule of law processes, and it seems likely that Canada also agreed to this. Australia should not. It runs against Australia's legal obligations under the CPTTP. It is also grossly unfair to Australian producers.

There is already substantial mistrust in government and the risks of this blatantly unethical approach in further undermining trust in government are strong. Those who have been denied their legitimate right to oppose specific names will likely feel aggrieved, with no clear avenue to seek compensation for this expropriation. The legal basis for a decision to accept a GI name prior to the introduction of any tailor-made GI legislation seems as absent as the legal basis for the robo-debt processes.

[66] Castalia (2017: 27) concluded that the net cost of implementing the likely EU GI demand would be small, **provided that** generic names such as feta, parmesan and haloumi are excluded **and** CETA-style protections for existing producers are adopted. These conditions were not met in the final agreed text.

6.2 No misleading food labels

Australia has high quality consumer protection laws, and labels that mislead consumers as to the origin of particular products are unlawful. Beyond this, the Australian government should not collude in legal fictions that officially registered names indicate a place of origin when they do not.

The EU should be required to produce the full registered specification rules as to place of origin for each PDO product proposed for protection in Australia and guarantee to Australia that the product is entirely produced within the designated region, including the raw materials. If any PDO product does not originate in the named area, its registration in Australia should be rejected. The EU has strict rules for registered wine GIs covering the production area, but has not applied similarly strict rules to foodstuffs. This is despite the principal objective being clear information for consumers. The most recent revisions to EU GI policy do not address this glaring omission.[67]

The EU should also be required to provide evidence as to the production location of all PGI products in their proposed list. If the raw material comes from outside the region or the proportion of value added in the region is less than, say 70%, then that PGI name should not be registered in Australia.

All registered GI products should be required to be labelled with the country of origin of the principal ingredient, where this differs from the place name on the label.

6.3 Recognition of generic names and grandfathering for existing producers

A number of the names proposed for registration in Australia are generic in this country and, indeed, globally. The original EU GI regulation required the EU to develop a list of generic names and publish this before the regulation came into effect (EC 2081/92 Article 3(3)). This commitment was never met and was dropped in the 2006 regulation.

Previous EU treaties have agreed – often in side-letters or footnotes to Annexes – that certain names are generic. A clear, transparent, non-exhaustive list of generic names should be specified as part of the treaty. This would bring together all names previously agreed by the EU to be generic and thus set a baseline for partner countries in future trade negotiations with the EU. It would also be an important protection for consumers – too often disregarded in EU GI policy. The list should include all generic names, not just those on the EU list, given the EU's track record in later trying to convert generic names to proprietary names (e.g. Prosecco). Proposals for identifying generic names, and a preliminary list of generic names, are in the Appendix.

The first best option would be to refuse to register any of these generic names as recognised GIs in Australia. This would not prevent the registration of compound names using a generic product name and a specific place name (such as thym de Provence).

A second best option would be to agree to provide GI privileges for certain generic names, but simultaneously adopt CETA-style grandfathering for all existing producers of such generically named products. All producers making the product prior to the commencement of EU trade negotiations should be allowed to use the name in perpetuity and, if they sell their business, the new owner should have the same right. New producers of such generically named products should be allowed to market their product using the product name together with a clear statement of where the product is made, e.g. "feta, made in Tasmania".

[67] https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en#proposaltostrengthengisystem.

6.4 Non-geographic names and legal fictions

There are many fictions in EU regulations on GIs, starting with the definition of what constitutes a misleading label. An important fiction is allowing non-geographic names to be registered as Geographical Indications.

Australia has always been a strong advocate for the rule of law. Agreeing to recognise legal fictions undermines this important value. No quantity of increased beef or lamb exports to Europe is worth sacrificing this principle.

Australian legislation to support a tailor-made GI system should include the principle that only place names can be registered as GIs, with a preference for compound names using a product type name combined with a place name.

Further, Australian legislation for a tailor-made GI system should include the principle that names that are animal breeds or plant varieties cannot be registered, even if qualified with a product name. Queso manchego combines the Spanish word for cheese with the sheep breed name manchego, so should not be eligible for registration. Similarly, while the EU has not hesitated to use legal fiction to redefine the name of the grape variety prosecco, Australia should refuse to be a party to such unethical action.

