Comments by the Consortium for Common Food Names
Regarding the 2019 Special 301 Review
Docket Number USTR-2018-0037
February 7, 2019

Our organization submits these comments in response to the notice of request for public comments concerning the 2019 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket Number USTR-2018-0037). 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 27, 2019. We therefore request the opportunity for Jaime Castaneda to testify at the hearing.

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 2018 Special 301 Report and recommends retaining a similar approach in the 2019 report.

Unlike many other challenges in the IP sphere, these predatory practices 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 benefits for producers in EU countries. 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 commitments assuring the future use of generic food and beverage names and rejecting the use of GIs as barriers to trade in products relying on common names.

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 common 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 firms. 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 chopping 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 to dismantle competition and erect barriers to trade which must not be tolerated. 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 while 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.

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?

As CCFN's Chairman and the President of Belgioioso Cheese Company, Errico Aurichio, stated last year: "Companies like BelGioioso have done much of the groundwork developing consumer love and trust for our cheeses in Mexico and other places. How can we stand by and allow the EU to steal the generic names of our products and push us out? The answer is, we cannot." (A catalogue of profiles of 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 urge the same resolute stance from the U.S. government to confronting this issue to safeguard U.S. jobs and the legitimate rights of food manufacturers, farmers and exporters.

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.

Cross-sector Relevance of GI and Common Names Issue:

As noted above, this issue threatens to impact a broad swath of U.S. farming and manufacturing sectors. A USDA-funded project designed to address export constraints on common food names has participants from the dairy, meat, wine, beer and rice sectors, as well as additional supporters representing wider agriculture and processed food sector interests, and provides instrumental assistance to combating this plague on U.S. exports. It is one key component of the broader strategy needed to tackle this challenge.

In May of last year, 11 organizations representing this broad swath of American food and agriculture wrote to Ambassador Lighthizer to highlight concerns about the EU's misuse of FTA negotiations to erect barriers to U.S. exports. The growing creep of GI misuse and the expansive scope of protection for GIs promulgated by the EU poses a sizable and growing threat to many sectors of the U.S. economy and must be halted.

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 and is in the processing of pursuing an FTA, we urge the Administration to secure 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 terms[1].

The USMCA 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 terms – 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

In 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 the Australia-EU FTA and urge the importance of rejecting any special process or rules specifically for EU GIs. 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. 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 commonly used terms be clearly preserved.

Canada

This year the U.S. concluded the U.S.-Mexico-Canada Agreement (USMCA) that includes a several notable precedents 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

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

forward. The key concepts that were included will benefit consumers and producers in the region. 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";

These commitments come on top of Canada's prior actions pertaining to GIs, namely the Comprehensive Economic and Trade Agreement (CETA), which saw last year it first full year of implementation. The agreement codified the violation by Canada of 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. As part of that agreement Canada imposed restrictions on the use of several terms that had previously been in generic usage in Canada by requiring "new[2]" users of the terms feta, asiago, gorgonzola, munster and fontina to label them as "feta-type" or "similar to muenster" and also limit the range of packaging images commonly used on food products.

To rally internal support for the trade agreement, the European Commission committed in the days prior to signing the FTA in 2016 to seek to entirely ban the use of one of the grandfathered generic terms (feta) by non-Europeans in Canada within five years. We urge a continued vigilance against this approach, particularly in light of the parallel utilization of Canada's trademark system by GI applicants in a means intended to subvert the grandfathering 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. For instance, applications for the exclusive use of asiago and gorgonzola were filed in Canada; last year they were abandoned following opposition by our organization and Canadian industry however it remains unclear how Canada may deal with similar applications in the future. Canada's trademark office should consistently reject any applications that would impose restrictions on the use of terms expressly permitted under CETA.

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

The 2016 U.S.-Honduras agreement[3] on GIs remains a positive model for the preservation of generic terms *vis a vie* compound GIs (despite the restrictions in that market of single term GIs) and we strongly urge the Administration to pursue similar understandings on a

[2] i.e. those companies that initiated use in Canada after October 2013.

[3] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/march/US-Honduras-Breakthrough-IP-Protection-Enforcement

proactive basis with other trading partners.

