What’s at Stake in the GI Debate?
The Strange Role of Generics

Tim Josling
Senior Fellow, FSI, Stanford University
Introduction

• Geographical Indications (GIs) are tangentially part of the Doha Agenda
• But likely that they will emerge as one of the “new” items to be discussed after Doha
• Producers are looking for ways to differentiate their products and establish reputations
• Geographical labels have proved popular in Europe, supported by EU legislation
• Fits in well with new emphasis on “quality” of EU food products and a move away from supporting commodity prices
Introduction

• Why is this an important trade topic?
• EU, Switzerland (and others) have been pushing for an expansion in GI super-protection from wines and spirits to other agricultural and food products
• US, Australia and Canada (with friends) have resisted, arguing that no further protection is needed
• Developing countries have had to take sides: several have become enthusiastic about GIs of their own (India)
• EU and US have been building support for their own views into the many bilaterals negotiated in recent years
• So, as with the GMO issue, the global market risks being fragmented into US and EU submarkets
Introduction

• Literature on GIs has blossomed in recent years
• Basic articles emphasizing the difference between “sui generis” GI systems of protection and the use of Trademarks (collective marks and certification marks) – and how these are treated in TRIPS
• Studies that examined the marketing options for European producers of differentiable goods
• Studies that emphasized the spin-off value of GI policy for regional and local development
• Articles discussing the possible use of GIs in developing countries (including “how to” manuals)
Introduction

• I’m **not** going to discuss GIs
• I’m going to discuss “**non-GIs**”
• Generic terms cannot be protected as GIs (TRIPS, 24.6)
• But generic terms are often the most important commercial names
• The distinction between generic and non-generic terms is in many ways the key issue in international negotiations
• Hence the lack of attention to generics among analysts is somewhat strange
Outline

• What is a generic term?
• How have countries operationalized the award of generic status?
• Generics and trade disputes
• Generics in negotiations
• Generics as a possible emphasis for resolving WTO issues
Definition of generics

• “When a product’s name becomes accepted as signifying a type of product rather than its geographical source, the name is considered generic and it becomes part of the public domain” (Benson)

• Is process reversible? Can generics become GIs again?

• Accepted by whom? By consumers in importing country? By the producers themselves?

• Can generic names be “negotiated” or even “traded” internationally?
Definition of generics

• If a generic is defined by consumer acceptance then the test should be empirical

• Producers should be able to “educate” consumers as to the “essential” link between place of origin and quality and hence remove generic status

• But governments treat generic status as something to be decided arbitrarily and bargained away in a negotiation
Definition of generics

• TRIPS does not help much
  – Nothing ... shall require a Member to [protect a GI] if the relevant indication is identical with the term customary in common language as the common name for such goods or services

• In practice, national authorities choose their own definition and make their own lists

• Suggests a fuzzy area in trade law and policy
EU regulations and generics

• EU GI legislation (Regulation 2081/92, Article 3.1) denies registration if the term “has become the common name of an agricultural product or a foodstuff”

• Commission has to take into account situation in producing country and in other member countries

• EU also prevents registered GI names from becoming generic (Article 3.3)
US Regulations

• Alcohol and Tobacco Tax and Trade Board (TTB) classifies wine names as:
  – Generic (used without registration) e.g. vermouth, sake
  – Semi-generic (can be used if qualified by place of origin) e.g. California burgundy, claret, chablis, champagne, etc. (if prior to US-EU Agreement)
  – Non-generic, non-distinctive (can be used if place of origin is indicated: no registration necessary) e.g. Napa Valley
  – Non-generic, distinctive (can only be used if produced in the place implied by the label) e.g. Bordeaux Rouge

CAES/CATPRN Workshop, Quebec City
US Regulations

• Non-wine food labels are regulated by Food and Drug Administration
• FDA defines standards for cheeses by reference to their composition and method of production, not geographical origin
• This has the effect of defining them as generics. Examples include:
  – Edam
  – Gorgonzola
  – Gouda
  – Gruyere
  – Mozzarella
  – Parmesan
  – Roquefort
• Any producer can use these names if they conform to the FDA “recipe”
Commercial Issue

- Generics are commercially important
- Cheeses are significant in trade
- US producers make full use of flexibility allowed by US law
  - Kraft and Parmesan
  - Korbel and Champagne
  - Rouge et Noir and Camenbert
  - Athenos and Feta
- Rebranding costly and risky
Generics in Trade Disputes

• Most significant EU case is Feta. France, Germany and Denmark argued that feta was a generic name for a white cheese in brine.

