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European Trade Treaties: Key Intellectual Property Demands

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Acronyms

ACCC	Australian Competition and Consumer Commission
ACTA	Anti-Counterfeiting Trade Agreement
AUSFTA	Australia-United States Free Trade Agreement
CETA	Canada and EU Comprehensive Economic and Trade Agreement
CO	Colombia
CTM	Community Trade Mark
EC	European Commission
ECJ	European Court of Justice
EU	European Union
GI	geographical indication
IP	intellectual property
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
PDO	Protected Designation of Origin
PE	Peru
PGI	Protected Geographical Indication
PLT	Patent Law Treaty
PTE	patent term extension
TPP	(proposed) Trans Pacific Partnership Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSG	Traditional Specialty Guaranteed
WG	working group
WTO	World Trade Organization

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European Trade Treaties: Key Intellectual Property Demands

Executive Summary

Modern “trade” treaties are much more than that. They now cover a wide range of market interventions and regulations, some of which have little, if any, relationship to trade or investment. The five post-2006 Global Europe treaties are no exception. They go beyond WTO issues, venturing into fields such as labour standards and the environment.

The European Union (EU) treaties with the Andean countries and with Central America are in style closer to older trade agreements, though the scope is broad. The agreements with Korea, Singapore and Canada show substantial regulatory detail, more like US preferential agreements. At least in respect of intellectual property (IP) they are very detailed.

The EU and the USA failed to achieve their full IP agenda in the Uruguay Round. Undaunted, both these powerful traders have been pursuing their unmet IP goals through a series of bilateral and regional agreements, often with quite small trading partners. The EU prioritises geographical indications (GI), present in all recent treaties. In contrast to the USA the EU rarely seeks changes to patent provisions, but it does seek stronger data protection than the USA. The EU’s copyright and enforcement demands are similar to those of the USA.

This paper focuses on the two issues which most distinguish EU IP demands – geographical indications and data protection. While agreeing to EU style data protection measures would be costly to Australia, such demands are not a deal-breaker. But GI demands are. All five *Global Europe* agreements include GI provisions, and it is unlikely that any EU agreement could proceed without at least some concessions in this area.

GIs are about what things can be called. They do not prevent anyone making an identical product, but it cannot be named in conflict with a registered GI. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) makes only modest provisions for GIs and provides substantial protection for trademark owners. Nonetheless some countries, including Australia, Canada and the USA have signed EU wine and spirit agreements, adopting strong form GI privileges in exchange for improved access to EU wine markets. But stronger GI provisions for foodstuffs have been a sticking point until the recent Canada-EU Trade Agreement (CETA).

The economic justification for GIs rests on slender presumptions, and the little existing empirical evidence suggests that the effectiveness of GI policies is variable and contingent. They work well when there is a strong quality reputation and where administrative and marketing costs are modest. Absent these conditions, producer groups would do well to scrutinise proposals for a GI approach carefully. So too would policy makers. Depending on the circumstances they can be welfare-reducing. Scrutiny of the EU approach indicates an absence of economic screening criteria, giving rise to some anti-competitive outcomes. In the EU, GI policy trumps competition policy.

That said, there are examples of more efficient GI schemes, such as that adopted by Australia’s wine industry. If carefully designed, GI schemes need not be welfare-reducing. As some form of GI protection is a deal-breaker for EU trade agreements, Australia might wish to develop its own proactive approach to GIs, drawing on existing experience with certification marks (where ACCC scrutiny is a prerequisite). This will not be easy as there are industry segments which would be negatively affected by stronger GIs. But it will be an essential early step in progressing an economic agreement with the EU.

1. Background

This research commenced through a joint project between the ANU's Centre for European Studies and the Europe-Australia Business Council. The project funded research designed to provide an evidence basis for selected issues that would be involved in any comprehensive economic agreement between Australia and the European Union (EU). This part of the project identifies key EU intellectual property (IP) demands and considers the cost and benefit implications of these for Australia.

The analysis of the EU's IP demands is based on a close reading of the EU's new generation economic agreements with Korea, Columbia/Peru, Central America, Singapore and Canada. While it is rare for any evidence to be tabled when increased IP provisions are sought, this analysis does consider some of the available data on the impact of GIs and data protection.

The 1994 Marrakesh Single Undertaking was a major change in international trade negotiations. This agreement established the World Trade Organization (WTO) and also mandated that nations wanting to participate in the General Agreement on Tariffs and Trade (GATT) also had to sign up to a set of agreements covering agriculture; services; textiles and clothing; technical barriers to trade; sanitary and phytosanitary measures; investment measures; and intellectual property.¹ In the subsequent myriad bilateral and regional preferential trade agreements a "beyond trade" scope is also evident. The analysis therefore starts with a broad overview of the content of the new generation of EU economic agreements (Section 2). This allows EU IP demands to be seen in context.

The IP issues are discussed in Sections 3 and 4. Section 3 focuses on the stated objectives of IP chapters in EU trade agreements. These are compared to the objectives of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS). The EU's three main demands are identified as geographical indications, protection for pharmaceutical and chemical data and enforcement. Both the EU and the USA were leaders in proposing increased enforcement provisions in the Anti-Counterfeiting Treaty Agreement (ACTA). Because enforcement provisions were thoroughly analysed when ACTA was considered,² they are not discussed in this paper.

Section 4 focuses on geographical indications. Because this new form of IP has been the one where there is the greatest gap between Australian and EU positions, GIs are discussed from a number of angles. A particular concern is potential clashes between GIs and competition policy, though there are ways of managing this. Section 5 reviews EU demands on patents and, more importantly, the related issue of data "protection" for pharmaceuticals.

The final section of the paper draws the previous discussion together, focusing on key issues for Australia in considering whether to trade improved market access to the EU in exchange for a different approach on GIs.

¹ The set of agreements that are required for World Trade Organization (WTO) membership comprises the Agreement establishing the WTO, the General Agreement on Tariffs and Trade (GATT) 1994; the Agreement on Agriculture; the Agreement on Sanitary and Phytosanitary (SPS) measures; the Agreement on Textiles and Clothing; the Agreement on Technical Barriers to Trade (TBTs); the Agreement on Trade-Related Investment Measures (TRIMS); the General Agreement on Trade in Services (GATS); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as a range of other technical agreements, understandings and decisions (see http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#top). Other Agreements, such as that on Government Purchasing, were not included in the Single Undertaking.

² See Joint Standing Committee on Treaties (JSCOT) report on ACTA and submissions to JSCOT (at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=jsct/21november2011/report.htm).

2. Overall trade treaty objectives

From Australia's perspective the desire for an economic agreement with the EU is based on the desire to remove constraints to Australia's ability to sell goods (including agricultural products) and services into the EU market. Current EU tariffs on most manufactured goods are low, at 1.5 percent.³ The principal area where imports into the EU are constrained remains agriculture. Here the outcome of the recent Canada-EU trade agreement (CETA) is of interest. In CETA reducing EU agricultural tariffs remained an issue that was too hard to tackle (Kerr and Hobbs, 2015). Instead, Canada was able to negotiate an increase in quota shares across a range of agricultural products. This is a very modest outcome. Services would thus seem to be the main area on which any potential agreement will focus.

Australia would do well to consider the outcomes of CETA in considering the market access gains that might – or might not – be achieved through a comprehensive economic agreement with the EU. The value of CETA as a road map for Australia is addressed in a companion project (Elijah, forthcoming).

The other benefit that Australia gains from economic treaties is from reforms to the domestic economy. Such reforms have traditionally been negotiating coin for improved market access. What is less well recognised is that the predominant share of benefits from trade agreements flows from such domestic reforms, not from increased market access for limited sectors (Armstrong, 2012). In traditional trade treaties domestic reforms focused on reductions in tariffs and barriers to trade. The consequent economy-wide reductions in costs benefitted not just consumers but also business. The immediate flow-on effect was an increase in the competitiveness of Australian businesses.

Now that Australian tariffs are very low, at 4.4 percent, Australia would do well to consider what negotiating coin it has to offer. Within the set of reforms that the EU might demand, which would create the greatest competitive edge for Australian firms, by reducing input costs? There is a good case to undertake such reforms unilaterally (Productivity Commission, 2010; Thirwell et al., 2009). But such reforms usually create losers, and politically it can be useful to package them in a trade agreement where a group of winners might have louder voices. Because intellectual property provisions reduce competition, Australia would do well to be very careful about extending the scope and strength of IP demands (Productivity Commission 2010; Harris et al., 2013; Harper et al., 2015).

The new generation of international economic treaties go well beyond reforms to improve competitiveness. As such they raise new questions as to benefits or losses from individual elements. Trade-offs between winning and losing groups become wider and more complex (Elijah et al., 2015).

EU objectives and scope

The first of the EU's new generation economic agreements was with Korea and the most recent with Canada (CETA).⁴ The three intermediate ones were all initially designed to be agreements with regions rather than individual countries. But the desired Andean agreement was eventually concluded only with Colombia and Peru, and the Association of Southeast Asian Nations (ASEAN) agreement only with Singapore. There was more success with the Central American agreement where six governments signed the agreement (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama).

³ <http://www.nationsencyclopedia.com/WorldStats/UNCTAD-import-rates-manufactured-goods.html>.

⁴ On 2 December 2015 the EU and Vietnam signed a trade agreement (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>). This very recent agreement is not covered in this paper.

The Central American agreement has the most ambitious objectives – to strengthen and consolidate relationships based on political dialogue, cooperation and trade.⁵ This agreement also specifies that this privileged political partnership should be based on democracy and human rights, good governance and sustainable development.⁶ It also has an objective of promoting regional economic integration in customs administration, technical regulation and sanitary and phytosanitary (SPS) measures both between and within the signatory parties. Unlike the other treaties, the Central American one couches trade liberalisation goals in terms of expansion *and diversification*.

The Korean, Singapore and Canada agreements all have the ambitious, but more specific, goal of establishing a free trade area.