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. As noted above, the example of the U.S.'s work with Honduras has been particularly effective in clearly preserving 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 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 clarity 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 had 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 in particular the high degree of risk to U.S. exports that 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 is in the process of updating its GI regulations; we urge the Administration to secure assurances regarding the proper scope of protection for generic terms such as parmesan, provolone, romano, bologna and other widely used product terms, drawing upon past U.S. approaches such as those utilized with Honduras and in USMCA (see above).

In addition, the proposed Costa Rica GI regulations had areas requiring refinement and clarification such as ensuring that all interested parties (both commercial and non-profit, both trademark holders and non-trademark holders) maintain full access to the country's objection tools and that clarity on GIs' scope of protection is proactively established by the government both for new applications and existing registrations. *It should not be the burden of industry to seek these clarifications regarding scope of protection*.

We note that the EU continues its engagement with Central America on the issue of GIs, including meetings held last year 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.

Chile

Throughout 2018 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. We therefore urge the Administration to take proactive steps this year to preserve the full range of exporters' access to the Chilean market by securing concrete commitments preserving our market access rights with this valuable FTA partner.

China

For several years now China has been involved in negotiations with the EU in pursuit of a "100 for 100" agreement on geographical indications. Given the existence of fully functioning GI systems that are open to foreign applications in both the EU and China, the very existence of these negotiations and the name assigned to them call into question whether or not the terms at issue will genuinely be considered on their merits. A fair consideration of GI applications is already available for pursuit by GI holders independently; it is essential that this government-driven process not yield protection for terms that would otherwise merit rejection.

In 2017 China published for public comment two lists comprising together 100 EU GIs (21 terms already registered in China and 79 new terms). The applications of concern include the following:

- GIs for feta, asiago and gorgonzola; all of which merit rejection.
- GIs for Parmigiano Reggiano, Mozzarella di Bufala Campana, Prosciutto di Parma, Prosciutto di San Danielle, Grana Padano, Pecorino Romano and West Country Farmhouse Cheddar; for which scope of protection clarity is required in order to safeguard the generic use of the terms parmesan, mozzarella, prosciutto, grana, romano and cheddar.
- GIs for numerous wines that could impact the generic use of multiple grape varieties (see August 2017 Wine Institute submission to China for specifics).

China has not yet published a resolution on how it will handle these terms nor. We have deep concerns about the impact this agreement may have on U.S. exports if safeguards for common names are not upheld and particularly on opportunities to continue to expand the range of U.S. products sold in this rapidly evolving market.

Our organization has welcomed the affirmations in recent years between the U.S. and China that commonly used product names are not eligible for GI protections, including those protected under international treaties. We also strongly value the work with China on providing for strong due process protections including robust evaluation and opposition procedures and procedures for the cancellation of previously registered GIs.

Equally important to how China conducts its GI *sui generis* system is how China handles trademarks that could similarly restrict the use of common food terms in a manner similar to traditional GI registrations. Towards that end, CCFN believes the regulation issued in January 2017 regarding the grant and determination of trademark rights remains very

important particularly its clear guidance that elements essential to evaluating generic use include product standards and dictionary or reference book citations.

The regulation states: "A product reference should be deemed a "generic name" of such products if the…relevant industry's standards have settled on this specific name to refer to such products." This, among other examples illustrating indicators of generic use, provides essential and objective guidance to trademark examiners to help ensure that common terms of good-faith commercial interest to multiple companies are not monopolized by one supplier in a bad-faith effort to limit all competition from the other producers of those products.

International product standards[4] relevant to the commercialization of products in all UN countries exist for numerous products. For instance, a product-specific example of an industry standard is the standard for mozzarella[5]. As an active participant in the Codex process and a WTO member bound to respect these international standards, it is essential that these terms be preserved for generic usage by all in the market. Predatory trademarks are being filed that put these international protections at risk; they must be rejected.

We look forward to continuing to work with the U.S. and China on furthering China's work on these types of critical elements with the ultimate goal of ensuring that in practice access for key products in one of the world's fastest growing food markets is not monopolized by European producers.

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.

[4] http://www.fao.org/fao-who-codexalimentarius/standards/list-of-standards/en/

[5] http://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCODEX%2BSTAN%2B262-2006%252FCXS_262e.pdf

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.

Potential 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 make a mockery of the goals the Administration has set of 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. pursue comprehensive trade agreement negotiations with the EU, separate discussions specific to the topic of GIs and Common Names are the proper way to tackle this complex and deeply fraught issue, and will call for an approach that addresses the myriad of problems that EU GI policy has created both in the EU market and in U.S. export markets around the world.

