Geographical Indications

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Preface

The debate over whether to extend the level of protection for geographical indications (GI's) for wines and spirits under Section Three of the TRIPS Agreement to foods is a complex legal issue and at the same time, highly political and emotional. The following paper was prepared by the IPC secretariat to clarify some of the arguments of both proponents and opponents of an expansion of GI protection to cover foods; to provide a basis for the IPC's deliberations on the issue; to raise additional questions and to identify additional analysis that might be needed. It is being published as an IPC Discussion Paper on that basis. The paper attempts to reflect the various positions of countries involved in the GI debate but, it does not claim to be exhaustive. As such, it does not reflect the position of any individual IPC member or that of the Council as a whole. Comments are welcome.

Introduction

Extending the level of protection accorded GI's on wines and spirits under the TRIPS Agreement¹ to foods has become a key demand for a number of WTO members. Unable to move this issue forward under the TRIPS negotiations, these members are asking that it be taken up under the agricultural negotiations. Their key demands are:

- to prevent the use of GI's that are false, whether or not they deceive consumers;
- to prevent the use of the words 'like' or 'style' or 'imitation' to distinguish between products of a geographical origin from those produced in the same manner or to similar standards in another region; and
- to extend the proposed multilateral notification and registration system, under negotiation for wines and spirits, to foods.

The debate on GI's has become exceedingly heated and controversial and the issues involved are complicated. All parties agree that GI's have economic as well as political value in the WTO negotiations, but there is intense disagreement over:

- the balance of concessions made during the Uruguay Round of WTO negotiations;
- the mandate for future negotiations;
- whether the protection afforded foods by the TRIPS Agreement is adequate; and
- the underlying philosophy of geographical indications.

<u>Balance of Concessions</u>. GI protection for wines and spirits was strengthened in the Uruguay Round Agreement primarily at the request of European wine-producing members, specifically France and Italy in exchange for accepting reductions in export subsidies. For other WTO members, including significant wine producing countries such as Argentina, Australia, New Zealand, South Africa and the United States, this represented a significant concession. Members who want to increase GI protection on foods in the Doha Round of WTO negotiations argue that the distinction between wines and spirits and food products is unlike any other in the TRIPS Agreement: it is not based on any intrinsic characteristic of the product and therefore, they argue, they should be treated in the same manner.

Members who oppose enhanced GI protection for foods perceive an imbalance in rights and obligations – in this case with other parts of the Uruguay Round Agreement on Agriculture – when it comes to the treatment of wines and spirits.

¹Uruguay Round Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Section Three.



They argue that special treatment for GI's on wines and spirits was given only as a concession in exchange for reductions in export subsidies on the part of the European Union. These members believe that extension of GI protection to all products would exacerbate the imbalance created by this concession. These members also believe that GI's are not an agricultural trade issue, but rather are an intellectual property rights issue, and therefore should be discussed under the TRIPS mandate and not the agricultural mandate.

<u>Mandate</u>: Members seeking extension of GI's to food, argue that the language in the TRIPS Agreement mandating further negotiations referred to all products, not only to wines and spirits. They also argue that a narrow interpretation - that new negotiations should only apply to wines and spirits - would further exacerbate the difference in treatment for these products versus food products.

Members opposing extension believe this is an attempt to re-open the TRIPS Agreement, for which they claim there is no mandate. They argue that the agenda built into the TRIPS Agreement refers specifically to unresolved issues from the wine and spirits negotiations.

Sufficient Protection: Those opposing GI extension see no evidence of systemic problems with the level of protection afforded foods under the TRIPS Agreement. They believe that GI's can be protected under the current Agreement and existing trademark laws as 'certification marks.'2 Those who support extension argue that under the existing TRIPS language on foods, only the use of a GI that actually deceives consumers can be prohibited, even if the indication itself is false. Whereas, under the TRIPS language on wines and spirits, the use of factually incorrect GI's can be prohibited even if consumers are not deceived by that information.