Article 2 of the EU-Korea agreement sets out eight objectives to support the principal objective of a free trade area.⁷ These mirror sections in the agreement: liberalise trade in goods; liberalise trade in services and investment; promote competition; mutually liberalise government procurement; adequately protect intellectual property rights (IPRs); and remove barriers to trade so as to increase investment flows. The last two of the eight sub-objectives are more in the nature of safeguards than objectives. Article 2(g) recognises sustainable development as an overarching objective and states that the development of trade should be done in such a way as to promote this overarching objective. Article 2(h) states that foreign direct investment should not lower environmental, labour or occupational health and safety standards in environmental and labour laws of the Parties.

The later Singapore agreement is structured differently, with objectives and principles scattered throughout the chapters – indeed this agreement is not available as a single document, but comes in 17 chapters, many appendices, a protocol, four understandings and a side letter.⁸ The specific Singapore commitment on services liberalisation contains a number of exclusions. But commitments on competition, IP, and sustainable development re-appear in this agreement. In contrast to Singapore, CETA comes as a single 1634 page document.⁹ The overarching objective is establishment of a free trade area.

While the Colombia/Peru agreement does not specify achievement of a free trade area as a goal, it includes very similar objectives in specific areas, including services, investment, competition, government procurement, sustainable development and intellectual property.¹⁰

Despite the fact that tariffs on manufactured goods have reached very low levels,¹¹ the bulk of all texts is the schedule of tariffs and quotas for trade in goods. These goods chapters also cover agricultural products, though progress in achieving globally competitive markets for most agricultural products remains slow, due to the political sensitivity of agriculture particularly in Europe, Japan and the USA. Kerr and Hobbs (2015) demonstrate that CETA does not liberalise agricultural trade for any commodity that is sensitive to either party.

All the agreements have substantial chapters on trade in services, usually also including the establishment of companies, e-commerce and the temporary entry of business personnel

⁵ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>.

⁶ The EU has had a policy of including human rights clauses in trade treaties since the early 1990s. In 2009 this changed to a policy whereby such clauses were negotiated in a Framework Agreement, concluded prior to the commencement of negotiations on a trade or investment treaty. The effectiveness of this policy of putting the human rights clauses into a separate agreement has been questioned (Bartels, 2014:7).

⁷ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2011:127:TOC>.

⁸ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

⁹ http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

¹⁰ <http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/>.

¹¹ By the mid 1990s average global tariffs were just 5 percent (Productivity Commission 2010: 30).

(see Table 1). Expanding trade in services can require changes to sensitive areas of domestic regulation including health, education, finance, the law and migration policy (Baldwin, 2011). Care needs to be taken in agreeing such regulations to ensure that the outcomes maximise competition and minimise damage to important social and economic safeguards (Elijah et al. 2015). Without such care there is a high risk of dissent from civil society.

Other standard inclusions are chapters on investment, government procurement, intellectual property and dispute settlement. These were all issues included in the Uruguay Round, though not all were part of the Single Undertaking. Going beyond matters included in the Uruguay Round, there are chapters on competition, transparency and sustainable development. Some of these issues require very careful handling.

Regulation in these areas is complex and, despite regular international policy borrowing, tend to be deeply rooted in a society's overall economic structure, laws and regulations. Importing only selected aspects of such regulations can lead to unanticipated negative outcomes. Weatherall (2015) has shown the problems this can raise with respect to copyright. Seuba (2014) has shown the lack of balance in EU IP enforcement demands and has indicated how countries can voluntarily also import EU safeguards to ensure the outcomes are balanced and proportionate.

CETA has the broadest scope of the five treaties – in addition to the full array of chapters present in the other treaties; it also has chapters on state enterprises, labour and the environment. Should the proposals for a comprehensive economic agreement with the EU progress, Australia would do well to study these chapters carefully as they involve sensitive domestic issues.

Table 1: Scope of post 2006 EU economic agreements

	Korea	Colombia and Peru	Central America	S'pore	CETA
Initial provisions / definitions	✓	✓	✓	✓	✓
Trade in goods	✓	✓	✓	✓	✓
Trade Remedies	✓	✓	✓	✓	✓
Technical barriers to trade	✓	✓	✓	✓	✓
Sanitary and phytosanitary measures	✓	✓	✓	✓	✓
Customs and Trade facilitation	✓	✓	✓	✓	✓
Rules of origin					✓
Movement of goods		✓			
Exceptions		✓	v		
Trade in commerce, establishment and e-commerce	✓				
General provisions		✓	✓		
Establishment		✓	✓		
Cross-border supply of services		✓	✓		✓
Temporary entry (natural persons)		✓	✓		✓
Regulatory framework		✓	✓		✓
E-Commerce		✓	✓		✓
Domestic regulation/cooperation					✓
Mutual recognition (prof qualifications)					✓
Financial services					✓
International shipping services					✓
Telecommunications					✓
Investment (Capital movements)	✓	✓	✓	✓	✓
Government procurement	✓	✓	✓	✓	✓
Intellectual property	✓	✓	✓	✓	✓
Competition	✓	✓	✓	✓	✓
Transparency	✓	✓	✓	✓	✓
Sustainable development	✓	✓	✓	✓	✓
Dispute settlement	✓	✓	✓	✓	✓
Technical Assistance	✓				
Regional economic integration			✓		
Final provisions	✓	✓	✓	✓	✓
Additional chapters on state enterprise, labour, environment					✓

3. Intellectual property objectives

The two most common IP objectives in these five agreements are:

- A. Facilitate the production and commercialisation of innovative and creative products in the Parties; and
- B. Achieve an adequate and effective level of protection and enforcement of intellectual property rights.

Objective A is in all the treaties except that for Central America, which has a specific objective on technology transfer and the creation of a sound technological base (see Table 2). Objective B is in all five agreements, though three add provisos. The Andean (Colombia/Peru) treaty proviso requires that "adequate and effective IP" be balanced – "that contributes to transfer and dissemination of technology and favour social and economic welfare and the balance between the rights of the holders and the public interest." The Central America proviso also requires some balance – "taking into consideration the economical [sic] situation and the social or cultural need of each Party." In contrast the proviso in the Singapore treaty strengthens the enforcement part of the objective.¹²

These two objectives *presume* that intellectual property rights will facilitate the production and commercialisation of innovative and creative products. With regard to patents (innovative products) there is a large empirical literature indicating that in most industries and technologies, patents are not needed as an incentive either to produce or to commercialise innovative products (López, 2009). Indeed, with the very low standards for patent grant (Moir, 2013a), much of what is patented is not recognisably innovative let alone inventive.¹³ Many patented products have little to do with innovation.

In regard to copyright (creative products), it is widely acknowledged that the current policies operate to provide substantial benefits for the *distributors* of creative material rather than the creators of such material (Court, 2013). Given current policy settings any claim that copyright provides an incentive for creative products is dubious. Again most policy discussion occurs in an evidence-free environment.

Objective B is vague, perhaps deliberately. What is an adequate level of protection? As monopolies and restraints of trade are generally undesirable, an adequate level of protection is one which will call forth creative or innovative products *which would not otherwise occur*. The incentives should not be available for products which would be produced absent IP policy. It is both inefficient and ineffective to provide IP rights for products which are not induced by the policy, though this is common practice. Nor is it in any society's interests to provide such trade-restraining privileges unless the social benefit from the induced product is greater than the social cost of the monopoly provision (Moir, 2013b: chapter 2). Again this rule is regularly broken. Objective B also covers enforcement – a high priority issue for the EU.

¹² In the Singapore agreement the objective has a preamble to "increase the benefits from trade and investment through ..." as well as the enforcement addition "... and the provision of measures for the effective enforcement of such rights."

¹³ For example, in the ordinary world, most citizens would assume that a pharmaceutical company would consider the appropriate delivery mechanism to use with a new drug – immediate, delayed or extended release. However pharmaceutical companies seek – and are granted – new patents for combining known compounds with known delivery mechanisms and they use such patents to delay generic entry (Moir and Palombi, 2013), thereby extending the monopoly period beyond that agreed by policy decision-makers.

Table 2: IP objectives in new generation EU economic treaties

IP objective	Korea 2011	Colombia/ Peru 2013	Central America 2013	Singapore 2013	Canada 2015
A. Facilitate the production and commercialisation of innovative and creative products in the Parties	✓	✓ (with addition: promote innovation and creativity and ..)		✓	✓
B. Achieve an adequate and effective level of protection and enforcement of intellectual property rights	✓	✓ (with proviso on balance)	✓ (with proviso on economic and cultural differences)	✓ (additions: context and enforcement)	✓
C. Promote and encourage technology transfer between both regions to enable the creation of a sound and viable technological base in the Republics of the CA Party		As proviso to objective 2.	✓		

All the agreements acknowledge TRIPS; that with Singapore specifically bringing the TRIPS objectives and principles into the objectives of their agreement with the EU. The TRIPS objective statement (Article 7) appears to be largely written for patents and requires that the privileges granted "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology" in a manner that advantages both producers and users of new technology. By implication, similar balance should be achieved for the variety of very different privileges covered in TRIPS – copyright, trademarks, geographical indications, design, circuit layouts and undisclosed information.

In fact there is little evidence of this required balance having any real-world effect. Preferential trade agreements generally require TRIPS+ policies, tilting existing arrangements even further in the interests of particular IP rights-holders. In the small number of IP cases brought before the WTO's dispute settlement body, Article 7 and 8 requirements have not yet been used in interpreting specific commitments (Frankel, 2000).

The Central American and Andean (Colombia/Peru) treaties include a technology transfer objective, though in the Andean treaty this is specified as a proviso to objective B. The Central American treaty also includes the objective to "promote technical and financial cooperation in the area of intellectual property rights between both regions."

In general, though, the IP provisions in these five treaties are all provisions which benefit IP owners. Where EU internal policy is more balanced – recognising both creator and user rights – protections for users rarely feature in EU IP chapters. This is particularly the case for copyright and enforcement issues (Drexler et al., 2014).

The EU IP ask

Because of the statutory basis of most intellectual property provisions, and the Most Favoured Nation (MFN) clause in TRIPS (Article 4), when Australia agrees to new “intellectual property” provisions, it must provide these new provisions to all nations, even those which are not members of the WTO (Frankel, 2008). The exchange, however, is improved market access with only the other party. This means that the cost of IP concessions has a particularly high weight compared to any trade benefits.

