

Worldwide Symposium on Geographical Indications

Yangzhou, Jiangsu Province, June 29 to July 1, 2017

- Panel: The Economic, Social and Cultural Dimensions of Geographical Indications

“Uruguay: the danbo case”

- INTRODUCTION

1. At today’s world markets, product differentiation is a key to many producers who day to day have to face a more complex, competitive and challenging environment with a growing number of consumers that are more aware and interested in knowing about products’ characteristics.
2. For agricultural products, in particular, GIs have become a useful tool to achieve that differentiation¹ by providing to those consumers with information that is relevant to them and could be regarded as an equivalent of traceability, uniqueness and ultimately a particular quality.
3. In this context, GIs could play a role for social and rural development by adding value to products through differentiation that sometimes cannot be achieved by other means.
4. Having said that and after listening to a series of cases of success, I would like to take this opportunity to present you the case of danbo that has its own particular social, economic and cultural dimensions. I believe that this case showcases elements that should be taken into account when developing or applying for a new GI, in order to avoid unnecessary tensions or hindering third party rights and global trade.
5. Even though we are in an intellectual property (IP) environment, I will be referring to trade related issues such as WTO, the Agreement on Technical Barriers to Trade (TBT), Codex Alimentarius, etc. Because, when we speak about IP and in particular about GIs, it is fundamental to consider their intersections with global trade.

- IN BRIEF: URUGUAY

6. Before diving into the case, I would like to give you some background information about Uruguay and its production. Uruguay is a relatively small country, in South American terms, with a population of 3.4 million people. It became independent in 1825 with an estimated population of around 70 thousand people², basically Spanish settlers. Nowadays, its population descends

¹ Geographical Indications of Origin as a Tool of Product Differentiation: The Case of Coffee, Ramona Teuber, Justus-Liebig-University of Giessen, Germany

² Russell H. Fitzgibbon (1956). *Uruguay: Portrait of a democracy*. Londres: George Allen & Unwin.

mainly from Spanish and Italians, but also French, British, Swiss, Germans, Portuguese, Russians, Armenian and from almost every country in Europe.

7. It was in 1908 when Uruguay reached 1 million people and in 1963 when overpasses 2.5 millions basically due to mass migration from Europe during the two world wars³. As in other any cases, migrants brought their culture, knowledge, habits, languages, expressions and recipes than sooner than later became part of our national identity.
8. Since its inception as a country, the agricultural activities have been at the heart of Uruguay's economy and society and it remains the same until today. In 2016, the agro-industrial sector accounted for 78% of Uruguay's exports⁴ and for approximately 12.4% of its GDP⁵.
9. Uruguay, like any other small economy faces structural conditions that impose a series of restrictions to its economic growth and development. In particular, its rather small domestic market imposes to be inexorably linked and dependant of its external sector.
10. For that reason, the rules that emerge from the multilateral trading system are absolutely fundamental to Uruguay's economy, trade and development. And that includes WTO and WIPO, among other forums. It is imperative that the multilateral system and the rules agreed in them, generate legal and commercial certainties to ensure a smooth, unhindered trade, in particular for agricultural products.
11. Uruguay being a country of just over 3 million inhabitants produce food for 28 million and it is estimated that will produce food for a population of 50 million people⁶ within the next years. In times where nations are trying to address food security, Uruguay can play an important role as a supplier of innocuous, safe and high quality food.

- DAIRY INDUSTRY IN URUGUAY

12. The dairy sector is a particularly important activity in Uruguay both in social and economic terms. It is an intensive sector, family and cooperatively oriented that generates greater value added to a commodity.
13. Dairy production in Uruguay grew uninterruptedly between 1975 and 2013, when a record high of more than 2000 million litres of milk were sent to industrial plants. In recent years because of climatic reasons, that figure has been slightly reduced, although they remain historically high. It is estimated that this production is made by around 4500 producers of which 61% are family producers⁷.

³ *idem*

⁴ Informe Agronegocios – Oportunidades de Inversión. Instituto Uruguay XXI, December 2016.