GI Expansion:

The EU continues to expand its list of GIs, having recently flouted the integrity and importance of Codex standards by establishing a GI for the term Danbo despite the existence of an active international Codex standard for this product that the EU actively participated in renewing just over a decade ago. The EU's behavior in this case contradicts its own previous position 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. Reportedly, approval of the long-pending GI for the generic term havarti is likely to be next – again despite the existence of a Codex standard for this commonly used cheese term.

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 would 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.

CAP Reform and GI Policy Modifications:

Last year the EU proposed changes to its Common Agriculture Program that would include numerous modifications to 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 use the 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, almost 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.

<u>Traditional Specialty Guarantee Program:</u>
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 by the Italian government 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 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

Japan

Japan concluded its FTA negotiations with the EU in 2017 and implemented it 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 on its own trade agreement negotiations with Japan.

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. government has devoted ample time to working to preserve this market over many years; the numerous positive elements of the Japan-EU agreement are the result of that investment. As U.S. Trade Agreement negotiations, we urge the Administration to pursue the elements noted above as well as to draw upon the market access assurance precedent established in USMCA via side letter.

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 establishing securing a commitment[6] from Korea that provides clarity regarding the status of common names contained in multi-term GIs. Similar to the type of clarity secured with Honduras, 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 will continue to be permitted in the market and remains a strong model that should be drawn upon in working with other trading partners.

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

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

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 that 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

Last year 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).

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 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 moving forward.

With respect to the EU-Mexico FTA, although the results of the negotiations were favorable for some terms, CCFN remains deeply disappointed in the Mexican government's decision to surrender to EU 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 we have filed "amparos" (constitutional legal challenges) of these decisions. What the prior Mexican Administration has failed to faithfully do, its court system should rectify by insisting on the rule of law in Mexico.

We also note that Mexico has 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 (e.g. Italian sausage; Greek yogurt) will also be a key basis of negotiations that hold significant commercial relevance for U.S. companies.

MERCOSUR: Argentina, Brazil, Paraguay and Uruguay

The Mercosur countries and the EU have been engaged in the negotiation of an FTA for many years; that shifted in a more intensified stage of talks in 2017 and continued into 2018. In the fall of 2017 these countries published hundreds of EU GIs for opposition. CCFN opposed restrictions on 24 names.

As evidenced by leaked reports[7], it is entirely clear that, just as the EU has sought to do around the world through other FTAs, it is using the strong-arm tactic of FTA negotiations to impose European product monopolies on the use of common names in these four economies as well. These leaked reports – which echo those seen previously in the EU-Central America negotiations and in the CETA context – indicate quite clearly that the decisions on the EU's GI applications are not being made impartially on the basis of their merits but rather behind closed doors at the negotiating table. This flies in the face of how IP should be handled and makes a mockery of the integrity of the IP systems in these countries while hypocritical any statements by the EU are 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. must stand firm in rejecting this direct threat to the integrity of IP systems globally.

In addition to these FTA developments, Brazil has recently revised its GI regulations. We have concerns about these revisions as virtually none of the input we provided via the public comment process was taken into account and the final regulations were published mere weeks after the deadline for public comment, calling into question how much consideration had genuinely been given to those comments.

We urge the Administration to continue to work with Mercosur countries to ensure that U.S. export rights are upheld and that these partners do not capitulate to EU demands for market restrictions at the expense of not only U.S. exporters as well as Mercosur's own food and agriculture industries. moreover, we would underscore the importance of vigilant monitoring of this market given the changes in regulations and active EU negotiations.

[7] https://www.bilaterals.org/IMG/pdf/20180829123331.pdf

Morocco
In January 2015 Morocco and the EU announced that they had reached an agreement on GIs. The agreement, which is broader in scope than any previous agreement of its kind, requires each party to protect all GIs that were registered in the other party before January 2013. To our knowledge, neither party afforded outside interests the opportunity to register opposition to any of these registrations or to seek clarifications regarding, for example, scope of protection. We are to date unaware of any individual assessment of these thousands of GIs by the government of Morocco nor of the publication for public comment of these GIs. We remain concerned about the impact of this agreement on U.S. exports as it is implemented. Engagement is needed with Morocco to secure assurances about what the U.S. will continue to be permitted to ship 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
In June 2018 New Zealand and the EU launched their free trade agreement negotiations. Already, a list of EU GIs has been published for public consultation. /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 they 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. We urge the Administration to work 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. In recent months U.S. exporters have reported a heightened level of challenges and trade barriers related to the shipment of their products to this market. We urge continued engagement with Peru to establish clearer trading conditions for U.S. exporters and 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. 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.

