



**Comments by the Consortium for Common Food Names
Regarding the 2020 Special 301 Review
Docket Number USTR-2019-0023
February 6, 2020**

Our organization submits these comments in response to the notice of request for public comments concerning the 2020 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket Number USTR-2019-0023). The Consortium for Common Food Names (CCFN) appreciates the opportunity to present its views on this important annual report.

In addition to these written statements, our organization intends to testify to the points cited below at the Special 301 Public Hearing to be held by the Special 301 Subcommittee on February 26, 2020. We therefore request the opportunity to testify at the hearing. Shawna Morris, Sr. Director of CCFN, will be CCFN's witness.

The Consortium for Common Food Names (CCFN) is an independent, international non-profit alliance that represents the interests of consumers, farmers, food producers and retailers. Membership includes companies and organizations from around the world, including in several emerging economies. Our mission is to preserve the legitimate right of producers and consumers worldwide to use common names, to protect the value of internationally recognized brands and to prevent new barriers to commerce.

CCFN members are facing nontariff trade barrier threats to their products in the form of unjustified trade restrictions that run counter to our trading partners' WTO commitments and that in many cases undermine the integrity of intellectual property systems in countries around the world. CCFN strongly supports the apt description of this issue and prescription for addressing it that were captured in the 2019 Special 301 Report and recommends retaining a similar approach in the 2020 report.

We are doing all we as the private industry can to combat this challenge. Last year, for instance, we negotiated a novel agreement with a leading EU GI stakeholder that affirmed our recognition of the legitimacy of their unique GI while also affirming our mutual recognition of the generic nature of a common food name contained within their multi-term GI. This agreement saves both our organizations the trouble and expense of combatting one another in global markets around the world. We shared the agreement with the U.S. and EU governments. The EU however refused to welcome this positive example of industry collaboration and encourage similar agreements, thereby illustrating that it prioritizes being "part of the problem" over choosing to be "part of the solution" of finding common sense common ground.

Unlike many other challenges in the IP sphere, the predatory practices plaguing our members and allies are not the work of rogue companies but instead are a government-driven strategy that is being deliberately and methodically carried out to wield government influence and treasuries to establish unique monopoly benefits for producers in EU countries. U.S. strategies to combat the misuse of GIs must be informed by a recognition of this unique nature and how it differs markedly from the type of IP challenges most commonly confronting most other sectors.

We appreciate the Administration's strong focus on tearing down trade barriers that hinder U.S. competitiveness and pursuing a level playing field for U.S. companies. To further these goals, we

urge the U.S. government to expand its actions in the coming year to keep doors around the world and here at home open for equitable competition by securing firm and explicit commitments assuring the future use of specific generic food and beverage names targeted by EU monopolization efforts and rejecting the use of GIs as barriers to trade in products relying on common names. Without such a focus, U.S. companies are likely to see more and more barriers to their exports grow as EU governments and stakeholders persistently pursue various avenues to limit competition from U.S. and other suppliers.

Opening Comments:

Unwilling to compete head to head with others in the marketplace on the traditional factors of product quality and pricing, the EU has instead sought to stamp out competition by banning the use in its market and increasingly in other markets the use of commonly used product terms. This anti-competitive practice denies U.S. companies a level playing field by prohibiting them from marketing their products with accurate labels that can correctly convey to consumers the type of product they are purchasing.

Intellectual property protections serve a vital goal in protecting innovation and company's investments. CCFN is not at all opposed to robust IP protections, whether for genuine geographical indications or for other forms of IP such as trademarks. However, the EU's pursuit of market restrictions for commonly used product terms undermines the integrity and independent functioning of IP systems around the world by pressuring countries to shun their own judgements about which unique terms merit protection and which are commonly used in the market.

Putting intellectual property principles "up for sale" by horse-trading GI protection for other trade concessions runs directly counter to the safeguards that IP systems are intended to uphold for terms already in the common domain and relied upon by a variety of other individuals and companies. And if a bedrock element of IP systems – generic terms – can be effectively nationalized to the benefit of a foreign government, may privately registered IP terms be next on the government auctioning block?

U.S. trademark law is clear and well-established about the important role that generic terms play in fostering healthy competition and commercialization of products by a variety of companies. This principle is just as relevant in our market as it is in others around the world. In a case dating back to 1888 the U.S. Supreme Court found that:

"No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself....Nor can a generic name...be employed as a trade-mark, and the exclusive use of it be entitled to legal protection." The court found that if a trademark could restrict the use of a generic term, **"the public would be injured, rather than protected, for competition would be destroyed."** (Goodyear's Rubber Manufacturing Co. v. Goodyear Rubber Co)

As will be reflected in our comments, there is a persistent push by the European Union and other European interests to dismantle competition and erect barriers to trade which must be more strongly combatted.

Simply put, the EU's GI policies are anti-trade, anti-competitive, anti-free market, and anti-intellectual

property, and are being paid for by consumers, producers, and its trading partners and third parties. This is particularly evident in countries such as the U.S. that experienced waves of European immigration in the past or in developing countries that are former European colonies. All the while the EU professes a commitment to promoting trade, competitiveness, free markets and the intellectual property system, it is instead misusing those principles to gain advantages for its own producers.

As a result, countries around the globe are under pressure from EU trade negotiators to ignore the rights of third-party countries (including the U.S.) and non-EU companies, and to sacrifice basic intellectual property principles, in order to grant EU producers monopolies in their country in exchange for market access into the EU. In addition, users of common food names are being exposed to significant legal costs and jeopardy as entities supported by European governments attempt to register GIs, trademarks, and threaten litigation in order to clear the field of non-EU competitors in many markets, including the U.S. The EU's agenda is not limited to bilateral abuse as they also seek to undermine and even usurp individual countries' IP systems through their World Intellectual Property Organization (WIPO) GI efforts.

American companies, their employees and supplying farmers are harmed greatly by these EU efforts as barriers to the trade of these products and increased risks of doing business result in lost sales, jobs and economic development. The U.S. is not alone in confronting the impact of these actions; workers and farmers in a number of other countries around the world, including developing countries, are also impacted by these EU efforts and their trading partners' acquiescence. In addition to GI-specific concerns, we are also concerned about efforts to use similar types of regulatory restrictions such as the EU's "traditional terms" program and its "traditional specialty guarantee" program to impose limits on the fair use of common food terms.

