

**NO MORE WHINING ABOUT  
GEOGRAPHICAL INDICATIONS:  
ASSESSING THE 2005 AGREEMENT  
BETWEEN THE UNITED STATES AND  
THE EUROPEAN COMMUNITY ON  
THE TRADE IN WINE**

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## I. INTRODUCTION

### *A. The Winds of War*

On March 10, 2006, the United States and the European Community entered into the Agreement between the United States of America and the European Community on Trade in Wine (the Wine Agreement).<sup>1</sup> With this agreement, the European Community and the United States averted an intercontinental “Wine War” concerning the treatment of wine imports<sup>2</sup> that had been looming for 22 years.<sup>3</sup> Specifically, the Wine Agreement attempts to settle differences concerning winemaking practices and the labeling of a wine’s place of origin, yet the parties remain far apart on these issues.<sup>4</sup>

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1. See Press Release, U.S. Trade Rep., United States and European Community Reach Agreement on Trade in Wine (Mar. 10, 2006), [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2006/March/United\\_States\\_European\\_Community\\_Reach\\_Agreement\\_on\\_Trade\\_in\\_Wine.html](http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States_European_Community_Reach_Agreement_on_Trade_in_Wine.html) [hereinafter March Wine Agreement Press Release].

2. Christian Charcossey, *US Threatens Wine War with EU*, BUS. REPORT, June 23, 2005, <http://www.busrep.co.za/index.php?fSectionId=566&fArticleId=2583675>.

3. Daniel Sogg, *Agreement Smooths Over Rough Spots in Wine Trade Between America and Europe*, WINE SPECTATOR ONLINE, Sept. 16, 2005, [http://www.winespectator.com/Wine/Features\\_Print/0,2462,2904,00.html](http://www.winespectator.com/Wine/Features_Print/0,2462,2904,00.html).

4. See Press Release, U.S. Trade Rep., United States and European Community Reach Agreement on Trade in Wine (Sept. 15, 2005), [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2005/September/United\\_States\\_European\\_Community\\_Reach\\_Agreement\\_on\\_Trade\\_in\\_Wine.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/September/United_States_European_Community_Reach_Agreement_on_Trade_in_Wine.html) (discussing the issues the agreement does not address).

At the center of the ongoing conflict between the United States and the European Community is a fundamental disagreement about how a wine's origin should be described to the consumer and legally protected.<sup>5</sup> While the United States has relied on trademark law to regulate the description of a wine's origin, the European Community has established and advocated a system of "geographical indications," separate and apart from trademark designations, to identify the historically recognizable sources of wine.<sup>6</sup> Geographical indications, which are not limited to wine, are protected geographical references which evoke a certain quality and character of the products arising from a given region.<sup>7</sup> For example, the European Community would assert that Tott's California Champagne should be barred from the market because it misleads the customer: according to the European view, "champagne" describes not just any sparkling white wine, but sparkling white wine made from chardonnay grapes grown in the Champagne region of France.<sup>8</sup>

The European Community's emphasis on geographical indications derives from the belief that wine is more than an ordinary agricultural product made from grapes. European wine producers and connoisseurs employ the term *terroir* to reflect the concept that a wine's taste evokes the artistic talents of the winemaker as well as the "[c]limate, soils, drainage, elevation, slope, [and] sun exposure" of the land on which the grapes are grown.<sup>9</sup>

This taste is found in the minerality of a lean, lemony Chablis made from Chardonnay grapes grown in limestone soils in northern Burgundy. It's in the smoky, meaty notes of a Syrah from the Cote Rotie ("roasted

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5. See Stacy D. Goldberg, Comment, *Who Will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications*, 22 U. PA. J. INT'L ECON. L. 107, 107, 136 (2001).

6. *Id.* at 108–09, 135–36.

7. See Agreement on Trade-Related Aspects of Intellectual Property Rights, § 3, art. 22(1), Apr. 15, 1994, 33 I.L.M. 1125, 1205 (1994) [hereinafter TRIPS].

8. See Linda Murphy, *Recognizing Wine's Taste of Place*, S.F. CHRON., Aug. 4, 2005, at F1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/08/04/WIG1LE1N351.DTL&type=printable>.

9. *Id.*

slopes”) in France’s Rhone Valley. It’s in the pungently herbal character of a Sauvignon Blanc made in New Zealand’s cool, marine-influenced Marlborough region. It’s in the dark berry, pepper and spice in an old-vine Dry Creek Zinfandel made in sun-baked Sonoma County.<sup>10</sup>

More practically speaking, however, the European Community’s advocacy for the protection of geographical indications should be understood as a desire to protect Europe’s historical dominance of the global wine market at a time of increasing threats from America and other “New World” producers in places such as Australia, New Zealand, South Africa, and Chile.<sup>11</sup> In this way, European advocacy of the use of geographical indications can be interpreted as an agricultural subsidy to one of its most important sources of economic output.<sup>12</sup>

### *B. The Decline of European Dominance*

Despite Europe’s historical control over the world’s wine trade, several factors have coalesced to place the European market position in peril. First, Europe’s wine producers face

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10. *Id.*

11. See Goldberg, *supra* note 5, at 107, 110, 144; see also Maureen Benson-Rea, Roderick J. Brodie & Wayne Cartwright, *Strategic Issues Facing the New Zealand Wine Industry in a Global Environment*, <http://www.unisa.edu.au/winemarketing/conferences/docs/File028.pdf> (2003). In 2004, Italy, France, and Spain, the three largest wine producing countries in the world, combined for a 59% share of the world’s wine exports. See U.S. DEPT OF AGRIC., WORLD WINE SITUATION AND OUTLOOK 3, 5 (2005), <http://www.fas.usda.gov/agx/Processed/Wine/Circulars%20and%20Reports/WorldWineSituationandOutlookApril2005.pdf> [hereinafter DOA OUTLOOK] (listing 2004 market share as 21% Italy, 19% France, and 19% Spain). Wine production is a significant driver of the economies of these traditional wine producing countries. See Corie Brown, *Who’s Killing the Great Wines of France?*, L.A. TIMES, Mar. 2, 2005, at F1 (asserting that in France wine represents 12% of agricultural production and \$9.9 billion (USD) of gross domestic product).

12. Goldberg, *supra* note 5, at 144–45 n.215; Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France’s Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29, 62 (1996). Chen argues that the driving force behind France’s geographical naming standards is an effort to maximize producer income by enabling “farmstead-to-doorstep domination of discrete product markets.” Chen, *supra* at 36. Consumer protection is of only secondary importance. See *id.* at 62.

declining domestic consumption.<sup>13</sup> For example, in France, where wine had traditionally been served with every meal, concerns about the health effects of alcohol and increased dissatisfaction with the taste of wine have relegated it to a beverage reserved for special occasions.<sup>14</sup> By contrast, wine consumption in the United States has steadily increased since 1996.<sup>15</sup> Americans are embracing the “lifestyle associated with fine wine and food” and have begun to seek out better quality wines while moving away from cheaper jug-quality products sold in supermarkets.<sup>16</sup>

Next, although greater demand in the United States would seem to present an opportunity for European wine producers, American consumption patterns and market forces have created a barrier to the entry of European wines. When compared to European competitors, American winemakers are able to meet the American wine consumer’s quality-driven needs at a much more reasonable price point due to an increased grape supply and the concomitant decreased price of winegrapes.<sup>17</sup> In addition, European wine producers are hamstrung by a weak dollar-to-euro exchange rate which increases the cost of European wines in the United States.<sup>18</sup>

European wine producers are facing stiff competition in the United States not only from higher quality American wines but also from wines produced in other New World countries.<sup>19</sup> For

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13. Kym Anderson et al., *The Global Picture*, in THE WORLD’S WINE MARKETS 14, 14, 26 (Kym Anderson ed., 2004).

14. PIERRE SPAHNI, THE INTERNATIONAL WINE TRADE 54–55 (2d ed. 2000).

15. Daniel A. Sumner et al., *North America*, in THE WORLD’S WINE MARKETS, *supra* note 13, at 187, 192.

16. Philip Martin & Dale Heien, *The California Wine Industry: Entering a New Era?*, 7 U.C. GIANNINI FOUND. AGRIC. & RESOURCE ECON. UPDATE 5, 5 (Mar./Apr. 2004). See discussion *infra* Part I.D.2 for a more detailed discussion of the trends in American wine consumption.

17. Martin & Heien, *supra* note 16, at 5–6; see also Gordon T. Anderson, *Can Anything Save French Wine?*, CNN MONEY, Aug. 23, 2004, [http://money.cnn.com/2004/08/19/pf/goodlife/french\\_wine/index.htm](http://money.cnn.com/2004/08/19/pf/goodlife/french_wine/index.htm).

18. See DOA OUTLOOK, *supra* note 11, at 3. In addition, European governmental controls on grape production that seek to improve the quality of wines produced have led to higher prices for European wines worldwide. See *id.* at 4.

19. See *id.* at 3. New World countries were settled by European immigrants; therefore, they share a common style of fresh and fruity wine. Martin & Heien, *supra*

example, while France has been losing market share in the United States over the past few years,<sup>20</sup> “the main culprit” for this decline was not American producers, but New World wines from Australia and Chile that “together managed to roughly double their value share of US imports” in the 1990s.<sup>21</sup> Australia has been particularly successful in the U.S. market: the importation of Australian wines to the United States has increased by roughly 20% in 2004.<sup>22</sup>

Part of the success of these New World wines is due to the “integrated operations” of the winemakers that combine both grape growing and wine making within a single corporate entity.<sup>23</sup> By integrating grape growing and wine production, as well as embracing technology, New World winemakers have produced wines that are more consistent in quality than those of their European competitors.<sup>24</sup> Further, New World wine producers have been better able to capitalize on the American consumer’s strong affinity for brand. “Australian brands like Yellow Tail and the Little Penguin, created and packaged for American tastes, have been tremendous successes [in the United States]. Where the grapes are grown is not important, just what’s in the bottle—easy-going, fruity, inexpensive wines that have a consistency of quality.”<sup>25</sup> The American identification of

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note 16, at 7. In the 1970s, European producers reacted to the New World’s entrance into the American market by taking the competition head-on and producing similar wines. See *Weekend Edition Sunday: In Italy’s Wine Regions, a Return to Tradition* (NPR radio broadcast Oct. 16, 2005). For example, in Italy, an influx of American expatriate winemakers emphasized using technology to create fruit-forward, nontraditional blends aimed at the international markets. *Id.* It was during this “wine revolution” that the Super Tuscan blend was born. *Id.* More recently, because European wines are being priced out of the international markets by New World competitors, European producers have begun to refocus their efforts on creating wines that are true to the *terroir*. *Id.*

20. SPAHNI, *supra* note 14, at 134–35; see also Anderson, *supra* note 17.

21. *Id.* at 140. New World countries, which have experienced a recent boom in the U.S. market, include Australia, Argentina, South Africa, and Chile. See DOA OUTLOOK, *supra* note 11, at 21–26; see also Martin & Heien, *supra* note 16, at 7 (discussing the wine production of these countries).

