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## Trademarks, GIs, and Commercial Aspects of Wine Distribution Agreements

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TRADEMARKS, GIS, AND COMMERCIAL ASPECTS OF WINE  
DISTRIBUTION AGREEMENTS

*Sarah A. Hinchliffe\**

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## I. INTRODUCTION

The marketing of goods under geographical names has always been common. In addition to introducing commercial facets of wine distribution agreements, this article discusses the justifications, principles and, policies that lie behind the protection of geographical indications (GIs) for wine on an international level as well as in the Old World and, to a lesser degree, in the New World.<sup>1</sup> The scope and shape of the GI system will then be scrutinized in light of its own justifications and in the light of its impact on international trade, intellectual property, and agricultural policy.

The undercurrents of the global wine industry are better understood through a brief history of wine as well as an overview of international wine distribution. Some countries have longer historical and cultural ties with wine than others and that can affect the quality and perception of the product in the eyes of the consumer. The essential issues that this article attempts to address, in relation to the latter, are the basis and criteria for the granting of GI rights, the scope of the protection that is afforded to GIs, and the justifications for the above in light of the functions and policies that underlie the granting and protecting of GIs.<sup>2</sup> These are factors which can create a superior wine (at least from a marketing perspective) and therefore produce a competitive advantage both domestically and internationally.

First, the origin of the term “geographical indication” will be explained. Formerly, legal protection for GIs was based on the idea that geographical origin provides a product with exclusive qualities and characteristics. The current premise is that a geographical name extends beyond and exists apart from the product and therefore deserves its own protection. The view will be taken that the minimum standards provided in the *Agreement on Trade-Related Aspects of Intellectual Property Rights*

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1. The Old World is generally regarded to be comprised of European Union (EU) Member States, while the New World is generally taken to be comprised of Argentina, Australia, Canada, Chile, New Zealand, South Africa, Mexico, and the United States (US). In this article, the position of the Old World will mainly be discussed in relation to France, and the position of the New World will mainly be discussed in relation to Australia. See Christine Fund & Stephen Stern, *The Australian System of Registration and Protection of Geographical Indications for Wines*, 5 FLINDERS J.L. REFORM 39, 40 (2000); see also Sarah Hinchliffe, *When Place Names are Worth Bottling*, 82 L. INST. J. 44, 44-47 (2008).

2. In this article “protection” encompasses both the determination of the GI, including boundaries and the name, and use of the GI on labels of wines.

(the TRIPS Agreement)<sup>3</sup> highlights this shift and, in so doing, has formalized a global system of GI protection which encompasses the World Trade Organization (WTO), the New World, and the Old World. The scope and shape of this system will be scrutinized through a discussion of GI protection in relation to international trade, intellectual property laws and agricultural policy, which in effect operate in favor of the European Union (EU).<sup>4</sup>

Second, despite a wide range of scholarship on the WTO, intellectual property, and agricultural policy, the conceptual underpinnings of GIs have not been scrupulously examined.<sup>5</sup> The rationale for the protection of GIs in international law will therefore be discussed, which raises the issue of the normative justification for GI rights. It will be argued that GI protection in international law is justifiable for many of the same reasons that protection of trademarks is warranted: primarily, to protect consumers against confusion.<sup>6</sup> However, the current level of protection that is afforded to wine and spirits by the TRIPS Agreement goes beyond what any existing theory of property can support.

Third, the purpose and operation of EU laws will be examined. GIs confer legal monopoly rights on local producers and, on a national level at least may be seen as incompatible (in part, at least) with the notion of free

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3. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter *Marrakesh Agreement*], Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, 1867 U.N.T.S. 299 (incorporating by reference the Paris Convention for the Protection of Industrial Property), July 14, 1967, 828 U.N.T.S. 306 [hereinafter *Paris Convention*]; Berne Convention for the Protection of Literary & Artistic Works, Sept. 9, 1886, revised on July 14, 1967, 828 U.N.T.S. 222.

4. J Boutonnet, R. Jassaume & D Sautier, *The Place of "Localized" Food Systems within the Political Economy of the Agri-Food System* 1, 1 (paper presented at the World Congress of Sociology, Durban, July 24, 2006); see also THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 1 (Daniel Kennedy & James Southwick, eds., 2002).

5. The most thorough treatments of GIs in international law are: BERNARD O'CONNOR, THE LAW OF GEOGRAPHICAL INDICATIONS (2004); Tomer Broude, *Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protections in WTO Law*, 26 U. PA. J. INT'L L. 623, 625 (2005); Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L. J. 299, 301 (2006). None of these publications, however, critically assess the fundamental property rights claims that underlie GI protection.

6. WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 168 (2003); KEITH MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 47 (2000); Nicholas Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 528 (1998); William Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 284 (1987).

movement of goods in the common market.<sup>7</sup> From an international trade perspective, various national laws have allowed the EU to gain market power and to effectively shield itself from increasing competition from New World GI products. It will be argued that this situation can be justified from the perspective of competition policy. It will be argued that, while systems of GI protection seem justified in the Old World, the animosity created in the New World has amplified uncertainty and contributed, though not always directly, to unprincipled and unsatisfactory outcomes that seem to work against the concept of GI protection.

The final section looks at certain commercial aspects of wine distribution agreements precipitated as a result of domestic measures and international trade measures.

## II. THE CONCEPT OF GEOGRAPHICAL INDICATIONS

### A. Underlying Themes

GIs, in a broad sense, are words, signs or symbols that indicate or imply that a given product has its origin in a specific area or place.<sup>8</sup> GIs can enhance the value of a wine product whose distinctive characteristics are associated with its geographical origin and can thus protect the linkage between a product and its physical source. In this regard, four possible functions for GIs exist, which are drawn upon throughout this article to justify the existence and scope of protection afforded to GIs.<sup>9</sup> These are:

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7. Oskari Rovamo, *Monopolizing Names? The Protection of Geographical Indications in the European Community* (Aug. 2006) (unpublished dissertation, Helsinki University), available at <https://helda.helsinki.fi/bitstream/handle/10138/21550/monopoli.pdf?sequence=2>.

8. Kasturi Das, *International Protection of India's Geographic Indications with Special Reference to "Darjeeling" Tea*, 9 J. WORLD INTELL. PROP. 460, 461 (2006). In this article, reference to "GI" is used in a general sense to embrace all forms of the concept, including more specific terms such as indication of source, appellation of origin, protected designation of origin (PDO) and protected geographical indication (PGI), and traditional terms that come from different international and EU legal instruments.

9. The functions of GIs are similar to those traditionally distinguished for trademarks. See, e.g. JEREMY PHILIPS, *TRADE MARK LAW: A PRACTICAL ANATOMY* 603 (2003); Onno Brouwer, *Community Protection of Geographical Indications and Specific Character as a Means to Enhance Foodstuff Quality*, 28 COMMON MKT. L. REV. 615, 630 (1991). Trademarks have been distinguished for a different number of functions. The simplest categorization is used as a starting point for GIs and is discussed in WILLIAM CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS* 587 (5th ed. 2003).

- Origin: Designations operate as indicators of origin from which the products come, or are in some other way connected.
- Quality: Designations symbolize qualities which certain products have or which consumers associate them with and guarantee that they measure up to expectations.
- Investment or advertising: Designations are ciphers around which investment in the aggrandizement of a product is fabricated. Instilled in such an investment is inherent value, which is deserving of protection – even when no abuse arises from misrepresentations about origin or quality.
- Culture protecting and exchange: Designations protect culture by preserving traditional production methods, cultural identity, and consumption patterns.<sup>10</sup>

In this regard, the value of each of these functions guides the assessment of trade interests in intangible property, of which a GI right is one.<sup>11</sup> Wine distribution agreements play a key role in reinforcing the importance of GIs in an international trade context. As will be discussed, the presence of trade interests will often generate systems of protection for such rights. Accordingly, aims to prevent abuse have given rise to separate forms of legal protection for GIs which link global trade in physical produce with borderless trade in intangibles.<sup>12</sup>

Under the strongest forms of GI protection, GIs are treated as a separate form of concerted intellectual property whereby protection concerns the product itself and is not dependent on consumer deception, or on a specific right holder.<sup>13</sup> The use of geographical names is closely

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10. See Broude, *supra* note 5, at 626.