What the EU is perpetrating on the world is not a victimless wrong. Their actions impact real U.S. companies employing American manufacturing sector workers who are making their goods with American farmers' products. Moreover, they specifically undermine the value of market access concessions gained by the U.S. in its trade agreements with these countries by barring producers outside the EU from using terms that have become the common names for various types of products. Simply put, what is the value of the U.S. gaining no or low tariffs into a country's market in an FTA if U.S. producers are then banned from selling that product into that country due to their later GI concessions to the EU? A catalogue of profiles of some of the companies that are negatively impacted by the EU's GI strategy can be found on our website: <http://www.commonfoodnames.com/un-common-heroes/>.

We look forward to continuing to work closely with the Office of the United States Trade Representative (USTR), the United States Patent and Trademark Office (PTO), the United State Department of Agriculture (USDA), the Department of Commerce, and the Department of State to ensure that our trading partners live up to their commitments under the World Trade Organization (WTO) and bilateral trade agreements with respect to common food names and to use all necessary tools to dismantle illegitimate trade barriers that the EU is working to erect through their bilateral trade negotiations and in international forums.

Bilateral Issues

We provide below a number of examples of the way in which this global phenomenon is manifesting itself. This is an illustrative, not comprehensive list. We will continue to monitor the situation and provide information to USTR as appropriate.

Over the last year the EU has been particularly aggressive in pursuing multiple trade agreements with the U.S.'s trading partners and injecting into those negotiations GI demands that completely disregard the rights of third parties, including the U.S. Each of these countries is obliged under WTO rules to avoid restricting access for products from the U.S. that rely on common names for their marketing and several of the countries are also obligated to avoid doing so under U.S. bilateral trade agreements, given the established value of concessions in those FTAs. As U.S. work on this issue continues, it is our expectation that the U.S. will insist that our trading partners honor those obligations and avoid imposing nontariff barriers, disguised as GIs, on U.S. exports.

Across all markets, but particularly those with which the U.S. has an FTA or is in the process of pursuing an FTA, we urge the Administration to secure explicit commitments from our trading partners that build upon the positive precedent established in the U.S.-Mexico-Canada Agreement whereby market access rights were clearly and definitively affirmed for a non-exhaustive list of common used product terms¹.

The USMCA common names list is naturally not the full list of all food terms that the U.S. retains the right to use; but the clarity it provides for the subset of terms it does cover is vitally important. **This type of tool – expanded to include a fuller range of commonly used and commercially important terms² – should be carried forward aggressively by the Administration in order to safeguard our WTO and FTA market access rights in the strongest manner possible.** In this way, the U.S. government can best make efficient use of its resources while preserving global sales opportunities for U.S. companies operating on a good-faith basis.

Australia

On June 2018 Australia and the EU launched negotiations for a free trade agreement. The EU has made clear its goal of using this process to secure the GI registration of common names, as it has done in other markets. We welcome the transparency to date of the Australian government in soliciting public comment on draft FTA text related to this topic and urge the importance of rejecting any special process or rules specifically for EU GIs. At the end of 2019 a list of 172 EU GIs was published as part of the negotiating process. Commonly used product names including asiago, black forest ham, bologna, feta, fontina, gorgonzola, grana, gruyere, munster, neufchatel, parmesan and romano appeared on it.

Australia has a well-designed and highly functioning IP system in place already that is more than capable of providing reasonable protection to legitimate GIs; there exists no basis for bypassing this system. Particularly in light of the U.S.-Australia FTA and the market access to U.S. products granted under that agreement, we urge the Administration to preserve the value of the bargain struck in its own trade treaty with Australia by insisting that Australia

¹ https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/MX-US_Side_Letter_on_Cheeses.pdf

² Such as those cited as common names on CCFN's website: <http://www.commonfoodnames.com/the-issue/names-at-risk/>

ensure that the common names cited in industry opposition submissions remain free to use for both the Australian industry and its international partners, including the U.S.

Canada

The newly approved U.S.-Mexico-Canada Agreement (USMCA) includes several notable precedents that we urge the Administration to ensure are fully utilized in the North American trade context and to work to build upon with additional trading partners moving forward. The key concepts that were included will benefit consumers and producers in the region when implemented this year. Some of these key elements relevant to Canada include:

- Important due process procedures governing GI applications to create transparency and help provide tools to preserve the use of common food names throughout the course of GI consideration procedures;
- Mandated government to government discussions to “pursue solutions to GI requests arising from trade treaties...[to] endeavor to reach mutually agreeable solutions before taking measures in connection with future requests of recognition or protection of a geographical indication from any other country through a trade agreement”;

As noted in our prior submissions, Canada has a history of taking actions not in keeping with these new USMCA commitments, namely in its approach to GIs during the course of the Comprehensive Economic and Trade Agreement (CETA) negotiations where Canada flouted its TRIPS obligations by bypassing standard evaluation of intellectual property rights for EU GI holders and failing to provide for any opposition process before granting uniquely beneficial IP rights to EU interest groups – including for several terms long used generically in Canada.

We trust that the new disciplines in USMCA will help to effectively guard against replication of this deeply unfortunate action in the future. This remains relevant given continued pressure within the EU to further tighten the restrictions on the generic terms currently subject to “-style”/“-kind”/“-type” mandates and grandfathering provisions in the Canadian market. In addition, some EU GI stakeholders have sought in recent years to exploit Canada’s trademark system to subvert the grandfathering and “-style” allowance provisions of CETA.

While we firmly disagree with the Canadian government’s decision to impose new limits on the use of terms in generic usage in Canada, the CETA terms clearly allow the use of the specified terms by grandfathered users and Canada’s trademark system must not be allowed to be used as a tool to circumvent those residual protections. Canada’s trademark office should consistently reject any applications that would impose restrictions on the use of terms expressly permitted under CETA. Any action to the contrary would undermine the value of the new market access concessions so painstakingly secured by the U.S. for cheese exports to Canada under the USMCA.

Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua & Panama)

The consequences in this region resulting from the implementation of FTAs with the EU have been variable. In some countries, such as El Salvador, Guatemala and Honduras, government officials have restricted the use of various single-term names of concern to the U.S. but at least have been willing to provide important clarifications regarding the treatment of common names that are components of certain multi-term GIs of particular interest to U.S. companies. We commend in particular the past work by USTR with Honduras to clarify the scope of registered multi-term GIs. These steps have helped to preserve a significant portion of the value of market access commitments contained in the U.S.-CAFTA. In other markets in the region, namely Panama, Nicaragua and Costa Rica, the governments have to date declined to provide such clarity regarding multi-term GIs in writing and we urge continued pursuit of this certainty.

It should be noted however that, even in countries where the government has taken steps to clarify and properly define the scope of EU GIs, the EU has not stopped its efforts to harass local producers in these developing countries and the U.S. exporters that rely upon those markets. For example, over the last several years, CCFN and its allies in Guatemala have spent considerable time, effort and resources to fight continued EU attempts to use the court system to monopolize the common term “parmesan”. The EU has pursued appeal after appeal and the case is now before the Constitutional Court of Guatemala (the final stage of that country’s court system). While the Guatemalan government is to be commended for remaining resolute on this issue and refusing to bow to the EU’s pressure to restrict use of this generic term, such harassment and aggressive actions by the EU serve to only illustrate the importance of memorializing clarity surrounding the scope of U.S. market access terms with our trading partners.

We note that the EU continues its engagement with Central America on the issue of GIs, including meetings held within the last two years on this specific topic. Our organization strongly urges the countries in this region to work further with the Administration to establish clearer trading conditions for U.S. exporters and ensure that the GIs registered in their countries are not protected in an overly expansive manner that impacts trade. Central America is an important growth market for the U.S. and safeguarding the full value of the concessions the U.S. secured under CAFTA is essential.

A particularly high degree of risk to U.S. exports remains in Costa Rica given past cases where the country has disregarded standard intellectual property considerations and issued decisions restricting the use of various common names. We recognize that Costa Rica has recently updated its GI regulations; in light of this progress, we urge the Administration to secure assurances regarding U.S. market access rights for relevant products including parmesan, provolone, romano, bologna and other widely used product terms, building upon the approach taken with Mexico in USMCA (see above). *It should not be the burden of industry to seek these clarifications regarding scope of protection and market access rights.*

Chile

Throughout last year the EU and Chile advanced their negotiations aimed at modernizing the EU-Chile FTA. As has been seen in other EU FTAs, the EU is seeking to use this negotiation to create monopolies for European companies in common food and beverage categories while working to deny common name users the right to sell products in Chile. Such a result would strip U.S. exporters of the full value of concessions negotiated by the U.S. under the U.S.-Chile FTA.

As part of the negotiations, Chile published a list of 222 GIs for which the EU seeks registration. As indicated in our comments filed in response to that process “We applaud this Public Comment process on GIs conducted by the Government of Chile. This will allow Chile to conduct an in-depth analysis of the potential impact of these recognitions on its domestic market and commercial relations with other important partners, and also to consider the budgetary consequences that such a recognition would have for some of its agencies and offices – particularly those involved in the protection and enforcement of intellectual property rights.” We urge the Administration to take proactive steps this year to preserve the full range of U.S. exporters’ access to the Chilean market by securing concrete commitments preserving our market access rights with this valuable FTA partner. Without such steps, U.S. export opportunity to this FTA partner are at high risk of facing new barriers to trade.

China

In November 2019, China and the EU concluded negotiations on their “100 for 100” GI agreement. The EU GIs covered by this new treaty include dairy and meat products, wine, beer and spirits. Restrictions include common terms such as asiago, feta and gorgonzola. In addition, the EU and China committed to consider additional GIs over the next few years. CCFN is appealing two of the 2019 GI decisions issued by China to explore how effectively China’s GI appeal process can operate in practice.

We commend the Administration’s successful incorporation of new safeguards and due process procedures related to GIs and common food names in the Phase 1 U.S.-China agreement signed this year. It is essential that these be applied to the ongoing GI appeal procedures and that implementation of the commitments be carefully monitored to ensure they generate the intended changes in how GIs are dealt with.

Colombia

As part of the Colombia-EU FTA, Colombia agreed to establish GIs for certain common food names such as feta and asiago. This action impaired the value of concessions granted to the U.S. under the U.S.-Colombia FTA. At the same time, however, Colombia also took positive steps to address U.S. concerns regarding other names by clarifying the scope of protection provided for certain multi-term GIs including terms such as parmesan, provolone, brie and others. Those generic use assurances related to compound GIs must be upheld and should be further memorialized, drawing upon the type of approach employed in USMCA with a properly expanded set of commonly used terms. In doing so, the U.S. should make every effort to ensure that the full spectrum of U.S. exports to this FTA partner market is not impaired.

Ecuador

In November 2016, Ecuador signed an FTA with the EU that included GI provisions. As part of that agreement, Ecuador banned the import of certain commonly produced U.S. foods if they were labeled using their common names. To ensure that the maximum possible range of U.S. products remain eligible for sale in Ecuador, we urge USTR to work with Ecuador to establish an appropriately defined scope of protection for multi-term GIs that preserves the maximum range of market access to this market.

Europe

In addition to driving the escalating threat of nontariff barriers to U.S. products world-wide, the EU also continues to contemplate new restrictions on the use of common food names within its borders and use regulatory tools similar in intent to its GI system to restrict the use of common names.

Resumption of US-EU Trade Agreement Negotiations:

We fully expect the EU to seek to use the same WTO-illegal playbook it has employed in its other trade treaties by insisting that it should be permitted in trade talks with the U.S. to turn the very idea of an FTA on its head by imposing more restrictions on trade and competition via new burdens on the users of common food names in the U.S. market. This wrong-headed approach must surely be rejected outright as it would conflict directly with the goals the Administration has set out for removing unfair impediments to U.S. manufacturing, including food manufacturers, and tackling trade deficits that result from the wielding of policy tools by some trading partners to curtail global opportunities for U.S. firms and workers.