22. See DOA OUTLOOK, *supra* note 11, at 22. By contrast, the quantity of French exports to the United States fell 6% in 2004. *Id.* at 17.

23. Martin & Heien, *supra* note 16, at 8.

24. *Id.*

25. Murphy, *supra* note 8; see SPAHNI, *supra* note 14, at 79 (asserting that

brand as a marker of quality facilitates the impulsive nature of the typical American wine purchase experience: the American consumer purchases wine, on average, only three hours before consumption.<sup>26</sup>

### C. Increased U.S. Presence in Europe

Although the United States remains a major market for European wines, America has become a serious competitor for the European wine consumer.<sup>27</sup> In total, the United States exported \$794 million in wine and wine products worldwide in 2004, a 28% increase over the previous year.<sup>28</sup> European imports of American wine in 2004 accounted for roughly 61% of U.S. exports in value (more than \$484 million).<sup>29</sup> And while American wines have traditionally had trouble penetrating the markets of Europe's largest wine producers, an increased amount of American wine was imported to Italy, France, and Spain in 2004.<sup>30</sup> American wines were particularly successful in Italy; in 2004, exports of U.S. wine to Italy increased "over [one thousand] percent in value to \$12.5 million and of over [two thousand] percent in quantity to 20.8 thousand hectoliters [hl]."<sup>31</sup> Imports of American wine by France and Spain have also increased steadily over the past several years.<sup>32</sup>

There are two reasons for increased American success in the European market. First, American winemakers have dramatically increased the quality of their product so that they

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"nowhere in the world are brands so important and fads so full of consequences" as among the American wine consumers).

26. See SPAHNI, *supra* note 14, at 79. Like their fellow New World competitors, American wine producers have also been successful at exploiting the benefits of building a strong brand presence. See *id.* at 79–80. America's largest wine producer E. & J. Gallo has flourished in its efforts to reposition its brands as premium, rather than jug-quality, wines. *Id.* at 91.

27. See DOA OUTLOOK, *supra* note 11, at 17–20.

28. *Id.* at 8. The United States is currently the world's fourth largest wine producer. Martin & Heien, *supra* note 16, at 7.

29. See DOA OUTLOOK, *supra* note 11, at 8. Great Britain is by far the largest European importer of American wines, comprising 32% of all U.S. wine exports. *Id.*

30. See *id.* at 17–21.

31. *Id.* at 19.

32. See *id.* at 18, 20.

can finally compete “cork to cork” with European producers.<sup>33</sup> Second, given the similar quality of American and European wine, significant price differences make American wine a much better value; “[i]n 2000–2002, the average U.S. wine export unit value was less than [two dollars] per litre, compared with around [four dollars]” for European imports into the United States.<sup>34</sup> As noted above, American winemakers have been able to produce wine more cheaply than their European counterparts as a result of increased grape supply.<sup>35</sup> In addition, the current value of the dollar as compared to the euro amplifies price differences in the product.<sup>36</sup>

#### *D. The American Wine Market*

##### *1. The Development of the Industry*

The U.S. wine industry arose with European colonization.<sup>37</sup> After early efforts to establish wineries in the East failed, the spread of Spanish missionaries to California, the 1849 Gold Rush, and the ascendance of California to statehood resulted in an increase in American wine production from 9,462 hl in 1850 to 1.55 million hl in the early 1900s.<sup>38</sup> Roughly 85% of U.S. wine production between 1904 and 1908 came from California.<sup>39</sup> The

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33. See *American Wine Comes of Age*, TIME, Nov. 27, 1972, <http://www.time.com/time/magazine/article/0,9171,944560-1,00.html> (discussing how the increased quality of and respect for American wine was competitively advantageous to American winemakers as early as 1972).

34. Sumner, *supra* note 15, at 187, 203.

35. See Martin & Heien, *supra* note 16, at 6.

36. Sumner, *supra* note 15, 187, 206–07 (asserting that a strong U.S. dollar would bring higher price differences and increased competition from other New World winemakers).

37. *Id.* at 188.

38. See *id.* at 188–89. The emergence of the California wine industry in the mid-nineteenth century did not occur without setbacks. SPAHNI, *supra* note 14, at 76. “[W]idespread fraudulent practices by East Coast wine merchants, notably the mislabeling and marketing of California wines as European products, and the burst of the financial bubble of the 1870s . . . spared only a third of California’s 139 wineries.” *Id.*

39. Sumner, *supra* note 15, at 189. Early California wine was marketed to miners and was of low quality. *Id.* at 188–89. During the first part of the twentieth century, a tremendous influx of immigrants from European wine producing regions provided the

prohibition movement between 1920 and 1933 severely stunted the U.S. wine industry; nearly all of California's seven hundred commercial wineries were forced to close their doors while the 18th Amendment to the U.S. Constitution, which implemented the prohibition of alcohol, was in effect.<sup>40</sup> Today, California is responsible for more than 90% of total U.S. wine production.<sup>41</sup>

Once Prohibition ended, the American wine industry experienced a rebirth.<sup>42</sup> Population growth as well as an increase in California's wine quality during the 1960s and 1970s resulted in a per capita increase in yearly wine consumption from 3.5 to 8 liters between 1950 and 1980.<sup>43</sup> After stagnant to declining American table wine<sup>44</sup> consumption in the mid-1980s, consumption in the United States has steadily increased from the mid-1990s to present.<sup>45</sup>

## 2. *Current Trends in American Consumption*

Much of this increase in wine consumption is due to the maturation of the baby boomers who have allocated a significant portion of their increased disposable income to the exploration of high quality food and wine.<sup>46</sup> In addition, an improved American economy has fostered increased wine purchases.<sup>47</sup> Finally, many scholars attribute the growth in American wine consumption to the November 1991 *60 Minutes* television broadcast concerning

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technological know-how and demand for higher quality wines from this region. *Id.* at 189.

40. U.S. CONST. amend. XVIII (repealed in 1933); Sumner, *supra* note 15, at 189–90.

41. Wine Institute, Wine Production, [http://www.wineinstitute.org/communications/statistics/wine\\_production\\_key\\_facts.htm](http://www.wineinstitute.org/communications/statistics/wine_production_key_facts.htm) (last visited Mar. 25, 2006).

42. Sumner, *supra* note 15, at 187.

43. *Id.* at 191. Despite a steady growth in American wine consumption after the Prohibition, the industry experienced a noticeable lag in the mid 1970s. *Id.* at 191–92.

44. The term “table wine” refers to still wine that is less than 14% in alcohol by volume. *Id.* at 191.

45. Wine Institute, Wine Consumption in the U.S. 1934–2004, [http://www.wineinstitute.org/communications/statistics/consumption1934\\_99.html](http://www.wineinstitute.org/communications/statistics/consumption1934_99.html) (last visited Mar. 25, 2007).

46. Martin & Heien, *supra* note 16, at 5.

47. John Love, *The U.S. Wine Market Uncorked*, AGRIC. OUTLOOK, Aug. 1997, at 12.

a study of the French diet that found a correlation between moderate consumption of red wine and a lower incidence of coronary heart disease among the French.<sup>48</sup> This phenomenon is known as the “French Paradox.”<sup>49</sup>

Along with the upward trend in consumption has come a shift in wine purchase patterns by American consumers from lower quality “jug” wines to higher quality bottles.<sup>50</sup> The high-end premium segment has been the most rapidly expanding segment of the U.S. wine market; between 1980 and 2001, the volume share of high-end premium bottles has increased from less than seven to 20%.<sup>51</sup> This preference for high-end premium bottles, characterized by a movement from white and blush wines to red wines,<sup>52</sup> has entailed a necessary shift away from jug wines.<sup>53</sup> Between 1991 and 2001, the share of jug wine as a percent of total volume consumed in the United States fell from 65% to 36%.<sup>54</sup> Jug wines typically bear labels describing wines with “semi-generic” terms such as Chablis or Burgundy.<sup>55</sup> By

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48. See Martin & Heien, *supra* note 16, at 5; see also SPAHNI, *supra* note 14, at 79 n.90 (describing the television broadcast and the immediate 45% increase in wine sales compared with the previous year).

49. Martin & Heien, *supra* note 16, at 5.

50. See *id.* at 5 tbl.1 (charting growing sales among higher quality wines and falling sales among jug wine). The U.S. government, unlike the European Community, does not impose wine quality standards, and as a result, retail price has emerged as the chief indicator of quality. Jon A. Fredrikson, *The Context for Marketing Strategies: A Look at the U.S. Wine Market*, in SUCCESSFUL WINE MARKETING 47, 52 (Kirby Moulton & James Lapsley eds., 2001). The lowest quality tier, jug wine, consists of all wines which sell for less than \$3 per 750-mililiter bottle. *Id.* Popular-premium wines sell between \$3 and \$7 per bottle. *Id.* Finally, high-end premium wines include superpremiums (\$7 to \$14 per bottle) and ultrapremiums (over \$14 per bottle). *Id.*

51. Sumner, *supra* note 15, at 194. As further testimony of this dramatic shift in purchase habits, there has been more than a 600% increase in the number of cases of ultrapremium wine sold in the United States between 1991 and 2001. See Martin & Heien, *supra* note 16, at 5 tbl.1.

52. Fredrikson, *supra* note 50, at 52–53.

53. See Martin & Heien, *supra* note 16, at 5.

54. *Id.* Indeed, increased purchases of high-end premium bottles have helped to offset the drop-off in jug wine consumption, which otherwise would have severely flattened the trend in total U.S. wine consumption. SPAHNI, *supra* note 14, at 84.