6.5 No TRIPS-Plus privileges

EU GI regulations have, from the beginning, allowed TRIPs-Plus privileges, preventing indirect commercial uses of registered names and "evocation" of such names. The history of EU legal decisions on evocation is well documented by Battaglene et al (2020), culminating in the absurd decision regarding the cheeses queso manchego and rocinante. Queso manchego is made in and around the Spanish province of La Mancha, where the famous Don Quixote novel is set. Competitor cheeses called Rocinante, and picturing the image of Don Quixote's equally famous horse, have been held by the European Court of Justice (ECJ) to unlawfully evoke images of Queso manchego.[68] This absurd and extreme restraint of trade has no place in a country like Australia which places a high value on competition as the basis for economic prosperity.

6.6 Compensation from later GI to earlier trademark owner

An important principle of trademark law, long upheld in Australia, is that the first registration of a name prevents subsequent registrations of the same name for that product class. EU GI policy seeks to undermine this fundamental legal principle with respect to the intersection of GI names and trademarks, and the EU has sought to extend this policy globally through trade treaties. This is not the place to discuss the ethics (or rather lack of them) in EU trade policy. However a minimum principle if any such policy is agreed should be that the later GI registrant compensate the earlier trademark owner for any consequent loss in asset value or earnings. Such compensation should be enshrined in any tailor-made GI registration system legislation.

6.7 Would enhanced exports offset the damage from EU GI name registration?

Costs and benefits from trade treaties are complex to evaluate and require some brave assumptions. These days, with very low tariffs on most non-agricultural products, the key issue becomes services trade. It is even harder to quantify benefits and costs from services chapters in trade treaties than for those concerning trade in goods. The service sector is diverse, and in many sub-sectors the main barrier is domestic regulation – regulation which may inhibit imports, but which also protects consumers from insufficiently skilled

[68] https://www.courthousenews.com/don-quixote-cheese-labels-may-infringe-manchego-protections/

providers (Nerlich and Ong, 2019). Revising these regulations is a long and arduous process, which needs to be sensitively handled so that essential consumer protections remain.

Against this background of hard-to-quantify but easy-to-claim benefits from "enhanced" services trade, agriculture becomes a dominant issue. EU agricultural markets remain very highly protected, and there are also pockets of strong protection for Australian agricultural products. Indeed it is interesting to note that Curzi and Huysmans (2021) estimate that, with respect to cheeses in 2004-19, for Canada and the USA, the EU would achieve greater exports through increased quotas and reduced tariffs than through GI protection in Canada or the USA. This replicates 2003-04 research on French and Italian GI cheeses and Italian GI ham and the relative value of GI extension or improved tariff/quota access to US and Canadian markets, which also reached the conclusion that reduced tariffs and increased quotas would be a far more effective strategy for increasing EU GI exports (Vincent, 2007).

That said, the predominant mind set of trade negotiators appears to be increased exports rather than enhance economic welfare for their country by improving the level of competition domestically. So the likelihood in the Australia-EU trade negotiations is that the interests of the Australian dairy industry – and of food producers using dairy ingredients in their products – will be discounted against estimated increased beef and lamb exports. In part this is due to the complexity of the GI issue. And complex regulations are a key device for hiding excess privileges for selected constituencies (Braithwaite, 2005; Murray and Frijters, 2022).

Australia has often compromised in its trade treaties – for example when draft treaties with China, Japan and Korea were taken off the back-burner and fast-tracked by the new Abbott government. But it has also stood on principle on occasions, as when it refused to include investor-state dispute settlement processes in the Australia-United States Free Trade Agreement. Today, there is sufficient merit in the case for resisting the EU's unethical demands on GIs that refusal to this part of the treaty demand would not only benefit Australian producers and consumers, but would also be a beacon for a more ethical approach to trade negotiations generally.

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Appendix: Identifying generic names

The provisions in Article 18.33 of the CPTPP are a good starting point for determining what is a generic name.

> "… in determining whether a term is the term customary in common language as the common name for the relevant good in the territory of a Party, that Party's authorities shall have the authority to take into account how consumers understand the term in the territory of that Party. Factors relevant to such consumer understanding may include:
>
> (a) whether the term is used to refer to the type of good in question, as indicated by competent sources such as dictionaries, newspapers and relevant websites; and
>
> (b) how the good referenced by the term is marketed and used in trade in the territory of that Party.[69]"

However it needs to be clearly recognised that final consumers are not the only parties with understandings about the meaning of words. Wholesalers, the food service sector and retailers are key actors in distributing product and have particular insights into product naming and identification. The interests of domestic producers should also be recognised. If producers have marketed a product under a particular name for that product, this provides sound evidence that the product name is generic (common) in that country. Such producers may also have been responsible for developing a market for that product in the country where the name has become generic.

