試論納「乳製品地理標示保護」於 TTIP 之可能性-由歐美法規及產業出發

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歐盟因原先在世界貿易組織下與貿易有關的智慧財產權協定談判中難以持續推展地理標示保護,進而轉向在與各國簽訂自由貿易協定的場域中推展地理標示,並確實獲得諸多成果;特別是於去年(2013年)屬於美派的加拿大承諾對歐盟 145 項產品給予地理標示保護¹。歐盟順利逐步推展地理標示,最終莫過於希望能與在此議題上長期對立的美國及更多國家達成共識。

事實上,今年初歐盟方面在 TTIP 的談判上即已瞄準地理標示議題²;反觀美國方面 3 月即已有 55 位眾議院議員明確表達針對起司名稱地理標示的反對;4 月份美國 2014 年特別 301 報告 (2014 Special 301 Report),亦特別針對地理標示議題舉帕瑪森 (parmesan) 及莫札瑞拉 (mozzarella) 起司,說明美國促進及保護這些被認定使用通用名稱 (common name 或 generic term)的產品進入國外市場³。

至2014年5月9日,美國共有177位眾議院議員向美國農業部及貿易代表署連署表達,希望美國於歐美跨大西洋貿易與投資夥伴協定(Transatlantic Trade and Investment Partnership,簡稱TTIP)中為美國乳製品取得雄健的成果,並強烈要求其應阻止歐盟試圖將乳製品地理標示納入TTIP的一切努力⁴。除此之外,稍早於眾議院議員之連署,同年5月1日美國貿易代表 Michael Froman 亦保證對抗歐盟於地理標示之努力⁵;歐盟在自由貿易協議場域順利的進程,可能因此

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¹ 趙思博、唐君豪,從歐、美兩派關於地理標示議題之發展 探討其在 TTIP 下之可能結果,政治 大學國際經貿組織暨法律研究中心經貿法訊,153期,頁1,網址:

http://www.tradelaw.nccu.edu.tw/epaper/no153/1.pdf (最後瀏覽日:2014年6月4日)。

² "...4. Important elements in the ongoing TTIP negotiations, Regulation...At the first stocktaking in February 2014 EU Trade Commissioner Karel De Gucht raised a number of important points in the area of regulation where the EU would like to see progress in the negotiations: ...the guarantee that particular foodstuffs or beverages from a specific place in Europe are the only products allowed to be sold in the US under their respective names (geographical indications or 'GI's')...." European Commission, *The Transatlantic Trade and Investment Partnership (TTIP) TTIP explained*, ,May. 8, 2014, available at http://trade.ec.europa.eu/doclib/html/152462.htm (last visited June 4, 2014).

³ 2014 Special 301 Report, USTR, Apr., 2014, available at http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf

⁴ 177 位眾議院議員之連署信請見: http://www.nmpf.org/files/HouseDairyTTIPLetter.pdf (last visited Jun. 4, 2014).

⁵ Froman Pledges To Oppose EU Efforts To Protect Food Names As GIs, INSIDE U.S. TRADE, May. 13, 2014.

受阻。

眾議院之連署中提及,美國及歐盟雖同為乳製品大國,然因歐盟之關稅為美國的三倍而導致美國每年對其有 13 億美元的貿易逆差;此外,認為歐盟於乳製品所嘗試之努力乃是地理標示之濫用⁶。故本文將從美國及歐盟在法規上,對於地理標示的看法差異,並參酌兩國的產業差異及各方立場,試析美國乳製品納入地理標示保護的可能性。

美國法規

美國並未針對地理標示另行規範,而是以商標法的體系予以保護⁷;「其中不論是在聯邦法或是各州普通法下,商標的保護都是從商標被實際的使用於商品上時方為有效⁸」,因此註冊並非商標權利存在之要件。然而,當某一商標被完成註冊後,方取得商標專有權的證明、在聯邦法院提出相關商標專有權告訴的權利及向美國海關登記商標要求扣押侵害商標貨品的進口及輸入等重要之權利⁹。因此,商標的註冊仍對於商標所有人仍然相當重要。