55. See SPAHNI, *supra* note 14, at 84; see also Martin & Heien, *supra* note 16, at 5 (classifying Chablis and Burgundy as jug wines). For now, the reader need only

contrast, the high-end premium category wine labels describe the product by the variety of grape from which the wine was derived.<sup>56</sup>

### 3. *The American Wine Producers*

American wine production is characterized by a remarkable degree of consolidation, with the Big Three (E. & J. Gallo, Canadaigua, and the Wine Group) accounting for roughly 60% of all wine shipped in the United States.<sup>57</sup> Despite the declining popularity of jug wines, these wines still constitute a strong majority of the Big Three's sales.<sup>58</sup> The continued presence of jug wines on supermarket shelves is due in part to the strong brands under which they are sold and the tremendous brand loyalty for lower segment wine.<sup>59</sup>

The brand affinity for jug wine has been both a benefit and a disadvantage for American producers, as many wineries have struggled to compete in both the jug and higher quality segments.<sup>60</sup> Robert Mondavi was particularly unsuccessful in its venture from the high-end premium market to lower-priced wines when it lent its name to lesser quality wines produced outside of Napa Valley, "the paragon of US wines in the eyes of consumers . . ." <sup>61</sup> Some wineries, however, such as E. & J. Gallo, have been more effective at bridging the gap between jug and high-end premium by slowly disassociating their names

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differentiate between wines described by varietal terms and those identified by generic or semi-generic terms. See *infra* Part II.B.1 (defining the legal term "semi-generic").

56. See SPAHNI, *supra* note 14, at 89.

57. Martin & Heien, *supra* note 16, at 6. In 2004, the top 30 wine companies (ranked by total case sales) comprised over 90% of the U.S. wine market. *The Top 30 US Wine Companies of 2004*, WINE BUS. MONTHLY, Feb. 2005, <http://www.winebusiness.com/SpecialSection/2005/Top30USWineCompanies.cfm>. As a consequence of consolidation, mid-sized wineries are being squeezed out of the business. *Id.*

58. See SPAHNI, *supra* note 14, at 89 (asserting that generics represented 57% of the Big Three's supermarket sales in 1998). Because of the Big Three's strong market presence, semi-generics account for approximately 40% of wines sold in the U.S. market. Sogg, *supra* note 3.

59. SPAHNI, *supra* note 14, at 89.

60. *Id.*

61. *Id.*

from the jug wines.<sup>62</sup> Other producers have sought to tap into the high-end market by creating standalone, premium brands.<sup>63</sup> As briefly discussed above, the New World producers, particularly the Australians and Chileans, have been most adept at capitalizing on the desire for higher quality and filling the “void left by US wineries repositioning themselves into higher price segments. . . largely to the cost of the Old World.”<sup>64</sup>

### *E. The Stakes in the Global Wine Trade*

The conflict between the United States and the European Community over the trade in wine must be analyzed against the changing backdrop of the global wine industry. While Europe retains a strong presence in the American market, increased competition from other New World producers has resulted in a slip in market share despite increased American consumption and purchasing patterns that would seem to suggest a golden opportunity for the refined European product.<sup>65</sup> Further, American winemakers have increased their presence and reputation in European markets that have traditionally turned up their noses at American wine.<sup>66</sup> The end result is that by September 2005, both the Americans and Europeans had increased incentives to come to a new agreement on the trade in wine and end the 22-year stalemate.

## II. DEVELOPMENT OF LEGAL PROTECTIONS FOR WINE

### *A. European Protection of Geographical Indications*

European efforts to regulate the labeling of wine by place of origin date back to the nineteenth century.<sup>67</sup> In 1824, France became the first country to protect geographical indication by

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62. *Id.* at 91.

63. *Id.*

64. *Id.*

65. See DOA OUTLOOK, *supra* note 11, at 3.

66. See *id.* at 19.

67. Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 312 (1999).

legislation.<sup>68</sup> The legislation sought to deter fraudulent indication of origin by subjecting violators to criminal sanctions.<sup>69</sup> In 1919, the French created the Appellation D'Origine Controlee (AOC) which layered a quality rating system on top of the requirement of accurately representing the true geographical origin of the agricultural product.<sup>70</sup> The AOC system recognized that a wine's place of origin was a product of both "natural and human factors in the particular locale."<sup>71</sup>

With the formation of the European Union, member countries continued their emphasis on origin as they moved from individual, country-specific regulation of the use of geographical indications to a Europe-wide scheme.<sup>72</sup> This system was created in 1989 when the European Union passed Council Regulation Number 2392/89 entitled "Laying Down General Rules for the Description and Presentation of Wines and Grape Musts."<sup>73</sup> Under this legislation, the regulations of wine descriptions apply to both wines produced in the European Community as well as wines originating in third countries.<sup>74</sup> The Council Regulation's primary concern was that descriptions of wine products "must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed . . ."<sup>75</sup>

Accordingly, wines imported into the European Community must meet the strict labeling standards for identification of geographical units as defined by Article 29 of the Council Regulation.<sup>76</sup> Article 29 provides that the "geographical

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68. *Id.*

69. *Id.* at 312-13.

70. *Id.* at 313; *see also* Wine.com, About Appellations, <http://www.wine.com/aboutwine/basics/appellations.asp> (last visited Mar. 25, 2007).

71. Lindquist, *supra* note 67, at 312; *see also* Chen, *supra* note 12, at 32 (describing AOCs as reflecting "seasonal and annual variations in the designated locale's climate").

72. Lindquist, *supra* note 67, at 320.

73. Council Regulation 2392/89, Laying Down General Rules for the Description and Presentation of Wines and Grape Musts, 1989 O.J. (L 232) 13 [hereinafter Council Reg. 2392/89].

74. *Id.* art. 1(1)(b); *see id.* art. 4 (concerning regulation of the use of geographical indications for wines produced by member states).

75. *Id.* art. 40(1).

76. *Id.* art. 26(1)(a).

description” of wine imported into the European Union be conveyed by use of a “geographical unit which denotes a clearly defined wine-producing area: which is smaller than the territory of the third country in question, which produces the grapes from which the product was made, [and] in which grapes yielding wines conforming to standard quality criteria are harvested.”<sup>77</sup>

To add additional protection for the European geographical units, Article 29 stipulates that “[t]he name of a geographical unit used to describe . . . the name of a given region in the Community may not be used to describe an imported wine . . . .”<sup>78</sup> This language bars wines produced in third countries from using terms such as “style” to link the product to a recognized quality of wine produced in another geographical unit.<sup>79</sup> The European approach to protecting geographical indications is particularly important given the degree to which the most recent international agreement on the use of geographical indications, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994,<sup>80</sup> embodies similar protections.<sup>81</sup>

### *B. American Protection of Place of Origin*

Currently, the Bureau of Alcohol, Tobacco, and Firearms (BATF) is chiefly responsible for regulating the labeling of wine sold in America.<sup>82</sup> Compared to the European regulation of

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77. *Id.* art. 29(1)(a).

78. *Id.* art. 29(2).

79. *See id.* art. 28(1) (“Only the information specified in Articles 25, 26 and 27 shall be allowed for the description on the labeling of products originating in third countries.”). Thus, a California winemaker who designates his product as “Bordeaux style” would be precluded from selling his wine in the European Community. As a concession to products in violation of this Regulation that have a U.S. trademark, the owner of a U.S. trademark was permitted to continue to use the trademark until December 31, 2002. *Id.* art. 40(3).

80. TRIPS, *supra* note 7, § 3.

81. *See* Goldberg, *supra* note 5, at 141–42 n.195 (asserting that the Council Regulation “is significant because of the corresponding subject matter in Articles 23 and 24 of TRIPS”). The TRIPS agreement will be discussed in greater detail. *See infra* Part II.C.2.

82. *See* 27 C.F.R. § 4.1 (2006) (giving a general overview of § 4, which promulgates rules for the labeling and advertising of wine).

geographical indications, the American system of law is notable for its de-emphasis on place of origin.<sup>83</sup> This devaluation of geographical indications resulted from the practices of America's earliest winemakers.<sup>84</sup> In the early nineteenth century, European immigrants brought with them cuttings from vines in Europe.<sup>85</sup> Influenced by the traditional European emphasis on place of origin, these pioneer wine producers identified their product by the region from which the vine cuttings were taken.<sup>86</sup> As a result, these geographical indications gradually lost their specificity and instead came to represent a generic "type" of wine rather than a particular product of known quality from a specific place.<sup>87</sup>

### 1. *BATF Regulations*

With respect to the identification of geographical origin, BATF separates such names into three different classes: generic, semi-generic, and nongeneric.<sup>88</sup> A geographical indication is deemed "generic" if the name, while "originally having geographical significance," now merely designates a "class or type of wine."<sup>89</sup> Examples include Vermouth and Sake.<sup>90</sup> Semi-generic names are those which currently have "geographical significance" but also designate "a class or type of wine."<sup>91</sup> The use of semi-generic names is limited when the wine is produced from a region other than that indicated by the name; in such a case, the label must designate the wine's true place of origin, and the wine itself must reflect the qualities typically associated with the semi-generic name.<sup>92</sup> Under the BATF's regulations, semi-generic names include Chablis, Champagne, Chianti, and

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83. See Lindquist, *supra* note 67, at 313.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. 27 C.F.R. § 4.24.

89. *Id.* § 4.24(a)(1)–(2).

90. *Id.* § 4.24(a)(2).

91. *Id.* § 4.24(b)(1).