11. See *infra* pp. 135-36.

12. Commonwealth, *Agriculture, Fisheries, and Forestry Legislation Amendment Bill (No.1) 1998 Second Reading Speech*, House of Rep. 688 (Nov. 25, 1998) (Mr. Connor): “Mr. Brian Croser, past President of the Winemakers Federation . . . challenged the audience not to view his industry as a rural industry but as part of the entertainment industry.”

13. See Rovamo, *supra* note 7. GIs are intellectual property that are affixed to a specific place and identify a collective commercial source of the products as opposed to trademarks that identify a single commercial source, i.e. all producers from a given geographical area are conferred the right to use a GI to identify their product. See

controlled by *a priori* geographical delineation, also backdrop of quality standards to be realized within the requisite delineated area.<sup>14</sup> The oldest and most famous of such protection is the system of *appellations d'origine contrôlée* (AOC) in France.<sup>15</sup> GIs are also protected under bilateral treaties and under multilateral treaties such as the TRIPS Agreement. These forms of GI protection also treat GIs as a separate form of collective intellectual property, but in addition might also be justified on the basis of avoiding consumer deception. However, these forms of GI protection are not as strong as the protection that is afforded to GIs under the AOC system. The protection afforded to GIs in both of the above contexts may be justified only if GIs really fulfill their functions.

### 1. Consumer Protection through Information

Consumers constantly encounter choice of similar products offered for sale. Superficial similarities between products may conceal differences in their characteristics and quality.<sup>16</sup> So, in addition to other signs and advertising, consumers may use the help of GIs to identify these differences in levels of quality. Identifying the source of the product enables a consumer to identify which best caters to a range of personal expectations about quality and characteristics, which in turn may derive from previous experience or the recommendations of others.<sup>17</sup> This presents a strong case to control misleading indications in the interest of

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FOOD & AGRIC. ORG. OF THE UNITED NATIONS, MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE: A RESOURCE MANUAL, *Ch. 3.4.1: IV Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* (R. Silva Repetto & M. Cavalcanti); Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPS Agreement*, 5 J. WORLD INTELL. PROP. 865, 869-70 (2002).

14. Rovamo, *supra* note 7; *see also* STEPHEN LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION VOL. III 1574 (1975); Stefania Fusco, *Geographical Indications: A Discussion on the TRIPS Regulation after the Ministerial Conference of Hong Kong*, 12 MARQ. INTELL. PROP. L. REV. 197, 239 (2008); *see also* MARSHA ECHOLS, GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS: INTERNATIONAL, LEGAL AND REGULATORY PERSPECTIVES (2008).

15. In France, the year 2005 was the 100-year anniversary of the law establishing the concept of geographic origin and the 70th birthday of the *appellations d'origine contrôlée* system. *See e.g.*, 2005 ANNÉE DES TERROIRS, [http://www.agrisalon.com/fr/actualites/productions-vegetales/article/3870157/2005-annec-des-terroirs-Ce-5-aoet-la-Fete-de-l-Ail-Rose-de-Lautrec-a-Lautrec-\(Tarn\).html](http://www.agrisalon.com/fr/actualites/productions-vegetales/article/3870157/2005-annec-des-terroirs-Ce-5-aoet-la-Fete-de-l-Ail-Rose-de-Lautrec-a-Lautrec-(Tarn).html) (last visited May 7, 2014).

16. *See* KAMIL IDRIS, INTELLECTUAL PROPERTY: A POWERFUL TOOL FOR ECONOMIC GROWTH 151 (2003).

17. *Id.*

consumers. Artificial product differentiation, through regulated use of GIs, however, might not be in the interest of consumers as it would allow producers to create monopolies and gain market power based on non-existent uniqueness and quality.<sup>18</sup> This is particularly so if GIs convey non-geographical qualities arising from the geographical origin of the product, because such products cannot truly be reproduced anywhere else.<sup>19</sup> Yet, such protection would only be indirect because GI protection does not grant enforceable rights to consumers but rather to producers.<sup>20</sup>

## 2. Producer Promotion

It is in the interest of a producer to try in some way to differentiate his products from those of others. GIs may provide producers with a unique or an alternative way to identify their products as prime, and with a view to targeting the consuming public.<sup>21</sup> This is particularly important to smaller wine producers who may not be able to make the substantial investments which are needed to promote an individual brand.<sup>22</sup>

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18. PERSPECTIVES ON INTELLECTUAL PROPERTY LAW SERIES: INTELLECTUAL PROPERTY AND MARKET FREEDOM, VOLUME 2 101 (Adrian Sterling ed., 1997); *see also* IDRIS, *supra* note 16, at 153; Marina Kolia, *Monopolising Names: EEC Proposals on the Protection of Trade Descriptions of Foodstuffs*, 14 EUR. INTELL. PROP. REV. 233, 237 (1992); Maria Kolia, *Monopolising Names of Foodstuffs*, 4 EUR. BUS. L. REV. 323, 326 (1992).

19. Although consumers take great interest in the true origin of products, they do not in general recognize what the GI stands for. This is the case even in France and Italy where GIs have been used for decades to inform consumers of origin and quality. *See* Bruce Babcock & Roxanne Clemens, *Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products* 3-4, (MATRIC Briefing Paper 04-MBP 7, Midwest Agribusiness Trade Research and Information Center, May 2006), available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/04mbp7.pdf>.

20. This which is true of trademark law is also, in my mind, applicable to laws governing GIs. *See* Jennifer Davis, *To Protect or Serve? European Trademark Law and the Decline of the Public Interest*, 25 EUR. INTELL. PROP. REV. 180, 187 (2003). The author also argues that the rights and interests of consumers and producers in relation to GIs are inextricably connected but that modern trademark law cannot be explained with reference to consumers.

21. PHILIPS, *supra* note 9, at 26.

22. *See* Sanjeev Agarwal & Michael Barone, *Emerging Issues for Geographical Indication Branding Strategies* 1, (MATRIC Research Paper 05-MRP 9, Midwest Agribusiness Trade Research and Information Centre, 2005), available at [www.card.iastate.edu/publications/DBS/PDFFiles/05mrp9.pdf](http://www.card.iastate.edu/publications/DBS/PDFFiles/05mrp9.pdf); Broude, *supra* note 5, at 621. The EU seems to have undertaken at least some of the promoting. *See* Press Release, European Commission, € 27.6 Million EU Support for the Promotion of



GIs facilitate producers to create an attractive product image that a consumer associates with the product. The image that is constructed has a sales-promoting effect intended by the advertising or investment function.<sup>23</sup> This sales-promoting effect of a given GI is generally connected to the quality of the product. GIs (and wine GIs to a more limited degree), however, can also generate their efficacy through evocative, and aesthetic uses.<sup>24</sup> This means that the GI itself becomes a desired characteristic of a good, notwithstanding its quality, and such a GI may gain selling-power above that of the underlying goodwill.<sup>25</sup> Producers of GIs are therefore able to obtain premium prices for products that may otherwise be regarded as a mere commodity.<sup>26</sup> Others may try to imitate a GI and use the goodwill that producers have developed or fortified by using the GI on a related or disparate product, which may be viewed as unfair competition.<sup>27</sup>

### 3. Protecting Tradition

Wine GIs in the EU seem apposite for the preservation of traditional know-how. This is because such GIs do not reward innovation but rather producer adherence to the traditional methods used in the region of production.<sup>28</sup> Internationally, the EU is the main partisan of this cultural rationale claiming that GIs are “key to EU and developing countries’ cultural heritage, traditional methods of production and natural resources.”<sup>29</sup>

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Agricultural Products (July 7, 2006), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/960&format=HTML&aged=0&language=EN&guiLanguage=en>.