• Greece argued that feta was a Greek product from certain designated regions and had to be from ewe’s milk: requested PDO status under EU GI rules.

• Feta comes from an Italian word (fetta means chunk): no geographical meaning.

• Commission approved PDO status in 1996.
Generics in Trade Disputes

• Denmark, France and Germany complained and ECJ reversed the Commission decision: ruled that the Commission had ignored the market conditions in those countries
• Commission asked for the opinion of the Scientific Committee which ruled that feta was not generic
• Key evidence was that German and French producers used Greek symbols (names and temples) and Danish producers sold their product as Danish Feta
• Score one for the Greek producers
Negotiating about Generics

• Generics have been at the heart of several types of negotiations. In the WTO:
  – EU introduced request for “claw back” of 41 names mostly considered generic in US, Canada, and other developed countries
  – EU has pushed for mandatory GI register for wines that would oblige other WTO members to protect EU (and other listed) wines
  – EU has argued for an extension of “Article 23” protection – as currently given to wines and spirits – for other food products
The Claw-back Proposal

• Acceptance of GI status for 41 products suggested by EU in August 2003 (prior to Cancun) as a part of “market access” in the agricultural talks

• Included many of the US semi-generic wine names (Chablis, Champagne, Chianti, Madeira, Malaga, Marsala, Port, Rhine, Sherry and Sauternes)

• Included many cheeses (Asiago, feta, fontina, gorgonzola, Grana Padano, Manchego, Parmiggiano, Roquefort)

• Also included some meats (Prosciutto di Parma)

• Proposal met with condemnation and was withdrawn
Multilateral Register for Wines

• Obligation in TRIPS Article 24
• Discussions held in TRIPS Council since 2000
• Two opposing positions:
  – EU and friends: mandatory list
  – US and friends: voluntary database
• DG attempted to mediate
• Still no resolution: EU unlikely to get mandatory list
Extension of “Additional Protection”

• No agreement as to whether it is a part of Doha Agenda
• Developing countries being courted by EU as allies
• If agreed then all foods would get protection even when no deception is involved
• This would also require negotiation of a register for these products as well, and include protection of qualifiers
Negotiating about Generics

• EU has built in GI protection into bilateral trade agreements
• EU-RSA: nearly stalled over rights to names “port”, “sherry”, “ouzo” and “Grappa”. RSA agreed to phase out their use
• EU-Chile: agreement to recognize each other’s wine GIs
• EU-RPAs: Developing countries have to introduce regulations to protect EU GIs
Negotiating about Generics

- EU has also been negotiating specific bilateral agreements on wines, including claw-back of some generic names
- US-EU Agreement on wines
  - Agreement to remove semi-generic status for several wine names (now has to be from original country)
- EU-Australia Agreement on wines
  - Mutual protection of each other’s GIs, including Champagne, Port, Sherry and 8 other names
- Canada-EU agreement on wines
  - Repatriation of 21 Canadian Generic wine names
New Approach to WTO GI Issues?

• If this is where the action is, perhaps negotiations should focus on generics, not GIs
• Clearer definition of the term generic might help
• Members could register generics in a database (rather than GIs)
• Members could challenge such registration but would have the burden of proof that the name is not a generic
Concluding Questions about Generics

• Generic status as negotiating capital
  – Did Canada gain anything from the EU Canada Wine Agreement? Why have Australia, Chile and the US given up valuable “generic” names?

• Generic status as market asset
  – Should Kraft make payment to GI holder? Or should Italian Parmesan cheese producers buy-back name?

• Generic status as dynamic concept
  – Failure of owner to enforce GI may lead to generic status
  – Generics could develop from popular usage (as with some trademarks)
  – Producers could regain GI status by establishing reputation
Thanks

Comments Welcome
josling@stanford.edu