The demandeurs for enhancing GI protections also note that for foods, the burden of proof to demonstrate infringement and deception rests on the holder of the GI. They argue that since the 'holder' of a GI is not a single corporation or individual, protecting GI's through a trademark system is unwieldy. They believe that the reliance on 'deception' creates uncertainty and inconsistent judicial decisions, and undermines trade in products bearing GI's, while the burden of proof for wines is simply to establish whether the product in question came from the geographical region claimed on the label. Proponents of extension assert that this is a much easier and more straightforward test.

<u>Philosophy</u>: The countries opposing enhanced protection for GI's insist there is little to be gained and much to be lost

from the extension. Some countries object to including GI's under the definition of intellectual property rights altogether. They make a distinction between geographical endowments — which they believe should not be subject to such rights – and human creativity — which should. The United States, among others, argues that transparent treatment of GI's and protection of existing trademarks is also important. Unless these are extant, they argue, no international treaties will be enforceable.

By extension, they argue that individual problems with GI protection can be addressed bilaterally, without creating a complex, costly and ineffective global system. Those opposed to extension also argue that many of the names now used to identify products were derived from names that originated in Europe many years ago as a result of immigration and colonization, and that these names should not be proprietary to the 'home' countries that were the source of immigrants and colonies.

For the European Union and others who wish to expand GI protections the geographical indication *IS* the product. The EU does not view GI's as a form of intellectual property. They believe that GI's are intrinsic to the product and their protection is properly discussed under the heading of market access in the agricultural negotiations. For the United States and others who oppose such an expansion, GI's are a distinctive element that can be addressed under trademark law. US legal authorities argue that both trademarks and GI's are source-indicators; quality indicators; and business interests and therefore, the two are not fundamentally different.

Rationale for Protecting Geographical Indications

Intellectual property is protected by a number of tools, most notably trademarks and patents. These insure that creators are rewarded for the work and financial risk they took in developing the invention or idea. Patents and trademarks prevent competitors from 'free-riding' on others' intellectual property investments and protect consumers from deception. The rationale for protecting GI's is similar. As with trademarks and patents, GI's are subject to free-riding problems and consumer deception. Consumers understand that GI's denote the origin and quality of products. Many of these products have acquired valuable reputations which, if not protected, could be misrepresented by dishonest commercial operators. False use of GI's is detrimental to consumers, as well as to legitimate producers: consumers are led into buying a false product which does not meet

²Certification Marks are discussed later in the text under Issues in the Current debate.

their expectations, while producers suffer because valuable business is taken away from them.

Consumers are protected against both false and deceptive use of geographical indications. For a GI to mislead consumers, consumers must first perceive that the original GI refers to a certain geographical area. Geographical denominations that have become generic or synonymous with the product are not deemed to mislead the public. For example, Parmesan cheese has become a generic term in the United States that refers to cheese grated on pasta. US consumers do not relate the cheese to its geographical origin in Parma, Italy.

In other cases, deceptive indications might be literally true, but may be misleading. For example, if two geographical areas have the same name, but only one has been used as an indication of source for a certain product, then an indication used from products originating from the other area would be considered misleading. A false declaration, on the other hand, would misstate the true name of the place where the product originated. The wine producing Rioja regions in Spain and Argentina are an excellent example. Wine from the Rioja region in Spain has acquired a strong positive reputation, while wine from the Rioja region in Argentina does not have the same cachet. The TRIPS Agreement allows both countries to use the same geographical name, although they must agree on how producers are to distinguish between the two products. On the other hand, the term Chablis, has been used in the United States to refer to a rather inferior wine and could, some argue, be seen as de-valuing white Burgundy wine from the region of Chablis in France.

Definitions of Geographical Indications, Appellations of Origin and Indications of Source

Since 1883, countries have been grappling with the issue of trade and GI's. Three treaties, the Paris Convention for the Protection of Industrial Property (1883), the Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods (1891) and the Lisbon Agreement for Appellations of Origin (1958) form the basis of the current definitions of GI's. The definitions and philosophy underlying these three treaties have been integrated into the TRIPS Agreement.³.