⁵ *idem*

⁶ *idem*

⁷ El Sector Lechero Uruguayo. Contribuciones de las Políticas Públicas y la Institucionalidad Sectorial a su Desarrollo. Eduardo Viera, Dr. Federico Bengoa, Ing. Agr. Gabriel Bagnato, Ing. Agr. Ignacio Arboleya. Programa Regional FIDA - MERCOSUR

14. The great dynamism shown by the dairy sector occurred in a context of a strong increase in productivity. The sector has continuously incorporated technical advances, both pastures and feed for livestock, machinery and equipment, health and medicine for the rodeo⁸.
15. But even with an internal market with high levels of consumption of milk (250 litres per capita per year), 70% of the production is destined to foreign markets accounting for over 9% of the country's total exports^{9,10}. This is not an exception in Uruguay, where 95% of the rice produced is exported¹¹, close to 100% of the soy beans and so on.
16. Hence, as for the others sectors it is vital for the dairy sector to have predictability and better access to third markets. Although, dairy exports were relatively concentrated, the number of markets has gradually increased to 65.
17. In the last decade, exports of dairy products grew by an average of 8% yearly and in 2016 totalled USD 567 million, 10% less than 2015¹². Of the total exports, 57% corresponded to whole milk powder, 23% to cheese, 8% skimmed milk powder and 7% for butter, others 5%¹³.

- Uruguayan Exports of Danbo Cheese

18. The Danbo is a semi-hard matured cheese made from cow's milk and belongs to the “washed rings” type of cheese.¹⁴ It usually ages for 12 and 52 weeks in rectangular blocks of 6 or 9 kg coated with a bacterial culture. The culture is washed at the end of the healing period and the cheese is packaged for retail sale. It has a compact texture, smooth, not grainy and uniform white-yellow colour. With medium moisture and elastic consistency, it tastes lactic, soft and slightly salty¹⁵.
19. In Uruguay, danbo cheese has been produced and exported for decades, partially thanks to the technical assistance received decades ago from the Danish themselves. It is also one of the most popular and consumed cheese by its population.
20. In the last few years, Uruguayan exports of cheese have been markedly reduced, both in value and volume. After a steady growth in the previous years, since 2013 they have systematically dropped. In 2012, they reached a record figure of USD 264 million, representing 34% of total dairy exports. Since that year, sales have dropped by 3%, 4%, 41% and 11% in 2016, where exports accounted for USD 128 million. Undoubtedly, this has had a strong impact on several industrial activities and employment.

⁸ *Idem*

⁹ *idem*

¹⁰ <http://www.inale.org/innovaportal/v/3462/4/innova.front/datos-del-uruguay-lechero.html>

¹¹ <http://www.todoelcampo.com.uy/uruguay-exporta-casi-todo-el-arroz-que-produce-15?nid=6408>

¹² Oportunidades de Inversión – Agronegocios – Instituto Uruguay XXI

¹³ Informe Mensual de Comercio Exterior, Marzo 2017, Instituto Uruguay XXI.

¹⁴ Fermented Foods of Latin America: From Traditional Knowledge to Innovative Applications. Ana Lucia Barretto Penna, Luis A. Nero, Svetoslav D. Todorov.

¹⁵ <http://www.conaprole.uy/quesos/pasta-semidura/danbo-1139>

21. As for the danbo cheese and due to the registration used in the tariff system that includes other semi-hard cheeses, it is difficult to quantify the exact proportion of the item. According to Trade Map the exports for the tariff line that includes danbo (04069020 / Other cheeses: with a humidity content of 36,0% or superior) are as follow:

