

**Comments by the Consortium for Common Food Names
Regarding the 2021 Special 301 Review (Docket: USTR-2020-0041)
January 28, 2021**

The Consortium for Common Food Names (CCFN) submits these comments in response to the notice of request for public comments concerning the 2021 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket Number USTR-2020-0041). CCFN appreciates the opportunity to present its views on this important annual report.

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.

As the U.S. Supreme Court declared over 130 years ago in a case considering whether 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). This public harm is exactly the impact we are seeing proliferate, to the detriment of U.S. farmers, U.S. food and beverage producers, U.S. workers in those sectors and supporting ones, and consumers in many markets around the world.

Too many trading partners continue to put in place trade restrictions on the use of common food and beverage terms in ways that run counter to our trading partners’ WTO and/or FTA commitments and often flout the integrity of their intellectual property system procedures. Although public comment periods are now routinely used by most countries evaluating EU GIs considered as part of a trade agreement, these procedures are conducted as pro forma exercises to simply determine which terms merit grandfathering vs. phase-out vs. immediate protection. Decisions on the EU government’s requested GIs are now made at the trade negotiating table, not by impartial IP examiners.

This reality of where and how the decision-making on GIs sought by the EU government in its negotiation is taking place is abundantly clear from the increasing use of grandfathering and phase-out tools (which by themselves clearly indicate common usage of a term in a market) and by public remarks given by government officials from the EU and its trading partners regarding progress in their negotiations. In light of this dynamic of how GIs are dealt with in practice, we strongly urge the U.S. government to pursue a more targeted approach to effectively dealing with the abuse of geographical indications to create barriers to trade.

To that end, we ask the Administration to support U.S. companies’ desire to compete fairly in foreign markets by securing firm and explicit commitments assuring the future use of specific generic food and beverage terms targeted by or at risk of EU monopolization efforts. This approach is strongly supported by Congress as evidenced by the more than 160 Senators¹ and Representatives² that urged its pursuit just last year.

¹ https://www.nmpf.org/wp-content/uploads/2020/07/Final-Senate-Thune-Stabenow-Letter-on-Common-Names-Letterhead-7.30.20_200p.pdf

² <https://www.nmpf.org/wp-content/uploads/2020/11/Letter-House-Common-Food-and-Wine-Terms-Letter-USTR-USDA-11.02.2020.pdf>

If the U.S. does not add this tactic specifically focused on preserving market access rights for our exporters to the U.S. government's tool kit for tackling GI issues, U.S. exporters will continue to face more and more barriers to their products around the world, gradually choking off the growth and opportunities needed to best support American jobs and the production of Made-In-America foods and beverages.

The challenge faced by users of common food and beverage terms facing protectionist efforts by the EU government to bar competition from them is unlike the typical challenge faced in any other IP area. In the vast majority of cases, U.S. focus as it relates to IP issues is rightly and effectively focused on: 1) crafting regulations that will provide protections for U.S. IP interests; and 2) encouraging foreign governments to ensure adequate enforcement of those regulations against the private sector. Following the first step of securing the right rules of the road, U.S. IP interests are typically pitted solely against the private sector interests of other countries. That is unfortunately far from the case for users of common food and beverage terms.

In the case of GIs and common food and beverage terms, the predatory practices plaguing U.S. companies are not the work of rogue foreign firms but instead are the result of an international strategy by one of the world's most powerful governments to use their political influence and treasury to establish unique monopoly benefits for producers of common food and beverage products in EU countries. The U.S. private sector has neither the financial means nor the policy incentives necessary to effectively combat this foreign government pressure and spending.

Without a shift in U.S. policy to treat the misuse of GIs as the *defacto* non-tariff trade barrier they are and protect our market access rights in a concrete manner, we are David battling Goliath – without the benefit of a sling.

Overview of Global Dynamic:

This year marks the 25th anniversary of a tragic event in the history of companies relying on the use of common food and beverage terms long entrenched in the public domain: the establishment of an EU-wide list of GIs that contained numerous commonly used terms and was accompanied by a scope of protection that has amounted to barring anything the EU government deems to be somewhat similar to a high-value GI.