An important first principle

The MFN provisions of TRIPS mean that concessions on IP issues must be given to all 161 WTO members, not just the other partner to the preferential trade agreement.

The EU, the USA and the European Free Trade Association (EFTA) all actively pursue preferential economic agreements (Roffe, 2014). All contain intellectual property provisions and these generally go beyond TRIPS, sometimes radically constraining the policy freedom of a signing country (Drahos, 2003; Flynn et al., 2012; Sell, 2011). These agreements have, until recently, been with small countries. Even the Korea-US or Australia-US free trade agreements (respectively KORUS and AUSFTA) involve negotiations between parties with substantially different bargaining power. The most recent trade negotiations – for example between the USA and the EU and between the USA and Japan (in the context of the proposed Trans Pacific Partnership (TPP) agreement) – are quite different and place the principal negotiating parties on a relatively equal footing. These negotiations have been proceeding slowly (Vastine et al., 2015).

Compared to the USA, the EU emphasises different aspects of intellectual property in its trade treaties (Watal, 2014). The most important difference is geographical indications (GIs). These are a central plank of the EU’s revised approach to agricultural policy. EU bureaucrats report that GIs can be “a deal-maker or a deal-breaker” to a proposed trade agreement. There are also differences between the EU and the US in regard to what the EU asks for on patents. The USA asks for continually lower standards for the grant of patents, which benefits the pharmaceutical industry by allowing evergreening patents. These minimally inventive patents play an important role in delaying generic entry into the pharmaceutical market (Moir and Palombi 2013). The EU, which has a slightly higher standard for the grant of a patent, focuses more on “data protection”. Data protection is an alternative form of regulatory impediment to generic entry to the pharmaceutical market.

While strong enforcement is also a priority for the EU, recent experience with ACTA indicates that EU demands are similar to those proposed by the USA. Indeed the EU and the USA were in partnership proposing ACTA. Eventually the European Parliament resoundingly voted against this treaty,¹⁴ though elements from it resurface in other EU trade agreements (Jaeger, 2014). If one considers the last five EU treaties (the “*Global Europe Strategy*” treaties) in terms of the structure and content of the “intellectual property” chapters, they are dominated by enforcement issues. Fully one-third of the length of the chapter, on average, is devoted to enforcement matters (Table 3). Effectively the EU appears to be using a different route to gain the demands it failed to achieve in ACTA.

¹⁴ There were 478 votes against ratification, 39 for and 165 abstentions (see Monica Horten, “Wow what a scorcher! ACTA slaughtered 478 to 39”, IPtegrity.com, 4 July 2012 (<http://www.iptegrity.com/index.php/acta/781-wow-what-a-scorcher-acta-slaughtered-478-to-39>)).

Running a close second are sections on geographical indications – these average 21 per cent of the chapters, with a range from a low of a mere 13 per cent for Central America to a high of 24 per cent in Singapore. As noted, EU negotiators seek little on patents – such sections run from a just 21 words in CETA to 518 in Singapore (see Table 3). But the associated data protection provisions are much lengthier ranging from 342 words in Korea to 1,596 in CETA. A highly sensitive issue in respect of data protection is “patent linkage”, a policy which effectively turns medicine approval authorities into patent police. Patent linkage is not permitted in the EU,¹⁵ yet the EU demanded extensions to Canada’s patent linkage system in the CETA negotiations (Lexchin and Gagnon, 2013).

Table 3 Typical structure of “IP” chapters: new generation EU trade treaties *

Sub-sections cover	Word length of provisions				
	Korea	Andean (CO/PE)	Central America	Singapore	CETA
General provisions:					
Objectives	37	69	85	92	42
Nature/scope obligations	163	312	396		86
General principles		321		177	170
Other provisions		177	109		55
Copyright and related rights	1,375	1,664	625	1,476	1,517
Trademarks	185	646	294	328	214
Geographical Indications	2,398	1,449 ^a	1,431	2,345	2,132
Designs	671	626	730	517	78
Patents	448	347	67	518	21
Protection of test data	342	513		632	1,596
Plant varieties	25	57	85	59	27
Enforcement	2,427	2,351	1,750	2,858	3,149
Service providers	861	789	94	413	
Transfer of technology	138	419	343		
Cooperation		304	367	289	102
Biodiversity / traditional knowledge	229	736			
Total words in IP provisions	10,109	10,861	6,376	9,704	9,189

* Word length of provisions excluding all annexes but including footnotes.

a The Andean treaty also included a short (81 word) section on unfair competition an issue closely related to geographical indications.

¹⁵ In 2012 Italy was reprimanded by the European Commission for trying to introduce a patent linkage system (http://europa.eu/rapid/press-release_IP-12-48_en.htm?locale=en).

In regard to copyright, both the EU and the USA push continually for new provisions which benefit content distributors, but which do not increase incentives for creators. This copyright agenda also attempts to shift enforcement costs from rights-holders to intermediaries such as internet service providers. The EU focuses on two particular copyright issues – the three-step test used to limit copyright exceptions and the three strikes sanction for repeated unauthorised downloading (Gervais, 2014). Copyright policy is complex because the nature of markets varies considerably by the type of creation – just within the book market there are radical differences in the economics of encyclopaedia, monograph, text book and fiction markets. The differences become more complex as one considers content forms such as audio-visual, broadcasting, paintings, emails and so on. Further there are an additional set of complexities for content forms using digital technologies – which both allows for the ready and cheap dissemination of information and knowledge and allows owners to tie up content without any need for copyright, using a variety of encryption techniques. As can be seen from the data in Table 3, copyright provisions are the third lengthiest section in the “IP” chapters of these treaties. Because of the similarity between EU and US copyright demands, they are not included in the detailed analysis in this paper.

4 Geographical indications

What are geographical indications?

Geographical indications (GIs) are collective marks signalling the region from which a product comes. The product characteristics *must derive from* the land and climate (the “*terroir*”). GIs originated in Europe and are currently available only for agricultural products.

The formal TRIPS definition is:

“Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in... a region..., where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

(TRIPS Article 22.1)

GIs are the most contested form of “intellectual property”, and the newest. Typically New World countries, long settled by European emigrants, produce very similar products, using the same names of origin. In these countries names such as feta, beaujolais and parmesan have become generic descriptors for the characteristics of the product. New World producers reject EU claims that use of such terms constitutes theft, deception or passing off.¹⁶ Rather they consider these production techniques to be equally their cultural heritage. Consumers in these countries are well aware of the origin of products sold under these generic names. In Australia, for example, Danish feta is well regarded and clearly marketed as a Danish product.

While GIs for wines have a long history in Europe, protection for other agricultural products dates only from 1992, when the first EU Regulation on GIs was adopted. There are, as yet, no EU regulations on GIs for non-agricultural products. However the European Commission (EC) has undertaken studies in this area,¹⁷ and France has recently promulgated regulations for non-agricultural GIs. This discussion in this paper is, however, limited to GIs for agriculture and foodstuffs.

¹⁶ For such claims, see http://ec.europa.eu/agriculture/gi-international/index_en.htm, http://ec.europa.eu/agriculture/quality/schemes/index_en.htm. Surprisingly, given this, only one of the EU's new generation economic agreements includes the unfair competition issue.

¹⁷ Available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147926.pdf and http://ec.europa.eu/internal_market/indprop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf.

The earliest formal GI system was introduced in France in 1919 following earlier legislation to prevent fraud in wine labelling (van Caenegem, 2003; Gangjee, 2006: 302). Italy, Spain, Portugal and Greece had all adopted similar systems before the first EU-wide regulations.

Germany had a completely different system, with regional names protected where there was a reputational link to the place (Gangjee, 2006). But most EU members used laws preventing unfair trade as the basis for protecting place names.¹⁸ GI policy side-steps the need to show unfair competition, by presuming it.¹⁹

Developing countries, where the principal IP concern is the protection of genetic resources and traditional knowledge, find GIs potentially attractive. They are a form of collective, or community, protection unlike copyrights, patents or trademarks. Further there is no creativity or inventive requirement – indeed a hallmark of GIs is that the production technique is long-standing. As a result the usual utilitarian justification for the restraint of competition (providing an incentive for creativity and innovation) cannot apply. The most sustainable rationale is similar to that for trademarks – consumers are “protected” by knowing the provenance of the product and producers are protected from counterfeits.

However there are elements of this rationale that are far less sustainable for GIs than for trademarks (TMs). Particularly in New World countries, European emigrants have brought their knowledge and skills with them, creating new industries in their new homes. By producing products that are part of their cultural heritage, they have helped to make names such as burgundy, champagne and parmesan widely understood in non-European markets. From this perspective, the drawback of these generic names can be seen as expropriation.

It is important to note that GIs are only about *labelling, packaging and marketing*. Nothing in GI rules prevents any producer anywhere from using the techniques specified as being associated with the GI name. But they may not use the name to communicate the production techniques they have used.

The current GI framework: TRIPS and trademarks

Both from EU and New World perspectives the TRIPS outcome was a compromise (Geuze, 2009). The EU gained “strong form” protection for wines and spirits. With strong form protection, no producer from outside the designated region may use the protected name, even with qualifiers. While an identical product may be produced, any reference to a protected name – for example “champagne-style wine, product of Australia” is not allowed.

For all other products TRIPS mandates only “weak form” protection from competition. Countries are free to determine the form this protection takes, and New World countries have generally used a trade mark system of collective and/or certification marks. This weak form protection allows producers from outside the region to use labels such as “parmesan-style cheese, made in New Zealand.”

TRIPS has good grandfathering safeguards, such that even strong form GIs do not have to be adopted. TRIPS safeguards generic names and existing trademarks, protecting the

¹⁸ These laws align with the Paris Convention for the Protection of Industrial Property’s Article 10bis, designed to prevent unfair trade. TRIPS Article 2 mandates compliance with Paris Convention Articles 1-12 and 19.