List of importing countries for 2012 / 2016 in kilograms

Importers	2012	2013	2014	2015	2016
	Exported quantity, Kilograms	Exported quantity, Kilograms	Exported quantity, Kilograms	Exported quantity, Kilograms	Exported quantity, Kilograms
World	32,531,950	30,602,351	28,444,056	17,180,823	13,306,495
Mexico	6,514,854	3,863,755	4,917,465	7,886,030	7,168,412
Brazil	1,427,366	3,069,088	793,825	855,197	5,472,315
Russian Federation	0	0	2,870,500	691,575	480,668
Chile	72,809	90,909	136,039	1,353,150	147,000
Paraguay	135,893	185,400	159,560	54,000	18,200
United States of America	0	0	44,810	0	15,000
Peru	104,478	109,201	125,830	33,498	4,900
Venezuela	24,017,500	23,140,200	18,900,000	6,257,000	0
Singapore	0	18,000	48,000	0	0
China	6,992	7,056	12,000	0	0

Sources: ITC calculations based on Scavage, Información en comercio exterior statistics

22. Mexico, Venezuela and Brazil have been the main destination for this type of cheese, with an increasing participation of the Russian Federation, China and Chile.

- The DANBO case

23. On February 2nd, 2012, the European Commission published the application of Denmark to obtain the protection of danbo as a Protected Geographical Indication (PGI)¹⁶ according to the then Regulation EU 510/2006.

24. According to the application¹⁷, the request was made based on the characteristics of the production methods and reputation.

¹⁶ <http://ec.europa.eu/agriculture/quality/door/publishedName.html?denominationId=2751>

¹⁷ Official Journal of the European Union, 2/2/2012 pages C29/14 to C29/18

25. In the application there is background information on how the production of this type of cheese was originated in Denmark. There are references to the missions that Mr. Rasmus Nielsen held in 1897 to eastern Prussia and Holland, and how at his return home Mr. Nielsen begins to try out on the basis of that experience.
26. It is also detailed how step by step the production of this cheese increases and how during the 50's Denmark begins to export it. It was only in 1952, when this cheese, which was known at that time as marshland cheese or "Steppeost" in Danish¹⁸ (this is not mentioned in the application) takes the name of Danbo. This name was given under the Stresa Convention and the Order 80 of the Ministry of Agriculture Danes of March 13, 1952.
27. On the August 2nd 2012, the Uruguayan Mission to the EU in Brussels filed a statement opposing to such registration. In it, Uruguay clearly states its opposition to the registration of Danbo, understanding that this is a generic name for a particular production of a type of cheese which at that point had already been regulated at national, regional and multilateral level.
28. At a multilateral level it was regulated by the Codex Alimentarius¹⁹ in 1966, with the standard "CODEX STAN 264-1966" and subsequently updated in several opportunities, which sets out the standards of quality, identity and production of Danbo worldwide. There is also a Regulation MERCOSUR/GMC/RES N°29/96 called "Technical Regulation of MERCOSUR on the identity and quality of Danbo Cheese" ("*Reglamento tecnico Mercosur de identidad y calidad del queso Danbo*") and incorporated to the national legislation of Uruguay.
29. With regard to Article 2 of EU Regulation 510/2006 on "exceptional circumstances", Uruguay notes that linking a term with a country, as intended with the Danbo, is the exception and not the rule. Situation that is no longer applicable, since the international community has recognized the Danbo as a generic when establishing the above mentioned Codex Alimentarius²⁰ standard in 1966.
30. Article 3 of EU Regulation 510/2006 established that a generic could not be registered and provided a guide for its analysis, in particular by taking the consumption in member states and national legislation. In this regard, Uruguay makes reference to the reports of the Codex Alimentarius Milk and Dairy Committee that showed that danbo was not only produced and consumed in

¹⁸ <https://www.arla.com/our-brands/arla-cheeses/arla-danbo/>

¹⁹ The *Codex Alimentarius* (Latin for "Food Code") is a collection of internationally recognized standards, codes of practice, guidelines, and other recommendations relating to foods, food production, and food safety. Its name is derived from the *Codex Alimentarius Austriacus*. Its texts are developed and maintained by the *Codex Alimentarius* Commission, a body that was established in early November 1961 by the Food and Agriculture Organization of the United Nations (FAO), was joined by the World Health Organization (WHO) in June 1962, and held its first session in Rome in October 1963. The Commission's main goals are to protect the health of consumers and ensure fair practices in the international food trade. The Codex Alimentarius is recognized by the World Trade Organization as an international reference point for the resolution of disputes concerning food safety and consumer protection. As of 2012, there were 186 members of the Codex Alimentarius Commission: 186 member countries and one member organization, the European Union (EU). There were 215 Codex observers: 49 intergovernmental organizations, 150 non-governmental organizations, and 16 United Nations organizations. Source: https://en.wikipedia.org/wiki/Codex_Alimentarius