地理標示若要依美國商標法註冊為其中一種標章(mark)而享有商標法之保護,則其必須符合幾項重要要件:

第一,由於地理標示之定義¹⁰,其往往包含地理的描述,因此若構成美國商標法第 2 條 e 項之情形,即商標(trademarks)「除非符合美國商標法第 4 條可予以註冊外,主要在地理上描述(primarily geographically descriptive)申請人的產品¹¹」及「主要在地理上錯誤地描述(primarily geographically deceptively misdescriptive)申請人的產品¹²」時,美國專利與商標署(The United States Patent and Trademark Office,簡稱 USPTO)得拒絕其商標的註冊申請。

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⁶ Supra note 4.

⁷ "...The United States Patent and Trademark Office (USPTO) does not have a special register for GIs in the United States. The United States has protected marks that are geographical indications through the trademark system for decades, ..." THE UNITED STATES PATENT AND TRADEMARK OFFICE, FREQUENTLY ASKED QUESTIONS, available at

http://www.uspto.gov/ip/global/geographical/faq/#heading-2 (last visited June 6, 2014).

⁸ 參見李宗翰,農產品地理標示相關法律之研究,國立台灣大學農藝學研究所碩士論文,第陸章頁6,2003年6月。

⁹ Id.

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, art.22.1: "Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

¹¹ 15 U.S.C. § 1052(e)(2): "when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title,"

¹² 15 U.S.C. § 1052(e)(3): "when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them,"

所謂「主要在地理上錯誤地描述申請人的產品」,係指描述所指稱的地理位置並非該產品的真正生產地,此際 USPTO 得拒絕其註冊申請。

所謂「除非....,主要地理上描述申請人的產品」意謂當消費者看到該描述,即會立即聯想到某一位置,而該位置亦正是產品地理上之原產地的情形¹³,於此,除非有符合例外規定(亦即是美國商標法第 4 條),原則上 USPTO 得拒絕其商標的註冊申請。此外,依 USPTO 的解釋¹⁴,若該地理描述(geographic term)使得消費者不僅聯想到某一原產地,更已開始對該描述聯想到特定的公司、製造商或一群生產者,則此時該地理描述可說具備「第二意義(secondary meaning)」,當一個地理描述具有第二意義時,表示該描述已具有認定來源的能力,廠商因而能申請商標的保護。

而商標法第4條乃是集合標章(collective marks)及證明標章(certification marks)得予以註冊的例外情況;舉證明標章為例:在美國商標法中,將地區產地的標示(indications of regional origin)排除於「主要在地理上描述」的概念¹⁵,因此即使不具「第二意義」而不能註冊為商標者,仍不影響證明標章的申請。證明標章與商標並不相同,其不限於證明商標的擁有者才能使用;此外,其不表示商業來源,也不區辨不同人提供的產品¹⁶,簡而言之,任何人所提供的產品只要符合該證明標章的標準,即能使用該證明標章。

因此,目前在美國商標法上,地理標示得以註冊之方式有三:第一,具有第 二意義、主要地理上描述申請人的產品的商標;第二,集合標章;第三,證明標

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¹³ "A term used in the manner of a trademark that conveys to the consumer a geographical connotation primarily or immediately. If the consumer is likely to believe that the underlying goods or services in fact come from that location, and that location is in fact the geographic origin of the underlying goods or services, then the mark is primarily geographically descriptive,..." *Primarily geographically descriptive*, MARKLAW.COM, *available at*

http://www.marklaw.com/index.php?option=com_content&view=article&id=232:primarily-geographic ally-descriptive&catid=37:p&Itemid=16 (last visited Jun. 6, 2014).

^{14 &}quot;If a geographic term is used in such a way as to identify the source of the goods/services and, over time, consumers start to recognize it as identifying a particular company or manufacturer or group of producers, the geographic term no longer describes only where the goods/services come from, it also describes the "source" of the goods/services. We say that the term has "secondary meaning" or "acquired distinctiveness." The primary meaning to consumers is the geographic place, whereas the secondary meaning to consumers is the producing or manufacturing source. If a descriptive term has "secondary meaning" to consumers, the term has a source-identifying capacity and is protectable as a trademark." The United States Patent and Trademark Office, Frequently Asked Questions, available at http://www.uspto.gov/ip/global/geographical/faq/#heading-2 (last visited Jun. 6, 2014).