¹⁹ So too do the privileges conferred by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration. As this treaty has very few signatories and is specifically rejected by the EU as a useful option for progressing their GI agenda (Gervais, 2009), it is excluded from the scope of this discussion. It should be noted, however, that recent actions to broaden the Lisbon Agreement – the Geneva Act of May 2016 (http://www.wipo.int/pressroom/en/articles/2015/article_0009.html) – have been controversial (<http://ipkitten.blogspot.com.au/2015/05/a-transcendental-moment-for-very.html>).

community and trademark owners from expropriation. Article 24 provides that those with existing trademarks, or having used a name continuously for at least 10 years, may continue to use those names, with no provisos, even if they are for wines or spirits.

How important are they to the European Union?

It was the EU who alone pushed for the inclusion of GIs in TRIPS. The EU remains committed to the extension of "strong form" GI protection globally. In the Doha Round negotiations, the EU has linked the agenda of yet stronger GI rights to developing country demands for fair sharing of genetic resources and protection of traditional knowledge. This has created two blocks, divided both on the GI issue and on how proper recognition of genetic resources should be provided. As at 2009, 111 countries had *sui generis* GI systems and 56 met their TRIPS obligations through their trademark systems (Giovannucci et al., 2009: 14).

There are reports that GIs are a "deal-breaker" for the EU in relation to preferential economic agreements. Given that the multi-lateral trade negotiations are stalled, it is as yet impossible to say whether this is a deal-breaker globally. Certainly the post-2006 EU trade agreements include "protections" for GIs, though in some cases these do not move substantially beyond TRIPS (see below, pp 17-21).

The EU *sui generis* system

The EU framework for the protection of GIs for foodstuffs was established in 1992,²⁰ building on earlier systems in place in a few member countries. The system was revised in 2006 following a WTO dispute with Australia and the USA,²¹ and revised again in 2012.²² The system identifies three separate types of designation:

- Protected Designation of Origin (PDO): must be produced, processed, and prepared within the specified geographical area, and the product's quality or characteristics must be 'essentially due to that area' (Evans and Blakeney, 2006);
- Protected Geographical Indication (PGI): requires production, processing, *or* preparation in the geographical area, and the quality, reputation, or other characteristics to be *attributable to* that area (Evans and Blakeney 2006); and
- Traditional Specialty Guaranteed (TSG): production must be established over at least 25 years,²³ and there must be a geographic affiliation, but production need not take place in the specified locality. Effectively TSGs protect a recipe (Giovannucci, 2011).

TSGs are little used at present (Trichopoulou et al., 2007: 424) and are not further discussed in this paper. They provide few difficulties for competition policy because production need not take place in the specified geographic area.

While the privileges provided by PDOs and PGIs are identical – in neither case may a competitor from outside the designated region use the name, even with clear qualifiers – the requirements are very different. PDOs have strict production controls and the key ingredients

²⁰ Council Regulation (EEC) No. 2081/92 of 14 July 1992, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992R2081&from=EN>.

²¹ Council Regulation (EC) No 510/2006 of 20 March 2006, also incorporated some other changes, including dropping the requirement for a published list of generic names (see Profeta et al., 2009: 633). See http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/l66044_en.htm.

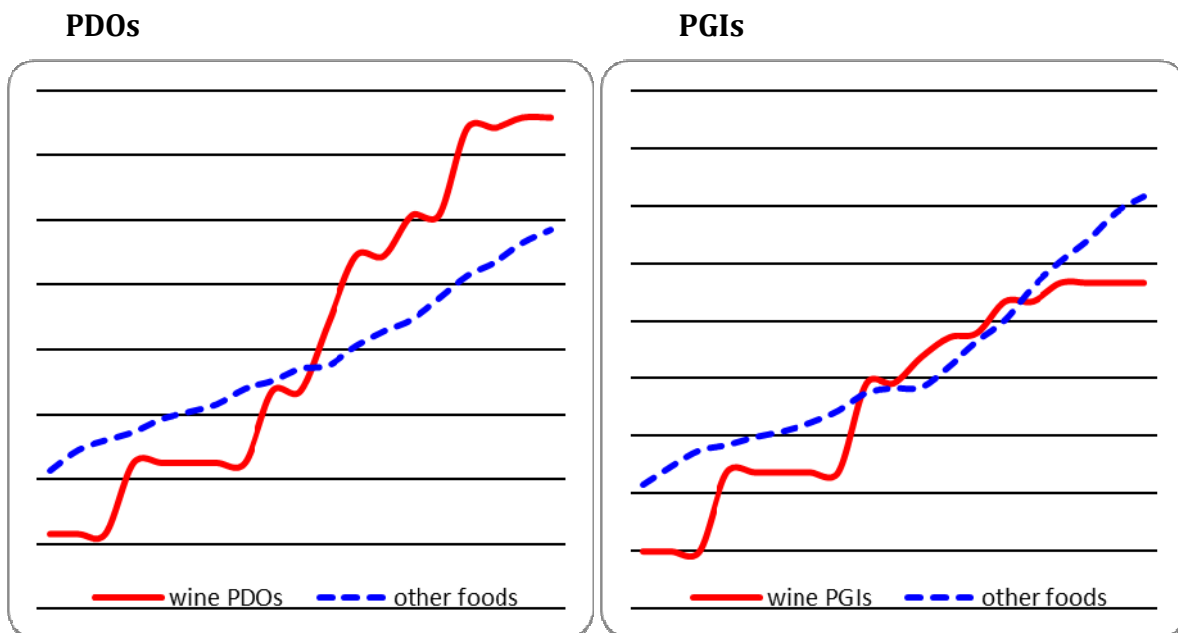
²² Regulation (EU) No 1151/2012 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=en>) followed a rather poor quality evaluation of the GI program, largely because of the absence of relevant data. The EU's Impact Assessment Board considered that the added value of the GI schemes had not been demonstrated (European Commission staff, 2010: 6 and http://ec.europa.eu/agriculture/quality/policy/quality-package-2010/ia-gi_en.pdf).

²³ When TSGs were rolled into the 2012 GI regulation, this 25 year requirement was dropped.

must, in theory, be produced within the designated area.²⁴ In contrast PGIs are far more flexible in terms of the sourcing of inputs and indeed seem to be able to have limited association with the designated region. Indeed issues have been raised that this flexibility in the origin of materials for PGI products can make such labelling misleading for consumers (London Economics, 2008: 86-91).

There have been a number of initiatives to promote the use of GIs within the EU,²⁵ and, as the data in Figure 1 show, there have been impressive increases in the number of registered PDOs and PGIs. PDOs seem to be the preferred vehicle for wines, while PDOs and PGIs are used fairly equally for other products. By 2014 62 per cent of all GI registrations for wines were PDOs, compared to 49 per cent for other agricultural products.

Figure 1 EU registered GIs: cumulative registrations, by year of registration.



Note: Calculated from data from EU's GI registers (DOOR and E-Bacchus). At end 2014 there were 1,224 wine products registered (of which 759 were PDOs) and 1,201 other agricultural products (of which 585 PDOs).

Economic rationales used to justify GIs

The alleged economic rationale for GIs is that consumers are not able to determine quality well. There is a large economics literature on information asymmetries,²⁶ largely developed with respect to consumer durables, where producers typically know far more about their product's quality than do consumers. For some goods, a consumer can search existing information and end up well informed. But for experience or credence goods, search is less simple. Experience goods are those where the consumer actually needs to experience the product in order to be well informed. With credence goods, however, even experiencing the good does not fully inform the consumer as to its provenance or quality. Drawing on this literature, the existing research on GIs is often based on the argument that consumers are not well placed to determine the quality attributes of agricultural products, particularly those at the high end of the quality spectrum.

²⁴ In practice, raw materials can come from a far wider area for PDOs registered before May 2004 (Calboli, 2014).

²⁵ 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: 118-119).

²⁶ For a clear and succinct presentation of these economic theories see OECD, 2000: Annex 1.

Most food and drink purchases are regularly repeated events, a characteristic rarely noted in the GI literature.²⁷ It may be the case for some food and drink products that initially consumers have little knowledge. In such cases an initial purchase and trial will move that product out of the experience goods information asymmetry situation. If the quality and taste align, and the consumer has a preference for the product, s/he will seek it in future purchases. A GI is not needed, though a trademark may be helpful. In other situations consumers are well-informed through search – this is particularly likely to be the case with expensive wines and spirits, where there is an active market producing information for consumers, through wine reviews and general articles and books on food and wine.

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

Competition policy and GI policy

By now some case law on GIs has developed in the EU (Evans and Blakeney, 2006). One thing that is clearly evident from this emerging case law is that there are few, if any, competition controls on the registration of a GI name.

EC Regulation 510/2006 of 20 March 2006 does not require any substantive scrutiny of GI applications against any competition principles. As long as the product specification, control and regional designation details (set out in Article 2) are specified in the application, and a process of opposition is provided, the application will be granted. This contrasts with, for example, Australia’s processes for certification marks. The Australian Competition and Consumer Commission (ACCC) is required to examine the proposed certification mark rules “to ensure they are not to the detriment of the public, or likely to raise any concerns relating to competition, unconscionable conduct, unfair practices, product safety and/or product information.”²⁸ Only after an application has passed ACCC scrutiny can it be granted an Australian certification mark.

The GI decisions emerging from the European Court of Justice indicate that such a process might be beneficial in the EU. Three cases are particularly enlightening.

Feta: expropriation of Danish and German producers

Under EU GI policy, a GI can partly or fully override a trademark. This is clearly demonstrated in one of the best known and most contentious GI cases – feta cheese. Produced throughout the middle east and south-east Europe, Greece has claimed the name feta (Italian for slice) for itself. When feta was first registered as a PDO in 1996, the UK, France, Denmark and Germany applied for its cancellation on the grounds that it had become a generic term. After surveying the use of the term feta in Europe, the Commission disagreed. Denmark and Germany, producers of feta for over 50 years, appealed.

Despite the long production history in Germany and Denmark, the European Court of Justice (ECJ) ruled in favour of Greece, limiting the use of the term feta to certain areas of Greece, and confirming its status as an EU PDO. The court made a number of points in reaching this

²⁷ See, for example, Bramley et al., 2009. An important exception is Teuber, 2011, who also provides a sound analysis of the economic literature to date.

