

What's at Stake in the GI Debate?

The Strange Role of Generics

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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

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 Camembert
 - 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
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