²⁰ *idem*

Denmark but it also was widely produced and consumed in many other countries, including several EU member states.

31. It is also noted by Uruguay that at the 30th Session of the Codex Commission in 2007, all members, including the EU and Denmark, agreed that danbo is a generic name for a type of cheese that is produced in various parts of the world.
32. But mainly, it is noted that this application collides head-on against with what it is established on the Codex Standard specifically developed for the danbo in 1966 (Codex Stan 264-1966) on quality, identity and production of danbo worldwide.
33. Under Section 7 “Labelling”, Article 7.1 of the Stan 264-1966²¹ establishes no limitations to the use of the term of danbo.
34. And Article 7.2 states: *“The country of origin (which means the country of manufacture, not the country in which the name originated) shall be declared”*.²² The generalized interpretation of this article is that the members recognize the danbo as a generic term that can be produced in various locations, as long as they comply with the specifications set out at this standard.
35. Non-recognition of a Codex Standard raises a number of questions and uncertainties. Failure to comply with a Codex Standard, which is a technical reference for the WTO, could be regarded as a breach of the WTO Agreement on Technical Barriers to Trade (TBT) because this would generate an unnecessary disruption to trade. But above all, it would put into question the validity and application of Codex standards for another series of cheeses widely disseminated and considered generics. Undoubtedly, this generates a great systemic concern for Uruguay and many other WTO members.
36. In view of Art.7.1 and 7.2, one wonders, what is the meaning of generating an international agreed standard - such as the Codex - if then a member claims and potentially benefits from exclusive rights for use of that term? Would any current GI right holder agree that the Codex Alimentarius, with 188 member states have a say and develop a standard that they would only have to apply? What is the meaning of Articles 7.1 and 7.2 on the labelling of the Codex Standard for danbo, if only Danish producers can use it?

- COMMERCIAL EFFECTS ON THIRD MARKETS

37. The fact that the application to obtain a PGI for the term danbo is still pending²³, raises many questions and concerns for Uruguayan exporters.

²¹ Codex Stan 264-1966 Art. 7.1 Name of the food The name danbo may be applied in accordance with section 4.1 of the General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985), provided that the product is in conformity with this Standard.

²² Codex Stan 264-1966 Art. 7.2 Country of origin: The country of origin (which means the country of manufacture, not the country in which the name originated) shall be declared. When the product undergoes substantial transformation³ in a second country, the country in which the transformation is performed shall be considered to be the country of origin for the purpose of labelling.

²³ <http://ec.europa.eu/agriculture/quality/door/publishedName.html?denominationId=2751>