²⁸ <https://www.accc.gov.au/business/applying-for-exemptions/certification-trade-marks>

decision. It found an interplay between natural factors and human factors in developing feta's "remarkable international reputation." It found that more than 85 per cent of annual per capita European consumption took place in Greece. It found that in producing countries in the Balkans and southeast Mediterranean, the word feta was not used to describe the cheese. It concluded that feta had not become a generic word (except in Denmark and Germany) and that it continued to evoke a Greek origin.²⁹ The Court does not appear to have considered the fact that when the EC attempted to draw up a list of generic names, the majority of member states proposed the word feta as being generic (Gangjee, 2007: 175). As Evans and Blakeney (2006: 593) point out "the ruling dramatically illustrates the breadth of the EU Regulation and its capacity to offer protection to terms previously considered generic."

It would be useful to know how this decision has impacted on long-term producers in Denmark, Germany, France and the UK. Has the value of their existing trademarks been eroded by the feta GI? How have their marketing strategies been affected? What impact has the feta GI had on the sales of similar cheeses produced elsewhere than in Greece?

Parma ham: when standard processing becomes anti-competitive

The British supermarket chain ASDA was purchasing Parma ham in bulk and slicing and packaging it for its customers. The *Consorzio del Prosciutto di Parma and Salumificio*, the registered inspection body for the Prosciutto di Parma PDO sued, arguing that slicing and packaging were part of the registered production specifications for Parma ham. ASDA argued that this amounted to a quantitative restriction on Italian exports or ham imports into other member states, thus breaching Article 29 of the EC Treaty (Evans and Blakeney, 2006: 590). The ECJ found that including slicing and packaging elements in the PDO description did not breach the GI regulation. As the GI regulation is very process oriented, and contains no economic or competition assessment procedures, it is hard to see how *any* requirement could breach the GI regulations. The ECJ determined that as control of slicing and packaging had been drafted into the PDO specification, no further assessment was needed. As part of a registered PDO it met legitimate Community objectives on geographic indications, and could not therefore be considered to have a disproportionately adverse effect on trade between members.³⁰

This decision shows a reluctance to consider the possible anti-competitive effects of GIs. GIs are defined as a form of intellectual property despite the fact that they lack any of the key characteristics of intellectual property. As such, they fall within the exceptions to the EU Treaty's articles on competition and the single market. In addition to this blanket exemption, the defined procedures for registering a GI contain no safeguards to ensure that GI objectives are achieved with minimal anti-competitive effect. This places the ECJ in the position of considering only whether the required processing formalities have been followed. The Court typically refers substantive matters back to national courts.³¹ The feta case appears to be the only one where a substantive issue has been considered by the ECJ.

²⁹ Federal Republic of Germany, Kingdom of Denmark supported by French Republic United Kingdom of Great Britain and Northern Ireland v. Commission of the European Communities, 25 October 2005, Cases C-465/02 and C-466/02.

³⁰ *Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd & Hygrade Foods Ltd*, ECJ, Case C-108/01, (20 May 2003).

³¹ For example, the German courts referred a PGI registration to the ECJ as they were concerned that the proportion of input materials from the designated region was too low. The ECJ simply looked at whether the Commission had followed the required procedures and did not comment on the substantive question referred to it (see C-269/99 - *Carl Kühne GmbH & Co. KG and others v. Jütro Konservenfabrik GmbH & Co. KG*. In this regard it is interesting to note that the raw materials for Parma ham come from a far more extensive region than the countryside around Parma

As the basis for the establishment of the European Community was the creation of a single competitive market, this issue is of considerable concern. As GIs have few, if any, of the attributes of other privileges such as patents and copyrights, perhaps the Article 26 wholesale exclusion of industrial property from the Articles prohibiting restrictions on trade between Member States could be re-visited.

Melton Mowbray pies: using GIs to undermine your competitors

A British case shows how GIs can be actively used as an anti-competitive device. Samworth Brothers, who make 62 percent of Britain's Melton Mowbray pies, was instrumental in creating the Melton Mowbray Pork Pie Association in order to lodge a GI. The GI proposed an area of some 1,800 square miles, i.e. far beyond the town of Melton Mowbray. But it did not include neighbouring counties where the major competitor was based. Northern Foods produces for about 28 percent of the British market. Naturally Northern Foods made a formal opposition to the registration of the GI. The UK High Court dismissed the opposition as EU case law indicates the size of the area is immaterial to defining a geographical area (Gangjee, 2006). A narrow reference on how PGI boundaries should be drawn was sent to the European Court of Justice, but withdrawn before any ruling was made (Moir, 2015: 19).

From an economic perspective this case indicates that GIs can be actively used as an anti-competitive device. Again the absence of any economic or competition criteria for determining boundaries indicates that the regulation is highly deficient from an economic perspective. There are no specific criteria for defining GI boundaries (Evans, 2010: 242), nor any procedures to ensure that the GI system is not used to undermine competition.

EU goals and recent trade treaty outcomes

The EU's principal goals in GI negotiations with other countries are: *sui generis* register-based systems; strong-form protection for all GIs; and administrative enforcement. Strong form privileges lead to clawback of names that are generic in some parts of the world.

Two of the EU's *Global Europe* treaties appear to require *sui generis* register-based systems. These are Central America and Singapore.³² Three have clauses specifying systems which sound like *sui generis* register-based systems. But the legal language used in treaties can mislead. From the treaty text it sounds like Korea agreed to such a system,³³ but the Korean Intellectual Property Office website clearly states that in Korea GIs are registered under the trademark system as collective marks.³⁴ Canada also retains its trademark based system for GIs. The Andean treaty does not directly touch on this issue: it is far shorter and less prescriptive than the other four treaties. The design elements of the agreed GI systems are shown in Table 4.

The requirement for transparent processes includes opposition and appeal procedures. The remaining elements are all very process oriented, a characteristic of most intellectual

(http://www.prosciuttodiparma.com/en_UK/prosciutto/pigs).

³² Singapore has passed legislation which will come into force when the Treaty with the EU commences (<http://www.wongpartnership.com/index.php/files/download/1259>). At present the Intellectual Property Office of Singapore (IPOS) advises that GIs can either be protected as GIs or under the Trade Marks Act (<http://www.ipos.gov.sg/AboutIP/TypesofIP/WhatIsIntellectualProperty/WhatIsageographicalindication.aspx>). This parallels the EU, with regulations governing both GIs and Community Trade Marks (CTMs). For a useful discussion of the relative merits of EU GIs or EU CTMs see Evans 2010.

³³ Article 10.18.6, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>.

³⁴ "In the Republic of Korea, geographical indications have been protected as a collective mark under the Trademark Act (Act No. 7290) since July 1, 2005." (http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=930002&catmenu=ek04_01_01, dated 20 February 2013 and accessed 22 February 2015).

property regulations. As such they are ideally suited to delivery of GIs through a trademark system. In terms of the elements included in the treaties, the stand-out exception is the Andean agreement – as noted earlier this is, throughout, a more general and less prescriptive agreement than the other four. The Korean and Singaporean agreements have the largest number of EU-specified elements in the agreed GI procedures.

All five treaties include procedures for adding new GI names. All list names that are to be recognised as GIs in the other jurisdiction.³⁵ These lists are subject to examination and opposition procedures in each country and there is a process for ensuring that names that have passed these processes are protected as GIs.³⁶ In all cases the lists of names are very much longer for the EU than for the other party, and over time the EU lists have expanded. In the 2011 Korea agreement the EU listed 60 foods; in the 2013 Singapore agreement they listed 82 foods; and in the 2014 CETA the EU has listed 173 foods (see Table 5).

Table 4 GI system requirements (new generation EU trade treaties)

GI system: required elements	Included in:
National register	Korea; Central America; Singapore
Transparent processes	Korea; Central America; Singapore
Administrative certification and control processes	Korea; Central America; Singapore
Name and production standards to align	Korea; Central America; Singapore
Process for adding new GIs	All
Cannot require users of GI to register	Central America
Must be registered in own country	Korea; Andean; Singapore; Canada
No within-region producer exclusions	Korea; Central America; Singapore
Homonymous names: other party can comment	Korea; Andean; Singapore; Canada
Register open to non-nationals	Korea; Canada
Limitation to agricultural products	Korea; Singapore; Canada
Extensions to non-agricultural products	Andean (discretionary)

³⁵ Though the documents available as at December 2015 do not yet show GI name lists for Singapore or Canada.

³⁶ In general the treaties specify that opposition and examination procedures for listed GIs have already been completed or will be completed by the time the treaties come into force. As at late December 2015 no GIs listed in *Global Europe* treaties for partner countries appear on the DOOR register.

Table 5 GIs proposed in new generation EU trade treaties by each party

	Korea	Colombia /Peru	Central America	Singapore	Canada
EU wines	80	63	110	90	---#
EU spirits	19	21	25	22	---#
Total EU wines and spirits	101	82	135	112	---#
Partner wines and spirits	1	1	2	*	---#
EU foods	60	34	88	82	173 ^a
Partner foods	63	3	8	*	**
Partner non-foods	---	2	---	*	
Total EU GIs	161	116	223	194^b	
Total partner GIs	64	5	10	*	

* Despite completion in December 2012 and initialling in September 2013, as at late December 2015 Singapore had not yet tabled any GIs. A new geographic indications statute was passed by Singapore's parliament in April 2014 – implementation is tied to ratification of the treaty.

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

** None listed in the available draft.

a The summary document states 145.

b The summary document states 196.

The 2014 implementation report on the EU-Korea Free Trade Agreement notes that the GI Working Group (WG) met for the first time in October 2012. The WG had discussed but not yet adopted rules of procedure. Clearly the priority for the WG was *the new GIs that the EU had already proposed*. The implementation report advises that:

"The EU emphasised the interest that EU Member States attach to GIs and the importance of increasing the list by as many GIs as necessary. Korea also announced the intention of proposing Korean GIs to the said Annex."³⁷

As noted above (Figure 1), the number of registered GIs in the EU is rapidly expanding. A second EU priority is to gain strong-form protection for all GIs. The specific privileges granted to GI owners in each treaty are shown in Table 6. The EU has achieved strong-form protection for many non-wine foodstuffs in Korea, Central America, Singapore and Canada. In Colombia and Peru, the agreement allows weak-form GIs for wines and spirits, but leaves the door open for the adoption of strong-form protection, including for foodstuffs. It also extends GI protection beyond agricultural products. The Andean agreement also covers misleading packaging, advertising or other practices. The use of flags and other images to denote a specific country or region is considered by the EU to undermine GI privileges.