15 "Therefore, a geographical name may be registered as a certification mark even though it may otherwise be primarily geographically descriptive and hence unregistrable as a trademark in the absence of secondary meaning." The United States Patent and Trademark Office, Frequently Asked Questions, available at http://www.uspto.gov/ip/global/geographical/faq/#heading-2 (last visited Jun. 6, 2014).

Geographical Indication Protection in the United States, THE UNITED STATES PATENT AND TRADEMARK OFFICE, FREQUENTLY ASKED QUESTIONS *available at* http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi system.pdf (last visited Jun. 6, 2014).

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第二,無論是何種形式註冊所取得之地理標示類的標章,若被認定為通用名稱時,依美國商標法第 14 條第 3 款的規定,可以申請撤銷該標章¹⁷;同款對於通用名稱的認定略有說明,即認為註冊的標章不應僅因同被用作某獨一無二的產品名稱或用以識別該獨一無二產品,而逕被認定為通用名稱;於考慮該註冊標章是否已成為一種通用名稱時,所應考慮的是該註冊標章對公眾所具有的首要含意(primary significance),而不是消費者的動機(purchaser motivation)¹⁸。簡單來說,當該描述使得一般大眾聯想到的已非某一註冊標章,而是泛指某種類的產品時,該註冊標章即可能被認定為通用名稱而遭撤銷;且不應考慮消費者是否會喜愛該商品,進而產生購買動機這樣主觀的要素¹⁹。

綜前所述,在美國商標法上,地理標示所享有的標章保護,在取得註冊後,若原名稱的首要含意已不再被聯想到特定地區,反而聯想到某一種類產品的泛稱時,可能因此被認定已變成通用名稱而再遭撤銷註冊,失去其原有之保護。

歐盟法規

歐盟之地理標示保護法規為 2006 年所制訂的「理事會規則(EC) 2006 年 3 月 20 日第 510/2006 號『農產品和食品地理標示和原產地名稱的保護』 20 (COUNCIL REGULATION (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs,以下簡稱 510/2006 規則)」,其第 2 條明文所保護之客體有二:一為地理標示(geographical indications) 21 ;二為原產地名稱(designation of origin) 22 。兩者差別在於地理標示較原產地名稱來得廣,且要件較為寬鬆;地理標示僅要求產品的特殊「品質」「名聲」或「其他特質」可歸因於其源自的地理來源,此外僅需「生產」、「加工」或「準備」其一在該地理區進行 23 ,即可註冊為地理標示,獲得保護。

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¹⁷ 15 U.S.C. § 1064: "A petition to cancel a registration of a mark,...(3) At any time if the registered mark becomes the generic name for the goods or services....".

¹⁸ 15 U.S.C. § 1064(3): "...A registered mark shall not be deemed to be the generic name of goods or services solely because such mark is also used as a name of or to identify a unique product or service. The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used."

 $^{^{19}}$ 鄧振球,商標名稱通用化之理論與實務,科技法學評論,5 卷 1 期,頁 206-207,2008 年。 20 法規名稱翻譯參見:周建文,歐洲共同體地理標示制度,頁 1,2007 年。

²¹ Regulation (EC) No 510/2006, of the European Parliament and of the Council of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2006 O.J. (L 93) 12, *available at*

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1402009751517&uri=CELEX:32006R0510.