In intentionally erecting trade barriers to U.S. through its own internal GI policies and the exporting of those policies via EU trade agreements, the EU government has pursued a multi-prong approach of:

- 1) Registering terms already widely used by other producers, both within and outside the EU (e.g., “feta” cheese, “prosecco” wine and “muenchener” beer), and
- 2) Establishing an exceedingly broad yet often unclear scope of protection for multi-component GIs that can include, as the EU see fits:
 - multiple words in a multi-term GI (e.g., both the grape varietal “montepulciano” and the regional term “Abruzzo” in the GI “Montepulciano d'Abruzzo”),
 - only one words in a multi-term GI (e.g., just “bologna” in the GI “Mortadella Bologna”),
 - words not even contained in the GI yet deemed, typically after the public comment period, to be “translations” or “evocations” of a single or multi-term GI (e.g., “parmesan” in light of the GI “Parmigiano Reggiano”).

In addition, the EU government is increasingly seeking to restrict other commonly used marketing terms and techniques in its market and in trading partner markets by:

- 1) Restricting usage of words deemed to be “traditional terms” (e.g., clos, chateau, ruby, etc.)
- 2) Granting exclusive usage rights to for words deemed to be “traditional specialty guarantee” terms,
- 3) Imposing restrictions on packaging shapes and images it unilaterally deems to be commonly used by a GI product (despite a lack of any apparent registration process for these elements),
- 4) Considering extending its approach to GIs beyond food and beverage products to include non-agricultural products as well.

The EU government’s anti-competitive and protectionist practices deny 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. The impacts of this are not contained merely to the EU market but instead are expanding like policy tentacles around the world to throttle competition from U.S. suppliers.

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.

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. In late 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.

In addition to wide-spread usage of these terms in the Australian market, multiple terms on this list have already been considered by the Australian IP office and deemed to be generic and/or are included as generic components of registered trademarks in Australia. It is frankly astonishing that they are even under consideration given these facts yet the political dynamics of the EU-Australian government FTA negotiations put them at risk of monopolization. The Australian government has to date refused to provide assurance that these and other generic terms will remain freely available for use in Australia, instead stating in public interviews regarding that the negotiations that the final decisions on all the GIs will be made in consideration of the EU’s market access offer. There can hardly be more convincing evidence that Australia is not committed to following an objective, evidence-driven process than this.

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 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 U.S.-Mexico-Canada Agreement (USMCA) implemented last year 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 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 USMCA market access concessions.

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. These steps have helped to preserve a significant portion of the value of market access commitments contained in the U.S.-CAFTA.

- In particular, we note the value of USTR's work several years ago with Honduras to clarify the scope of registered multi-term GIs and believe it should form the basis for similar assurances throughout the region.
- In addition, last year the EU government finally exhausted a multi-stage appeal gauntlet with the highest Guatemalan court upholding the government's accurate ruling many years ago: that parmesan is a generic term and that the registration of the GI Parmigiano Reggiano does not in any way restrict the usage of parmesan. It was gratifying to see a small country stand up to the EU government's bullying tactics and insist on doing the right thing at every turn in the process, yet deeply disappointing that such an obvious result was one that Guatemala and generic users in that market were forced to litigate for years through multiple appeal stages simply to hold onto the status quo situation that existed prior to the EU's bad-faith efforts to eradicate usage of the generic term in that market.

In other markets in the region, namely Panama, Nicaragua and Costa Rica, the governments have to date declined to provide clarity regarding multi-term GIs in writing and we urge continued pursuit of this certainty. U.S. exporters seeking to use their FTA rights to export to Costa Rica, for example, remain in a state of uncertainty as to the permissibility of certain generic terms given the fact that Costa Rica has not issued confirmations regarding the scope of protection of previously registered GIs nor provided assurances to the U.S. that its FTA market access rights will not be further eroded in the future by subsequent GI applications. USTR and/or USDA quite commonly seek clarifications and assurances from our trading partners regarding how foreign regulations/policies are to be interpreted and how they will impact U.S. exports – that remains in our view the entirely appropriate course of action to pursue in this case as well.

Against the backdrop of continued EU pressure to register more GIs in the region, our organization strongly urges Central American countries 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.