³⁷ See http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152239.PDF: p.8.

Table 6 GI privileges (new generation EU trade treaties)

Privileges granted:	
Specific product name lists to be protected	All; important carve-outs in Canada
No use of GI, even with qualifiers (wines)	Korea; Singapore; Canada.
No use of GI , even with qualifiers (other foods)	Korea; Central America; Singapore Canada: <i>agree strong form for food, but there are important qualifiers, 5 major exceptions for cheeses and lesser exceptions for 3 meat products</i>
10bis unfair competition protection	All but Andean
Registered GIs cannot become generic	KR (implicitly); CO/PE; C America
New TMs not allowed to use a GI name	Korea; Central America; Singapore
Prior TM does not prejudice new GI registration	Singapore ("would not completely preclude")
No misleading advertising or packaging	Andean
Any misleading practice	Andean

Canada has agreed to allow co-existence of EU GIs with pre-existing Canadian trademarks. The EU claims this as a strong precedential victory, as it "establishes for the first time in a 'common law' country like Canada a deviation from the principle 'first in time first in right'".³⁸ Canada has, however, grandfathered certain GI names, providing for perpetual rights for existing users of the names feta, Asiago, Gorgonzola, fontina and Munster. New producers will also be able to use these names, but with qualifiers.³⁹ Canada has also specified that *any new GI names cannot be the same as existing trademarks*, so the agreed co-existence is very limited in scope.

These privileges need to be assessed side-by-side with the agreed safeguards, shown in Table 7. Like TRIPS, all five new generation EU treaties include important safeguards.⁴⁰ All provide that a GI will not be registered if it will cause confusion with an existing reputed or well-known mark, at least partially protecting trade mark owners from appropriation.

Existing trademarks may continue under all five treaties.

Some allow continued trading using a geographic name if that has been past practice (Singapore, Canada). Some allow refusal of a GI if the name is customary.⁴¹ Generally there

³⁸ European Union, 2014: 14-15.

³⁹ The Agreement also contains similar protections for the names of three meat products (Article 7.6).

⁴⁰ The treaties with the Andean and Central American countries are more general than the other three treaties, with far fewer operational details specified, and fewer safeguards spelled out.

⁴¹ The Central America treaty even allows continued use of customary names for wines and spirits.

Table 7 GI safeguards (new generation EU trade treaties)

Safeguards	
Existing TMs allowed to continue (wines)	Korea; Andean; Singapore; Canada
Existing TMs allowed to continue (other foods)	All
Continued prior use of TM	Singapore
Allowed to use own name	Korea; Singapore; Canada
No obligation to register GI if, given reputed or well-known marks, would be misleading	Andean; Central America; Singapore
If GI same as customary / generic name, customary / generic name can still be used (though GI gets registered too)	Central America; Singapore; Canada (but lists 14 specific food names that remain in public possession, as long as not misleading; also some further exclusions in some provinces)
If insufficient commercial activity, can cancel GI	Singapore
Cannot use plant variety or animal breed names	Korea (if likely to mislead) ; Singapore (but see footnote 42); Canada
Time limit on adverse impact objections	Singapore; Canada
No prejudice to rights already granted in other trade agreements	Andean

is some form of prohibition on the use of plant variety or animal breed names – sometimes limited to where this will cause confusion (Korea), or to new GIs (Canada).⁴² All allow a person to use their own name to trade as long as this will not cause consumer confusion.

The third EU GI priority is administrative enforcement – this shifts enforcement costs from individual rights-holders to the overseas taxpayer. This appears to have been achieved in both Korea and Canada, but as the EU has claimed neither as a precedent-setting win, there may be escape clauses (Table 8).⁴³

Two other provisions are worth noting. The Andean agreement specifically states that the GI provisions do not prejudice rights already granted in other trade agreements. The Central American agreement specifically excludes any dispute settlement procedures beyond national courts.

⁴² Oddly the Singapore agreement states that a conflict with the name of a plant variety or animal breed will *not* prevent a GI being registered (Article 11.22.8). This may well be a typographical error as the EU Regulations on GIs prohibit a GI “where it conflicts with a name of a plant variety or an animal breed and is likely to mislead the consumer as to the true origin of the product” (Article 6.2, EU Regulation N0 1151/2012 and Article 3.2 in the 1992 and 2006 regulations).

⁴³ The CETA wording is ambiguous and may simply allow GI owners to use administrative processes to resolve disputes rather than requiring official authorities to enforce GI names (Article 7.4).

Table 8 **GI enforcement (new generation EU trade treaties)**

Enforcement and co-operation	
Administrative enforcement	Korea; Canada
Technical information exchange	Andean
Publication of product specifications	Andean
Ongoing committee or working group	Korea; Singapore; Canada
Cannot dispute beyond national courts	Central America

Third country markets

A major concern that New World countries have is whether they will be shut out of existing export markets by EU trade agreements containing GI clauses. These concerns principally relate to markets for cheese and for processed meats. The example of the global cheese market is used to illustrate the issue.

In 2012 global cheese trade was US\$ 28.1 billion.⁴⁴ The top five exporters were Germany, France, the Netherlands, Italy and Denmark accounting for 56 per cent of global exports. These five countries were also the top five importers, accounting for 32 per cent of global cheese imports. USA was the 7th largest cheese exporter (US\$ 1.17 billion) and Australian ranked 10th with global cheese exports of US\$ 0.77 billion.

Australia's top five markets for cheese are Japan, China, Korea, Saudi Arabia and Taiwan (Figure 2).⁴⁵ UN trade data for 2012 suggest that other important markets are Singapore, Malaysia and Hong Kong.⁴⁶ In terms of markets where the EU has been successful in negotiating GI agreements, Australia sells very little cheese into Canada, the Andean countries or Central America. But Korea and Singapore are important markets – each taking about 4 percent of Australian cheese exports in 2012.⁴⁷ The USA's top export markets for cheese are Mexico, Korea, Japan, Australia, Canada and Saudi Arabia. Australia and the USA thus have similar interests in the impact of EU GI negotiations on access to cheese in traditional export markets. For both, Korea is an important market. Singapore is also important for Australia, and Canada for the USA. Because of the similarity of interests, it will be useful to monitor US reactions to CETA.

Australia's main cheese exports are cheddar, mozzarella and cream cheese.⁴⁸ Mozzarella di Bufala Campana is listed in Annex AI to CETA (on geographical indications), but mozzarella alone is not.⁴⁹ Neither cheddar nor cream cheese are mentioned in the GI annex. The situation in the Korean agreement is the same – only Mozzarella di Bufala Campana is listed in the annex on geographical indications. Mozzarella and cheddar are also listed in the Canadian tariff offer. The impact of CETA on Australia cheese exporters should thus be limited to the impact of the improved tariffs available to EU exporters.

⁴⁴ UN Trade Statistics, Observatory of Economic Complexity, <https://atlas.media.mit.edu/en/>.

⁴⁵ <http://www.pwc.com.au/industry/agribusiness/assets/Australian-Dairy-Industry-Nov11.pdf>, p.5.

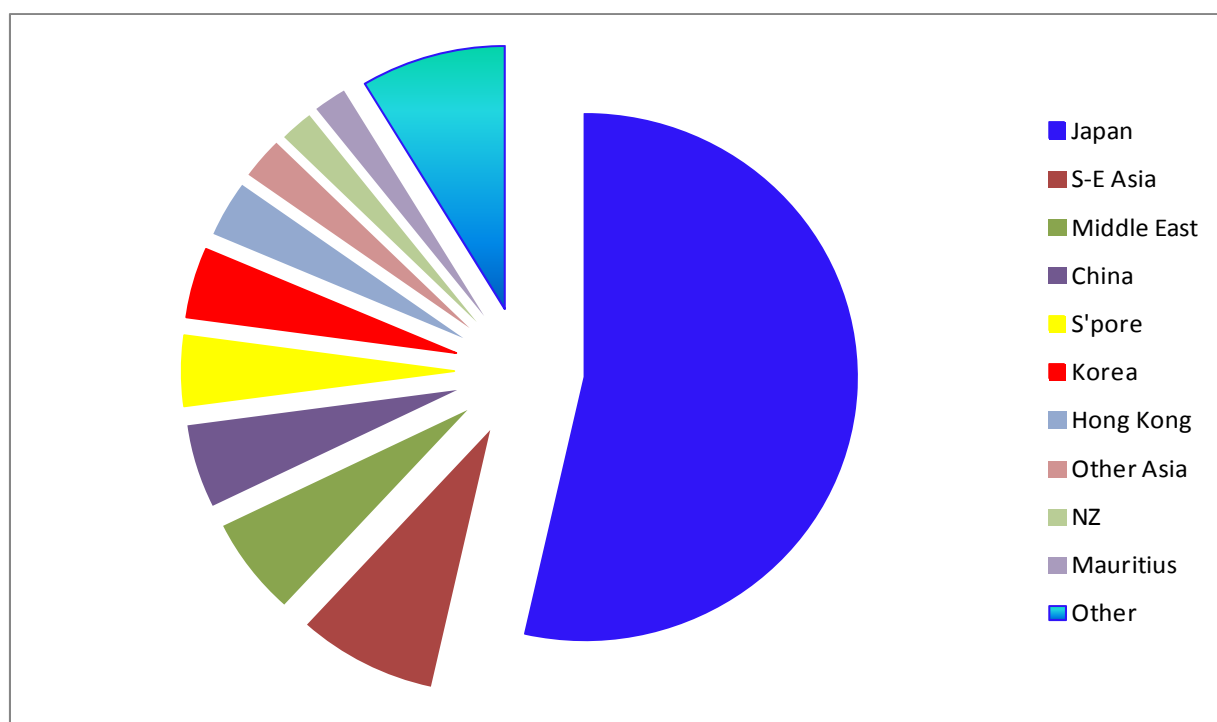
⁴⁶ As the trade data used are from a United Nations source, they do not include any data on Taiwan.