Should the U.S. further pursue comprehensive trade agreement negotiations with the EU, separate discussions are needed to effectively focus on the EU's misuse of GIs as a defacto technical barrier to trade in common food name products, both in the EU and in third-country markets.

GI Expansion:

The EU continues to expand its list of GIs, having recently flouted the integrity and importance of Codex standards by approving last year a GI for the generic term "havarti" despite the existence of a Codex standard for this commonly used cheese term. The EU's behavior in this case contradicts its own previous position taken in the Codex discussions that created that standard and exemplifies why no name is safe from the EU's zealous attempts to expand the number of GIs and to broaden the protection of GIs.

It is unacceptable for countries to abuse the multilateral Codex standards process to develop a global standard for a commonly produced and traded product, only to subsequently seek to monopolize use of the standardized term for their sole benefit. Such actions make a mockery of the multilateral Codex process that underpins trade predictability and WTO commitments.

There are examples of EU GIs that have not proven to be problematic in practice because of the reasonability of the GI applicants and their EU member state government. One strong example of this alternate path has been the UK. For instance, the UK has multiple GIs

registered for types of cheddar, a generic type of cheese that long ago took its name from the town of Cheddar, England (e.g. GIs exist for Orkney Scottish Island Cheddar and West Country Farmhouse Cheddar). Those GI registrations, however, make equally clear that use of the generic term cheddar is preserved. Unfortunately, the EU has refused to consistently follow this positive model, thereby creating increasingly problematic barriers to trade.

CAP Reform and GI Policy Modifications:

In 2018 the EU proposed changes to its Common Agriculture Program that would include numerous modifications to its GI policies. This month saw the close of a further public comment period on its GI policies. If these proposed regulations are implemented as written it would lead to further disruption in the EU as the proposed CAP Reform would:

- Loosen evidentiary requirements regarding the historic origination of the product;
- Expand member states' authority in deciding if a GI application is eligible for protection and in amending GI specifications, thereby magnifying the likelihood of commerce challenges across the EU's common market as well as with trading partners;
- Shorten the opposition deadline to respond to GI applications;
- Expand the scope of protection for GIs; and
- Continue the absence of a list of names that the EU considers to be generic and of objective criteria to determine what constitutes a generic name.

In addition, the EU proposed revisions to its regulations impacting wine GIs and traditional terms. We are concerned that EU policies in this space continue to trend in the wrong direction rather than in a more trade-compliant one.

Traditional Terms:

Certain U.S. winemakers are prohibited from using common descriptive terms related to winemaking on wines exported to the EU. The terms used on U.S. wines which are prohibited in the EU are not associated with a specific place or GI, such as Bordeaux or Napa Valley. Rather, they are common nouns and adjectives used to describe the wine. These so-called "traditional" terms include "chateau," "clos," "ruby," "tawny," "crusted/crusting," "noble," "ruby," "superior," "sur lie," "tawny" and "vintage/vintage character."

As part of the "Agreement between the United States of America and the European Community on Trade in Wine," signed in 2006, the EU granted U.S. winemakers a derogation to continue to use common terms in question for three years. Although there was an understanding that, at the end of the three-year period, the EU would renew the derogation but the renewal was never granted. Consequently, in 2010, the U.S. wine industry submitted applications to the EU for approval of 13 terms, with definitions provided for each term as required by the EU. In 2012, the EU approved the applications for "classic" and "cream." Now, however, numerous years after the applications were submitted, the EU has failed to respond to any of the 11 remaining applications.

The EU's refusal to process these 11 applications prevents U.S. wineries from using the terms in question on wine labels or even in company names when filing for trademark protection, unless the term's use pre-dates the 2006 agreement. Regulation EC 207/2009, Section 2, Article 4(j) of EU Directive 2015/2436 on trademarks, protects traditional terms

for wine, giving the use of the terms by a third country without an agreement or an approved application, absolute grounds for refusal of a trademark application. Therefore, any U.S. winery that newly uses such a term cannot export its wine to the important European market. CCFN strongly objects to the EU's unreasonable refusal to process the remaining applications.

Over the past few years, the European Commission, has continued to stall the application approval process by engaging in a supposed review of EU traditional term wine regulations, including Commission Regulation (EC) No 607/2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008, in order to "simplify" the traditional terms application and approval process.

The U.S. wine industry has sought to play a constructive role in this process, seeking more transparency from European officials. However, to date the EU has failed to adopt a clear and transparent approach to the process, including notification of issues and claims that delay or prevent a prompt decision.

Applicants continue to be prevented from reviewing and responding to written objections submitted by Members States and other stakeholders. In addition, the EU has refused to amend its notification and objection procedures to allow those who have made prior use of a term in the EU the opportunity to object or register their own usage of the same term.

The Commission has also failed to revise its regulations to ensure use of legitimate descriptive terms without the need to go through a cumbersome and unnecessary registration process that creates cost and uncertainty for both regulators and industry, by:

- Broadening the definition of what is considered "generic" in the legislation;
- Limiting the high level (Article 40(2)) protection of traditional terms to wines from the country seeking protection only – uses by other countries would therefore only be prohibited where this could be shown to be actually misleading or deceptive; and
- Developing a non-protected list of descriptive terms of third countries that may continue to be used by those countries in the EU, including in co-existence with registered traditional terms.

Finally, in violation of its National Treatment obligations and basic principles of good regulation, with respect to traditional terms the EU has apparently failed to utilize the same regulatory process and criteria for applications from Member States that it uses for those submitted by third countries.

Traditional Specialty Guarantee Program:

We remain strongly concerned about how the TSG program may be abused by the EU moving forward given changes to it a few years ago to align it with the competition restricting approach employed by the EU through its GIs and TTs programs. The TSG program was initially a program whereby producers that fit a specified product definition earned the right to use a particular EU TSG logo on their packaging. However, in 2013 the EU reformed this program to instead require that new TSGs be implemented in a restrictive manner, blocking use of the registered term by any who do not meet the specific product definition.