However, because the rationale for (and signatories to) each treaty differed, their definitions of GI's differed as well. In its papers on the subject, the WTO Secretariat created the term 'indications of geographical origin' to avoid confusion

with the many different legal concepts arising from such treaties.

Indications of Source: Indications of source are most commonly labels such as 'Made in America' or 'Product of Mexico.' The idea originated in the Paris Convention and the Madrid Agreement. However, neither document actually defines the concept. It is generally understood that an indication of source is contingent only on the product's geographical origin and not necessarily its inherent quality. The Madrid Agreement provided specific rules for the repression of false as well as deceptive indications of source.

Appellations of Origin: Appellations of Origin, as defined in the Paris Convention, convey not only the geographical source of the product, but make a direct link between the product's quality and its geographical origin. The Lisbon Agreement goes further, stating that the geographical name designates a product, whose quality and characteristics are exclusively or essentially related to the geographical environment, including natural or human factors. Appellations of Origin must contain the name of a country, region or locality. This definition constitutes a higher threshold than for indications of source and narrows the range of products that are eligible for this classification.

The Lisbon Agreement sets out two basic requirements for the protection of Appellations of Origin. First, the Appellation must be protected in the home market and second, it must be registered with the World Intellectual Property Organization (WIPO). Once an Appellation is protected under WIPO, it cannot become a generic name as long as the product remains protected in its home market. This protection covers usurpation or imitation, even if the true origin of the product is indicated or is accompanied by a term, such as 'kind,' 'type,' 'make,' 'imitation' or 'style.'

As of 1999, 766 appellations are enforced by WIPO. Of the nineteen signatories of the Lisbon Agreement, France accounts for two-thirds of the appellations and only six parties to the Treaty account for 94 percent of the registrations. Of the products covered, 84 percent are wines, spirits, cheese, tobacco and cigarettes, with wines and spirits alone accounting for 70 percent.

Geographical Indications: The TRIPS Agreement allows GI's on goods where a given quality, reputation or 'other characteristic' of the good is attributable to its geographical origin. The Agreement does not differentiate between agricultural and industrial goods, nor between handicrafts and manufactured goods, but the definition does not apply to services. It does, however, distinguish a) between wines

³In addition to these broad international agreements, there are a plethora of bilateral and plurilateral agreements covering GI's. These include agreements between Germany and France; the United States and Australia; the European Union and Australia; the European Union and South America. GI provisions have also been incorporated into the NAFTA and the Mexico-Chile Agreement.

and spirits and all other goods and beyond that, b) between wine and all other goods.

There are, therefore, three levels of definitions: indications of source, Appellations of Origin and geographical indications. The broadest definition, indication of source, does not require that the product have a certain quality, reputation or characteristic linked to its origin, but it covers both Appellations of Origin and geographical indications. Appellation of Origin is the most specific concept and necessarily corresponds to the name of a country, region or locality. In between is the term geographical indication, which identifies the product as originating in a particular place, where quality, reputation or other characteristics are attributable to their geographical origin. In other words, all Appellations of Origin are geographical indications but not every geographical indication is an Appellation of Origin.

The TRIPS Agreement

During the Uruguay Round, the discussion of GI's in the TRIPS negotiations was sensitive. Even though three treaties with strong provisions governed GI protection before the Uruguay Round, the impact was limited because membership in these treaties was limited. (The fact that few countries chose to sign strong treaties on GI's provides some insight into how controversial the debate has been.) Placing GI's under the TRIPS Agreement bound 130 signatories to protect them. The Agreement also provided a dispute settlement mechanism, periodic reviews and a provision for subsequent negotiations.

The TRIPS Agreement incorporated a number of provisions from the Paris Convention and the Lisbon Agreement. Under the TRIPS Agreement, Gl's are subject to the same general principles applied to other intellectual property rights in the Agreement, including national treatment and MFN principles.