23. See ECONOMIC AND LEGAL ISSUES IN INTELLECTUAL PROPERTY 60–69 (Michael McAleer & Les Oxley eds., 2007).

24. See Rovamo, *supra* note 7; see also CORNISH & LLEWELYN, *supra* note 9, at 587.

25. See Andrew Griffiths, *The Impact of the Global Appreciation Approach on the Boundaries of Trademark Protection*, 4 INTELL. PROP. Q. 326, 328 (2001); see also DAVID AAKER, BUILDING STRONG BRANDS 7-8 (1996) (identifying goodwill as consisting of the following four elements: awareness, loyalty, perceived quality, and positive associations).

26. See Rovamo, *supra* note 7; see also Agarwal & Barone, *supra* note 22, at 1.

27. See Rovamo, *supra* note 7. Regarding the issue of “goodwill,” see WESTON ANSON, DONNA SUCHY & CHAITALI AHYA, FUNDAMENTALS OF INTELLECTUAL PROPERTY VALUATION: A PRIMER FOR IDENTIFYING AND DETERMINING VALUE 11-20 (2006).

28. O’CONNOR, *supra* note 5, at 373-74; Broude, *supra* note 5, at 631.

29. Broude, *supra* note 5, at 631 (quoting Delegation of the European Commission to Japan, *Why do Geographical Indications Matter to Us?* EU Background Note 01/04, Feb. 10, 2004, available at [http://jpn.cec.eu.int/home/news\\_en\\_newsjob553.php](http://jpn.cec.eu.int/home/news_en_newsjob553.php)).

In the EU, a wine product does not receive GI protection by the mere fact of its geographical origin but rather because it complies with set of criteria concerning content and production methods.<sup>30</sup> Generally, such practices are grounded in social and historic circumstances and are not necessary for the characteristics and qualities of the finished product.<sup>31</sup> It seems logical to say that if such practices were to vanish, it would also result in the elimination of the associated culture of production.

GI wine products may also represent cultural identity. Cognac and Chardonnay, for example, form part of the cultural, national, and regional identity of France. Therein, wine GIs operate as custodians of cultural character or identity, also as an aegis against homogeneity precipitated by globalization.<sup>32</sup> Notably, markets and consumer preference affect both directly and indirectly the methods of production.<sup>33</sup> In this context, it is fair to say that, in the absence of culture or tradition, the pursuit for culture may rely only on the use of cobbled up tradition.

### III. GLOBAL INSTITUTIONALIZATION OF WINE GIS

#### A. Overview

The relatively recent standards on GI protection in the TRIPS Agreement are built on over a century's progressive international normative development.<sup>34</sup> The failed attempts to revise the *Paris Convention* or loose accord on alternative arrangements, for example, demonstrate the varying perceptions amongst countries concerning the devoir to protect GIs.<sup>35</sup> When the United States (US) initiated the

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30. In New World countries such as Australia and the US, the protection of tradition is not a factor in determining the GI itself, and thus the protection of products from that GI. See Gary Edmond, *Disorder with Law: Determining the Geographical Indication for the Coonawarra Wine Region*, 27 ADELAIDE L. REV. 59, 100-20 (2006). The term GI is used in a general sense in this article to embrace all forms of the concept, including *appellations d'origine contrôlée* (AOC).

31. *Id.* at 115-16.

32. Griffiths, *supra* note 25, at 328.

33. See Eric Hobsbawm, *Introductions: Inventing Traditions*, in THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., 2003).

34. See Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883. A detailed account of these multilateral treaties, however, is beyond the scope of this article.

35. See Rovamo, *supra* note 7; see also Elena Kapustina, *Protection of Well Known Trademarks Under Russian Law*, 9 TRADE PRAC. L. J. 64, 65 (2001).

development of the TRIPS Agreement as a part of the Uruguay Round of Multilateral Trade Negotiations under the General Agreement on Tariffs and Trade,<sup>36</sup> the EU saw an opportunity to augment the international protection of GIs and, with Switzerland, managed to anchor it on the agenda of the negotiations for the TRIPS Agreement.<sup>37</sup>

Broadly, Articles 22, 23, and 24 of the TRIPS Agreement<sup>38</sup> set out the minimum standard of GI protection that WTO Members are to implement in their national laws.<sup>39</sup> Failure to enact appropriate implementing legislation will subject a Member to the possibility of claims and sanctions under the WTO dispute resolution mechanisms.<sup>40</sup> In this way, GIs, through the TRIPS Agreement, can be viewed as capable of uniting global protection systems with an intrinsically necessarily localized basis of production, linking cultural diversity and the local environment with global markets.<sup>41</sup>

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36. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187; *see also* Doha Ministerial Conference, WTO Doc WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

37. Rovamo, *supra* note 7; *see also* PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 145 (2002); Ved Nanda, *Selected Aspects of International Trade and the World Trade Organization's Doha Round: Overview and Introduction*, 36 DENV. J. INT'L L. & POL'Y 255, 258-59 (2008).

38. Article 22 sets out the general provisions for protection of GIs that applies to all foodstuff. Article 23 provides for additional protection for GIs.

39. The WTO currently has 159 member countries. WORLD TRADE ORGANIZATION, <http://www.wto.org> (last visited May 7, 2014).

40. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter *TRIPS Agreement*]; *see also* *Marrakesh Agreement*, *supra* note 3, at Arts. 41 & 64; THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), [hereinafter *The Legal Texts*].

41. *See TRIPS Agreement*, *supra* note 39, at Art. 8. These factors in turn imply the protection of consumer interests. Jim Keon, *Intellectual Property Rules for Trademarks and Geographical Indications: Important Parts of the New World Trade Order*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 167 (Carlos Correa & Abdulqawi Yusuf, eds., 1998). Compare the analysis of theories concerning the WTO's legal system. Chios Carmody, *A Theory of WTO Law* 11 J. INT'L ECON. L. 527 (2008) (positing the idea that a theory can be identified if the WTO Agreement is seen as protecting expectations about trade, facilitating adjustment to realities encountered in trade, and promoting interdependence); *see also* Neil Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 216 (1993); Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building*

Article 22(1) of the TRIPS Agreement defines GIs 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>42</sup> By virtue of this definition, GIs are categorized as an intellectual property right, although according to some analysis of GIs, they are not regarded as private property rights unlike other forms of intellectual property.<sup>43</sup> A GI is associated not just with the goods having some qualities or characteristics attributable to the place, but also to the producers. Accordingly:

[t]he consumers’ mental association between the indication, the place, the goods, the qualities or characteristics of the goods, and the producers elevates a geographic sign to the level of a distinctive source identifier in that it functions to distinguish one producing source from another producing source when used on particular goods.<sup>44</sup>

### B. *Barriers to Trade for the New World*

Other implementing regulations exist and operate as implicit barriers to trade for New World wine GIs. These include the EC laws regarding production potential, market mechanisms, oenological practices, description, designation, presentation, and protection of certain products and quality wine produced in specified regions.<sup>45</sup> In Australia, such laws

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*Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. INT’L. L. REV. 1, 5-6 (2003).

42. *TRIPS Agreement*, *supra* note 40.

43. International GI protection is a distinct set of IP standards and remains one of the most complex and contentious issues in international intellectual property law. See Sarah Hinchliffe, *Overlap Between Trademarks and Geographical Indications in Australia*, 21 INTELL. PROP. L. BULL. 147-49 (2009).

44. In relation to trademarks, this would mean that GI are those with secondary meaning in the country where protection is being asserted. See Amy Cotton, *123 Years at the Negotiating Table and Still no Dessert? The Case in Support of TRIPS Geographical Indication Protection*, 82 CHI.-KENT L. REV. 1295, 1296 (2007).

45. See Commission Regulation 538/2011, 2011 O.J. (L147) 6 (EU) [hereinafter Reg. No. 583/2011], amending Commission Regulation 607/2009, 2009 O.J. (L193) 60 (EC) (laying down certain detailed rules for the implementation of Council Regulation 479/2008, 2008 O.J. (L148) 1 (EC) regarding protected designations of origin and geographical indications, traditional terms, labeling, and presentation of certain wine sector products); Commission Regulation 606/2009, 2009 O.J. (L193) 1 (EC) (laying

are non-existent, yet they seem to surface when the issue of international trade with the EU is raised.<sup>46</sup> The obstacles to market entry by New World wine producers, and thus their GIs, include the EU's system of tariffs, internal taxes, governmental subsidies, licensing requirements, labeling restrictions, marketing regulations and oenological practices, the operation of which is discussed below.