92. *Id.*

Port.<sup>93</sup> Finally, nongeneric names can be subdivided into two categories.<sup>94</sup> First, names which BATF has found to be neither generic nor semi-generic can only be used “to designate wines of the origin indicated by such name.”<sup>95</sup> Examples within this category include American, California, French, and Spanish.<sup>96</sup> Second, nongeneric names become “distinctive designations” when they are “known to the consumer and to the trade as the designation of a specific wine of a particular place or region, distinguishable from all other wines.”<sup>97</sup> Names within this final category include Bordeaux Rouge, Graves, Medoc, and Rhone.<sup>98</sup>

## 2. 26 U.S.C. § 5388: Codification of Semi-Generics

In 26 U.S.C. § 5388, Congress codified the segment of the BATF wine regulations dealing with semi-generics.<sup>99</sup> This section provides that “[s]emi-generic designations may be used to designate wines of an origin other than that indicated by such name” under the same conditions as those set out in the BATF regulations.<sup>100</sup> Accordingly, the wine producer must indicate the “appropriate appellation of origin disclosing the true place of origin,” and the product must meet expected standards for wine produced in the geographic region identified by the semi-generic name.<sup>101</sup> While Section 4.24(b)(2) of the BATF regulations merely provides “examples of semi-generic names,”<sup>102</sup> 26 U.S.C. § 5388 specifically identifies seventeen geographical indications to be treated as semi-generic names.<sup>103</sup> Most notably, Burgundy,

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93. *Id.* § 4.24(b)(2). American tolerance of such terms brings it into direct conflict with Council Reg. 2392/89, which unequivocally forbids the use of “the name of a given region in the Community” on the label of an imported wine. Council Reg. 2392/89, *supra* note 73, art. 29(2).

94. 27 C.F.R. § 4.24(c).

95. *Id.* § 4.24(c)(1).

96. *Id.* § 4.24(c)(2).

97. *Id.* § 4.24(c)(1).

98. *Id.* § 4.24(c)(3).

99. Lindquist, *supra* note 67, at 327.

100. 26 U.S.C.A. § 5388(c)(1) (West 2006).

101. *Id.*

102. *See* 27 C.F.R. § 4.24.

103. 26 U.S.C.A. § 5388(c)(2)(B).

Chablis, Champagne, Chianti, Port, and Sherry are deemed semi-generic.<sup>104</sup>

This piece of legislation was included in the Taxpayer Relief Act of 1997 in response to persistent lobbying from the American wine industry.<sup>105</sup> The lobbyists, which include both individual wineries and wine associations, have supported their position by arguing that consumers rely on semi-generic names to make informed purchases.<sup>106</sup> As a result of this legislation, it is “more difficult for the U.S. Trade Representative to ‘trade away’ the semi-generic names in trade discussions with the European Union.”<sup>107</sup>

### *C. International Cooperation for the Protection of Geographical Indications*

#### *1. Early International Agreements*

The movement to arrive at an international agreement for the protection of geographical indications was initiated by the Europeans in the late nineteenth century.<sup>108</sup> The Paris Convention for the Protection of Industrial Property of 1883 was the first foray into international protection for geographical indications.<sup>109</sup> This convention achieved a large number of signatories, including the United States, due in part to an agenda that was limited in its protection of geographical indications.<sup>110</sup> The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (Madrid Agreement), signed in 1891, initiated stricter measures that

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104. *Id.*

105. Lindquist, *supra* note 67, at 327. The Wine Institute is arguably the American Wine Industry’s most powerful political voice. *See, e.g.*, Press Release, Wine Institute, Wine Institute Encourages Developing “California Message” (Jan. 23, 2006), <http://winebusiness.com/news/DailyNewsArticle.cfm?dataId=41304> (stating that the “Wine Institute is the association of 887 California wineries and affiliated businesses whose members account for 85% of U.S. wine production”).

106. Lindquist, *supra* note 67, at 327–28.

107. *Id.* at 329.

108. *See id.* at 314.

109. Goldberg, *supra* note 5, at 112.

110. *Id.*

sought to “prevent the dilution of geographical indications into generic terms.”<sup>111</sup> Consequently, this agreement achieved far fewer signatories than the Paris Convention; the United States balked at joining this agreement.<sup>112</sup>

The most recent of these early efforts, still in effect today, is the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (Lisbon Agreement).<sup>113</sup> Ratified in 1958, this accord went beyond the Madrid Agreement in its attempt to protect geographical indications.<sup>114</sup> For example, Article 3 of the Lisbon Agreement prohibits the misuse of a term of origin “even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’ ‘imitation,’ or the like.”<sup>115</sup> The most important aspect of this agreement is Article 5, which created an international registration system for the identification and protection of terms designating a product’s place of origin.<sup>116</sup> The harsh terms of the Lisbon Agreement resulted in a dearth of signatories.<sup>117</sup> The United States did not sign this agreement either.<sup>118</sup>

## 2. *Trade-Related Aspects of Intellectual Property Rights*

The first comprehensive and widely supported international agreement on the protection of intellectual property rights was forged during the World Trade Organization’s (WTO) Uruguay Round of the General Agreement on Tariffs and Trade (GATT)

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111. *Id.* at 113.

112. *Id.*

113. Lindquist, *supra* note 67, at 315; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, [http://www.wipo.int/lisbon/en/legal\\_texts/lisbon\\_agreement.htm](http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm) [hereinafter Lisbon Agreement].

114. Goldberg, *supra* note 5, at 114; *see also* Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11, 25–26 (1996) (stating that the Lisbon Agreement’s “focus is not restricted to border measures, as in the Paris Convention or the Madrid Agreement, but also includes adoption of a registration system comparable to that of trademarks. . .”).

115. Lisbon Agreement, *supra* note 113, art. 3.

116. *Id.* art. 5; *see* Goldberg, *supra* note 5, at 114.

117. Goldberg, *supra* note 5, at 115.

118. *Id.*

negotiations.<sup>119</sup> The resulting agreement, TRIPS, came at the urging of the United States, which sought greater international respect for intellectual property.<sup>120</sup> However, while the United States was the driving force behind TRIPS, the inclusion of provisions concerning geographical indications, Articles 22 through 24, was “essentially due to the persistent endeavors of the [European Community] and Switzerland . . . .”<sup>121</sup>

TRIPS has two distinguishing characteristics when compared to the previous international accords on geographical indications discussed above: first, the detailed provisions concerning the enforcement of TRIPS that “promise that protection will be more effective than under any of the previous agreements,” and second, the sheer number of signatories to TRIPS.<sup>122</sup> By its terms, the portion of TRIPS concerned with geographical indications has three primary aims: (1) eliminating the use of false or misleading geographical indications in order to protect the consumer and eliminate unfair competition; (2) precluding, with some exceptions, the “registrability of geographical indications as trademarks,” and (3) preventing geographic terms from becoming generic.<sup>123</sup> The guiding principle throughout this portion of TRIPS is to implement new, substantive standards for protecting geographical indications while sanctioning past developments through the use of exceptions and grandfather clauses.<sup>124</sup>

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119. *Id.* at 116.

120. Lindquist, *supra* note 67, at 315.

121. Conrad, *supra* note 114, at 29–30. The willingness to include protection for geographical indications within TRIPS was a central bargaining chip for the United States in its negotiations with the European Community, as the United States “has virtually no commercially valuable appellations of origin and therefore nothing to gain from joining specific international agreements” concerning protection of places of origin. Chen, *supra* note 12, at 55.

122. Conrad, *supra* note 114, at 31. The signatories to TRIPS include all 149 members of the World Trade Organization (WTO). Goldberg, *supra* note 5, at 116; see also World Trade Organization, Understanding the WTO: The Organization, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Mar. 25, 2007) (indicating that the WTO’s membership was 150 as of Jan. 11, 2007).

123. Conrad, *supra* note 114, at 44–45.

124. See *id.* at 43. In addition, in consideration of the failures of the Madrid Agreement but with an eye to the future, Article 23(4) of TRIPS demands subsequent

*a. Article 22: The Basic Tenets*

Article 22 of TRIPS sets forth the tenets for the international protection of geographical indications.<sup>125</sup> First, Article 22(1) defines geographical indications as “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.”<sup>126</sup> Second, Article 22 also presents a two-pronged rationale for protecting geographical indications.<sup>127</sup> Article 22(2) enables interested parties to prevent use of these terms where such use is “in a manner which misleads the public” or which “constitutes an act of unfair competition” as defined by the Paris Convention.<sup>128</sup>

*b. Article 23: Preventing a Lapse into Generic*

Article 23 of TRIPS concerns the protection of geographical indications for wines and spirits specifically.<sup>129</sup> The principal aim of this section is to prevent geographical indications identifying wines from becoming generic terms.<sup>130</sup> It is often quite difficult to determine when a term designating a place of origin has become generic.<sup>131</sup>

When the geographical name is so widely used that the public comes to understand it as the name for a category of all the products of the same type but not necessarily of a certain origin, the name is not and cannot be protected anymore as a geographical indication. “Moutarde de Dijon” is one example of a geographical name that has become generic throughout the world.<sup>132</sup>

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negotiations for “the establishment of a multilateral system of notification and registration of geographical indications for wines.” TRIPS, *supra* note 7, art. 23(4).

125. TRIPS, *supra* note 7, art. 22.

126. *Id.* art. 22(1).

127. Conrad, *supra* note 114, at 34.

128. TRIPS, *supra* note 7, art. 22(2). The United States opposed including the provision concerning “unfair competition.” Conrad, *supra* note 114, at 34.

129. TRIPS, *supra* note 7, art. 23.

130. Conrad, *supra* note 114, at 38–39.

131. *Id.* at 12.

132. *Id.*

Accordingly, to avoid messy determinations about whether a geographical term is generic and to prevent this transformation altogether, TRIPS prospectively precludes such conversion through two subsections in Article 23.<sup>133</sup> Article 23(1) eliminates the potential for weakening the meaning of geographical indication in the minds of consumers by prohibiting use of adjoining terms such as “kind,” “type,” or “style” along with a geographical indication that is not the wine’s true place of origin.<sup>134</sup> This subsection precludes such wine labeling practices even where the label displays the wine’s true place of origin.<sup>135</sup> Article 23(2) provides for signatories to refuse or invalidate a trademark for wines or spirits which “contains or consists of a geographical indication.”<sup>136</sup>

Exemplifying TRIPS’s practice of grandfathering in past developments of geographical indications, Article 24(6) provides two broad exceptions to Articles 23(1) and (2).<sup>137</sup> The first portion of Article 24(6) provides:

Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term *customary in common language as the common name for such goods or services in the territory of that Member*.<sup>138</sup>

This language precludes any member of TRIPS from adhering to the requirements of Articles 22 through 24 where a geographical

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133. *Id.* at 39.