<u>Definitions</u>: the TRIPS Agreement definition of GI's is broader than the one contained in the Lisbon Agreement because it includes products that do not possess any qualities specifically due to their origin. However, under the TRIPS Agreement, not every indication of origin can rise to the level of a GI. Only goods whose quality *OR* reputation *OR* 'other characteristics' are linked to its geographical origin, and to consumer's purchasing decisions can qualify. To be protected, goods must originate in the territory with which they are associated. Licensing the name of the good to other growers or processors is therefore, not allowed.

The TRIPS Agreement does not require the use of a real geographical name. Reference to geographical origin could be a symbol, such as a French flag, the map of Italy or the Taj Mahal. Denominations that are not a place name, such as Basmati rice, could also be feasible under the general heading of geographical indications, although this issue has

not been tested. To be considered eligible for a geographical indication, a good must possess any one of three characteristics—1) quality, 2) reputation or 3) other characteristic attributable to its geographical origin. Going beyond the definitions contained in earlier agreements, reputation is a critical component of geographical indications under the TRIPS Agreement.

<u>Deception and Fraud:</u> Under the TRIPS Agreement, there are three levels of protection for GI's:

- protection against the use of GI's that mislead or deceive the public;
- protection against the use of indications that constitute unfair competition; and
- refusal or invalidation of trademarks that contain GI's if the trademark misleads the public.

Importantly, GI's that do not mislead the public are not prohibited by the TRIPS Agreement. For example, a label designating Antarctic Oranges would be false, but not misleading under the TRIPS definition. It is common knowledge that oranges could not possibly be grown in Antarctica, therefore, such a designation would not be prohibited. Under the Agreement, remedies for the misuse of an indication of source are the same as for the misuse of a trademark or trade name, including seizure or prohibition of imports. Signatories are obliged to protect against unfair competition and provide a non-exhaustive list of prohibited practices. But, the Agreement does not specify the legal means to protect GI's.

<u>Wines and Spirits</u>: In exchange for concessions on export subsidies and domestic subsidies, the European Union demanded that the Uruguay Round provide special protections for wine and spirits, with additional protections for wine. There are two main elements of special protection for wine and spirits:

- Legal means to prevent the use of a GI identifying wine and spirits not originating in the place indicated, even if the true origin is indicated or accompanied by words such as 'kind', 'type', 'style' or 'imitation.' For example calling an Australian or Californian sparking wine 'Champagne-style' is prohibited.
- 2. Legal means to refuse to register or invalidate trademarks for wines or spirits that contain a GI not originating in the territory indicated at the request of an interested party.

<u>Wines:</u> The notion of treating wines differently from other foods dates to the Madrid Agreement, which required governments to include wines under its provisions against deceptive marketing. It is not surprising that wines were the first to be granted additional protections, since they

were among the few products that could be shipped internationally before modern food preservation techniques were developed.

In the TRIPS Agreement, GI's on wine are further protected against 'homonymous indications' as well as by a multilateral system of notification and registration. Notably, the protection against the use of homonyms covers geographical names that are the same in two countries, like in the previous example of Rioja in Spain and Argentina. As discussed earlier, both indications are protected under the Agreement, but Members must decide among themselves how the homonymous indications will be differentiated.

Article Twenty-Three of the Agreement calls for negotiations to establish a multilateral system of notification and registration of GI's for wines eligible for protection in Member Countries participating in the system. This system is now the subject of intensive negotiations in Geneva and has not yet been finalized. The main sticking point is whether countries that do not sign on to the agreement will be required to enforce its provisions.

Exemptions: There are two key exemptions under the TRIPS Agreement. These exemptions apply regardless of whether the GI is for a food, or whether it qualifies for additional protection under the wines and spirits agreement. The first relates to terms that have become generic. If a term has become 'customary' for the product in the member's territory, then it is considered generic and is therefore ineligible for GI protection. Many well-known indications that originally had a geographical connection (for example Cheddar and Emmentaler cheeses and Dijon mustard) have become generic in many WTO member countries. The TRIPS Agreement does not require a WTO member to extend protection to a GI if it has become the generic name for the product in that member's territory.