## 1. Internal Taxes

Internal taxes function as a trade barrier to wine importers within the EU. Internal taxes consist of an individual Member State's excise and Value Added Taxes (VATs).<sup>47</sup> On January 1, 1993, the European Commission of the European Economic Community established minimum excise duty rates for alcoholic beverages, including wine.<sup>48</sup> Prior to the enactment of this legislation, each Member State levied excise duties based

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down certain detailed rules for implementing Council Regulation 479/2008, 2008 (L148) 1 (EC) regarding the categories of grapevine products, oenological practices, and the applicable restrictions; Commission Regulation 607/2009, 2009 O.J. (L193) 60 (EC) [hereinafter Reg. No. 607/2009] (laying down certain detailed rules for the implementation of Council Regulation 479/2008, 2008 O.J. (L148) 1 (EC) regarding protected designations of origin and geographical indications, traditional terms, labeling, and presentation of certain wine sector products; Commission Regulation 670/2011, 2011 O.J. (L183) 6 (EU) [hereinafter Reg. No. 670/2011], *amending* Commission Regulation 607/2009, 2009 O.J. (L193) 60 (EC) (laying down certain detailed rules for the implementation of Council Regulation 479/2008, 2008 (L148) 1 (EC) regarding protected designations of origin and geographical indications, traditional terms, labeling, and presentation of certain wine sector products; Commission Regulation 772/2010, 2010 O.J. (L232) 1 (EU), *amending* Commission Regulation 555/2008, 2008 O.J. (L170) 1 (EC) (laying down detailed rules for implementing Council Regulation 479/2008, 2008 O.J. (L148) 1 (EC) on the common organization of the market in wine regarding support programs, trade with third countries, production potential and on controls in the wine sector.

46. See generally Michael Blakeney, *Geographical Indications and the International Trade in Australian Wines* 3 INT'L TRADE L. & REG. 70 (2012).

47. EUROPEAN COMMISSION, TAXATION & CUSTOMS UNION, THE EU'S TAX POLICY TOWARDS A BARRIER-FREE AREA FOR CITIZENS AND BUSINESSES 1-2 (2006), *available at* [http://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_6\\_raporlar/1\\_3\\_diger/commission\\_report\\_eu\\_tax\\_policy.pdf](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_3_diger/commission_report_eu_tax_policy.pdf).

48. See Directive 92/83, of the European Economic Community of 19 October 1992 on the Harmonization of the Structures of Excise Duties on Alcohol and Alcoholic Beverages, 1992 O.J. (L316) 21; Directive 92/84, of the European Economic Community of 19 October 1992 on the Approximation of the Rates of Excise Duty on Alcohol and Alcoholic Beverages, 1992 O.J. (L316) 29 [hereinafter Council Directive 92/84].

on the weight or volume of wine with no minimum excise duty rates.<sup>49</sup> The Economic and Finance Council for the EU adopted Directive 92/84 on October 19, 1992, which deals specifically with the excise duty rates levied on alcoholic beverages and the alcohol contained in other products.<sup>50</sup> According to this directive, the excise duties in the Member States for wine must exceed the minimum level required, unless a Member State is given an express exception by subsequent EU legislation.<sup>51</sup> However, these directives only established minimum excise duties on wine.<sup>52</sup> Each individual country within the EU also imposes taxes on wine through VATs as well as the mandated minimum excise taxes.<sup>53</sup>

Moreover, the tax systems of the Member States within the EU are still relatively diverse (even after the attempt by the EU to create a more uniform system of excise and VATs for each individual state), and these taxes make it more expensive to import wine into many countries of the EU.<sup>54</sup> The diversity of these taxes among EU Member States distorts the potential for sales among individual Member States within the EU. The more money a bottle of wine commands in a particular Member State, the less chance a consumer there has to purchase that bottle because of its internal tax. In turn, this inhibits the ability of a wine producer to market its product in the EU. Therefore, these differences in internal taxes convolute sales among several countries within the EU. The more uniform these taxes, the greater the opportunity a seller has to maximize sales in all the EU countries equally.

Still, internal taxes imposed by the individual Member States appear to impose the least amount of trade barriers to importers. These duties

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49. See Council Directive 92/84, *supra* note 48, at Art. 3.

50. *Id.*; see also COMM'N OF THE EUR. CMTYS., REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE ON THE RATES OF EXCISE DUTY APPLIED ON ALCOHOL AND ALCOHOLIC BEVERAGES (PRESENTED PURSUANT TO ARTICLE 8 OF COUNCIL DIRECTIVE 92/84/EEC ON THE APPROXIMATION OF EXCISE DUTY ON ALCOHOL AND ALCOHOLIC BEVERAGES) (examining the status of Community legislation in the field of excise duties on alcohol and alcoholic beverages), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0223&from=EN>.

51. Council Directive 92/84, *supra* note 48, at Art. 5, 8.

52. *Id.* at Art. 4.

53. EUROPEAN COMMISSION, GENERAL OVERVIEW, [http://ec.europa.eu/taxation\\_customs/taxation/vat/how\\_vat\\_works/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm) (last visited May 8, 2014).

54. See ALAN SCHENK & OLIVER OLDMAN, VALUE ADDED TAX: A COMPARATIVE APPROACH 90-102 (2007); ALAN TAIT, VALUE-ADDED TAX: INTERNATIONAL PRACTICE AND PROBLEMS 389-95 (1988); Hans Fehr, Christoph Rosenberg & Wolfgang Wiegand, *Value-Added Taxation in the EC After 1992: Some Applied General Equilibrium Calculations*, 37 EUR. ECON. REV. 1483, 1483 (1993).

apply equally to all wine products, including EU wines. Furthermore, these internal taxes, although a trade burden to Australian wines, are equally burdensome on EU wines.

## 2. Government Subsidies

Unlike Australia, the EU provides massive outlays of government subsidies to its wine industry. A significant portion of the EU's US \$1.8 billion wine budget has been allocated to subsidize its wine industry.<sup>55</sup> These subsidies consist of funding support for exporting costs, and for production and non-production of wine.<sup>56</sup> In addition, the EU provides internal support to the wine sector, including distillation intervention, storage aids, and vineyard restructuring support. Finally, promotional funding is available through the individual wine producing states. Countries generally justify the use of subsidies and other government support for its agricultural products to maintain a system of self-sufficiency in food and beverages. The EU asserts that self-sufficiency, by a system of government support, provides an EU country with a national independence of food security. A country with food security has independence and does not have to rely on other countries, thereby giving it international political power.

Wine is protected as an agricultural product under the justification of national self-sufficiency and food security. However, the EU is being disingenuous by classifying wine as a food or beverage product for food security. Thus, it may be true that the European Commission support for wine provides the EU self-sufficiency for the product itself. However, the product of wine itself is not a food or beverage item that is necessary to a nation's survival, such as milk or bread. Moreover, wine is a luxury and not an essential agricultural product for food security of a country.

EU support for its wine industry goes beyond a desire for self-sufficiency and security. The EU, especially France, is immensely protective of its wine industry through subsidies and other internal support, for cultural and political reasons.<sup>57</sup> The long history and success of EU wines in the world market provide an incentive for EU wine-producing countries, notably France, to maintain the success for this highly revered and prestigious industry.<sup>58</sup> Accordingly, the EU attempts to preserve the

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55. Leo Cendrowicz, *How Europe is Drowning in Wine*, TIME, July 3, 2007, <http://content.time.com/time/business/article/0,8599,1639674,00.html>.