Mandatory product standards and their enforcement are not in principle a concern. When properly employed, they can provide essential consistency and information to consumers.

For instance, the U.S. has a standards of identity program that specifies what products can be accurately labeled as “milk” or as “gruyere cheese”, regardless of where that product is produced.

However, given the EU’s track record of using its quality labeling programs to deter competition for groups of producers in specific regions of the EU, CCFN is concerned about how this regulation may be applied in practice and the lack of sufficient clear safeguards for generic names under the regulation. For instance, a TSG for neapolitan pizza (“Pizza Napoletana) has been created. Although the U.S. is presumably unlikely to export pizza to the EU, the EU’s propensity to “export” its regulations in the form of global regulatory and standards restrictions around the world could ultimately create challenges for restaurants and their global suppliers, including U.S. companies, if an overly restrictive standard for the term were imposed world-wide.

Although not strictly an IP issue itself, the development of the TSG program must be viewed in the context of what the EU has done with its established GI system and policies. It will be important for the U.S. government to monitor evolution of this program and to discourage its incorporation into EU FTAs; should the EU wish to create global product standards for particular products the proper pathway for doing so is through the established Codex process, not unilateral dictate by Europe.

Emerging Threats to Generic Country Name Use:

In addition, the EU has also used other methods to discredit products with certain names produced outside of specific EU member countries. This threatens a variety of companies that generically use country names to make references to their products. Here too, these developments must be carefully evaluated in the context of what the EU has done on GIs to date and ongoing discussions on the topic in international IP discussions.

Examples of this include:

- The EC’s decision that “Greek yogurt” could not be used on products produced outside of Greece despite the fact that the term is not protected by a geographical indication, nor even a TSG, and has become a widely used term to describe a type of high-protein yogurt.
- Efforts to bar the use of the colors of the Italian flag on labels (despite no unique proprietary rights to use the colors red, green and white) and the common marketing practice of making visual reference to the country from which a particular style of food initially originated.
 - This puts at risk products named in an Italian government report as inappropriately asserting an Italian connection including: Wishbone Italian Salad Dressing, Progresso Italian Wedding Soup, Rita’s Italian Ice or Chef Boyardee Spaghetti & Meatballs are surely not confusing consumers as to their origin, Italian claims to the contrary.

In sum, we reject the EU’s continued efforts to monopolize the use of common names on behalf of its member states. Their actions are particularly galling given the large trade deficit between the U.S. and the EU in food and agricultural products, by which the EU blocks access for many of these products to its market while profiting tremendously off its sales of those same foods to the U.S. market.

The U.S. offers a large and lucrative market to European producers of the products in question; it is entirely unacceptable that the EU response to this has been to predatorily work to restrict the sale of common American-made products all around the world. The U.S. should take further steps to more effectively combat the EU’s increasing escalation of its “quality system schemes” to limit fair competition from American suppliers.

Japan

Japan implemented its agreement with the EU on February 1, 2019. The agreement establishes an appropriately specific scope of protection with respect to compound GIs wherein the relevant common terms included in those compound GIs were preserved for free usage by all. At the same time, however, some terms were restricted such as various wine terms and generic terms impacted by several single-word GIs such as asiago, feta, fontina and gorgonzola.

While we commend Japan for having a transparent process and for making the right decision to preserve market access rights with respect to properly defining the scope of protection for compound GIs, the work in this market is not over. That is particularly relevant as the U.S. embarks pursues a comprehensive trade agreement with Japan this year.

U.S. agricultural sectors strongly welcomed the implementation on January 1, 2020 of a Phase 1 agreement with Japan on tariffs and TRQs. Looking ahead to the remaining negotiations on a fully comprehensive agreement, it remains essential that:

- Japan ensure that all those with product in the market prior to the implementation of the EU-Japan FTA be covered by the “prior use” allowances, in keeping with the terms of the 2018 WTO notice published by Japan regarding prior users;
- Japan not unduly restrict common labeling practices if information is still clearly conveyed to consumers by those labels;
- Japan’s existing GI regulations’ checks and balances, including with respect to cancellation rights, be preserved and apply to all terms covered by this exercise;
- The U.S. build on the model piloted in USMCA by establishing clear and explicit safeguards for the use of common food names to ensure that the EU and its stakeholders cannot impair the value of market access for those products in the future.

Korea

As part of the EU-Korea FTA, Korea banned the import of several commonly produced U.S. foods if they were labeled using their common names without conducting a due process procedure that included an impartial review of the terms and a public comment period. This action impaired the value of concessions granted to the U.S. under the previously negotiated U.S.-Korea FTA by forbidding the sale of accurately labeled U.S. asiago, fontina, gorgonzola and feta to one of the world’s most important cheese import markets. Fortunately, the U.S.

salvaged a large portion of the value of KORUS's benefits by securing a commitment³ from Korea that provides clarity regarding the status of common names contained in multi-term GIs. This type of very specific understanding with a key trading partner has been essential to providing clarity to U.S. exporters regarding the types of products that can be exported to Korea. To take this understanding to the next level and provide the strongest form of certainty moving forward, we urge the U.S. to work with Korea to secure clear market access assurances that build upon the precedent established under USMCA with Mexico.

Indonesia

Indonesia is involved in FTA negotiations with the EU. In keeping with recent practice, it is our understanding that a goal of these negotiations for the EU is to secure the registration of a long list of GIs and a broad scope of protection for those terms. We are very concerned that an eventual agreement could restrict current and future opportunities in the Indonesian market for commonly produced products. In a related manner, in 2016 Indonesia issued text proposing changes to its GI regulations. To our knowledge this has to date not been properly notified to the WTO. Moreover, it contained a number of highly troubling provisions with penalties and scope that appear to be even more draconian than those employed in the EU. We urge the Administration to work with Indonesia to ensure that access to that market for common food name products is maintained and to improve the deeply flawed GI regulations in place in this country.

Malaysia

Malaysia is involved in FTA negotiations with the EU. In keeping with recent practice, the EU is believed to be pursuing in this context the registration of a long list of GIs. We are very concerned that an eventual agreement could restrict current and future opportunities in the Malaysian market for commonly produced products. We urge the Administration to insist that Malaysia abide by both the letter and spirit of its trade commitments to the U.S.