The second exception is a grandfather clause, which protects trademarks acquired in good faith prior to the registration of a GI or before the TRIPS Agreement was signed. This is essentially the 'first-in-time, first-in-right' principle. These exceptions were primarily to benefit those countries where certain geographical names had become common expressions. It is important to point out that no one is calling for the elimination of these exemptions in the current negotiations.

Experience with Implementing the TRIPS Agreement on Geographical Indications

The TRIPS Agreement provides the basic framework for protecting all GI's. It specifies the minimum standards of required protection, but leaves members free to determine the appropriate methods of implementing its provisions.

WTO members are obliged to provide the legal means for interested parties to protect GI's. As discussed earlier, the required legal means are not clarified in the Agreement, creating the problem of multiple systems, and the opportunity for members to explore new mechanisms.

In April 2001, the WTO Secretariat distributed a survey asking Members how they protect Gl's. Fewer than forty countries responded, fifteen of whom were European Union member states. According to the survey, the implementation of GI protection has been diverse and uncoordinated compared to other forms of intellectual property protection under the TRIPS Agreement. Members use many different mechanisms, including general business laws, trademark laws, and/or special protections for geographical indications. This lack of harmony undermines the Agreement's general objective of establishing a predictable multilateral system of rules and disciplines for protecting Gl's.

According to the survey results, the major differences in GI protection among responding WTO members are:

- There is no unanimity on the legal definition of GI's across national legislation. Some use a TRIPS-like definition that is at times limited by a list of products. Others use the more restrictive definition under the Lisbon Agreement, requiring the direct use of a geographical name.
- Most countries require products to meet certain requirements for protection. Some rely on the TRIPS definition, but others have additional requirements, including production methods and product specifications to ensure quality.
- Measures to ensure the link between the good and the designated area of origin are implemented differently.
 Some include explicit requirements on all stages of production, some only for raw materials, and some only for the production process.
- Finally, some countries treat GI's as an extension of trademarks (notably the United States), while others have implemented specific legislation.

Issues in the Current Debate

Geographical Indications versus Trademarks and Certification Marks: The relationship between trademarks and Gl's is complex. Trademarks generally identify products from a specific manufacturer. Gl's do not identify a manufacturer (or producer), but rather the product's place of origin. Trademarks imply human creativity. Gl's, on the other hand, are linked to climate, soil and other factors that are largely independent of human ingenuity. They are expressions or symbols (such as a flag) which recognize a product as originating in a certain country where a given

quality, reputation or other characteristic is attributable to its geographical origin. Trademarks are words, signs, numerals, and figures that distinguish products of one manufacturer from another. GI's apply to all producers in a country, region or locality. Trademarks can be used by only one entity. They are easier to protect than GI's, but protection requires the active role of the trademark's owner. As the WTO survey cited earlier indicates, there is no single mechanism used to protect GI's.

As a rule, trademarks that contain a GI cannot be protected if the use of the trademark would mislead the public about the true origin of the product. The TRIPS Agreement allows Members to refuse or invalidate trademarks that contain geographical indications on goods that do not originate in the territory indicated *IF the use misleads the public*. The same rule applies to wine and spirits, but in that case, members can refuse or invalidate the trademark *whether or not the public is misled*⁴.

It has generally been understood that trademarks take precedence over GI's. However, this theory was tested recently, when the Czech Republic successfully canceled Anheuser-Busch's trademark registrations for "Budweiser" and/or "Bud" in several European countries by claiming that the terms were a proprietary GI for beer from the town of Ceske Budejovice. In this case, GI's were found to be superior to trademarks.

Some legal scholars in the United States advocate the use of Certification Marks. Certification marks are any word or symbol that is used by someone other than the mark's owner to certify a particular origin, production method or other characteristic of a product. They differ from trademarks in that a) they are not used by their owner, rather the owner *authorizes* their use⁵ and b) they are used to indicate origin in a group of producers, rather than one producer in particular. However, they are similar to trademarks in that they indicate a certain quality of the goods bearing the mark and they certify that the product meets standards established by the mark's owner. Certification marks are used in the United States for products like *Roquefort cheese* from France and *Banshu Somen noodles* from Japan.