56. *Id.*

57. O'CONNOR, *supra* note 5, at 95-96.

58. *Id.*

success of its wine industry through subsidies and other government support.<sup>59</sup> Australia offers a lesser degree of support through funding for promotional programs.<sup>60</sup> This disparity between Australia and the EU in providing government subsidies for wine makes it extremely difficult for Australian wine companies to compete with the EU wine makers in the European market.<sup>61</sup> EU support for its wine producers creates an advantage by enabling the wineries to save on costs and sell their products at lower prices due to the internal support and subsidies.<sup>62</sup>

Based on the above, it appears that the EU is not providing an equal playing field for imported wine from New World countries such as Australia. By virtue of the minimum standards afforded to GIs in the TRIPS Agreement, and the lack of any guidance provided to Member States to implement protection of GIs, the Old World's ability to use other protectionist measures to oust the import of New World wine GIs has been bolstered.<sup>63</sup>

### 3. Tariffs

The EU possesses a Common Customs Tariff (CCT) system which is comprised of all the tariff measures that affect imports into the EU.<sup>64</sup> Under the CCT, rates are determined by the alcohol strength of the wine, container size, and wine type.<sup>65</sup> The EU maintains tariff rates on imported wine that are significantly higher than Australia's.<sup>66</sup> EU tariffs on imported wine range from €13.1 to €32 per hundred liters, while Australia's tariffs

59. EUROPEAN COMM'N, EU CUSTOMS STRATEGY, [http://ec.europa.eu/taxation\\_customs/customs/policy\\_issues/customs\\_strategy/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_strategy/index_en.htm) (last visited May 8, 2014) [hereinafter *Customs Strategy*].

60. See generally JOSEPH CARROLL & LINDY CROTHERS, U.S. DEP'T OF AGRIC., AUSTRALIA 2012 WINE ANNUAL (2012), available at [http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Wine%20Annual\\_Canberra\\_Australia\\_3-14-2012.pdf](http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Wine%20Annual_Canberra_Australia_3-14-2012.pdf).

61. *Id.*

62. See *Customs Strategy*, *supra* note 59, at 1-2.

63. WORLD TRADE ORG., TRIPS: GEOGRAPHICAL INDICATIONS, [http://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_background\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm) (last visited May 8, 2014).

64. See *Customs Strategy*, *supra* note 59, at 1-2.

65. See generally Cees Dekker, *The Ambit of the Free Movement of Goods Under the Association of Overseas Countries and Territories*, 23 EUR. L. REV. 272, 724-26 (1998); EUROPEAN COMMISSION, WHAT IS THE COMMON CUSTOMS TARIFF?, [http://ec.europa.eu/taxation\\_customs/customs/customs\\_duties/tariff\\_aspects/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/index_en.htm) (last visited May 8, 2014).

66. See generally CARROLL & CROTHERS, U.S DEP'T OF AGRIC., *supra* note 60.



only range from a mere 9.9 cents per liter to 30.9 cents per liter.<sup>67</sup> Maintaining higher tariff rates within the EU places Australian wine companies at a disadvantage against EU wine companies competing for international market share. The EU is complying with the present conditions under the Uruguay Agreements, so Australia has no valid case against the EU under the WTO.<sup>68</sup> In turn, this has placed greater pressure on the EU to rely on various non-tariff trade barriers to maintain protection for their wine industry similar to those existing before the Uruguay Round Agreement.<sup>69</sup> It is these non-tariff barriers that will increasingly need to be the focus of attention for the Australian wine industry and government in future WTO negotiations.<sup>70</sup>

#### IV. FREE CIRCULATION OF GOODS

In addition to tariffs, internal taxes, and subsidies, the EU imposes various administrative and technical regulations considered by the industry as barriers to the free circulation of goods.<sup>71</sup> These barriers include: licensing regulations, labeling restrictions, marketing regulations, regulations on oenological practices and certification regulations, discussed briefly below. They may present themselves as silent critters in the context of wine distribution agreements.

##### A. Licensing Regulations

The EU, through Commission Regulation 3388/81,<sup>72</sup> established detailed rules with respect to import licenses in the wine sector. Article 1 of this Commission Regulation requires that all wine imports into the

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67. AUSTRALIAN DEP'T OF AGRIC., TARIFF SCHEDULE OF AUSTRALIA, [http://www.dfat.gov.au/trade/negotiations/us\\_fta/final-text/Annex2b\\_Tariff\\_Elimination/Annex\\_2-B\\_Australia\\_Tariff\\_Schedule.pdf](http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/Annex2b_Tariff_Elimination/Annex_2-B_Australia_Tariff_Schedule.pdf); see also CARROLL & CROTHERS, U.S DEP'T OF AGRIC., *supra* note 60, at 1. See generally AUSTRALIAN BUREAU OF STATISTICS, SHIPMENTS OF WINE AND BRANDY IN AUSTRALIA BY AUSTRALIAN WINEMAKERS AND IMPORTERS (2013), available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8504.0>; DANA BIASSETTI, U.S. DEP'T OF AGRIC., 2012 ITALY EXPORTER GUIDE (2013), available at [http://www.calwinexport.com/files/Wine%20Annual\\_Rome\\_EU-27\\_3-1-2012.pdf](http://www.calwinexport.com/files/Wine%20Annual_Rome_EU-27_3-1-2012.pdf).

68. See generally *The Legal Texts*, *supra* note 40, at 354-79.

69. *Id.*

70. *Id.*

71. Commission Regulation 3389/81, 1981 O.J. (L341) 2 (EEC) (laying down detailed rules for export refunds in the wine sector).

72. *Id.* at 24.

Community shall be subject to the production of an import license before their wine can be imported into the EC.<sup>73</sup> Among other things, the following information is required for the license: the country of origin of the wine producer, color of wine, tariff subheadings, and product descriptions.<sup>74</sup> Nations that participated in the Uruguay Round of GATT recognized that the flow of international trade could be impeded by the inappropriate use of import licensing procedures, and to counter this trade barrier the participating members adopted the “Agreement On Import Licensing Procedures.”<sup>75</sup> This Agreement restricts nations from facilitating unreasonable licensing requirements, resulting in the EU enacting policies to comply with the Agreement.<sup>76</sup> Even though this regulation appears to be a *de minimis* burden on a wine company exporting to the EU market, it nevertheless is a barrier to trade.

### B. Labeling Regulations

The EU imposes strict labeling requirements which, while Australia has been somewhat successful in harmonizing labeling regulations with the EU, pose a costly exercise for other New World producers such as America.<sup>77</sup> The labeling requirements the EU imposes on wine may be found in a number of Council Regulations and the numerous amendments to these regulations.<sup>78</sup>

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73. *Id.*

74. *Id.*

75. *See Marrakesh Agreement, supra* note 3, at annex 1A.

76. *See* Commission Regulation 76/2008, 2008 O.J. (L114) 3 (EC) (laying down common detailed rules for the application of the system of import and export licenses and advance fixing certificates for agricultural products; *see also* Commission Regulation 1351/97, 1997 O.J. (L186) 5 (EC) (laying down special detailed rules in respect of import and export licenses in the wine sector).

77. N.Y. Law School Ctr. for Int'l Law, *United States/European Union: An Agreement to Wine About*, INT'L REV., Spring 2006, at 1-3, available at [http://www.nyls.edu/center\\_for\\_international\\_law/wp-content/uploads/sites/132/2013/08/CIL\\_Newsletter\\_Spring2006.pdf](http://www.nyls.edu/center_for_international_law/wp-content/uploads/sites/132/2013/08/CIL_Newsletter_Spring2006.pdf).

78. *See* Reg. No. 583/2011, *supra* note 44; Reg. No. 607/2009, *supra* note 44; Reg. No. 670/2011, *supra* note 44; *see also* Commission Regulation 1640/2000, 2000 O.J. (L187) 43 (EC), *amending* Commission Regulation 3201/90, 1990 (L309) 1 (laying down detailed rules for the description and presentation of wines and grape musts); Council Regulation 2392/89, 1989 O.J. (L232) 13 (EEC) (laying down general rules for the description and presentation of wines and grape musts) (no longer in force) [hereinafter Council Regulation 2392/89]; Council Regulation 3201/90 of 16, 1990 O.J. (L309) 1 (EEC) (laying down detailed rules for the description and presentation of wines and grape musts) [hereinafter Council Regulation 3201/90].