Generic (common) names are available for all to use, as a fundamental principle of trademark law. They cannot be withdrawn from public use and limited to proprietary commercial uses. However where a product name is generic and it is combined with a place name – for example pecorino Toscano – then the compound form of the name does not remove anything from the public domain and the compound name can be registered as a GI without any negative impacts.

The following provides a non-exclusive listing of food and wine names already recognised as generic, both in Australia and globally. The list does not include words with general meanings such as broad types of food (bacon, mustard, marzipan, etc), plant variety names (prosecco, thyme) or animal breeds (manchego).

Appendix Table 1 looks only at names proposed by the EU for the trade treaty currently being negotiated with Australia and at cheese names in NEXDOC, the Australian export classification system. It is put forward as a starting position on the development of a non-exhaustive list of common names.

[69] For the purposes of this subparagraph, a Party's authorities may take into account, as appropriate, whether the term is used in relevant international standards recognised by the Parties to refer to a type or class of good in the territory of the Party.

Appendix Table 1 Initial non-exhaustive listing of generic food names

Name	Agreed by EU demand to AU[1]	EU Customs Tariff Schedule[2]	Codex Alimentarius[3]	NEXDOC (AU export classification)[4]	Other evidence, including EU treaties / *Notes where not a geographic name*	Product type
Names in Australian NEXDOC system and already agreed in the EU treaty demand as generic						
brie	agreed	*04069084*	CXS 277-1973	listed	Korea[5]	cheese
camembert	agreed	*04069082*	CXS 276-1973	listed	Korea[5]	cheese
cheddar	agreed	*04069021*	CXS 263-1966	listed	Korea[5]	cheese
edam	agreed	*04069023*	CXS 265-1966	listed		cheese
emmental	agreed	*04069013*	CXS 269-1967	listed	Korea[5]	cheese
gouda	agreed	*04069078*	CXS 266-1966	listed		cheese
mozzarella	agreed	*04061030*	CXS 262-2006	listed	*Not a geographic name*; in EU is a TSG not PDO or PGI; Korea[5], Japan[6]	cheese
pecorino	agreed	*04069063*		listed	Korea[5], Japan[6]	cheese
provolone	agreed	*04069073*	CXS 272-1968	listed	Korea[5]	cheese
Names in Australian NEXDOC system, agreed by EU as generic in other contexts, but not specifically agreed as generic in current treaty negotiations						
feta		*04069032*		listed as fetta (many varieties)	*Not a geographic name*; CETA[7], Singapore[8] A majority of then EU member states proposed feta as a generic name as part of the EEC 2081/92 regulation's (unmet) obligation to develop a register of generic names (Gangjee, 2007b: 175). Historically imported into Greece; produced in other EU member states (Bulgaria, Denmark, France, Germany) as well as in the UK and a number of Middle Eastern countries. Vincent (2007) states is generic in USA and Canada by 2004. Van Caenegem et al. (2015: 13, 64) suggest feta is generic in Australia.	cheese
fontina		*04069076*		listed	*Not a geographic name;* CETA[7]; Vincent (2007) states is generic in USA and Canada by 2004.	cheese
gruyère		*04069015*		listed	CETA[7]; New Zealand treaty[9] allows for continued use by New Zealand producers.	cheese
munster				listed as meunster	CETA[7]	cheese