Geographical Indications and Public Perception:

Geographical indications are valuable to producers from particular regions for the same reason that trademarks are valuable - they identify the source of a product. They are also indications of quality, business interests, and intellectual property eligible for relief from infringement and/ or unfair competition. Advertising is necessary, but not sufficient to create a public perception of quality; it takes

many years to develop a reputation around a GI. GI's cannot simply be declared like a patent or a trademark. They can only enhance sales of a product if the term has a certain positive reputation in the mind of the consumer in export markets. In situations where a product is not already known, simply extending the level of protection afforded wines is not likely to result in immediate financial gains.

Any legal action against the unauthorized use of a GI (for products other than wines and spirits) based on unfair competition will be successful only if the GI in question has acquired a distinctive reputation with the consumer. Proving the distinctive reputation of a GI would have to be done with every accusation of unfair commercial practice. Producer organizations with limited resources that hold GI's might find it more difficult than private entities that own trademarks to mount this kind of challenge.

Furthermore, because infringement of GI's can involve deceit in addition to falsehood, proving infringement of GI's can be more difficult than for trademarks, since deceit is by nature a subjective judgement. Because the use of GI's constitutes a negative right – the prohibition of use of a geographical indication by others – rather than the positive right of a trademark, the 'owner' of a GI must prove that the public has been deceived every time an accusation of misuse occurs. The user of a GI on wine or spirits, on the other hand, needs only to demonstrate that the offending product does not originate in the area claimed by its label.

Geographical Indications and Developing Countries: In the Uruguay Round, developing countries rejected the idea of incorporating intellectual property issues into the negotiations. Similarly, in the Doha Round, most developing countries oppose including GI's in the agricultural negotiations. Most developing countries do not export products that would benefit from GI's, and if an international agreement was negotiated as part of the Doha Round, they fear they might be required to establish legal framework to protect other countries' indications.

There are, however, some developing countries that advocate extending protection to GI's on wines and spirits to other products, including genetic resources and traditional knowledge. India, Pakistan, Egypt, and Indonesia, among others, have submitted proposals to extend the protection afforded to wines and spirits to other products. In their proposals they cite Basmati rice, Darjeeling tea, and alphonso mangoes. These countries have demanded that the extension be expedited so that benefits arising out of the Agreement emerge more quickly.

⁴As mentioned earlier, the TRIPS Agreement offers an exception if the trademark was registered in "good faith" before a certain date.

⁵ "Owners" of certification marks are often governments or bodies appointed by governments.

One of the reported triggers for developing country support of enhanced GI protection for foods were the registrations of US patents on Basmati and jasmine rice lines. In response, to the attempted registration, India established a Basmati Development Fund to monitor trademark applications for Basmati rice or other deceptive variations, which has subsequently successfully identified and challenged fifteen registrations. If issues relevant to intellectual property rights of genetic material continue to be linked to the GI's debate, it is likely to further complicate efforts to negotiate enhanced GI protection under the agricultural negotiations.

In principle, protecting GIs should be valuable to countries whose economies are based on agriculture. As the food industry becomes more global and as food products become more homogenized, food products' land-based association is becoming weaker. Yet, a counter-trend is emerging, which places a premium on locally grown and artesianal foods. By emphasizing the link between place and product, communities producing regionally distinctive goods want to develop niche markets, at least among consumers who wish to purchase such products. These niche markets are certainly limited—in most developed countries locally produced, artesianal and organic products account for less than 10 percent of the total food market—but they can be economically lucrative. However, exploiting these niches requires not only protected product designations, it also requires extensive marketing to develop a positive reputation and extensive policing to protect against counterfeiting.

Some developing countries see Gl's as a potential rural development tool. They believe that a GI would add value to local production, particularly for products like coffee and tea (and increasingly, chocolate), commodities that are commonly grown in the developing world and where marketers (and consumers) are beginning to distinguish between products from different origins. They believe that a GI product would bring in more income than traditional raw commodity exports. It is not clear, however, why existing protections for foods would be inadquate to allow developing countries to lay claim to GI's such as Kenyan coffee or Darjeeling tea.