Broadly, Council Regulations provide the permissible and required labeling requirements for imported wines.<sup>79</sup> These regulations draw a distinction in their treatment of what information is required and limited on wine labeling between imported wines described by reference to a geographic area and imported wines that are not described by reference to a geographic area.<sup>80</sup> For example, wine imports for retail sale must carry the labels in the language of the importing country and provide specific information including: the bottler's name and address, name of the region where the grapes were grown, quality category (e.g. table wine, quality wine, or quality wine with special attributes such as Cabernet), quality control number which has been previously issued by an approved grading agency, and alcohol content and net volume in metric units.<sup>81</sup>

Australia's labeling requirements, by comparison, are set out in certain regulations.<sup>82</sup> Moreover, a wine importer must also be aware of, and comply with, all the regulations and restrictions imposed by the amendments to these Council Regulations.<sup>83</sup> This process can be very time consuming for a wine producer to have to read through in order to comply with EU requirements.<sup>84</sup> Furthermore, although these regulations are uniform within the individual EU states, local customs officials have the ability to interpret and enforce these regulations.<sup>85</sup> This method utilized by the EU of interpreting and enforcing the regulations makes it cumbersome and expensive for Australian wine companies to conform to the local customs officials' interpretation.<sup>86</sup>

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79. See Reg. No. 670/2011, *supra* note 45.

80. *Id.*

81. EUROPA, LABELLING OF WINE AND CERTAIN OTHER WINE SECTOR PRODUCTS, [http://europa.eu/legislation\\_summaries/other/121303\\_en.htm](http://europa.eu/legislation_summaries/other/121303_en.htm) (last visited May 8, 2014).

82. See *Australian Wine and Brandy Corporation Act 1980* (Austl.); see also *Wine Australia Corporation Act 1980* (Austl.).

83. Memorandum from Alcohol & Tobacco Tax & Trade Bureau to All Wine Exporters, available at <http://www.ttb.gov/pdf/v11notice.pdf>.

84. European Commission, *Cutting Red Tape to Spur Growth*, ENTERPRISE INDUSTRY MAGAZINE, June 6, 2013, [http://ec.europa.eu/enterprise/magazine/articles/smes-entrepreneurship/article\\_11103\\_en.htm](http://ec.europa.eu/enterprise/magazine/articles/smes-entrepreneurship/article_11103_en.htm) [hereinafter *Cutting Red Tape*].

85. Reg. No. 670/2011, *supra* note 44, at 7.

86. *Cutting Red Tape*, *supra* note 83.

### C. Marketing Regulations in Relation to Non-EU Wines

The EU also imposes marketing restrictions on imported wine.<sup>87</sup> For example, the EU has prevented the terms “table wine” and “reserve” from appearing on non-EU wine.<sup>88</sup> The term “table wine” in Europe is known by ordinary wine drinkers as a type that is consumed with everyday meals.<sup>89</sup> This restriction makes it extremely difficult for some New World producers to market their wine as “dinner wine.”<sup>90</sup> While New World wine producers can get around this issue by selling clean skins to the EU, this fails to generate as much money as a labeled wine would.<sup>91</sup> The only guidance provided by the American Bureau of Alcohol, Tobacco, and Firearms is that a table wine means a “grape wine with an alcohol content not exceeding fourteen percent by volume.”<sup>92</sup> US regulations on the use of quality terms on wine sold in the US are less burdensome than the regulations imposed by the EU for non-European wines sold in the EU, requiring New World wine producers to factor this in from the outset of production.<sup>93</sup>

Further, no specific regulation exists against importers using the term “reserve.” Rather, the EU follows and implements the restrictions of individual Member States in using the term for the labeling of non-EU wine.<sup>94</sup> The term “reserve” is recognized by the EU as either fitting within the French definition of a wine of superior quality, or the Spanish interpretation of reserve as a wine from barrel aging.<sup>95</sup> No such definition for quality terms exists in Australia or in the US.

Further, the EU imposes other marketing regulations on imported wines. First, all wines bottled for importation into the EU must carry a “lot

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87. Commission Regulation 753/2002, 2002 O.J. (L118) 1 (EC).

88. *Id.*

89. TABLE WINE, <http://www.virtualwineknow.com/2010/11/table-wine.html> (last visited May 8, 2014).

90. Nicol Louw, *Logistical Problems with Wine Exports*, WINELAND, Oct. 2001, available at [http://wineland.co.za/archive/index.php?option=com\\_zine&view=article&id=677:logistical-problems-with-wine-exports](http://wineland.co.za/archive/index.php?option=com_zine&view=article&id=677:logistical-problems-with-wine-exports).

91. *Id.*

92. 27 C.F.R. § 4.21 (2013).

93. TABLE WINE, *supra* note 89.

94. Milo G. Coerper, *Certification Marks as a Means of Protecting Wine Appellations in the United States*, 15 GEN. PRAC., SOLO & SMALL FIRM MAG. 42, 42-43 (1998).

95. FRENCH WINE CLASSIFICATION, <http://www.slurp.co.uk/wine-pages/french-wine-classification/> (last visited May 8, 2014).

mark” so the EU can determine how to classify the wine.<sup>96</sup> The package can possess any coding system except bar codes for use as a lot mark, as long as the mark is preceded by an ostensible and distinct capital “L.”<sup>97</sup> This imposes an added burden on New World wine producers whose domestic laws do not require the mark. The EU has imposed unfair marketing regulations on the treatment of awards on wine labels. The EU only allows a wine bottle to display awards received in a competition officially recognized in the EU.<sup>98</sup> Ironically, the EU only recognizes its own competitions, which provides a disadvantage to New World wines in marketing.<sup>99</sup>

#### D. *Quality Control*

In a bid to deal with the increasingly competitive international market, governments domestically appear to be increasingly active in bringing about certain control measures with respect to wine trade. For example, such support by governments, in this respect, exists in Portugal and Spain and includes:

1. Quality control laws that specify boundaries of regions, regulators for the production and naming of wines, and create regional agencies to oversee production and enforcement of regulations.
2. With assistance from the EU, research and development of improved viticultural and enological technologies, and monetary investment in training and physical equipment.
3. National marketing programs that promote their countries as world class wine regions and assist individual producers to

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96. Reg. No. 670/2011, *supra* note 45.

97. LABELLING REQUIREMENTS FOR BOTTLED SOUTH AFRICAN WINE INTENDED FOR THE EUROPEAN UNION 7 (2012), *available at* [http://www.sawis.co.za/winelaw/download/EU\\_labelling\\_guide\\_July\\_2012.pdf](http://www.sawis.co.za/winelaw/download/EU_labelling_guide_July_2012.pdf).

98. AUSTRALIAN GOVERNMENT, LABEL APPROVAL CHECKLIST - EUROPEAN UNION 7 (2012), *available at* <https://www.wineaustralia.com/en/Production%20and%20Exporting/~media/0000Industry%20Site/Documents/Production%20and%20Exporting/Labeling/Label%20Approval%20Checklist%20-%20EU.ashx>.

99. *See id.*

device sophisticated marketing strategies for foreign markets.<sup>100</sup>

For example, with respect to the first abovementioned quality control measure, Spain has introduced laws controlling wine production which began in 1926 with the official demarcation of the *Rioja* region.<sup>101</sup> The process was completed for the rest of the country in 1972 with the passage of legislation that created the *Instituto Nacional de Denominaciones de Origen* (INDO) and established a system of *Denominacion de Origen* (DO).<sup>102</sup> There presently exist 68 DOs in Spain.<sup>103</sup> Furthermore, since joining the EU in 1986, Spain has had to conform to all regulations that mandate continent wide standards for winemaking, land use, and the marketing and distribution of alcoholic beverages.<sup>104</sup> In Spain, quality wines, broadly speaking, are wines from the official DO, made from authorized varietals, and minified and aged according to the regulations of that DO.<sup>105</sup>

An additional level of quality control was created by law in 1988, when Spain passed a law specifying that the most prestigious wine districts will be designated as *Denominacon de Origen Calificada* (DOC) – that being Spanish for “eminent” or “distinguished.”<sup>106</sup> Initially, only Rioja was designated a DOC. But in 2003, Priorat was also elevated to its prestigious status. The quality level of a DO or DOC wine is indicated on its label by a term that is based primarily on the amount of ageing that the wine received. The requirements for ageing are spelled out separately for each district.<sup>107</sup>

Most interesting, however, is Portuguese wine and regulation. Portugal created the world’s first demarcated wine region in 1756. Because of certain political upheaval however, Portugal only finalized the

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100. REGULATION: LAWS THAT REGULATE THE WINE INDUSTRY IN SPAIN, [http://www.winesfromspain.com/icex/cda/controller/pageGen/0,3346,1549487\\_6763486\\_6778161\\_0,00.html](http://www.winesfromspain.com/icex/cda/controller/pageGen/0,3346,1549487_6763486_6778161_0,00.html) (last visited May 8, 2014) [hereinafter *Regulation*].