Last year this resulted in the notable and positive outcome of an agreement 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 to such bill. 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.

Singapore:

The EU and Singapore concluded their FTA negotiations in 2012; however, agreement was delayed for the past few years due to legal issues in the EU. Those matters have been resolved and it is expected that the EU-Singapore FTA is likely to enter into force this year, including its provisions pertaining to GIs.

We remain deeply concerned about how these provisions will be applied, particularly in light of the exorbitant cost of opposition procedures in the Singapore market. CCFN urges the Administration to work proactively to secure assurances from Singapore that common names will not be limited in any way. In addition, to further that goal, it is critical that Singapore clearly define the scope of protection of compound GIs is defined at the time of their publication by clarifying which elements of a multi-term GI published for comment would be restricted and which would remain of free usage. These issues are essential given the impact that export restrictions would have on our existing U.S.-Singapore FTA market access rights.

As we noted in a letter to Singapore officials last year:

> "*Restrictions on the use of common names would clearly constitute de facto nontariff barriers to trade and as such be entirely incompatible with the existing World Trade Organization (WTO) commitments of Singapore. In addition, they would nullify and impair market access concessions granted under Singapore's prior free trade agreement such as the Singapore-U.S. Free Trade Agreement (FTA) and the ASEAN-Australia-New Zealand 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.

We appreciate the work done on this topic with S. Africa to date and 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.

United Kingdom

Although currently part of Europe, CCFN wishes to additionally mention some important points with respect to the United Kingdom itself. It is uncertain under what conditions the UK and EU will separate. However, Brexit presents the possibility of 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

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 UK products in the EU, just as the U.S. intellectual property system covers foreign products. 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 accessible to foreign registrants.

The EU system already has multiple foreign GIs from non-European countries registered; maintaining the existing protection for UK GIs and even approving new ones would simply be in keeping with the EU's international trade obligations. In addition, while they may be less inclined to do so, EU authorities still have an obligation to chase down GI offenders in the EU market. Discrimination against foreign GI registrants and preferential treatment for EU GI registrants would not be in keeping with the EU's clear WTO obligations.

Moreover, 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 more balanced system.

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 is expected to enter into effect this year, including its provisions on GIs. That agreement established 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 approaches, 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.

Multilateral and Regional Trade Agreements:

World Intellectual Property Organization (WIPO)

Our organizations remain highly concerned with the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, which has been pending implementation for the past few years. This agreement was negotiated over the objections of numerous WIPO countries and 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.

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 the lack of sufficient advance notice of WIPO GI-related events and the imbalanced time devoted to GI-holders interests vs. those of other stakeholders impacted by GI IP policies remain strong concerns.

It remains a reality that 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.

CCFN remains deeply concerned that implementation of the 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. In meetings in 2018 with WIPO officials, CCFN conveyed these concerns and encouraged WIPO to work with CCFN in developing a balanced way forward on GIs and common names.

We look forward to working with the Administration to help educate WIPO members on the deeply flawed nature of the Lisbon Agreement and on educating existing Lisbon members on ways in which they could mitigate its potential trade impacts when they implement its provisions.

Other Multilateral Fora and Organizations

There are two other high priority global-level areas of active concern related to GI policies that CCFN urges the Administration to take firm stances in engaging with: the Hague Convention on the Recognition and Enforcement of Foreign Judgments negotiations and the UN Food and Agriculture Organization (FAO)'s work on GIs.

The potential inclusion of IP issues in the Hague Convention runs directly counter to the notion of IP rights as being territorial rights. The EU's efforts to include IP in the scope of this Convention appear aimed at inappropriately co-opting other countries into leveraging sanctions on common name users. There are a myriad of concerns with folding IP into this agreement and we strongly urge the Administration to continue to insist that these topics be excluded from the scope of this treaty.

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 is not mindful of the neutral role it should play with respect to policy in this area.

CCFN encourages the Administration to continue to stress to FAO leadership 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 2018 Report and included here below, as well as 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.

- *"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."*

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