Chile

The EU and Chile continue negotiations aimed at modernizing the EU-Chile FTA. As it has with its other FTA partners, the EU government is working 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, in 2019 Chile published a list of 222 GIs for which the EU government seeks registration. 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

Last year, China and the EU government signed a "100 for 100" GIs agreement which is expected to enter into force early in 2021. The EU GIs covered by this new treaty include dairy and meat products, wine, beer and spirits; some GIs were approved that will restrict the ability of U.S. exporters to ship products relying on common names to China. In addition, the EU government and China have agreed to consider a second wave of 175 additional GIs within four years of the initial agreement's implementation.

We support the inclusion of assurances and due process procedures related to GIs and common food names in the Phase 1 U.S.-China agreement signed last year. It will be critical to ensure full usage of these provisions, should this agreement remain in effect, as China advances the additional wave of GIs and as some EU stakeholders attempt to assert certain rights which China made clear in its EU agreement were not granted to various GIs.

Colombia

As part of the Colombia-EU FTA, which was implemented in 2013, Colombia acquiesced to EU government demands to establish GIs for certain common food names. 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 terms 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, building 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 2017, Ecuador implemented an FTA with the EU that included granting protection to numerous GIs requested by the EU government. 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 promulgate new restrictions on the use of common food and beverage terms within its borders.

The EU continues to expand its list of GIs, in the past few years having even registered GIs for terms that are internationally standardized, thereby undermining the standards it, the US and so many other countries worked so hard to establish. Even as it does so, the EU continues to refuse to issue an illustrative list of common terms nor to provide clarity at the initial application stage regarding the scope of protection of each GI. A relevant example is a multi-term GI recently approved that included the term “mozzarella”; CCFN was forced to engage in the opposition process to secure confirmation that the GI would not restrict the generic use of “mozzarella” – a step that could and should have been fulfilled by the EU during its review of the application to provide sufficient clarity to the marketplace.

Beyond these persistent problems, the EU continues to advance additional policy changes to its GI and related “quality program” regulations. We are deeply concerned that these proposals will make a bad situation even worse by:

- Loosening evidentiary requirements regarding the historic origination of the product;
- Expanding 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;
- Shortening the opposition deadline to respond to GI applications;
- Expanding the scope of protection granted; and
- Continuing the glaring absence of a list of names that the EU considers to be generic and of objective criteria to determine what constitutes a generic name.

On a related front, we reiterate our long-standing concerns regarding the EU’s abusive restrictions of commonly used wine-making 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 Member 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.

Likewise, we remain concerned about how the Traditional Specialty Guarantee (TSG) program may be abused by the EU moving forward. 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.

Additional 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.

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 an FTA with the EU in 2019. The agreement established 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. Since then, Japan has used its GI system to consider additional GIs.

Should the U.S. pursue further negotiations with Japan to secure a 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 (e.g., colors, images) if information on the product's location is still conveyed to consumers on those labels;
- Japan's existing GI regulations' checks and balances, including with respect to cancellation rights, be preserved and apply to all terms registered including via FTAs;
- The U.S. build on the model piloted in USMCA by establishing clear and explicit safeguards for the use of common food and beverage terms to ensure that the EU and its stakeholders cannot impair the value of market access for those products in the future.

Kenya

Should the Administration continue to pursue FTA negotiations with Kenya, this represents an excellent opportunity to forge optimal GI regulations and due process procedures (Kenya's current intended approach having a number of concerns) and to secure explicit assurances regarding the market access rights of U.S. exporters. We urge the Administration to pursue these goals if it maintains the effort to secure an FTA with Kenya.

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. Moreover, we urge the U.S. to work with Korea to ensure that it is clear that the compound protection only approach laid out in the 2012 letter exchange pertains to new GIs as well such as those presently under consideration by Korea.

Indonesia

Indonesia is involved in FTA negotiations with the EU. A goal of these negotiations for the EU government 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, the proposed regulation 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 products relying on common food and beverage terms is maintained and to improve Indonesia's deeply flawed GI regulations.

Malaysia

Malaysia is involved in FTA negotiations with the EU. A goal of these negotiations for the EU government 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 Malaysian market for products relying on common food and beverage terms. We urge the Administration to work with Indonesia to ensure that access to that market for products relying on common food and beverage terms is maintained.