134. *See* TRIPS, *supra* note 7, art. 23(1).

135. *Id.*

136. *Id.* art. 23(2). A third approach to preventing geographical indications from becoming generic, not adopted by TRIPS, is legally prohibiting “the conversion of geographical names into generic terms.” Conrad, *supra* note 114, at 39. This approach was proposed in the European Community draft but never incorporated into the final document. *Id.*

137. *Id.* at 39–40.

138. TRIPS, *supra* note 7, art. 24(6) (emphasis added). An additional exception under Article 24(4) permits the continued use of a geographical indication that refers to a term of origin found within another member where such use had occurred continuously for ten years prior to April 15, 1994, or for any time preceding the date if done in good faith. *Id.* art. 24(4). This is “tantamount to an acknowledgment that TRIP[S] does not and cannot reverse past developments in the field.” Conrad, *supra* note 114, at 43.

indication of another state is considered generic in the member's state.<sup>139</sup> In this way, Article 24(6) arguably goes beyond simply preventing creation of future generic terms and seemingly creates an exception as large as the substantive rights provided under Articles 22 through 24.<sup>140</sup> One commentator states:

This final exception is so expansive that it virtually eliminates any practical effect on American commercial practice or on the operation of American law. "Champagne" and "port" are precisely the types of geographical indications that are "identical with the term[s] customary in common language as the common name[s]" of wines, cheeses, and other foods in the United States. Within the United States, the BATF, the Patent and Trademark Office, and the Federal Circuit have all concluded that "Chablis" is a more or less generic name for a white wine with certain characteristics. Nothing in TRIPS requires American legal institutions to revisit or rethink this conclusion.<sup>141</sup>

This exception is broadened further by the fact that each member state is seemingly vested with the authority to determine, according to its own laws, whether a geographical indication has become generic.<sup>142</sup>

The second portion of the Article 24(6) exception pertains to geographical indications that share a name with a grape variety.<sup>143</sup> An example that fits this exception is the term "Riesling," which refers to both the light, sweet wine of the Alsace region of Germany as well as the particular grape used to produce this wine.<sup>144</sup> The caveat to this exception, however, is

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139. *Id.* at 39–40.

140. Chen, *supra* note 12, at 57.

141. *Id.*

142. *See id.* ("[N]othing in TRIPS indicates that this determination, effectively a legal ruling that a geographical indication has become generic in a particular jurisdiction, should be performed outside a member state's courts or by reference to any law other than that of the member state.").

143. TRIPS, *supra* note 7, art. 24(6).

144. Conrad, *supra* note 114, at 40. As a testament to the permitted use of the term Riesling among TRIPS signatories, the Author can personally confirm the emergence of many excellent Rieslings from such New World producers as California, Oregon, Australia, and South Africa.

that in order to continue using the geographical indication, the grape variety must have existed “in the territory of that Member as of the date of entry into force of the WTO Agreement.”<sup>145</sup>

*c. Articles 22 and 23: Restricting Trademarks Containing Geographical Indications*

In addition to preventing geographical indications from becoming generic, the geographical indication portion of the TRIPS agreement aims to preclude the future registration of terms of origin as trademarks.<sup>146</sup> This is achieved through two substantive provisions: Article 22(3), which concerns geographical indications for any good, and Article 23(2), which refers to geographical indications for wine and spirits specifically.<sup>147</sup> While the two subsections are similar in language, they differ in so far as Article 22(3) adds a barrier not provided for in Article 23(2):<sup>148</sup> under Article 22(3), a member seeking to prevent the creation of a trademark containing a geographical indication must also prove (in addition to the presence of a geographical indication) that the term “is of such a nature as to mislead the public as to the true place of origin.”<sup>149</sup> By contrast, Article 23(2) places a blanket prohibition on any trademark “which contains or consists of a geographical indication identifying wines or . . . spirits . . . .”<sup>150</sup>

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145. TRIPS, *supra* note 7, art. 24(6).

146. Conrad, *supra* note 114, at 41.

147. See TRIPS, *supra* note 7, arts. 22(3), 23(2). In response to these provisions, “the United States amended its trademark law, effective Jan. 1, 1996, to comply with [these] provisions of TRIPS.” Lindquist, *supra* note 67, at 324. Accordingly, the Trademark Office will not award a mark consisting of a “geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods.” 15 U.S.C.A. § 1052(a) (West 2006). Still, this does not prevent an American wine producer from using a semi-generic term in compliance with 26 U.S.C. § 5388; it only precludes trademark protection for such use. See 26 U.S.C.A. § 5388(c)(1) (West 2006) (“Semi-generic designations may be used to designate wines of an origin other than that indicated by such name . . .”).

148. Conrad, *supra* note 114, at 41.

149. TRIPS, *supra* note 7, art. 22(3).

150. *Id.* art. 23(2). The variance in Articles 22(3) and 23(2) represents a compromise between the European Community and a coalition consisting of the United States, Canada, and Australia. Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123,

Article 24(5) provides two exceptions to Articles 23(2) and 23(3).<sup>151</sup> As a preliminary issue, trademarks that contain geographical indications are permitted as long as the mark “has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith.”<sup>152</sup> The term “good faith” is not defined by the agreement but is commonly thought to mean the party seeking the trademark “did not (and was not required to) know of the rights of other parties.”<sup>153</sup> The exception only applies if the registration for the trademark occurred under subsection (a) prior to the implementation of the TRIPS agreement or (b) before the term of origin was protected in its original country.<sup>154</sup> While subsection (a) is fairly straight-forward, subsection (b) gives rise to policy questions insofar as it provides an “advantage to the countries which have long recognized geographical indications.”<sup>155</sup> In sum, while consistent with the model of grandfathering in previous developments concerning geographical indications, TRIPS’s exceptions for the registration of trademarks containing terms of origin are considerably narrower than their counterparts in the dilution-prevention realm.<sup>156</sup>

As the most recent international accord regarding geographical indications, the TRIPS agreement has served as an important starting point in the latest bilateral negotiations

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166 (1995); accord Conrad, *supra* note 114, at 41 (acknowledging that the agreement “is a compromise between the two concepts”). Article 22(3), which requires a showing of consumer confusion to prevent issuance of the mark, expresses the American philosophy on trademark law “where registration as a trademark is possible if the geographical name has acquired ‘secondary meaning,’ i.e., does not denote merely the origin of the product but also identifies a single business source.” *Id.* On the other hand, with respect to wine and spirits, the agreement adopts the European philosophy of a distinction between geographical indications and the law of trademarks. *Id.*

151. See TRIPS, *supra* note 7, art. 24(5).

152. *Id.*

153. Conrad, *supra* note 114, at 41. This interpretation of “good faith” makes the scope of the exception “considerably smaller, because a geographical name is rarely used without knowledge of its origin.” *Id.*

154. TRIPS, *supra* note 7, art. 24(5).

155. Conrad, *supra* note 114, at 42–43.

156. See *id.* at 41–43.

between the European Community and the United States.<sup>157</sup> Articles 22 through 24 express consensus between the two parties on the basic premise that the consumer should receive product information, which is neither confusing nor misleading.<sup>158</sup> However, regarding geographical indications for wine and spirits specifically, the exception clauses, Articles 24(5) and 24(6), reflect the parties' continued differences about whether such terms of origin deserve special treatment.<sup>159</sup> Further, the grandfather clauses embedded in the text are an acknowledgement that TRIPS cannot undo what has already been done.<sup>160</sup> Instead, as exemplified by Article 23(4), which promises future negotiations regarding an international registration system,<sup>161</sup> a comprehensive agreement was postponed. Finally, and perhaps most important as far as the shape of the bilateral agreement between the United States and the European Community is concerned, the ambivalence of Articles 22 through 24 reflects the fact that this portion of TRIPS was itself a concession by the United States in order to gain European buy-in for the larger agreement on intellectual property rights.<sup>162</sup> American disinterest for protection of geographical indications has continued in subsequent bilateral talks with the European Community.<sup>163</sup>

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157. See Lindquist, *supra* note 67, at 332 (arguing that "the United States [is] obliged to enter negotiations").

158. See Conrad, *supra* note 114, at 29–34 (asserting that the United States "had tried to limit the minimum protection standards to non-generic appellations of origin for wine, if use of such a name would 'mislead the public as to the true origin of the wine'").

159. TRIPS, *supra* note 7, arts. 24(5)–(6); see *supra* text accompanying notes 137–45, 151–56.

160. See Conrad, *supra* note 114, at 11, 40, 42.

161. TRIPS, *supra* note 7, art. 23(4).

162. See Chen, *supra* note 12, at 29, 55.

163. See, e.g., Agreement Between the United States of America and the European Community on Trade in Wine, Sept. 14, 2005, [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file917\\_8030.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file917_8030.pdf) [hereinafter Wine Agreement].

*D. United States and European Community Bilateral Wine Accords*

Bilateral negotiations between the United State and the European Community concerning the trade in wine have been marked by aggressive bargaining tactics and an unwillingness to find a middle ground.<sup>164</sup> The Wine Agreement constitutes the first major movement between the two sides in over two decades.<sup>165</sup>

*1. The Wine Accord of 1983*

Prior to the Wine Agreement of September 2005, wine trade between the United States and the European Community was governed by an accord dating back to 1983 (the Accord).<sup>166</sup> The Accord was embodied in a letter written by John M. Walker, Jr., Assistant Secretary of the U.S. Treasury Department addressed to Mr. Leslie Fielding, Director-General for External Relations for the European Community.<sup>167</sup> The primary purpose of the Accord was to enable increased importation of American wine into the European Community.<sup>168</sup> The majority of the agreement focused on the European Community's willingness to allow the importation of American wines that had been treated with certain approved substances.<sup>169</sup> In addition, the Accord confirmed that the European Community would reexamine

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164. Corie Brown, *Sour Grapes: U.S., Europe in Tussle Over Wine Labeling*, J. GAZETTE (Fort Wayne), Nov. 30, 2003, at Bus.1D, available at 2003 WLNR 13270613.