Name	Agreed by EU demand to AU[1]	EU Customs Tariff Schedule[2]	Codex Alimentarius[3]	NEXDOC (AU export classification)[4]	Other evidence, including EU treaties / *Notes where not a geographic name*	Product type
parmesan		*04069061* (parmigiana Reggiano)		Listed as parmesan and as parmigiano	Korea[5], Japan[6]; CETA[7] provides for continuing use in trademarks; New Zealand treaty[9] allows for continued of terms parmesan and Parmigiano Reggiano by existing New Zealand producers. Margaret Fulton, 1983, *Encyclopedia of Food and Cookery* uses parmesan as a standard ingredient name; Vincent (2007) states is generic in USA and Canada by 2004.	cheese
romano				listed	Korea[5], Japan[6]	cheese
kasseri		*04069085*		listed		cheese
montasio		*04069075*		listed		cheese
Names in Australian NEXDOC system but not yet agreed by EU as generic in any context						
fiorello				listed		cheese
formaggini				listed		cheese
haloumi				listed	*Not a geographic name*	cheese
keffir				listed	*Not a geographic name*	cheese
kefolotouri				listed		cheese
labneh				listed	*Not a geographic name*	cheese
morbier				Morbier-style listed		cheese
neufchatel				listed		cheese
Agreed generic by EU but not important to Australian producers (not in NEXDOC)						
chabichou	agreed					cheese
bresaola	agreed					meat
canard à foie gras	agreed					meat
Evidence of generic name, but not in NEXDOC						
asiago		*04069075*			CETA[7]; Vincent (2007) states is generic in USA and Canada by 2004.	cheese
beaufort					CETA[7]	cheese
cantal		*04069081*				cheese
gorgonzola		*04064050*			CETA[7]; Vincent (2007) states is generic in USA and Canada by 2004.	cheese
grana		*04069061* (grana Padano)			Korea[5], Japan[6]	cheese
kefalograviera		*04069085*				cheese
roquefort		*04064010*				cheese

Name	Agreed by EU demand to AU[1]	EU Customs Tariff Schedule[2]	Codex Alimentarius[3]	NEXDOC (AU export classification)[4]	Other evidence, including EU treaties / *Notes where not a geographic name*	Product type
saint-nectaire		*04069079*				cheese
taleggio		*04069079*				cheese
jambon de bayonne					CETA[7]	meat
mortadella					Japan[6]	meat
nürnberger bratwürste					CETA[7]	meat
kiwi(fruit)			CXS 338-2020		Not included in EU-NZ treaty annex,[9] despite being in EU demand.	fruit
Other: not in EU demand, or agreed as generic by EU in other contexts						
havarti		*04069076*		listed	*Not a geographic name*	cheese
reblochon					*Not a geographic name* French recipes use reblochon as a variety name: https://www.recettes-gourmandes-de-joce.com/pages/sauces-chaudes-et-froides/sauce-au-reblochon-sauce-chaude.html or https://recettes.de/sauce-au-reblochon	cheese

Notes:

1 https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/geographical-indications/list-of-eu-requested-geographic-indications-gis#foodstuffs where all underlined names are agreed by the EU as generic/common names.

2 See https://www.tariffnumber.com/2023/0406 for specific cheese tariff numbers. See also EU's Customs Tariff Schedules: *EU Official Journal L282 (31 October 2017),* https://op.europa.eu/en/publication-detail/-/publication/fc31c796-bdcf-11e7-a7f8-01aa75ed71a1

3 See the FAO's Codex Alimentarius, setting out internationally agreed food standards (https://www.fao.org/fao-who-codexalimentarius/about-codex/en/), but note that listing of specific product names in the Codex has become a very political issue.

4 For listings of dairy names for Australian export classification, see https://www.agriculture.gov.au/biosecurity-trade/export/controlled-goods/dairy/exporters/category-codes#prescribed-by-an-importing-country. This very accessible site uses the Next Export Documentation (NEXDOC) system and links to the Australian Harmonized Export Commodity Classification (AHECC).

5 Korea-EU Trade agreement side-letter between Korean and US Ministers at https://ustr.gov/sites/default/files/uploads/pdfs/PDFs/December%202012/062011%20Kim-Kirk%20Letter%20on%20GIs.pdf.

6 EU-Japan Economic Partnership Agreement (https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/japan_en) specifies that grana and parmesan remain in public use and that mozzarella di buffalo campana, pecorino romano and mortadella bologna are privileged only in their full compound form.

7 EU-Canada Comprehensive Economic and Trade Agreement (CETA) (at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en), Article 20.21 and products listed in Annex 20-A. Note that Article 20.21.11 allows continued used of the following names in trademarks – Valencia Orange, Black Forest Ham, Tiroler Bacon, Parmesan and St. George Cheese.

8 Singapore EU Trade agreement side-letter at https://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151779.pdf.

9 EU-New Zealand trade agreement, Annex 18-B (https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Text/List-of-Geographical-Indications.pdf).