Another reason some developing countries have supported moves to strengthen GI provisions for food involves the potential to protect traditional and indigenous knowledge. Some developing countries argue that GI's are more amenable to the practices of indigenous communities than are the private property rights associated with patents and trademarks. With GI's, knowledge remains in the public domain. No private entity (firm or individual) exercises monopoly control over the knowledge embedded in the protected product. Yet, precisely because the knowledge

covered by a GI is not 'owned' it can be misappropriated by others.

It is also argued that GI's are also more consistent with practices in indigenous communities because rights are held in perpetuity. These exclusive rights do not expire as with patents. Furthermore, the scope of the protection is circumscribed. The 'holders' of the GI do not have the right to assign the indication (unlike holders of a trademark, which may license it to other firms.) The underlying value of GI's – the idea that they have a higher value because of the geographical location where they are produced - automatically prohibits the use of the indication on 'similar' goods originating from outside the geographical area.

Finally, GI's are seen to be free of the adverse socioeconomic results of corporate control over intellectual property rights. However, the fact that the vast majority of GI's are held by three or four developed countries that are trying to protect their existing rights from usurpers undermines that particular argument. Protection afforded by GI's does not protect the knowledge embodied within the product, or the associated production process. Therefore, GI protection is neither a guarantee against the misappropriation of traditional knowledge, nor are other strategies to protect traditional knowledge precluded by the use of a GI. Finally, the use of certification marks could well be consistent with existing social and cultural norms in developing countries.

Costs and Benefits of Extending Additional GI Protections to Foods

Producers: The most valuable result of enhancing GI protection for foods would give WTO members legal means to prevent the use of any GI not originating in the member country itself by disallowing the use of modifying language, such as 'like' or 'style.' If producers have GI's to protect, other than for wines and spirits, they could benefit from enhanced protection This assumes that the country can afford to protect its GI's domestically, and that it can afford to protect imported GI products. However, as discussed in the previous section, the authorization of a GI does not bring immediate benefits. Producers must be prepared to continuously protect against counterfeiting. The existence of a GI on a particular food does not mean an end to the problem of counterfeiting. In fact, it means there will be even more incentive on the part of others to counterfeit protected products.

According to the TRIPS Agreement, a GI can be protected even if the name is not the name of a place on earth. But, because it has never been interpreted in a dispute settlement proceeding, the use of indications that are varietal names (such as jasmine or Basmati rice) has not been

tested. Also untested is whether GI's can refer to an entire country (whether historical or current), or must refer to a territory or locality. Thus, it has not been tested whether Ceylon tea or Thai rice would be allowed under the TRIPS Agreement as written.

Moreover, developing countries might gain GI's for some products, but lose GI's that are important to other producers (for example Indian producers might gain a GI for Basmati rice, but lose on mozzarella made in India). Not only might this close off market access for current producers, it could hinder the development of future markets.

There is certainly a risk that, over time, some GI's could become generic if not specifically protected now. Those who oppose extending GI's to foods argue that this risk is overstated, and maintain that genuine GI's will always command a premium. It is not clear whether the lack of proper protection rendered these terms 'generic' or whether insufficient policing by the original holders is responsible. Regardless, many of the potential benefits of a higher level of protection for foods would not come to fruition. Terms that have already become generic (such as Cheddar) would be exempt from enhanced GI protection in any case.

National Governments: Under international law, countries must enforce GI's within their home market in order to place their own GI's under international protection. This provision is particularly important for developing countries that may not have the means to enforce a GI in the domestic market, even if a domestic product might comply with the definition. In fact, there are not many non-European countries with systems in place to protect GI's. India, one of the larger developing countries with a strong legal infrastructure, only recently enacted national laws for geographical indications.