165. Sogg, *supra* note 3.

166. See Wine Agreement, *supra* note 163; see Lindquist, *supra* note 67, at 324.

167. Letter from John M. Walker, Jr., Assistant Sec'y (Enforcement and Operations), U.S. Treasury Dep't, and Stephen E. Higgins, Dir., Bureau of Alcohol, Tobacco and Firearms, to Leslie Fielding, Dir.-Gen. for External Relations, Comm'n of the Eur. Comtys. (July 26, 1983), <http://www.fas.usda.gov/itp/agreements/euwine.html> [hereinafter Wine Letter]. This letter is considered the United States' official trade document concerning the Accord. Lindquist, *supra* note 67, at 324 n.134. For the European Community, the Accord was pressed into law by virtue of Council Regulation 1873/84. Council Regulation 1873/84, 1984 O.J. (L 176) 6.

168. Lindquist, *supra* note 67, at 324. The 1980s were the infancy of U.S. wine exports. See SPAHNI, *supra* note 14, at 234 fig.5.10 (charting U.S. exports by year). This spike in exports resulted from California production surpluses during the early 1980s, which forced these wineries to find additional markets for their product. *Id.* at 234.

169. Wine Letter, *supra* note 167.

import certification requirements and potentially adapt them to ensure they met U.S. certification requirements for wines intended to be exported to the European Community.<sup>170</sup> Further, the Accord contained an agreement to enter into technical negotiations concerning wine labeling requirements, as well as a statement of mutual understanding on the need to collaborate in future investigations of the wine sector.<sup>171</sup> Finally, the Accord briefly touched on the issue of geographic indications.<sup>172</sup> Specifically, the European Community recognized American viticultural areas.<sup>173</sup> In return, the United States agreed to undertake efforts “to prevent erosion of non-generic designations of geographic significance indicating a wine-growing area in the [European Economic Community].”<sup>174</sup> Although the Accord was originally designed to expire in 1988,<sup>175</sup> it was continually extended in varying increments until 2005.

## 2. *Temporary Extensions and an Escalating “Wine War”*

From 1988 to 1998, through a series of one-year extensions, the European Community temporarily extended the terms of the Accord, thus providing only short-term acceptance of American winemaking practices.<sup>176</sup> In 1998, the Council of the European

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170. *See id.* Certification is the process of detailing lab results on the particular characteristics of a wine, including: acidity, alcohol percentage, and levels of sulphur dioxide (a wine preservative). SPAHNI, *supra* note 14, at 104. It is the normal practice of bilateral agreements for certification to be “accelerated” in the importing country such that the importing country performs “only a few analyses and certification documents delivered by authorities of the exporting country are accepted at face value by the recipient country.” *Id.*

171. *See* Wine Letter, *supra* note 167.

172. *See id.*

173. *See id.* A viticultural area is defined as “[a] delimited grape growing region distinguishable by geographical features.” 27 C.F.R. § 4.25.

174. Wine Letter, *supra* note 167. More specifically, the Wine Letter promised “the willingness of the United States to work within the regulatory framework of 27 C.F.R. § 4.24(c)(3).” *Id.*

175. *See* Council Regulation 1873/84, *supra* note 167, art.1.

176. *U.S. Officials Signal Acceptance of EU Terms in Wine Talks, But Wait for EU*, FOOD & DRINK WKLY., Nov. 2, 1998, available at 1998 WLNR 3673630 [hereinafter *Wine Talks*]. The United States was able to extract these one year extensions because Europe strongly desired to reach a comprehensive wine agreement that addressed a number of

Union agreed to a five year extension of the Accord in return for American promises to enter into formal negotiations on wine issues beginning in 1999.<sup>177</sup> These issues included: efforts by the United States to curtail the use of semi-generic names, European acceptance of United States winemaking practices, and the reduction in European tariffs due to the wide trade gap between the two parties.<sup>178</sup> Still unable to arrive at an agreement, on December 17, 2003, the Accord was once again extended, this time until December 31, 2005.<sup>179</sup>

Tensions between the two sides heightened considerably during recent years.<sup>180</sup> In October 2002, the House passed the Miscellaneous Trade and Technical Corrections Act of 2002 which increased pressure on the European Community to come to an agreement.<sup>181</sup> Section 2003 of this legislation would have required American importers to comply with onerous certification requirements for every bottle of wine brought into the country.<sup>182</sup> The bill's supporters sought to encourage the European Community to drop wine certification requirements on American bottles and instead become part of a treaty, joined by the United States, Australia, and Argentina, in which the signatories unequivocally accepted each other's winemaking

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issues. *See id.* For their part, American exporters benefited from the fairly relaxed certification requirements permitted under the one year extensions. *See* Daniel Sogg, *Trade Bill Could Limit U.S. Wine Lovers' Selection of European Imports*, WINE SPECTATOR, Nov. 11, 2002, <http://www.winespectator.com/Wine/Daily/News/0,1145,1887,00.html>.

177. *California News Report*, SINOCAST, Dec. 21, 1998, <http://www.westlaw.com> (follow "Business & News" hyperlink; then search "Sinocast;" then search "California News Report and Wine" restricted by date 12/21/1998).

178. *Wine Talks*, *supra* note 176.

179. U.S. DEPT OF AGRIC. FOREIGN AGRIC. SERVICE, GAIN REPORT: FRANCE WINE ANN. 2004, 4 (2005), <http://www.fas.usda.gov/gainfiles/200501/146118497.doc>.

180. *See* Thomas Fuller, *U.S. and EU Reconcile Over Glass of Wine*, INT'L HERALD TRIB., Sept. 16, 2005, <http://www.iht.com/articles/2005/09/15/business/wine.php> (discussing the lengthy negotiation period for the new agreement).

181. *See* Sogg, *supra* note 176.

182. *Id.*

practices and dropped the need for certification.<sup>183</sup> This bill eventually died in committee.<sup>184</sup>

With the most recent extension of the Accord about to expire, the United States again used the threat of legislative action to create European incentive to arrive at an agreement favorable to American wine producers.<sup>185</sup> This time, American officials threatened to stiffen the application of the Bioterrorism Act, which affects the importation of all food and drink.<sup>186</sup> The Europeans, however, were not passive victims of aggressive American negotiation tactics.<sup>187</sup> During recent talks, frustrated with their inability to reach agreement on wine-naming practices, the Europeans walked away from the bargaining table.<sup>188</sup> The European negotiators debated whether to let the Accord lapse, a move that would have been “tantamount to a declaration of war between the world’s wine superpowers.”<sup>189</sup>

#### *E. The Wine Agreement of March 2006*

Finally, on March 10, 2006, after 22 years of negotiating and posturing, the United States and the European Community arrived at an accord.<sup>190</sup> This is known as the Agreement between the United States of America and the European Community on Trade in Wine (the Wine Agreement).<sup>191</sup>

The first substantive portion of the Wine Agreement is concerned with winemaking practices.<sup>192</sup> It establishes recognition by each party of the other’s winemaking laws and regulations as authorizing “wine-making practices that do not

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183. *Id.* Expressing the underlying rationale of this legislation, John De Luca, President of the Wine Institute remarked, “If the Europeans would accept that agreement, then this legislation will be superseded.” *Id.*

184. *Id.*

185. Charcossey, *supra* note 2.

186. *Id.* This law was passed in the wake of the September 11th attacks. *Id.*

187. See Brown, *supra* note 164.

188. *Id.*

189. *Id.* In response to such a move, it is likely that the United States would have taken up legal action with the World Trade Organization. *Id.*

190. March Wine Agreement Press Release, *supra* note 1.

191. Wine Agreement, *supra* note 163.

192. See *id.* tit. II, arts. 4–5.

change the character of wine arising from its origin in the grapes in a manner inconsistent with good wine-making practices.”<sup>193</sup> Addressing a major area of contention during the series of temporary extensions of the Accord, the Wine Agreement provides that neither party shall block the importation of wine on the basis of the other’s winemaking practices.<sup>194</sup> This portion of the Wine Agreement greatly benefits American wine producers who may export wine produced by techniques that are banned in Europe, such as adding wood chips to give the product an enhanced oak flavor.<sup>195</sup>

The second substantive portion of the Wine Agreement, entitled “Specific Provisions,” is comprised of Articles 6 through 9 and concerns a number of areas.<sup>196</sup> First, with regard to semi-generic terms of origin, under Section 1 of Article 6, the United States pledges to seek a change in legal status for a set of 17 semi-generic terms<sup>197</sup> such that these terms can only be used on wines produced in the European Community.<sup>198</sup> Wine labels that do not conform to this provision are to be blocked from the market.<sup>199</sup> Similar to the approach adopted by TRIPS, however, Section 2 of Article 6 is a grandfather clause whereby Section 1 does not apply to winemakers using a prohibited term as defined by Annex II “where such use has occurred in the United States” before the later of December 13, 2005, or the signing of the Wine Agreement.<sup>200</sup> In addition, the wine labels for wines employing semi-generic terms must comply with the BATF regulations that were in force as of September 14, 2005.<sup>201</sup> Accordingly, such

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193. *Id.* tit. II, art. 4.

194. *Id.* tit. II, art. 5; *see also* The Wine Institute, *Signing of US-EC Trade Agreement Expands Opportunities for Wine*, Mar. 10, 2006, [http://www.wineinstitute.org/industry/exports/2006/us\\_ec\\_trade\\_signing.php](http://www.wineinstitute.org/industry/exports/2006/us_ec_trade_signing.php).

195. *See* Fuller, *supra* note 180. The addition of oak chips or particles is permitted under U.S. law. 27 C.F.R. § 24.246.

196. Wine Agreement, *supra* note 163, tit. III, arts. 6–9.

197. The seventeen terms include: Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry, and Tokay. *Id.* annex 2.

198. *Id.* tit. III, art. 6(1).

199. *See id.* tit. III, art. 6(4).

200. *Id.* tit. III, art. 6(2).