²² *Id.* ²³ *Id.*

510/2006規則第3條第1項規定,當「名稱已變得通用」時,可不予註冊;而所謂「名稱已變得通用」於同項中則定義為,「該產品儘管與原生產或銷售地相關,但已在共同體中變成一項產品普通的名稱(common name)」²⁴,而要建立名稱是否已變得通用,必須考慮所有因素,特別是同項 a 款「在會員國及消費地存在的情況」及 b 款「相關的國家或共同體的法律」²⁵。此外,歐洲法院發展出了一套認定「通用的」所應考量的因素²⁶;例如於涉及 feta 起司之「丹麥、德國與法國控告歐洲執委會」(Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission of the European Communities)一案中,原告國針對執委會同意給與 feta 起司一地理標示之註冊提出控訴,執委會雖已以民意調查的方式詢問當時歐洲共同體的人民對於該名稱究竟是聯想到某一特定地區還是僅為一種起司的普通名稱²⁷,藉以認定是否該名稱已變得通用。然而法院認為,執委會尚必須考慮傳統上的正當實踐與實際上混淆的可能²⁸。

前述提及,於美國商標法的制度下,當某一已註冊之標章成為通用名稱時,可構成申請撤銷該註冊標章之事由,於歐盟的法制下是否亦有類似相關的規定?首先,在510/2006規則第12條關於撤銷的規定²⁹,及依510/2006規則第16條 k款訂立撤銷註冊條件的執行規則³⁰,均未明訂得撤銷註冊之事由,與美國明文「變得通用」列為得申請撤銷註冊的事由顯有不同。再者,在510/2006規則中,第13條第1項規定,註冊的名稱應予被保護;同條2項更規定「被保護的名稱不會變得通用(Protected names may not become generic.)³¹」。又所謂「被保護的名稱不會變得通用」的意義,參考其他文獻發現,其意指一旦註冊為地理標示,隨著時間演變,縱使大多數消費者改變想法認為它只是普通的產品種類名稱,也不

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³¹ Supra Note 21.

²⁴ *Id*

²⁵ Id

²⁶ "...The Court of Justice of the EU (CJEU), having been asked several times to rule on the interpretation of 'generic' has developed a set of factors to be applied to its assessment in such cases" TOSHIKO TAKENAKA, INTELLECTUAL PROPERTY IN COMMON LAW AND CIVIL LAW 268 (2013).

<sup>(2013).

27 &</sup>quot;To that end, in April 1994 the Commission arranged for a Eurobarometer survey of 12800 nationals of the 12 Member States which were then members of the European Community. To justify recourse to that survey, the Commission relied on the consideration that the basic regulation 'requires for the purpose of declaring a name to be generic that it has become the common name for a product, in other words that it designates the product as such without involving, in the view of the public, any reference to the geographical origin of the product'." Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission of the European Communities, CJEU Jointed Cases No. C-289/96, C-293/96 & C-299/96, Judgment of the Court, ¶ 36 (Mar. 16, 1999).

[&]quot;...the Commission must take account, as is expressly required by Article 7(5)(b) of the basic regulation, of 'traditional fair practice and of the actual likelihood of confusion.n Id, ¶ 94. ²⁹ Supra Note 21.

³⁰ Commission Regulation (EC) No. 1898/2006 of 14 December 2006 laying down detailed rules of implementation of Council Regulation (EC) No. 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2006 O.J. (L 369) 1, *available at* http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32006R1898

會再變成一個通用名稱32。

因此,除非該名稱在註冊前已變得通用外,基本上符合第2條要件之地理標 示即得註冊而受保護;且當該地理標示已受保護時,原則上亦不會因註冊後變得 通用而喪失該項保護。

結論及評析

從前述歐美法規比較看來,在註冊前所應符合的要件並無顯著的差異;然而一個相當大的規範差異在於「註冊標章是否能夠變得通用,甚至予以申請撤銷」。 在美國方面,註冊標章不能為一通用名稱,此項要求縱使在已註冊標章亦須隨時 具備,否則便可能被申請撤銷;反觀歐盟,已註冊的地理標示的保護包括阻斷其 變得通用的可能,而不再考量之後大眾的認知,更不會因此被撤銷。