Mexico

In 2018 we saw the conclusion by Mexico of two agreements of high relevance to the issue of GIs: an expansion of its FTA with the EU and the conclusion of the U.S.-Mexico-Canada Agreement (USMCA). One of those, USMCA, is now clearly moving forward this year; the future of the other remains less settled.

With respect to USMCA, several important precedents were established that we urge the Administration to ensure are fully utilized in the North American trade context and to build upon with additional trading partners moving forward. The key concepts that were included will benefit consumers and producers in the region. Some of these key elements include:

- Important due process procedures governing GI applications to create transparency and help provide tools to preserve the use of common food names throughout the course of GI consideration procedures;
- Mandated government to government discussions to “pursue solutions to GI requests arising from trade treaties...[to] endeavor to reach mutually agreeable

³ <https://ustr.gov/sites/default/files/uploads/pdfs/PDFs/December%202012/062011%20Kim-Kirk%20Letter%20on%20GIs.pdf>

solutions before taking measures in connection with future requests of recognition or protection of a geographical indication from any other country through a trade agreement”;

- US-Mexico side letter establishing a broad scope of coverage for any grandfathering rights accorded to prior users by defining them to include all actors across the supply chain including producers, distributors, marketers, importers and exporters;
- US-Mexico side letter breaking new ground by creating for the first time in a U.S. trade treaty a non-exhaustive list of commonly used food terms that may not be restricted by Mexico moving forward.
 - Although this list omits some commercially critical terms such as parmesan, romano and others that must be included in future versions of this list, the side letter does contain numerous generic terms while establishing an extremely valuable new precedent and model for providing market access certainty to U.S. exporters.

As the U.S. moves forward with USMCA implementation preparation, it is absolutely essential that USTR engage in robust dialogue with Mexico to ensure these provisions are utilized to their full effect and that Mexico is not able to erode their value by implementing them in an overly narrow or weak manner.

With respect to the EU-Mexico FTA, CCFN remains deeply disappointed in the Mexican government’s decision to surrender to EU demands by giving up a number of highly used common names in the Mexico-EU FTA (e.g., parmesan, feta, fontina, munster, asiago and gorgonzola). CCFN firmly believes that these GIs were illegally granted by disregarding the evidence our organization submitted, which is why in 2018 we filed several “amparos” (constitutional legal challenges) contesting these decisions. Those cases have advanced throughout last year but decisions remain pending by the Mexican courts. What the prior Mexican Administration failed to faithfully do, its court system should rectify by insisting on the rule of law in Mexico.

We also note that Mexico has in recent years been engaged in FTA negotiations with the EFTA bloc of countries, including Switzerland. GIs are also a topic of interest in these discussions. In addition, we anticipate that country name restrictions will also be a key basis of negotiations that hold significant commercial relevance for U.S. companies that utilize country terms to describe a common type of food product rather than a regional origin.

MERCOSUR: Argentina, Brazil, Paraguay and Uruguay

In June 2019 negotiations between the EU and the Mercosur bloc of countries concluded and results for how a lengthy list of EU GIs were to be handled were published. The results showed a clear disregard of established usage of a number of common food names. If the agreement is implemented as negotiated, common names like parmesan, feta and gorgonzola will have restrictions and grandfathering provisions designed to disadvantage new entrants to the market – including trading partners such as the U.S. – will be barred from selling many products.

Leaked reports⁴ as well as interviews with the negotiators made it abundantly clear that the

⁴ <https://www.bilaterals.org/IMG/pdf/20180829123331.pdf>

decisions on GIs were not made on their merits, but rather traded new bans on trade and competition for access to the EU market – thereby erecting trade barriers to Mercosur's other competitors in order to effectively purchase market access expansions into the EU market. This flies in the face of how IP should be handled and undermines the integrity of the IP systems in these countries. At the same time their negotiating positions cause such IP perversion, the EU makes hypocritical statements regarding the value of fully functioning intellectual property systems.

Countries must ask themselves: if bargaining away the rights of generic users by shirking the safeguards IP systems should provide for commonly used terms is appropriate for one form of IP (GIs), why would such a tactic be inappropriate for other forms of IP such as patents? The U.S. should reject this direct threat to the integrity of IP systems globally.

EFTA-Mercosur negotiations are also under way and a list of GIs was published last year for public consideration. Two terms posed particular concern: emmental (which has a Codex Standard) and gruyere. In an ironic turn of events, even EU stakeholders joined with CCFN in voicing opposition to restrictions on one of these terms given its global use to describe a type of cheese.

We urge the Administration to be active in engaging with these trading partners given the negative impacts on U.S. export rights that are likely to otherwise occur from Mercosur's negotiated agreement with the EU and its pending talks with EFTA countries.

Morocco

In January 2015 Morocco and the EU announced that they had reached an agreement on GIs. We remain concerned about the impact of this agreement on U.S. exports and strongly urge work with Morocco to secure assurances about what the U.S. will continue to be permitted to ship to this FTA partner. It is essential that we retain the rights to export the full range of products to this market and to preserve the value of the market access concessions that the U.S. negotiated with Morocco.

New Zealand

Last year New Zealand and the EU continued to advance their free trade agreement negotiations. We note that New Zealand has a well-designed and highly functioning IP system in place already that is more than capable of providing reasonable protection to legitimate GIs; the fact that GIs are instead being considered under the auspices of the FTA process raises the likelihood of a result driven by the politics of negotiation rather than the substance of the GIs at issue. New Zealand has long been an ally on the topic of GIs; we urge the Administration to work closely with New Zealand regarding the importance of safeguarding common names.