201. *See id.* (requiring that labeling be “in accordance with all regulations in effect

labels must indicate the wine's true origin as the United States.<sup>202</sup> Despite dealing with semi-generic names, this section of the Wine Agreement does not make reference to geographical indications.<sup>203</sup> Congress codified these provisions as part of the Tax Relief and Health Care Act of 2006,<sup>204</sup> which was signed into law by President Bush on December 20, 2006.<sup>205</sup>

Article 7 is designed to prevent European terms of origin from becoming generic terms in the United States.<sup>206</sup> Under Section 1 of Article 7, names of origin listed in Annex IV may only be used "to designate wines of the origin indicated by such a name."<sup>207</sup> The names listed in Annex IV include "names of quality wines produced in specified regions," such as France's Vacqueyras or Italy's Chianti Classico, or "names of table wines with geographical indications," such as Italy's Toscana/Toscano or Spain's Vino de la Tierra de Castilla.<sup>208</sup> This expands the list of nongeneric terms, which are not distinctive designations as specified under the BATF Regulations.<sup>209</sup> In return, the European Community promises reciprocal treatment for "names of viticultural significance" in the United States as listed in Annex V—for example, Napa County's Stags' Leap District.<sup>210</sup> As above, both parties pledge to prevent wine bottles not in

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on September 14, 2005," which would include the Bureau of Alcohol, Tobacco, and Firearms regulations).

202. See 27 C.F.R. § 4.24(b)(1).

203. Press Release, U.S. Trade Representative, Trade Facts: United States—European Community Agreement on Trade in Wine (Sept. 15, 2005), [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file611\\_7970.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file611_7970.pdf) [hereinafter Trade Facts].

204. Tax Relief and Healthcare Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006); see William New, *US Congress Passes Legislation On "Semi-Generic" Wines*, INTELLECTUAL PROP. WATCH, Dec. 15, 2006, <http://www.ip-watch.org/weblog/index.php?p=490>.

205. President George W. Bush, Remarks at the Signing of the Tax Relief and Health Care Act of 2006 (Dec. 20, 2006), in <http://www.whitehouse.gov/news/releases/2006/12/20061220-2.html>.

206. See Wine Agreement, *supra* note 163, tit. III, art. 7.

207. *Id.* tit. III, art. 7(1).

208. *Id.* tit. III, art. 7(1), annex IV, pt. A.

209. See 27 C.F.R. § 12.21.

210. Wine Agreement, *supra* note 163, tit. III, art. 7(2), annex V, pt. C.

conformity with this provision from reaching the consumer.<sup>211</sup> Finally, Section 4 asserts that the United States will preserve the status of the terms identified in 27 C.F.R. § 12.31 as nongeneric, distinctive designations.<sup>212</sup>

Article 8 of the Wine Agreement sets forth acceptable standards for wine labeling.<sup>213</sup> Echoing TRIPS, this section begins with a basic understanding that wine labels sold in each party's territory "shall not contain false or misleading information in particular as to character, composition or origin."<sup>214</sup> Next, the parties agree that wine labels may contain "optional particulars" as described in a supplemental portion of the Wine Agreement dubbed the Protocol on Wine Labeling (the Protocol).<sup>215</sup> The Protocol also provides a list of approved vine variety names that may appear on a wine label, which enables the listing of a single variety so long as 75% of the wine is produced from grapes of that variety.<sup>216</sup> Finally, among other labeling issues agreed upon, Article 8 sets forth a mutual agreement that winemaking processes, treatments, and techniques need not be disclosed on the label.<sup>217</sup>

Article 9 of the Wine Agreement attempts to simplify the process of wine certification.<sup>218</sup> Specifically, it implements a standard certification form for wines originating in the United States<sup>219</sup> that requires a description of the product limited to alcohol strength and color.<sup>220</sup> In addition, the accompanying

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211. *Id.* tit. III, art. 7(3).

212. *Id.* tit. III, art. 7(4).

213. *See id.* tit. III, art. 8.

214. *Id.* tit. III, art. 8(1).

215. *Id.* tit. III, art. 8(2). For example, American wine producers may continue to employ the following descriptors on their labels: chateau, classic, clos, cream, crusted/crusting, fine, noble, ruby superior, sur lie, tawny vintage, and vintage character. *Id.* (citing Protocol on Wine Labeling, pt. A, § 2.1(f) & app. I).

216. *Id.* (citing Protocol on Wine Labeling, pt. A, §§ 2.1(b), 3.6(a), 3.7(a), & app. IV).

217. *Id.* tit. III, art. 8(3).

218. *See id.* tit. III, art. 9 (allowing for standardized preprinted certifications and applications to be submitted electronically).

219. *See id.* tit. III, art. 9(1) (directing attention to Annex III(a), which provides the format and required information of a certification document).

220. *Id.* annex III(a). This represents a substantial loosening of the European certification requirements that previously required American wine exporters to detail the wine production practices. Sogg, *supra* note 3. Per Annex III(b), a copy of form

certification documentation may be preprinted and submitted electronically to the importing country.<sup>221</sup> Finally, Article 9 requires both parties to provide notice to each other when considering changes to their respective certification forms.<sup>222</sup>

The third substantive section of the Wine Agreement contains Articles 10 through 16 and is entitled “Final Provisions.”<sup>223</sup> Article 10 promises future negotiations to commence between the parties within 90 days of the Wine Agreement’s entry into force “with a view toward concluding one or more agreements that further facilitate trade in wine between the Parties.”<sup>224</sup> The second phase of negotiation will include a more detailed discussion on geographical indications, semi-generic terms, winemaking practices, and certification.<sup>225</sup> Article 11 sets forth the standards for future management of the Wine Agreement.<sup>226</sup> Next, Article 12 establishes the relationship between the Wine Agreement and other treaties and laws.<sup>227</sup>

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5100.31 to accompany bottles entering the United States may be found at [www.ttb.gov](http://www.ttb.gov), the website of the U.S. Department of Treasury, Alcohol, and Tobacco Tax and Trade Bureau. Wine Agreement, *supra* note 163, annex III(b).

221. Wine Agreement, *supra* note 163, tit. III, art. 9(2).

222. *Id.* tit. III, art. 9(5). This resolution to provide notice on certification requirements seems to answer a historical failure of both parties to provide openness in regulatory policy making. See Letter from James Clawson, Chief Executive Officer, JBC International, to Catherine A. Novelli, Assistant US Trade Representative (Feb. 11, 2005) ([http://www.ustr.gov/assets/World\\_Regions/Europe\\_Middle\\_East/Transatlantic\\_Dialogue/Public\\_Comments/asset\\_upload\\_file580\\_7237.pdf](http://www.ustr.gov/assets/World_Regions/Europe_Middle_East/Transatlantic_Dialogue/Public_Comments/asset_upload_file580_7237.pdf)) (describing the historic lack of cooperation between the United States and European Union in regulatory policy formulation in the context of the 2004 U.S.-E.U. Declaration on Strengthening Our Economic Partnership).

223. Wine Agreement, *supra* note 163, tit. IV.

224. *Id.* tit. IV, art. 10.

225. Press Release, European Union Delegation of the European Comm’n to the U.S., E.U.-U.S. Wine Trade Accord Will Enhance Protection of European Names and Safeguard E.U.’s Biggest Market (Sept. 15, 2005), <http://www.eurunion.org/News/press/2005/2005075.htm> [hereinafter E.U. Press Release].

226. Wine Agreement, *supra* note 163, tit. IV, art. 11. Importantly, Article 11 proposes that future interaction between the two parties regarding the Wine Agreement be undertaken through bilateral negotiation rather than presenting conflicts to the WTO. *Id.*; Press Release, European Parliament, U.S.-E.U. Wine Agreement Not to MEPs’ Taste (Sept. 29, 2005), [http://www.europarl.europa.eu/news/expert/infopress\\_page/032-676-270-09-39-904-20050922IPR00575-27-09-2005-2005-false/default\\_sv.htm](http://www.europarl.europa.eu/news/expert/infopress_page/032-676-270-09-39-904-20050922IPR00575-27-09-2005-2005-false/default_sv.htm).

227. Wine Agreement, *supra* note 163, tit. IV, art. 12.

With respect to TRIPS, Article 12 provides that the Wine Agreement shall not “affect the rights and obligations” under that treaty nor shall it command any obligations concerning intellectual property rights that TRIPS does not require.<sup>228</sup> Articles 13 and 14 concern implementation and withdrawal from the Wine Agreement respectively.<sup>229</sup> The Annexes and Protocol are included in the Wine Agreement by virtue of Article 15.<sup>230</sup> Article 16 outlines the additional languages in which duplicate copies of the Wine Agreement are written.<sup>231</sup> Finally, Article 17 establishes that the Wine Agreement will enter into force upon signing.<sup>232</sup>

### III. ASSESSING THE IMPACT OF THE WINE AGREEMENT

Given the United States’ reluctance to accept the portion of TRIPS dealing with geographical indications,<sup>233</sup> the Wine Agreement is a notable step towards compliance with TRIPS. Article 24, Section 1 of TRIPS provides, “Members agree to enter into negotiations aimed at increasing protection of individual geographical indications under [A]rticle 23.”<sup>234</sup> In this way, the very fact that the United States entered into a bilateral agreement that concerns terms of origin is itself evidence of compliance with TRIPS.

This recent compliance with TRIPS stands in contrast to the lack of respect the United States has historically shown for Articles 23 and 24.<sup>235</sup> In 1997, only three years after the signing of TRIPS, Congress passed the Taxpayer Relief Act, which codified treatment of semi-generic designations under the BATF

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228. *See id.*

229. *Id.* tit. IV, arts. 13–14.

230. *Id.* tit. IV, art. 15.

231. *Id.* tit. IV, art. 16.

232. *Id.* tit. IV, art. 17(1). However, the provisions concerning acceptance of winemaking practices (Article 4) and certification requirements (Article 9) will only go into effect two months after the European Community receives written notice that the United States has achieved a change in the legal status for the semi-generic terms listed in Annex II. *Id.* tit. II, art. 4; tit. III, arts. 6, 9; tit. IV, art. 17(2); annex II.

233. *See* Chen, *supra* note 12, at 29–30, 55.

234. *See* TRIPS, *supra* note 7, art. 24(1).