101. GREAT WINE AREAS: RIOJA, <http://www.oxfordwine.co.uk/features/summer08/rioja.html> (last visited May 8, 2014).

102. SPANISH WINE TYPES, <http://www.spanish-wines.org/spanish-wines-types.html> (last visited May 8, 2014) [hereinafter *Wine Types*].

103. MAIN SPANISH WINE REGIONS, <http://devinus.com/spanish-wine-do/> (last visited May 8, 2014).

104. See *Regulation*, *supra* note 100.

105. *Wine Types*, *supra* note 102.

106. *Id.*

107. *Id.*

creation of quality control laws for its wine trade following admittance into the EU in 1986.<sup>108</sup>

The system of laws for Portugal's *Deonominacao de Origem Controlada* is based on the *Appellation d'Origine Controlée* system in France. All laws are overseen by the *Instituto da Vinha e Vinho*, which works closely with local authorities in each province. There exist certain other guidelines governing the importing of alcoholic beverages into Portugal. Often such guidelines are posited as or fall under the guise of a quality control measure. One such measure in Portugal is that Port must not only be made in the region, but shipped from Porto.<sup>109</sup>

## V. REGULATIONS ON OENOLOGICAL PRACTICES

Wine, as an agricultural product, is subject to health and safety regulations for the protection of consumers and so countries attempt to protect the health and safety of wine consumers through the regulation of oenological practices. Oenological practices are the specific methods used by wine companies for the harvesting, production, and preservation of wine.<sup>110</sup> Both the EU and Australia regulate the oenological practices of wines grown and produced for human consumption within their respective markets.<sup>111</sup> Nevertheless, the specific restrictions and regulations of oenological practices that the EU imposes on imported wine are still considered trade barriers.<sup>112</sup> The EU provided common rules for defining the authorized oenological practices and processes for wine products to be marketed and sold in the EU.<sup>113</sup> Wine products that fail to conform with the authorized oenological practices and processes may not be legally

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108. HISTORY OF PORTUGUESE WINE, <https://bottlenotes.com/wineencyclopedia/region-portugal-history> (last visited May 8, 2014).

109. The Douro River region of Portugal claims the origin of Port wine and, accordingly, seeks to augment the international level of protection for Port wines. The Port industry is regulated by the *Instituto dos Vinhos do Douro e Porto* (IVDP). Port—much like the French wine Champagne produced in the Champagne region of France—is produced under very strict legal regulations. Port wine, under US federal law, is considered to be one of the sixteen semi-generic wines that currently are afforded legal protection by the US government, but are not awarded as high of an indemnity as wines classified as non-generic (see 26 U.S.C. § 5388 (2006)).

110. CTR. FOR THE PROMOTION OF IMPORTS FROM DEVELOPING COUNTRIES, EU LEGISLATION: WINE 2 (2008), available at <http://www.allindiawine.com/Portals/0/ACBIREPORT.pdf> [hereinafter *CBI*].

111. *Id.*

112. PETER J. GROVES, SOURCEBOOK ON INTELLECTUAL PROPERTY LAW 573 (1997).

113. *CBI*, *supra* note 110, at 2.

marketed or sold within the EU.<sup>114</sup> For the most part, the EU rejects oenological practices which do not specifically comport with intrinsic EU methods and standards.<sup>115</sup> The EU methods and standards are provided in various Council Regulations and the subsequent amendments to these regulations.<sup>116</sup> For example, the EU restricts the importation of wines that do not maintain a standard minimum and maximum alcohol content.<sup>117</sup> As another example, the EU mandates that oenological processes and practices for wine intended for direct human consumption, amongst other similar requirements, must conform to such items as the use of heat treatment, aeration, or bubbling using nitrogen.<sup>118</sup>

The EU maintains that it regulates oenological practices for health, safety, and quality reasons.<sup>119</sup> Nonetheless, these regulations amount to trade barriers because not all countries utilize the same oenological practices and processes as does the EU.<sup>120</sup> Many wine producing nations possess their own unique system of oenological processes and practices. In any event, a safe and effective oenological method takes time to develop and perfect. These EU mandated standards effectively act as a trade barrier to importers, because an importer must conform to these extremely technical requirements of oenological methods.<sup>121</sup>

## VI. CERTIFICATION REGULATIONS

The certification regulations administered by the EU are closely related to the labeling, marketing, and oenological regulations. Certification regulation is the process that wine importers must go through to obtain approval and become qualified to import.<sup>122</sup> The certification process is the process which actually determines whether an importer is in compliance with the labeling and oenological regulations.<sup>123</sup> The EU requires that imported wines meet compositional limits according to European Union standards.<sup>124</sup>

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114. *Id.*

115. See Caoimhin MacMaolain, *Eligibility Criteria for Protected Geographical Food Names*, 31 EUR. L. REV. 579, 580 (2006).

116. *CBI*, *supra* note 110, at 2.

117. *Id.*

118. *Id.*

119. *Id.*

120. GROVES, *supra* note 112, at 573.

121. *Id.*

122. *CBI*, *supra* note 110, at 2.

123. *Id.*

124. *Id.*



In order for an exporter to demonstrate that these standards have been met, a laboratory analysis is required which must be completed either by an EU laboratory, or by a laboratory officially recognized by the country in which the wine originated;<sup>125</sup> compliance which is time-consuming and adds costs to the wine producer and thus a barrier to the free movement of these products within the EU. While the EC–Australia Wine Agreement allows for the mutual recognition of testing methods and certification measures, not all New World countries are fortunate enough to obtain concessions for the harmonization of standards linked to the evolving EU-wide legislative standards.<sup>126</sup>

The implicit barriers to trade are a consequence of internal regulation within the EU that do not appear to be superficially directed to curb imports.<sup>127</sup> In reality, however, these regulations do have a protectionist effect and therefore have the result of the EU monopolizing the GI sector of wines. Monopolies are the kryptonite of competition – it can, nonetheless, endure or even be fortified if they assist the evolution and development of commerce to some extent.<sup>128</sup> As I see it, some of the above implicit barriers to trade are justified as being consistent with what is seen as the true mission of the TRIPS Agreement, to adopt intellectual property policies that encourage countries to promote their national interest in the way that will promote free trade.<sup>129</sup> But this is only a theoretical basis. Trade is inhibited if one party does not have something to trade or lacks leverage. With the increasing economic power of the EU, compared to, for example, New World countries with less leverage, it is questionable whether the TRIPS Agreement confers the same benefit on New World countries in comparison to the Old World.

Further, the trade regime can be seen as a political regime. Effectively, parties negotiate by banging their heads together until one party's head gets soft. This assumes that they are willing to negotiate in the first place. However, there are times when the political imperatives preclude a trade approach. This is precisely the environment in which trade

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125. MacMaolain, *supra* note 115, at 580.

126. GROVES, *supra* note 112, at 99.

127. *Id.* at 573.

128. *See* Rovamo, *supra* note 7.

129. ILKKA RAHNASTO, INTELLECTUAL PROPERTY RIGHTS, EXTERNAL EFFECTS AND ANTI-TRUST LAW: LEVERAGING IPRS IN THE COMMUNICATIONS INDUSTRY 53-54 (2003); Pamela Samuelson, *Challenges for the World Intellectual Property Organization and the Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age*, 21 EUR. INTELL. PROP. REV. 578, 586 (1999).

friction arises and one that brews competitive advantages over others. In this regard, it remains to be seen whether the cobbled-together patchwork of the TRIPS Agreement has the elegance necessary to survive more than a decade, much less 100 years.