Mexico

Last year Mexico implemented USMCA, which established several precedents that merit ensuring robust implementation in Mexico and building further upon with additional trading partners. Some of these key elements include the following:

- 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

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

chain including producers, distributors, marketers, importers and exporters. It is adamantly important that Mexico comply fully with these requirements in order for the U.S. to fully benefit from USMCA.

- 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 for crafting greater market access certainty for U.S. exporters.
- 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”.
- Inclusion of guidelines for determining whether a term is a customary term in the common language and of a specific provision that allows the protection of multi-component terms aimed to preserve the use of common food names throughout the course of GI consideration procedures.

We remain concerned that Mexico’s newly created IP law does not provide clear reference to implementing USMCA’s side letters as well as the agreement’s guidelines and provisions regarding the protection of multi-component terms. Further actions are needed to best implement these provisions so that the US fully reaps its investment made through the USMCA negotiations. We believe that Mexico’s implementing regulations on the IP law provide an optimal opportunity for pursuing this.

On a related front, this year Mexico is expected to sign its updated FTA with the EU. CCFN remains deeply disappointed in the Mexican government’s decision to surrender to EU demands by giving up a number of widely used common terms in the Mexico-EU FTA. 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 met with mixed results, in many cases stymied by the fact that the EU FTA has not yet been implemented, thereby impacting our standing with respect to demonstrating harm; however other rulings have indicated that although the Mexican government may have erred its courts cannot insist upon the need to follow Mexican law when those violations occurred as part of an international trade agreement.

MERCOSUR: Argentina, Brazil, Paraguay and Uruguay

In June 2019 FTA negotiations between the EU and the Mercosur bloc of countries concluded; in that agreement the EU government was able to secure registration of all of the GIs it sought despite wide-spread usage of numerous terms within Mercosur. That contradiction was dealt with through a combination of phase-out periods and grandfathering clauses – the very existence of these concessions indicates that the terms were already in

generic usage in the Mercosur region and as such should have been rejected had the GI process been handled objectively and independently. The structure used by the Mercosur countries for companies to secure their prior user rights was non-transparent, extremely burdensome and demonstrated how an onerous registration process can act as an even further hindrance on companies' ability to defend even their prior usage of a term, let alone its continued generic status. The vast majority of the companies benefiting from these phase-out and grandfathering provisions were – as intended – domestic firms, thereby blocking future access opportunities to those markets for virtually all U.S. exporters for the relevant products.

Leaked reports⁴, as well as public interviews with the negotiators and the very results of the GI registrations themselves, made it abundantly clear that the 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. Another indication of the faulty process followed was CCFN's ability to secure the cancellation of a GI registered through the FTA process by clearly demonstrating to through the standard IP system channels in Brazil its generic nature; despite this it will gain protection again once the FTA takes effect.

On another front, EFTA-Mercosur negotiations continue, and a list of GIs was published in 2019 for public consideration. Two terms for which exclusive use is sought pose particular concerns: 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 to address the negative impacts on U.S. exporters' ability to access these markets.

Morocco

In 2015 Morocco and the EU announced that they had reached an agreement on GIs; to date it remains unimplemented, however. 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

New Zealand and the EU continue 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 food and beverage terms.

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

Peru

As part of the Peru-EU FTA, Peru granted protection at the request of the EU government to some commonly used terms that were at that time generic in Peru (e.g., feta, which was previously not even primarily sourced from Greece in that market). 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. In 2019 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

GIs are protected under the Trademarks section of the Intellectual Property Code as collective marks. Nevertheless, 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. We also appreciate 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 and seek to ensure that the "short-circuit" approach that has at times been contemplated for foreign GIs via FTAs is rejected.

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. To the best of our knowledge, Russia has yet to implement this regulation. Separately, we commend Russia for its maintenance of a trademark opposition

process that is relatively user-friendly and low-cost.

Singapore:

The EU-Singapore FTA entered into force in 2019, including new provisions pertaining to GIs. While in principle Singapore established use of a formalized system for considering GIs and handling cancellations, in practice the ability of stakeholders to make good faith use of this system has been extremely problematic. Singapore approved for registration certain GIs without any apparent effort to evaluate the clear evidence of wide-spread usage in the Singapore market (acknowledged as such even by Singapore in its FTA text with the EU) while other terms were published without providing sufficient clarity regarding their scope of protection. While a process exists to contest these errors and omissions, our organization has found it exceedingly costly to utilize, thereby introducing a real-world impediment to securing accurate treatment for common terms in this market.