於本次乳製品爭議,舉美國眾議院議員所提之莫扎瑞拉起司為例,該乳製品早已於1988年11月26日註冊為義大利的地理標示33,因此在歐盟510/2006第13條第2項的規範下,該名稱不會再變得通用,而被撤銷。反觀在美國體系下,縱使該乳製品已依商標法的規定取得商標、集合標章或證明標章的保護,亦可能因時間經過,大眾對該名稱的認知不再以該原產地為首要含意,而成為一普通產品的通用名稱,進而申請撤銷該權利。況且,美國眾議院議員及乳製品業者並不認為「莫扎瑞拉」具有聯想到特定地理區的首要含意,因此其連要取得商標都顯得十分困難。又若是對一個不應受到保護的名稱給予保護,則其將不當限制其他廠商使用該名稱,進而可能影響到其銷售,產生貿易的限制性。

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^{32 &}quot;...However, unlike trademark law, once registered a PDO or PGI is protected from becoming generic...." Supra Note 26; 另外因 510/2006 是由 2081/92 規則發展而來,其中對於「被保護的名 稱不會變得通用 的條文並未有修正,因此對於2081/92規則之相關解釋,仍應能作為參考: "... The EU prohibition on the registration of generic names only applies to the initial registration process, however. Once protected, "Names may not become generic." 14 This is a significant rule. Never again shall a geographical indication like "Pilsner" become a widely used common name for a product. Even if 99 percent of European consumers come to believe that Feta is a common name, the Greek producers who registered the designation of origin will retain their rights under 2081/92. This is a striking departure from US law, where changed consumer perception can remove the rights of any mark holder...." EU and US: Opposing Views of Geographic Indications of Origin, Fish & Richardson P.C., Mar. 5, 2010, available at http://www.fr.com/TrademarkThoughtsFall2008/ (last visited Jun. 9, 2014); "... A recurrent objection is that the proposed denomination is a generic term for the product in question: generic names cannot be registered but, once registered, the denominations are protected from genericisation. Hence Cheddar cheese was deemed to be a generic name, but the PDO "West Country farmhouse Cheddar cheese" was allowed. Feta was deemed not to have become generic, and was registered as a PDO to the disappointment of cheesemakers outside of Greece...." Geographical indications and traditional specialities in the European Union, Wikipedia, available at http://en.wikipedia.org/wiki/Geographical_indications_and_traditional_specialities_in_the_European_ Union#cite note-5 (last visited Jun. 9, 2014).

³³ Commission Regulation (EC) No 2527/98, of 25 November 1998 supplementing the Annex to Regulation (EC) No 2301/97 on the entry of certain names in the 'Register of certificates of specific character' provided for in Council Regulation (EEC) No 2082/92 on certificates of specific character for agricultural products and foodstuffs, 1998 O.J. (L 317) 16.

以上關於美國觀點之看法,洽似與眾議院議員連署所提之理由相符:一、其認為系爭乳製品實為一般產品的通用名稱,故歐盟試圖於 TTIP 推展之乳製品地理標示,實為濫用地理標示之行為³⁴。二、其認為若美國於 TTIP 承諾保護歐盟所提之地理標示,則造成國內乳製品業者被排除於海內外的市場、造成貿易的障礙及商業對抗,此與貿易協定的基礎目標相違。

最後,雖眾議院議員希望歐盟調降遠較美國高的乳製品關稅,然應不至於以 乳製品的地理標示保護予以交換,畢竟面對歐盟傳統乳製品的悠久歷史,其應能 取得遠較美國更多的地理標示、且地理標示的保護為排他性的保護,貿易的限制 性或較關稅來得更高,美國應不至於為了關稅而予以讓步,反倒繼續惡化其對歐 盟乳製品的貿易逆差,而與調降關稅減低貿易逆差的目標相違。

綜上所述,在美國業者、眾議院及美國貿易代表署均已表態反對將乳製品的 地理標示納入TTIP以及在法規範及經濟上差異之下,歐盟在調和以上問題前可 能無法如過往在自由貿易協定的地理標示上繼續取得成果。若歐盟對美國的推展 受阻,是否會進而對歐盟正洽簽的各項自由貿易協定產生影響、歐盟透過自由貿 易協定推展地理標示的計畫是否產生改變實值得繼續關注。



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³⁴ Supra Note 4.