Peru

As part of the Peru-EU FTA, Peru granted protection to some commonly produced U.S. products, terms that were generic in Peru such as feta and asiago. For instance, the feta sold in Peru was not typically sourced from Greece, but rather from other markets. This action violated WTO rules and impaired the value of concessions granted to the U.S. under

the U.S.-Peru FTA, which pre-dated the EU agreement. Last year Peru's IP authorities entered into a partnership arrangement with the world's leading proponent for excessive GI policies – the organization OriGIn. We view this agreement with concern given its potential to influence the degree of impartial treatment Peru is obligated to utilize with respect to GI applications. We urge continued engagement with Peru to establish clearer trading conditions for U.S. exporters, strong safeguards for the use of common food names, and measures to ensure that the GIs registered are not protected in an overly expansive manner designed to hinder trade.

Philippines

The government of the Philippines has been considering new regulations on the protection of GIs over the course of the last few years. We appreciate the U.S. government's proactive education and outreach work with the Philippines throughout that process over the past few years. We also commend the Philippine government's openness to date to the importance of ensuring that a GI system is not abused to restrict the use of common food names.

We continue to rely on the agreement struck by USTR with the Philippine government regarding the need to handle GI applications in a fair, transparent manner that respects common name users. As USTR's statement indicated:

"The United States notes that the Philippines is continuing to protect geographical indications (GIs) in a manner mutually beneficial to both countries by ensuring transparency, due process, and fairness in the laws, regulations, and practices that provide for the protection of GIs, including by respecting prior trademark rights and not restricting the use of common names."

The logical next step in this sustained and positive engagement with the Philippines should be to secure more direct assurances safeguarding the use of commercially important common names to guard against EU efforts in its FTA talks with the Philippines to restrict the use of those terms.

Russia:

In 2018 Russia started a process of reviewing a draft bill amending its regulations on GIs. The bill was published for comments and CCFN filed comments in response. As with all GI regulations it is important to ensure that such procedures provide not only an avenue to protect legitimate GIs but also the means to sufficiently safeguard the use of terms already in the common domain. We are unaware of whether Russia has finalized this regulation.

Singapore:

The EU-Singapore FTA entered into force in 2019, including new provisions pertaining to GIs. We remain deeply concerned about how these provisions will be applied, particularly in light of the results from filings submitted by CCFN last year in Singapore regarding the registration of GIs impacting the use of three common terms: feta, parmesan and romano. CCFN is deeply concerned by what appeared based on the court's response in those rulings to be a bias in favor of granting the EU's GIs. Responses to CCFN's oppositions suggested that officials felt unduly obligated to move the GI application process forward quickly in a predetermined way due to a perceived linkage between their decisions and the EU-

Singapore FTA's implementation.

To preserve our rights in this key trading hub in Southeast Asia, we have submitted additional filings late last year and early this year. CCFN urges the Administration to work proactively to secure assurances from Singapore that common names will not be limited in any way and that our pending applications will receive fair consideration. In addition, we urge the U.S. to work with Singapore to secure safeguards of our market access rights under the existing U.S.-Singapore FTA.

South Africa

Under a trade agreement with the EU, South Africa imposed restrictions on the use of a number of common food names including feta, a term which is so generic in that market that past FAS reports noted that it is one of the largest cheese types produced in South Africa. That agreement has now been implemented by both parties.

South Africa took its action without providing the necessary notification to the WTO TBT Committee nor subjecting the proposal to its standard intellectual property procedures, thereby depriving the U.S. and other trading partners of the opportunity to comment at an earlier stage on the proposed regulation. Although revised GI regulations were subsequently notified to the WTO, the fundamental decisions regarding the GI restrictions imposed through the EU agreement were not revisited. Countries should not approve a lengthy list of GIs and then work backwards to create a framework under which to consider those GIs. The due process procedures, transparency that they provide and – most critically – the opportunity to oppose unjustified GIs and pursue their cancellation where needed must come before the final decisions are issued, not afterwards.

Last year South Africa published new regulations relating to the protection of GIs yet these still fell short of the necessary safeguards for common name products. We urge the Administration, should it pursue deeper trade relations with S. Africa through a trade agreement or other form of enhanced bilateral engagement with market, to memorialize market access assurances with this trading partner, drawing upon previous precedents, and work to improve S. Africa's GI regulations.

United Kingdom

As the U.S. prepares to commence negotiations with the UK, an opportunity exists to create a fresh start on GIs with this market in a manner that could work to the benefit of both UK and U.S. food producers. While the UK has implemented EU GI regulations and GIs during the transition period, it appears to retain the ability to amend those decisions in the course of further negotiations with the U.S.

We note that press coverage of the topic of GIs in the UK over the last few years has been woefully inaccurate as news stories have incorrectly suggested that UK geographical indications were suddenly in jeopardy across Europe. However, the EU GI system is required to continue to cover registered UK products in the EU (and will continue to be obligated to do so regardless of the form or results of a new UK GI system). This obligation was clarified thanks to a WTO case that the U.S. successfully brought against the EU several years ago. It is a violation of a country's WTO national treatment obligations to

maintain a GI system that is not equally accessible to foreign registrants.

With respect to how the UK now prepares to deal with GIs, the break with the EU affords the UK the opportunity to revisit how it handles the topic of GIs and institute a system more in keeping with the reasonable and pragmatic approach that UK officials and industry have typically advocated on GIs. We encourage USTR to work with the UK to help foster the creation of a balanced GI system that breaks with the destructive and deeply flawed GI model advanced by the EU to instead create a fairer and more reasonable system for GIs.

Through the course of that work the U.S. should address concerns about how UK courts have restricted the generic use of the term “Greek yogurt” despite its lack of a registration in the EU as a GI or registration in the UK as a trademark. This type of yogurt is widely produced and commonly known to mean a type of high-protein yogurt. Efforts by Greece to restrict usage of this generic term, particularly without following any due process procedures to seek its registration as a unique regional term, are inappropriate restrictions on sales.

Vietnam

The EU-Vietnam FTA was signed last year and is expected to be implemented in 2020 following final parliamentary approval. The agreement contains a number of provisions on GIs including the establishment of clarity about the scope of protection for key common names impacted by GIs. In addition, although the FTA imposes restrictions on the use of the common terms asiago, fontina and gorgonzola, it allows those that initiated exports of asiago, fontina and gorgonzola to Vietnam by Dec. 31, 2016 to sell those products in Vietnam moving forward.