We urge the Administration to work with this U.S. FTA partner to shore up access for U.S. products to avoid the further erosion of our market access to Singapore.

South Africa

Under a trade agreement with the EU, South Africa imposed restrictions on the use of a number of common terms 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 that action without providing the necessary notification to the WTO TBT Committee at a time when stakeholders could still comment on and influence the decisions regarding the GIs. In addition, South Africa's GI regulations, published in 2019, continue to have gaps regarding sufficiently robust protections for the use of common names. We urge the Administration to memorialize market access assurances with this trading partner, drawing upon previous precedents, and work to improve S. Africa's GI regulations.

United Kingdom

CCFN supports the continued pursuit of FTA negotiations with the UK in light of the opportunity this process provides 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. Positively, the EU withdrawal agreement terms struck at the end of last year retain for the UK the right to alter its GI regulations as it sees fit in the future. The UK has already taken a positive step in the right direction by expanding the standard trademark system right to file for cancellation to its GI system as well to – at least in principle at this stage – create the opportunity to revisit and revoke inappropriately granted GIs.

Given the UK's historically reasonable approach to this issue we see ample room for progress and robust outcomes with the UK on GIs. It is critical for 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 work to address the full range of common food and beverage term restrictions including GIs barring the use of common names and

varietal terms, evocation and the harmfully broad scope of protection for GIs, restrictions of “traditional terms”, TSG regulations and limitations the use of unregistered terms that have come to be understood as product categories such as “Greek yogurt”.

Vietnam

The EU-Vietnam FTA was implemented last year. 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 and provides grandfathering rights established for 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. Despite this and the FTA’s clear language regarding the intent to provide grandfathering rights, Vietnam has to date refused to provide clear confirmations to the specific companies that shipped the grandfathered products prior to the cut-off date so that they can proceed with certainty in the market.

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 took effect last year.

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. Implementation of this new Lisbon Agreement is poised to 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.

In contrast to GI holders who now have access to both the Madrid system for trademarks and certifications and to the Lisbon Agreement’s Geneva Act to register their GIs in a single one-stop manner, there is no comparable process by which stakeholders can signal to other countries the generic nature and wide-spread global usage of a term. This asymmetry creates a tremendous imbalance.

Moreover, our experience to date indicates that further progress by WIPO is needed to more fully balance the various rights and interests of IP system stakeholders, specifically those of common name users. We strongly welcome the new WIPO Director General selected last year and look forward to working with him and his staff, as well as with the U.S. government, to forge a more balanced approach to GIs and common name treatment in the future by WIPO.

UN Food and Agriculture Organization (FAO)

We recognize FAO's development mandate and that FAO seeks to use various means to spur agriculture, fisheries, forestry and rural development. We very much support 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. Rather, FAO has in recent years opted to encourage the use of GIs as a development tool without promoting appropriate due process procedures to ensure that GIs are handled in a manner that avoids negative impacts on other stakeholders in the developing country's market that rely on generic terms.

Moreover, FAO has not provided fully inclusive information as it works closely with developing countries to encourage the crafting of GI systems – namely, thanks to the WTO case that the U.S. won against the EU several years ago, GI holders all around the world have the right to register their GIs in the EU on their merits and there is no obligation for those countries to simultaneously recognize EU GIs in their own market if not merited. Moreover, we are also concerned that FAO is not ensuring that developing countries are aware of the fact that if they utilize sui generis systems in order to allow for free registration and enforcement of domestic GIs then, to fulfill WTO national treatment obligations they must also shoulder the cost and administrative burden of allowing for free registration and enforcement of all foreign GIs as well. A system based around certificate marks that puts the costs of registration and enforcement appropriately on the applicant would impose a far lower burden on developing country governments.

Conclusion

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 and beverage terms, and secure clear affirmations of our market access rights for these products with key trading partners.

Thank you for this opportunity to comment on these issues so important to U.S. companies, their employees and their supplying farmers.

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