⁴⁷ Identifying the exact impact of EU treaties on Australian cheese to third markets would require a substantial research project, ideally undertaken in cooperation with the Dairy Industry Association of Australia (DIAA).

⁴⁸ Verbal advice from the DIAA.

⁴⁹ Mozzarella is one of the few names registered in the EU as a TSG. This means that only products following the traditional recipe in the TSG specification can be sold in the EU with the label mozzarella.

Figure 2 Australia's top export markets for cheese, 2012



Source: UN Trade Statistics, Observatory of Economic Complexity, 29 April 2015. All data are 2012 US data in US\$. <https://atlas.media.mit.edu/en/> (excludes Taiwan, an important Australian export market)

The US-Canada cheese trade is now covered by both the North American Free Trade Agreement (NAFTA) and CETA. The USTR website provides a 2015 foreign trade barriers report which comments rather negatively on CETA's inclusion of geographical indications:

"the Canadian government has agreed to the EU's request to automatically protect more than 170 food and beverage terms as geographical indications without providing for due process safeguards, such as the possibility of refusal of applications or objection by third parties. Also, while the agreement appears to provide limited safeguards for the use of generic terms with respect to a short list of specific terms for existing producers, concerns remain about the right for future producers to use those terms and for producers to use generic terms with respect to other products."⁵⁰

The allegation that there is no allowance for opposition or refusal does not appear well-founded. Article 7.4 states that the listed GI names have been examined, not automatically granted protection. CETA also preserves the rights of all existing trade mark owners. It also provides that, for five cheeses, existing producers can use the names in perpetuity (while new producers can use the name with qualifications). It is unclear whether the right to use these names with qualifiers extends to non-EU imports into Canada.

Nonetheless some argue that inconsistencies between NAFTA and CETA might lead to a formal trade dispute between the USA and Canada. Viju and colleagues (2012) argue that there may well be grounds for the USA to use NAFTA's investor-state dispute settlement mechanisms to argue nullification or impairment of expected benefits. There is, after all, the precedent of Eli Lilly suing the Canadian government because Canadian courts have declared two of its patents invalid.⁵¹

⁵⁰ 2015 National Trade Estimate Report on Foreign Barriers (<https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf>), p.59.

⁵¹ <http://www.cbc.ca/news/business/eli-lilly-files-500m-nafta-suit-against-canada-over-drug-patents-1.1829854>.

Evaluating GI policy

The EU GI system provides strong-form exclusionary privileges, including for names which are generic in many markets. EU-style GIs can co-exist with the earlier trademark rights of other producers. It is therefore reasonable to ask whether the GI policy is well-designed, particularly with respect to regional boundaries, the scope of the production chain designated, compensation where trademark rights are diluted and competition issues generally. One might also ask what is the evidence that this restraint of trade actually provides a benefit to the GI owners? There is surprisingly little empirical literature on the impact of GIs. The literature that does exist shows that the impact of GIs on rural development is variable and contingent, as is the overall economic impact (Callois, 2004; Zago and Pick, 2004; Bramley et al., 2009; Grote, 2009; Teuber, 2011).

In Australia the experience with wine GIs has been quite positive. Australia has taken a light-handed approach to establishing production requirements. The sole requirement for using any wine GI in Australia is that 85 percent or more of the grapes used must have been grown in the GI region. The absence of other quality criteria is deliberate (van Caenegem et al., 2015). Producers prefer to use informal mechanisms (such as local tastings and wine competitions) to encourage all producers to achieve high standards. With this simple approach, implementation costs are low – indeed scrutiny has been tied in with existing quality audit processes and is implemented nationally by just four people. There has been little dispute over the establishment of wine GIs for already well-known regions.⁵² The system has also worked well for the creation of new wine GIs such as the Granite Belt GI.

Large-scale food producers strongly resist labelling regulations, particularly those specifying origin. Their scale and business model requires them to be able to change the sources of their inputs quickly in response to a variety of changing circumstances. As a consequence this business segment strongly opposes GIs (Bingen, 2012). In contrast small-scale producers, particularly artisanal producers, look more favourably on GIs. Yet GI labelling is of least value where distribution chains are short (London Economics, 2008: 208-214), as is likely to be the case for artisanal producers.

Whether there is an economic benefit to producers for a GI depends on a number of criteria, the most important of which is a reputation for quality (Giovannucci et al. 2009). The initial famous EU GIs, for a small number of wines, cheeses and meats, already had high quality reputations. For these premium products prices charged can and do exceed the administrative and marketing costs of maintaining a GI (Loureiro and McCluskey, 2000).

However, where a quality reputation has not yet been established producers face a long task of building the quality infrastructure and marketing that quality to consumers (Bramley et al. 2009; Giovannucci et al. 2009). Good returns are by no means guaranteed.

Within Australia the cases of King Island Dairy and King Island Beef are enlightening. Both are registered trademarks, not GIs. The King Island Dairy was developed and promoted by a local entrepreneur, with financial assistance from the Tasmanian government. At that time farmers were paid a premium price for a premium product. But since then the business and its trademarks have been sold a number of times. They are currently owned by a subsidiary of Japanese conglomerate Kirin Holdings. King island dairy farmers no longer receive a premium price for their premium product. King Island Beef has been a similar story, compounded by closure of the local abattoir. In these two product lines local farmers find that the King Island trademarks prevent them from developing new marketing strategies to

⁵² The single exception is the Coonawarra dispute (Edmond, 2006; Stern and Fund, 2000).

benefit from the King Island name.⁵³ Had the original King Island Dairy and Beef brands been registered GIs, the farmers would have had substantially more negotiating power (van Caenegem et al., 2015).

Does Australia's certified mark system provide an effective means of providing reasonable protection for rural producers while not unduly limiting legitimate competition? At the end of December 2015 there were 474 registered certified marks, of which 116 were exclusively for agricultural products and a further 47 for both agricultural and non- agricultural classes of goods. A further 41 certified marks for agricultural products were pending. Twenty-one of the registered certification marks and three of the pending applications were for wines. Very few of the registered marks for foodstuffs indicate a geographical area, and all of these are foreign registrations. Thus there are 12 Italian geographic marks registered, two each from India, Jamaica and the USA and one from the UK. There are no Australian registered certification marks for foodstuffs, though there are two pending – one from the Mornington peninsula and one from Hinchinbrook shire. Clearly overseas GI producers are using the system. Equally clearly there is – as yet – little demand from Australian producers.

Within both the USA (Bingen 2012) and Australia (van Caenegem et al. 2015) there are suggestions that, carefully used, GIs can provide some benefits to rural producers. It has been suggested that, faced with strong demands for a GI system from potential trading partners, Australia should investigate establishing its own GI system unilaterally. This would allow Australia to design a system that incorporates important economic criteria and so ensures that GIs would have minimum anti-competitive effect. Given the positive attitudes of both India and China towards GIs (Giovannucci 2011), Australia cannot simply assume that US opposition will maintain the status quo over the longer term.

What is clear from the economic evaluations is that establishing a new GI is a difficult, lengthy and expensive process (Bramley et al. 2009; Giovannucci et al. 2009). Consumer willingness to pay premium prices for premium products is often over-stated, and the high-end market is a small proportion of the total market (Bramley et al. 2009; Verbeke and Roosen, 2009). Rural producers considering developing a GI should first undertake a careful evaluation of the likelihood of success. New GIs can succeed – as the Granite Belt wines GI demonstrates – but they can also fail (van Caenegem et al. 2015).

To date Australia has refused absolutely to consider any extension of strong-form GIs beyond wines and spirits. But this is a major demand in all EU economic treaties. Unless Australia is able to bring together interested parties and be more open to other options on the GI issue, there is little point in commencing trade negotiations with the EU.

The door to a more accommodating position has been opened by the recent report for the Rural Industries Research and Development Corporation (van Caenegem et al. 2015).

Further, the actual GI changes to Canadian policy have been modest. It would seem possible, on this basis, that Australia might begin a domestic consultation and reform process to identify a GI strategy that both suits Australian interests and meets minimum EU demands. Such work could usefully incorporate an evaluation of the value of certification marks for GI policy purposes. Any GI strategy should learn from and avoid the worst pitfalls of EU GI policy. There should be clear economic criteria used in defining GIs and a process, such as those in place for certification marks, to ensure anti-competitive effects are minimised.

⁵³ Although there is a predisposition against allowing geographic names to be used in trademarks, as at 19 December 2015 there are currently 15 registered trademarks and 5 pending trademarks using the words King Island. One of the pending marks is being opposed.

Another missing element in EU GI policy is compensation for losers. Indeed EU GI policy eliminates the absolute safeguards that are part of its Community Trade Mark (CTM) policy.⁵⁴ When Australia reduced tariffs in highly protected industries, it also provided structural adjustment assistance to losing industries and their workers. Should a new GI policy lead to trademark expropriation, there needs to be a clear procedure for providing sufficient compensation to create new marketing images. Ideally this should be provided by the GI winners. For New World wines and spirit producers, such compensation took the form of increased access to EU markets.

5 Patents and Data protection

The five new generation EU trade treaties are almost silent on patents, except for pharmaceutical patents (Table 9). The only general patent articles are those recognising and committing to various existing IP treaties.⁵⁵ All include at least best endeavour commitments with reference to the Patent Law Treaty (PLT). The PLT simply harmonises basic administrative procedures involved in the patent application process. The Central American agreement has no further articles on either patents or data protection.

The other four all include measures to grant patent term extensions (PTEs) for pharmaceuticals where there has been a lengthy period between filing the patent application and gaining marketing approval. The least onerous requirement is in the Andean treaty which merely states that such term extensions *may* be made. In the other three treaties they must be provided, for a period up to 5 years. Interestingly, in CETA the PTE is re-labelled – as “*sui generis* protection for pharmaceuticals”.