235. *See* Lindquist, *supra* note 67, at 330–32.

regulations.<sup>236</sup> By permitting the use of semi-generic terms with a set of limited restrictions,<sup>237</sup> the United States flouted the obligations under Article 24 of TRIPS, which enables continued use of geographical indications only where there is evidence of good faith or use 10 years prior to the signing of TRIPS.<sup>238</sup>

#### A. *The Future of TRIPS*

In many ways, the Wine Agreement continues the pattern by which the United States has undermined the principles agreed upon in TRIPS.<sup>239</sup> Just as 26 U.S.C. § 5388 rendered the TRIPS grandfather clause meaningless with respect to American wines,<sup>240</sup> Article 6 of the Wine Agreement usurps TRIPS by creating a new grandfathering date of December 13, 2005, or the signature of the Wine Agreement, whichever is later.<sup>241</sup> In this way, the Wine Agreement effectively emasculates a key provision of TRIPS.<sup>242</sup> If essential elements of the TRIPS agreement can be renegotiated so that more favorable terms only apply to selective signatories, the legitimacy and authority of the entire TRIPS accord is in peril. Furthermore, the United States may be unwittingly harming its own interests because the practice of ignoring and renegotiating may be employed by other WTO signatories to achieve more favorable terms in areas of TRIPS that are far more crucial to U.S. interests.<sup>243</sup>

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236. *Id.* at 309, 310 & n.11, 327.

237. These restrictions, as indicated above, include the requirement that the label designate the true place of origin and that the wine match the characteristics expected of a wine from the region referred to by the semi-generic term. *See* 26 U.S.C.A. § 5388 (West 2006).

238. *See* Lindquist, *supra* note 67, at 317, 331–32.

239. *See id.* at 330–32 (discussing the incompatibility between 26 U.S.C. § 5388 and the requirements under TRIPS art. 23).

240. *See id.* at 330–31.

241. *See* Wine Agreement, *supra* note 163, tit. III, art. 6.

242. *Compare id. with* TRIPS, *supra* note 7.

243. *See US and EU Strike Wine Agreement; May Influence WTO Talks on GIs*, BRIDGES WKLY. TRADE NEWS DIG., Sept. 21, 2005, at 7, available at <http://www.ictsd.org/weekly/05-09-21/BRIDGESWeekly9-31.pdf> [hereinafter *US and EU Strike Wine Agreement*] (noting the Wine Agreement's failure to specifically mention geographical indications has potential long-term implications on TRIPS that could anger certain WTO members).

In addition, the remarkable absence of the phrase “geographical indication” from the Wine Agreement may portend an effort to alter the scope of TRIPS without the consent of the WTO signatories.<sup>244</sup> Whereas Section 3 of TRIPS (Articles 22 through 24) is expressly dedicated to “geographical indications,” the press release accompanying the Wine Agreement explicitly states the Wine Agreement “does not address the use of geographical indications, a form of intellectual property.”<sup>245</sup> This choice of terminology is quite startling given that the Wine Agreement focuses on semi-generic terms of origin which “have been at the core of the dispute” over protection for geographical indications.<sup>246</sup>

Further, the approach taken in the Wine Agreement potentially signals a shift of two of the WTO’s premier powers to a product-selective respect for geographical indications, rather than a blanket acceptance of the importance of these terms.<sup>247</sup> This movement to product-selective recognition of geographical indications threatens to exacerbate the rift between developing and developed countries that existed at the time of TRIPS negotiations.<sup>248</sup> Developing countries in the WTO most likely would be opposed to a product-based approach “given their concern that a product-based approach—especially one limited to wine—would not adequately cover their own geographically-based food and handicraft products.”<sup>249</sup> The potential change in scope may inhibit further negotiations among the TRIPS signatories, especially concerning the contentious multilateral register issue.<sup>250</sup> Thus, just as the inclusion of the superseding grandfather clause in the Wine Agreement undermines TRIPS,

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244. *See id.*

245. TRIPS, *supra* note 7, arts. 22–24; Trade Facts, *supra* note 203.

246. *US and EU Strike Wine Agreement*, *supra* note 243, at 7. This express limitation concerning geographical indications may, on the other hand, signal the intent of both parties to delay negotiation on this divisive issue until a second phase of bilateral talks. E.U. Press Release, *supra* note 225.

247. *US and EU Strike Wine Agreement*, *supra* note 243, at 7.

248. *See* Lindquist, *supra* note 67, at 337 (explaining that developing countries, as the holders of fewer intellectual property rights, are reluctant to strengthen international protection for such rights).

249. *US and EU Strike Wine Agreement*, *supra* note 243, at 7.

250. *See id.*

the failure to employ key TRIPS terminology calls into question the vitality of TRIPS.<sup>251</sup>

Finally, perhaps the most significant aspect of the Wine Agreement as it relates to the future of TRIPS is not what the Wine Agreement includes, but what it fails to address. If the parties' intent is to carry over discussion on geographical indications to a second phase of negotiation,<sup>252</sup> their failure to achieve common ground after a decade of discussion post-TRIPS is a testament to the intractability and incompatibility of their positions. In light of this disconnect between the WTO's premier members, the prospects of achieving meaningful dialogue on a system of international registration for geographical indications as required under Article 23 of TRIPS<sup>253</sup> appears extremely unlikely.

Thus, it is no surprise that the European wine producers reacted with such outrage to the Wine Agreement.<sup>254</sup> For these producers, the fight over semi-generic names is about providing the consumer with accurate information regarding a product which is as much about grape varieties as it is about soil, sun, and craftsmanship.<sup>255</sup> In their view, the European Community traded away its two largest bargaining chips, acceptance of American production practices and loosening of certification standards, for a grandfather clause that ratifies the continued

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251. *See id.* (discussing how the Wine Agreement does not mention geographic indications, but sets its own precedent for geographic indication recognition).

252. *See* E.U. Press Release, *supra* note 225. There is evidence suggesting the Europeans aim to achieve an American ban on the use of all European terms of origin on American wine. *EU, U.S. Toast Wine Trade Agreement*, THE HINDU, Sep. 16, 2005, <http://www.hindu.com/2005/09/16/stories/2005091604941804.htm>.

253. TRIPS, *supra* note 7, art. 23(4).

254. *See, e.g.*, Cyril Penn, *Trade Agreement Preserves 'California Champagne'*, S.F. CHRON., Sept. 22, 2005, at F2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/09/22/WIGVVER6B61.DTL> (quoting a French champagne producer as stating that the grandfather clause is "an absurdity on a moral point of view").

255. *See* Eric Arnold, *Trade Deal Approved by EU with Reservations*, WINE SPECTATOR, Dec. 22, 2005, <http://www.winespectator.com> (requiring subscription) (outlining complaints that European winemakers will have to compete against Americans who do not have to "take what nature gives [them]," and that European consumers will not be able to recognize the quality of product they are buying).

use of semi-generic terms by the greatest abusers of these terms.<sup>256</sup>

From the perspective of European Community officials, the Wine Agreement enabled Europe to retain access to one of its largest export markets and achieve heightened legal protection for 17 of its most precious geographic terms.<sup>257</sup> However, any leverage that the European Community possessed to enforce greater American compliance with Articles 22 through 24 of TRIPS now appears to be lost. The European Community must now turn to other sources of strength to achieve its desired ends, such as negotiations over other portions of TRIPS or threats concerning proposed changes to the Wine Agreement under Article 11. Neither of these options bode well for future amicable relations concerning the trade in wine.

*B. The Future of the United States-European Community Trade in Wine*

On its surface, the Wine Agreement appears to greatly benefit American winemakers at the expense of their European competitors.<sup>258</sup> While the European Community was able to extract an enforceable American promise to change the legal status of semi-generic terms of origin, the long-term effect of this American concession appears to be minimal at best. First, the high degree of consolidation among American wine producers,<sup>259</sup> coupled with the fact that the companies which dominate the market are also the greatest users of semi-generic terms,<sup>260</sup> means that the Wine Agreement's grandfather clause only serves to ratify the status quo where little risk of new users of semi-generics existed in the first place. Second, the shift in wine

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256. See Sogg, *supra* note 3 (highlighting the key compromises in the agreement).

257. E.U. Press Release, *supra* note 225.

258. See *Champagne-Port Region Reps Blast US-EU Wine Accord*, AGENCE FRANCE-PRESSE, Sept. 18, 2005, available at <http://www.newagebd.com/2005/sep/18/busi.html> (noting that the Wine Agreement, specifically its treatment of semi-generic terms, has not been universally accepted by all American wine producers). There is a sizeable contingent of American wine producers in California, Oregon, and Washington who have joined vintners from Sherry, Port, and Champagne in opposing the use of semi-generic terms on wines not produced from those regions. *Id.*

259. See Martin & Heien, *supra* note 16, at 6.

260. See SPAHNI, *supra* note 14, at 84, 89.

purchase patterns from jug wine, which maintains brand loyalty by using such semi-generics, to high-end premium bottles, which emphasize grape variety as a measure of product quality,<sup>261</sup> suggests that semi-generic terms of origin are becoming less relevant to the American consumer. Thus, the change in legal status for semi-generics appears to be a hollow victory for the Europeans.

At the same time, the relaxation of E.U. restrictions on American winemaking practices and certification requirements could be of great benefit to American wine producers.<sup>262</sup> These provisions, which facilitate the sale of American wine in the European market, occur at a crucial time when American wines have experienced unprecedented growth in the European markets.<sup>263</sup> If American wines were able to achieve such success in the face of cumbersome regulations under the Wine Accord of 1983 and its progeny, the easing of such regulations per the Wine Agreement should only enhance the prospects of future growth. Furthermore, the Wine Agreement provides market stability, which should enable American producers to operate with more efficiency and a better sense of market demand.<sup>264</sup>

#### IV. CONCLUSION

In the final accounting, the most significant aspect of the Wine Agreement is not what it means for the future of geographical indications, but rather what it says about the changing face of the global wine industry. In a desperate attempt to maintain its grasp over the lucrative and ever-expanding American wine market, the European Community gave up far more than it received—perhaps the European Community negotiators have finally come to recognize what the American consumer has already understood. The future of wine is not awash with Burgundy and Chianti, but instead is flowing with Sauvignon Blancs from New Zealand, Cabernets from

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261. *See id.*

262. *See Sogg, supra* note 3.

263. *See DOA OUTLOOK, supra* note 11, at 17–21 (highlighting the growth in U.S. wine exports in France, Italy, and Spain).

264. *See EU, U.S. Toast Wine Trade Agreement, supra* note 252.

Chile, and Pinot Noirs from Oregon. Facing such growing competition, the European Community has deferred the fight to another day. But, given the breadth of the ideological divide and the size of the stakes, the end of the Wine War is no where in sight.

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