## VII. OVERVIEW OF WINE DISTRIBUTION AND COMMERCIAL CONSIDERATIONS

In addition to the operation of international wine regulation from an intellectual property rights perspective is a more subtle (but nevertheless central) form of wine trade regulation, albeit from a contractual perspective – wine distribution agreements. Such agreements, at least in theory, could be seen to strike a balance between wine production and wine consumption, but may nevertheless be influenced by domestic policy and trade regulation. This section focuses predominantly on Europe and the US, but averts from a discussion of pure marketing (including a comparison of market share of wines in different countries), detailed economic analysis, and an exhaustive discussion of legal themes.

### *A. The Nuts and Bolts*

The sale of wine from a wine producer to a wine consumer can be a very straightforward sale.

#### **Wine Producer → Consumer**

However, in the international marketplace in particular, this simple transaction between two parties can become a large number of different transactions involving wine merchants, importers, distributors, wholesalers, and retailers, before the final sale to someone who will actually drink the wine. At any stage in the annals these parties can be represented by agents. A comprehensive account of matters concerning wine vineyard production, order and product flow, and international and domestic supply chain atomization is, however, beyond the scope of this article.

Government departments become involved when wine is moved out of one country and into another. Other entities including storage companies, road transport, shipping companies, bond stores, and insurance companies may become involved and what started out as a simple transaction ends up looking like a complex flow-chart. While a number of

dimensions exist with respect to the abovementioned entities, this section seeks to outline some of the practical contractual obligations that may exist.

Therein, contracts naturally reflect the comparative economic bargaining power of the parties.<sup>130</sup> The “ideal” wine distribution contract will vary among wineries and situations. The titles of some of the main clauses present in such contracts (the drafting of which is not discussed in this article), include:

- Recitals;
- Appointment;
- Territory Restrictions;
- Terms of Sale;
- Performance Standards (e.g. by wholesaler and/or winery)
- Terms of Agreement;
- Termination of Agreement;
- Liquidated Damages;
- Events Following Expiration or Termination;
- Claims, Damages, and Waiver;
- Warranties;
- Force Majeure;
- Notices;
- Severability;
- Governing Law;
- Waiver;
- Adherence to Laws;
- Entire Agreement;
- Nature of Agreement;
- Binding Agreement.

Parties should also be mindful of other factors, including domestic laws and international obligations outlined in this article.<sup>131</sup> Reference should also be made to “INCOTERMS,” introduced in 1936 by the International Chamber of Commerce, which were designed to create a bridge between different members of the industry by acting as a uniform language they can use.<sup>132</sup>

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130. THEODORE L. BANKS, *DISTRIBUTION LAW, ANTITRUST PRINCIPLES AND PRACTICE* 86 (2nd ed. 2004).

131. For a comprehensive description of wine distribution laws in the US, *see id.*

132. INCOTERMS, <http://www.foreign-trade.com/reference/incoterms.cfm> (last visited May 8, 2014).

Each INCOTERM refers to a type of agreement for the purchase and shipping of goods internationally.<sup>133</sup> There are eleven different terms, each of which helps users deal with different situations involving the movement of goods.<sup>134</sup> For example, the term FCA is often used with shipments involving Ro/Ro or container transport.<sup>135</sup>

### B. Domestic Factors

In addition to the above, a winery should also be aware of domestic laws regarding bribery, registration of certain intellectual property such as trademarks, the state's distribution system labeling requirements, franchising laws (if relevant), and consumer protection laws (e.g. the three-tier system), amongst other matters.<sup>136</sup>

It is pertinent to, for example, examine the legal framework of a state's distribution network, which may be comprised of "control" or "non-control" measures.<sup>137</sup> In relation to the former, a government "monopoly" (broadly speaking) may exist for the wholesale distribution and sale of wine.<sup>138</sup> Control states (which exist mainly in the US) may sell directly to the state, but would be required to appoint a broker or agent to assist them in serving control state markets. In "non-control" or "open" states, wineries from outside that state must generally sell to an in-state wholesaler.<sup>139</sup> The wholesaler would, in-turn, sell the wine to retailers (i.e. the "three-tier system", comprised of the winery/supplier, wholesaler, and retailer).<sup>140</sup>

## VIII. SUMMARY

There is a notable increase in global trade in GI-related products over the last sixty years that has resulted from a number of facets relating to

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133. *Id.*

134. *Id.*

135. *Id.*

136. BANKS, *supra* note 130, at 4-5.

137. *Id.* at 684-85.

138. *Id.* at 459.

139. WINE & SPIRITS DIST. OF ILL., REGULATION OF BEVERAGE ALCOHOL IN ILLINOIS: UNDERSTANDING THE THREE-TIER SYSTEM 2, *available at* [http://wineandspiritsill.com/images/Regulation%20of%20Beverage %20Alcohol%20in%20Illinois%20Understanding%20the%20Three%20Tier%20System.pdf](http://wineandspiritsill.com/images/Regulation%20of%20Beverage%20Alcohol%20in%20Illinois%20Understanding%20the%20Three%20Tier%20System.pdf).

140. *See id.*

political, economic, legal, and technological considerations.<sup>141</sup> For example, there are increased transportation channels and methods of choice, which facilitate fast movement of goods at competitive prices – particularly for transcontinental transport. Of avid benefit has been the establishment of international trade agreements, and international instrumental bodies such as the WTO. These have been instrumental in minimizing barriers to trade – including tariffs – as well as pruning non-tariff barriers. Importantly, there has been a notable spur of consumer and economic demand for GI-market products such as food, beverages, and other drinks – particularly in countries such as China, Canada, the US, Australia, and New Zealand. We now see that global markets have precipitated from local markets, and therein established artisanal products, such as champagne, Russian caviar, Tokaji, Gorgonzola, and even feta, which are competing with modern options such as Australia or New Zealand sparkling wines, American Paddlefish “Spoonfish” roe, Monterey Jack, or Beyaz Peynir.

Of significance in this article is the ongoing issue surrounding GIs, particularly for the international wine industry. Europe and the “Old World” had previously led the way in the international wine market, but now compete with producers in a number of “New World” countries, including the US and Australia. Wine is a highly traded commodity and, for two key powers in world trade – the EU and the US – is superimposed with cultural conflict.<sup>142</sup> Viewed another way, this transpires as reflecting New World technique against Old World terroir.<sup>143</sup>

At the heart of Europe’s keen efforts to expand GI protection is the desire to preserve its historical and rich agricultural tradition. While the US and other New World producers such as Australia are wary about overtly strong GI protection (particularly at the WTO level), they do not wholly reject the concept of GIs. Over 150 viticultural GIs are protected in the US, including discrete designations such as the “Mississippi Delta” wine-growing region. Further, precipitating from the relatively recent US-Australia Free Trade Agreement is Tennessee whisky, and Bourbon whisky as protected GIs in Australia. The New World is, however, largely opposed to the extension of the absolute protection standard of GI protection to new food products, in addition to proposed procedural extensions that would result in further embedding the absolute standard in international law.

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141. See Kal Raustiala and Stephen R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT’L L. 337, 351 (2007).

142. See *id.*

143. See *id.*

What is apparent is an intriguing parallel within the modern economy of information and innovation in the form of GIs impelled to spout by a spurring shift from local to global markets. And, on the flipside, rising competition utilizes innovation to converge. While this article does not endorse a claim that economic impetus drives *all* property claims, new property rights are demanded by entities when cardinal benefits and costs veer in an elemental manner. The evolution and prominence of GIs on an international plateau highlights this. It is equally acknowledged that GI partisans, who may seek to capitalize on GIs through the intellectual property system, do fear the equalizing and homogenizing intrusion of global competition.

As intellectual property rights aspire to conserve both stakeholders (i.e. vineyards), and culture (i.e. heritage), GIs endure at the junction of these foremost trends. Distribution agreements – specifically their operation – are illustrative of this. This article has highlighted the prominence of GIs on the international radar due to their assemblage of cultural exchange, present globalization, and ongoing changes in consumer preferences.

Moving forward, the compelling tread of technological progress and unfolding impact of globalization, coupled with the expanding of global economic liberalization, feasibly implies the ongoing presence of domestic and international issues concerning wine in the present century.