38. What would happen if this application is granted in the EU and eventually extended to third markets either by free trade agreements (FTA) or by the Geneva Act of the Lisbon Agreement? How this potential extension would affect the position of Uruguayan exporters in markets where they have been trading for decades? How the genericness of danbo is going to be examined in those third markets? How the “reputation” is going to be evaluated? According to consumers of those third markets or according to Danish consumers?
39. Although, both the Lisbon Agreement and the Geneva Act contemplate the possibility that at the time of registration, an application could be denied because it is already considered totally or partially generic there is no clear mechanism, criteria or guidelines to determine whether a term is generic or not. But also has the particularity that once granted the protection to a term it cannot become generic unless that happens in the country of origin²⁴²⁵.
40. Facing the absence of clear mechanism, should Uruguayan exporters or its government go country by country opposing the recognition of this term as GI? How these opposition processes are going to be conducted? This remains unclear and will probably vary country to country.
41. With regard to "degeneration", we share the view of Professor Daniel Gervais who points out²⁶ that there is here a strange case in the international IP system, where the "*lex origin*" (the law of origin) prevails over the "*lex loci protectionis*" (the law where protection is sought)²⁷. As Professor Gervais rightly affirms: "*It would be strange indeed if a court could not find a patent or mark invalid unless it had been found invalid in the inventor's or trademark owner's country of origin. Yet that is the system under the 1958 Lisbon Agreement*".²⁸
42. There are many markets such as Mexico that for decades have imported cheese from Uruguay and danbo being on of them. Undoubtedly, if we ask consumers about danbo to consumers in those markets it will be surely associated to Uruguay or Argentina rather than Denmark itself.
43. However, there is no certainty on how this could affect the trade flows built by those who have legitimately produced and exported high quality and competitive danbo cheese for decades. Danbo is just one case of the many that could arise in the future if others pretend to ignore the various Codex Standards for cheese.

²⁴ Geneva Act of the Lisbon Agreement: Article 12 - Protection Against Becoming Generic- : "*Subject to the provisions of this Act, registered appellations of origin and registered geographical indications cannot be considered to have become generic in a Contracting Party*".

²⁵ Geneva Act of the Lisbon Agreement: Agreed Statement concerning Article 12: "*For the purposes of this Act, it is understood that Article 12 is without prejudice to the application of the provisions of this Act concerning prior use, as, prior to international registration, the denomination or indication constituting the appellation of origin or geographical indication may already, in whole or in part, be generic in a Contracting Party other than the Contracting Party of Origin, for example, because the denomination or indication, or part of it, is identical with a term customary in common language as the common name of a good or service in such Contracting Party, or is identical with the customary name of a grape variety in such Contracting Party*".

²⁶ Gervais, Daniel J., Irreconcilable Differences? The Geneva Act of the Lisbon Agreement and the Common Law (November 20, 2015). Houston Law Review, Vol. 53, No. 2, 2015; Vanderbilt Public Law Research Paper No. 16-7. Available at SSRN: <https://ssrn.com/abstract=2717287>

²⁷ *idem*

²⁸ *idem*

- Conclusions

44. There are historical, cultural and economic facts we cannot ignore when we address issues like these. The first one is migration and its effects. We cannot ignore the migration that occurred during the nineteenth and twentieth century from Europe and its effects in the construction of national identities in the “New World”.
45. The second fact is culture. Those migrants contributed to the natural dissemination of terms that are descriptive of things and do not refer to a place or region in particular. They were common terms used by these migrants and their descendants that became popular in such a way that are now part of the national language of our countries. Needless to say, without pretending by its use to mislead or illegitimately appropriate the reputation of others.
46. A third fact is the effect of trade. Terms such as danbo are known and popular in many markets thanks to the trade of companies and cooperatives from Uruguay or Argentina, to name a few.
47. In this particular case, we are not in presence of a sum-zero game. We could arrive to a point where one party loses and the other, the applicant, does not necessarily win at all. By providing a monopoly rent to Danish producers of danbo term it does not necessarily mean that they will become automatic substitutes of Uruguayan danbo in those markets where they were present for decades. Surely, this will end up affecting Uruguayan producers and consumers in those markets.
48. For that reason, we insist in finding common ground, fair balance and ways of coexistence that protects current and future GIs holders but also provide certainties to those who have legitimately been producing and exporting products under generic terms such as danbo.
49. From our side, as member states, we should continue working to find mutual understanding on this issue. This would result in greater legal and commercial certainty, with better means and alternatives of the protection of GIs, but also with more clear guidelines, processes and mechanisms of oppositions to determine what a generic term is and what it is not.
50. Meanwhile, and in order to avoid any kind of tension, confusion between products or even hindering global trade, it would be desirable that new GIs applications abide international agreed rules, such as Codex Alimentarius, and if possible, contain the name of a geographical location that unequivocally refers to its origin, as we saw in the previous cases of success. Because, at the end this is about origin.