While we firmly disagree with the decision to grant the EU GIs for these common names, as well as to restrict new users of those terms and use of the generic term feta, those provisions were essential elements resulting from the parallel work by the U.S. government with Vietnam on the issue of GIs. Particularly as the EU FTA’s implementation takes place this year, it is critical that the U.S. aggressively defend this right by ensuring that no other legal or policy instruments are used to erode the rights of U.S. companies covered by the grandfathering provision and that Vietnam affirm clearly in writing those companies that are covered by the grandfathering provision in order to provide certainty in the marketplace.

At the end of 2019 Vietnam’s Intellectual Property Office published the Trademark and GI law for comments. CCFN filed comments and emphasized that GI’s that corresponds to or include generic terms or common names should not be registered. The laws/rules should clearly state also that if a GI conflict with a prior trademark, that the GI should be refused protection. We requested full transparency in the application and opposition process, robust examination, clear indication in the law of grounds for opposition such as that the GI conflicts with prior trademark or generic term, and a disclaimer practice especially for compound terms that contain a generic term. It is our understanding that comments are under review, so we encourage the administration to work with Vietnam officials and make sure these regulations help safeguard common names.

Multilateral and Regional Trade Agreements:

World Intellectual Property Organization (WIPO)

Our organization remains highly concerned with the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications. This agreement is now scheduled to become active this month. The Geneva Act was negotiated over the objections of numerous WIPO countries. Like its predecessor agreement, the Act facilitates GI registrations while giving short shrift to the rights of generic users by automatically granting approval to GI registrations if no objection is received. CCFN remains deeply concerned that implementation of this new Lisbon Agreement will give GI holders an unfair commercial advantage in markets around the world at the expense of companies in the U.S. and the developing world, who have for many generations used common names in the marketing of their cheeses, meats, wines and other products.

As part of its ongoing efforts to ensure that WIPO members are educated on how GIs can be handled in a balanced manner, CCFN has participated in various workshops where the message of common names and GIs has been presented and discussed. We welcome these opportunities yet it remains clear that WIPO under its currently leadership has refused to fully embrace a genuine balance in its programming and policies between the interests of GI-holders vs. those of other stakeholders impacted by GI IP policies.

WIPO treatment of the topic of GIs still too often gives relatively short shrift to the fundamental question of sufficient protections for common names that have already entered into the public domain and as such are commercially important for stakeholders in various WIPO countries. As the world's leading IP organization, it is incumbent upon WIPO to help promote approaches to IP that appropriately balance the interests of rights holders and the interests of those reliant on strong safeguards of terms and information in the public domain. We urge the U.S. to make a reformed approach to this topic by WIPO a priority as WIPO moves to elect a new Director General.

Other Multilateral Fora and Organizations

There are two other high-priority global-level areas of importance related to GI policies: the Hague Convention on the Recognition and Enforcement of Foreign Judgments negotiations and the UN Food and Agriculture Organization (FAO)'s work on GIs.

With respect to the former, we commend the Administration for successfully ensuring that IP issues remain outside the scope of the Hague Convention. The potential inclusion of IP issues in the Hague Convention ran directly counter to the notion of IP rights as territorial rights; its exclusion is therefore entirely appropriate and avoids the creation of yet another new front of risk for U.S. companies relying on common food names.

With respect to the FAO, we recognize FAO's development mandate and that FAO seeks to use various means to spur agriculture, fisheries, forestry and rural development. We also reiterate CCFN's support of well-designed and appropriately focused GI policies. However, as an organization funded in a significant part by dues from the United States and with a responsibility to represent the interests of the whole of the UN membership, in which there exists a broad diversity of views on the topic of GIs, we are concerned that FAO's approach

to GI topics does not adhere to the neutral role it should play with respect to policy in this area.

CCFN encourages the Administration to make it clear to FAO leadership and staff that the organization should give equal attention to the concerns of common name users, the value of common names to developing countries' consumers and producers, and its importance to third-parties when having any discussions with the EU. It should be clear to developing countries that there is no quid pro quo to recognize illegitimate EU GIs in order to have their own legitimate GIs accepted.

Conclusion

In conclusion, we support continuation of the core objectives outlined in the 2019 Report and included here below, but would like to underscore the importance of working across the U.S. government to achieve each of the objectives and to build upon the Administration's work in USMCA to establish clear market access assurances for U.S. exports relying on common food names.

2020 Special 301 Report Objectives on GIs:

- *“Ensuring that the grant of GI protection does not violate prior rights (for example, in cases in which a U.S. company has a trademark that includes a place name);*
- ***Ensuring that the grant of GI protection does not deprive interested parties of the ability to use common names, such as parmesan or feta;***
- *Ensuring that interested persons have notice of, and opportunity to oppose or to seek cancellation of, any GI protection that is sought or granted;*
- *Ensuring that notices issued when granting a GI consisting of compound terms identify its common name components; and*
- *Opposing efforts to extend the protection given to GIs for wines and spirits to other products.”*

To date, U.S. efforts have most typically focused on securing procedural reforms, including those listed above. However it is clear that the EU can and has “gamed the system” in many instances by convincing trading partners to treat procedural measures as little more than a “check the box” exercise with the real decisions being made at the negotiating table, not based on the merits of the applications nor a consideration of countries' prior trade commitments to other trading partners.

This pattern illustrates the need for new U.S. tactics to ensure that the bolded objective above – which most directly equates to the impact U.S. companies will see from the registration of GIs that infringe on the use of common food names – is achieved in practice. To that end, the U.S. must pursue an enhanced effort to hold our trading partners to their commitments to us and preserve the value of market access the U.S. negotiated for in prior WTO and trade agreement contexts. Without this, the U.S. will be forced to play a continual game of defense rather than pursuing the type of proactive offensive strategy this Administration has shown in numerous other trade forums to date.

Thank you for this opportunity to comment on these issues so important to U.S. companies, their employees and their supplying farmers. We look forward to working with the Administration to tackle foreign policies that threaten U.S. exports and the American jobs they support here at home.



Point of Contact:

Shawna Morris

Sr. Director, Consortium for Common Food Names

703-528-4818

smorris@commonfoodnames.com