Table 9 Patent and data protection provisions (EU trade treaties)

	Korea	Colombia /Peru	Central America	Singapore	Canada
Recognise existing:					
Patent Law Treaty	✓	✓	✓	✓	✓
Other treaties	Doha	Budapest	Budapest	PCT/Doha	TRIPS
Term extensions					<i>“sui generis”</i>
Compulsion?	SHALL	MAY	---	SHALL	
Term	≤5 years	≤5 years	---	≤5 years	2-5 years
Data protection*					
Term	≥5 years	5 years	---	≥5 years	≥6 years ≥8 years
Other attributes		Exceptions	---		Exceptions

* Pharmaceutical products only. The Andean, Korean and Singapore agreements also include data protection for agricultural chemicals (usually for 10 years, as in TRIPS), and the Korean and Canadian agreements also include measure for “plant protection products”.

⁵⁴ Under the CTM policy any member state can object to a proposed registration, including on grounds that the name has become common or generic in their state, and the CTM registration will then fail.

⁵⁵ There are other patent related provisions in the Singapore and Korea treaties. The Singapore treaty recognises applications made in the other country and also provides for mutual recognition of Patent Attorneys. The Korean treaty has an article on implementation, and, unusually, lists patents under border mechanisms.

Term extensions are usually only available for pharmaceutical compounds, and only when the time from patent filing to marketing approval has been unusually long. Canada and Australia have complex processes to determine this. Five years are deducted from the period between patent filing and marketing approval, and the result is added to the patent term, to a maximum of 5 years. CETA has detailed specifications – for example a strict time-limit of 60 days.⁵⁶ Where the company owns more than one patent on the drug, the company can choose which patent receives the extension. The agreement also includes a general exceptions clause, which simply provides the right to make exceptions.

Data protection is a relatively new form of market restraint introduced in 1984 by the US Congress after a court decision that generic companies could not use data in patents to prepare for market entry on day one after the patent expired. The resulting Hatch-Waxman Act provides a clear right for generic companies to use clinical trial data demonstrating safety and efficacy when they introduce generic products. Indeed as the chemical is identical, it would be unethical to require that clinical trials be repeated as the result is already known.⁵⁷ In negotiating this clear authority for generic companies, Congress also spelled out a new right for originator companies – that their clinical trial data could not be used as a basis for generic marketing approval for a period of 5 years (Holovac, 2004).

The data protection privilege is shorter but stronger than patent “protection”. While it lasts only 5 years, there are no rights of appeal or challenge. The data protection privilege has spread rapidly and was included in TRIPS. But TRIPS Article 39 requires only that such data be protected from unfair commercial use. In most nations this is not interpreted to include use to gain generic marketing approval. Most preferential economic agreements contain data protection clauses that go well beyond TRIPS. The most interesting variant in these five EU treaties is in the Andean agreement, where Colombia specifically agrees to include biological and biotechnological products (as, of course does the EU), but Peru undertakes no specific data protection commitments except for protection against “practices that are contrary to honest commercial practices” (Article 231.1).

The lengthiest data protection period is set out in CETA where it takes two forms. Protected data cannot be used to **apply for** marketing approval for at least 6 years. Protected data cannot be used to **grant** marketing approval for at least 8 years. The Canadian agreement also has a data linkage provision. Data linkage provisions, again first introduced in the USA, require drug approval authorities to act in the role of “patent police”. This shifts the enforcement of pharmaceutical patents partly from patent owners to these public health authorities. As noted above, patent linkage is unlawful in the EU. In CETA the EU insisted on additional appeal rights for owners of pharmaceutical patents in relation to marketing approval for generic products.

Australia agreed 5 year term extensions, 5 year data protection and patent linkage in the AUSFTA. The EU generally demands longer data protection, particularly for newer biological (as compared to small molecule) drugs. The 2012-13 Pharmaceutical Patent Review found that patent term extensions were costly but provided no discernible benefits.⁵⁸ The review panel noted that Australia’s ability to reform this ineffective and costly policy was limited by

⁵⁶ A much tighter timeframe than Australia’s 6 months. Indeed in a recent highly contentious case the Australian Patent Office allowed Lundbeck to re-file for a term extension ten years after the normal date for such applications. This demonstrates a strong inclination to be helpful to clients (Moir and Palombi, 2013).

⁵⁷ The World Medical Association’s Declaration of Helsinki on ethical principles for medical research, Article 18 states that “when there is conclusive proof of definitive outcomes, physicians must assess whether to continue, modify or immediately stop the study” (<http://www.wma.net/en/30publications/10policies/b3/>). This would seem to preclude any testing of generics as being unethical.

⁵⁸ Annual costs estimated at \$A280m rising to almost \$A600m over the longer term (Harris et al. 2013: viii).

the AUSFTA. The panel also looked at the issue of longer data protection terms for biological drugs and again found this unwarranted (Harris et al. 2013: 180).

Given this evidence, it is clear that it would be expensive for Australia to extend the data protection and linkage provisions already conceded under the AUSFTA.⁵⁹ From the evidence, particularly the complete absence of such provisions in the Central American agreement, this does not appear to be an issue that the EU will insist on. It will be interesting, however, to see the European Parliament's reaction to the patent linkage requirements in CETA.

6 Conclusions: trading market access for GIs

Modern "trade" treaties would be better called regulatory treaties or economic agreements. They extend well beyond trade matters, into a wide range of regulatory areas. While some of these – such as mutual recognition of professional qualifications – can be modified to reduce anti-competitive effects, intellectual property regulations have the reverse effect – they increase rather than reduce anti-competitive impacts. The *Global Europe* treaties cover the full range of matters included in the Marrakesh Single Undertaking. Indeed they go beyond this, covering government procurement, competition, and even – in the latest agreement with Canada – state enterprises, labour standards and the environment.

As part of this "beyond trade" agenda, all five *Global Europe* treaties have substantial chapters on intellectual property. The objectives of these chapters contain propositions which are more mantra than evidence-based. They all contain provisions on GIs, copyright and enforcement. Four cover patent matters that are specific to the pharmaceutical industry, and extensions in data protection – a form of protection from competition that is also specific to the pharmaceutical industry.

The paper considers two of these issues in some detail – geographic indications and data protection. As obtaining "progress" on GIs appears to be a *sine qua non* of EU trade agreements, the larger part of the paper has been devoted to this issue.

Geographic indications are the newest form of intellectual property – indeed some commentators question whether it is properly intellectual property as the rationale is not strong. Particularly where traditional techniques form a large part of the GI designation, the use of an IP measure – usually intended to promote innovation and creativity – seems inappropriate. Further, the arguments as to consumer confusion largely ignore the evidence that most wines and foodstuffs are repeat purchasing experiences, thus undermining information asymmetry justifications.

The EU regulations, introduced in 1992 and amended in 2006 and 2012, show clearly that GIs are an important element of EU agricultural policy, with the additional aim of assisting in reducing consumer confusion. However the argument that "feta-style cheese, product of New Zealand" creates consumer confusion is unconvincing.

The EU approach to implementing GIs follows the best traditions of IP policy. There are no clearly stated goals and the processes to be followed are all formalities and procedural matters. There are no economic criteria brought to bear on key issues such as how regions are defined, what proportion of a production chain is designated, or how the proposed GI will

⁵⁹ Notwithstanding which, Australia has agreed even more extensive provisions for biologics in the Trans Pacific Partnership Agreement. These provide for either eight year's data protection or for five years with other provisions which provide an equivalent market effect as eight years of data protection (<http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/ch18-intellectual-property.pdf>).

impact on competitors. European GI policy trumps competition policy, without any questions asked.

Be that as it may, if Australia considers that there are net national benefits in entering into a comprehensive economic agreement with the European Union, then Australia may need to take a more conciliatory position to GIs.

Australia has had a positive experience with the voluntary agreement to adopt strong-form GIs for wines and spirits in exchange for improved access to European markets. The procedures Australia has adopted are simple, and match well with existing regulatory standards. Indeed the GI measures are implemented nationally by the four existing standards auditors. But while regional premiums are well recognised within the domestic market, overseas most Australian wine still sells as “brand Australia”. The same is true of certain foods. For example, Tasmania has invested heavily in “brand Tasmania” and there is probably little advantage in developing specific regional marks. This contrasts with King Island. On King Island the brands are trademarks – private property now owned by large global conglomerates. King island producers now receive very little in the way of premiums for their premium products. There may therefore be some advantages in Australia considering a more open approach to GI policy. Used wisely – particularly with good measures to protect against anti-competitive uses – they might be of value for some producers in rural and regional Australia (van Caenegem et al., 2015).

If Australia followed this path, there are important lessons to be learned from the EU. The EU’s very process-oriented approval process does little to minimise anti-competitive effects as shown in the Parma ham and Melton Mowbray cases. Similarly there seem to be no proper measures for compensating losers from any change to the current trademark based system. Procedures for identifying whether a name is generic seem to favour the would-be GI name owner.

In designing a GI system Australia might be mindful of:

- the value of retaining weak-form GIs – these provide for consumer recognition of known products while allowing reasonable competition among producers. Canada has been able to protect important generic names such as feta in its negotiations with the EU, and Australia might develop a shortlist of generic names that are important in our markets;
- protection of trademark rights or a good system of compensation where these rights have to be diluted. The compensation should be from the winning party to the party which will have to begin anew on its marketing and market positioning;
- the effectiveness of certified trademarks in providing appropriate protection for regional producers; and
- that GIs are a government-enforced privilege which allows the users to extract a higher price from their consumers. In common with other intellectual property privileges, these are economic privileges derived from government intervention in the market. They come at a cost to consumers and to some producers. It is not, therefore reasonable for enforcement action (and costs) to be shifted from the privilege holders to taxpayers.

Unless Australia moves on GIs, the prospects of a successful treaty negotiation with the EU look slim. One of the major parties opposed to the extension of GIs is the large agri-food industry. Domestic producers of certain types of cheese and processed meats might also actively oppose any changes to GI policy. A further impediment will likely be the strong US opposition to GIs. Australia is not noted for taking policy positions contrary to those favoured by the USA.

But a well-designed system, that minimised anti-competitive effects, could be of benefit in some regions and for some products. It is also clear from CETA that for important products that have generic names in Australia, major safeguards can be built into an agreement with the EU.

The recent report for the Rural Industries Research and Development Corporation opens the door to discussions on this issue. These will be likely to take some time, and careful thought might be given as to how best to manage this process. Commencing such a process would seem to be an essential first step in creating the conditions needed for a positive outcome in any economic negotiations with the EU.

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