Implementing any new law entails administrative costs. Because the TRIPS Agreement leaves the actual implementation decision to WTO Members, it is not clear how much a higher level of protection for foods would actually cost. However, it is certainly clear that the cost would fall most squarely on developing countries that wish to protect a handful of Gl's but do not have an adequate system in place to protect the hundreds of Gl's already in existence on foreign products. Extending the level of protection to foods does not in and of itself entail new costs, but would impose new costs to those countries that want to claim Gl's on foods for the first time. However, extending the type of protection afforded wine and spirits under the TRIPS Agreement could lower the legal costs of enforcing Gl's by making enforcement decisions less subjective.

Part of the administrative burden could also involve establishing a multilateral registry of GI's similar to that being negotiated for wines and spirits. Advocates of enhanced GI protection argue that the trademark system is more expensive for small users than an international registry. They maintain that a multilateral registration system is necessary to effectively protect Gl's, in part because Gl's and trademarks are fundamentally different intellectual property rights. A trademark system does not protect Gl's against abusive use in translated forms, or in connection with modifiers, such as 'style' or 'like'. Since this system is still under negotiation for wines and spirits, it is difficult to assess the costs and benefits of extending Gl's to other food products.

Some argue that rather than imposing a complex, costly, multilateral agreement, pragmatic solutions to particular problems should be developed. There are clearly examples where bilateral solutions between individual countries may be more effective and less costly and burdensome than extending a complex, multilateral agreement to all countries and all products.

Consumers: WTO members opposed to enhanced GI's on foods argue that many terms consumers now use to identify products will disappear, thereby increasing consumers' search and transaction costs, at least in the short to medium term. Demandeurs argue that consumers are entitled to real choice based on correct indications. Prohibiting the use of translated names or the use of the words 'like' or 'style' will allow consumers to quickly determine the authentic origin of a product. They further argue that very few products will be affected, due to the generic exemption that applies to both foods and wines. It is likely that consumers would benefit from more clarity, but neither these benefits (nor short-term costs) have been evaluated.

Trade: Like other intellectual property rights, GI's permit the right holder to exclude or prevent others from using the same expression in all products other than those produced where the GI applies. Extending protection to foods would prevent other producers from 'free-riding' on some GI's. In many cases, those prevented from using these terms will be from so-called New World countries, where immigration, colonization and cultural diffusion led the use of similar names and production practices used in the 'home country'. It is important to note, however, that even extending enhanced GI protection to foods will not prevent those products from being produced and sold.

Finally, for many WTO members, the goal of the Doha Round agricultural market access negotiations is to increase market access. They argue that including GI's under the market access negotiations would result in reduced – not increased – market access.

Observations

- 1. Despite the intense political interest in GI's by many WTO members, outside of legal circles there is little scholarly attention being given to the subject. There are few substantive, economic assessments of how GI's are functioning in practice. There are few evaluations of the costs and benefits associated with extending the protection now being negotiated for wines and spirits to foods. It is not clear how and to what extent growers, processors, manufacturers, traders and consumers have benefited from the existence of GI's in countries where such protection exists. There is also no assessment of how these costs and benefits are distributed across different groups. There has been no analysis of the costs and benefits of enhancing the level of GI protection for foods, nor any assessment of how those costs and benefits would be distributed between developed and developing countries, or between producers and consumers.
- 2. The system of notification and registration for wines and spirits has not yet been agreed or implemented. It is not known how this system would work in practice, nor is it clear what the implications of a voluntary versus a mandatory system would be for countries who do not now enforce GI's in their home markets.
- 3. It is not clear that extending the system now being negotiated for wines and spirits would substantially improve enforcement of GI's on foods. Moreover, it has not been demonstrated that there are real problems associated with GI's on foods that cannot be addressed through the existing TRIPS Agreement.
- 4. It is not clear that negotiating GI's on foods (not to mention handicrafts and other manufactured products) outside of the TRIPS negotiations is necessary. The relationships between various articles in the TRIPS agreement on GI's, along with the implications of the exemptions is complicated and should be considered in the context of other intellectual property rights debates, not isolated for foods in the agricultural negotiations.



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