

CHAMPAGNE OR CHAMPAGNE? AN EXAMINATION OF U.S. FAILURE TO COMPLY WITH THE GEOGRAPHICAL PROVISIONS OF THE TRIPS AGREEMENT

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I. INTRODUCTION

A wine store in the United States, Australia, or New Zealand offers a consumer an abundance of choices. In the United States, one may select champagne from California,¹ claret from Virginia,² or chablis from Ohio.³ An Australian consumer may purchase domestically produced burgundy,⁴ port,⁵ or claret.⁶ The wine shops in New Zealand sell national products labeled port,⁷ sherry,⁸ and champagne.⁹ What the average wine consumer in the United States, Australia, or New Zealand may not realize is that the use of such designations as wine types, for example, champagne, claret, and port, may violate a multinational treaty of which all three countries are members.

As the global economy increases and international trade expands, countries throughout the world have had to negotiate various trade agreements with one another.¹⁰ One of the most important trade agreements concluded is the Trade-Related Aspects of Intellectual Property Rights, Including Trade

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¹ See, e.g., Korbelt Champagne Cellars Brut Rose Champagne.

² See, e.g., Lake Anna Winery Spotsylvania Claret.

³ See, e.g., Lake Erie Golden Chablis.

⁴ See, e.g., Houghtons White Burgundy.

⁵ See, e.g., Whiskers Blake Tawny Port.

⁶ See, e.g., Hardy Knottage Hill Claret.

⁷ See, e.g., Corbans Callars Tawny Port.

⁸ See, e.g., Don de Monte Sherry.

⁹ See, e.g., Angas Brut Champagne.

¹⁰ See Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 770 (1997).

in Counterfeit Goods of the Uruguay GATT (TRIPS)¹¹ which provides for the international protection and enforcement of intellectual property rights.¹²

The Agreement covers a broad range of intellectual property rights.¹³ Included within this spectrum is protection for geographical indications of source.¹⁴ The inclusion of these provisions caused heated debates during the Uruguay GATT Rounds and continues to generate discussion.¹⁵ The article that causes the most debate is Article 23 which deals with the protection of geographical indications for wine and spirits.¹⁶

Under this provision, member countries must develop laws to prevent the use of geographical indications on wines that do not originate from the area signified by the indication.¹⁷ For example, the French assert that only wine produced in Champagne, France should bear the designation Champagne—champagne, in the lower case and generic sense, does not exist.¹⁸ The current debate surrounding Article 23 is over how much protection should be given to geographical indications that have long been used beyond their boundaries and what obligations TRIPS imposes on its members.¹⁹

The United States has recently tested the boundaries of Article 23 by enacting legislation that provides greater protection to U.S. wine makers who use European geographical indications on wine made in the United States.²⁰ The European Union (EU),²¹ which is a staunch supporter of Article 23,

¹¹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

¹² See Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123, 125 (1995); W. Lee Webster, *The Impact of NAFTA, GATT, and TRIPS Provisions on Trademark and Copyright Law*, 455 PRAC. L. INST. 21, 27 (1996).

¹³ See Hicks & Holbein, *supra* note 10, at 784.

¹⁴ See TRIPS, *supra* note 11, at arts. 22, 23, 24.

¹⁵ See Webster, *supra* note 12, at 43-44. The debate includes whether or not geographical indications should even be considered property. See Louis Lorvellec, *You've Got to Fight for Your Right to Party: A Response to Professor Jim Chen*, 5 MINN. J. GLOBAL TRADE 65, 69 (1996).

¹⁶ See Webster, *supra* note 12, at 43-44.

¹⁷ See TRIPS, *supra* note 11, at art. 23(1).

¹⁸ See Bruce A. Lehman, *Intellectual Property Under the Clinton Administration*, 27 GEO. WASH. J. INT'L L. & ECON. 395, 409 (1993-1994).

¹⁹ In some instances, TRIPS allows members to continue their pre-TRIPS activities and remain in compliance with TRIPS. See *id.* (discussing "grandfather" practices).

²⁰ See 26 U.S.C. § 5388 (1997).

²¹ The term European Union will be used throughout this paper even though European Community may be accurate at some points.

believes the new legislation clearly violates the TRIPS Agreement.²² This article will discuss whether the United States is in breach of its TRIPS obligations.

After a brief discussion of the prior international protection afforded geographical indications, this article will examine the TRIPS provisions for such indications. A discussion of the EU's efforts to persuade other members to comply with these provisions will follow. Next, the article will consider the U.S. legislation that may violate TRIPS and whether the United States is in breach of its obligations. Various arguments in favor of granting further protection and in favor of maintaining the status quo will be offered. The article will conclude that the United States should accept its responsibility to provide greater protection for geographical indications. By doing so, the United States would assist in ensuring that TRIPS remains an effective multinational treaty and set an example for compliance by other members.

II. GEOGRAPHICAL INDICATIONS

A. *What Are They?*

Geographical indications are similar to trademarks in that they function as source indicators.²³ Producers use such designations to signify the place from which a good originates.²⁴ Geographical indications, however, are not trademarks;²⁵ trademarks, for example, Nike® or Coke®, inform the

²² See Paul Magnusson, *A Good Year for Buffalo Beaujolais*, BUS. WK., Sept. 1, 1997, at 4.

²³ See Daniel Hangard, *Protection of Trademarks and Geographical Indications in France and in the European Union*, in SYMPOSIUM ON THE INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS 65, 66 (WIPO 1995) [hereinafter SYMPOSIUM].

²⁴ See *id.*

²⁵ See *id.* at 68-69. In the United States, geographical indications may be registered as certification marks. See Lori E. Simon, *Appellations of Origin: The Continuing Controversy*, 5 J. INT'L L. BUS. 132, 145 n.63 (1983). An individual owns a certification mark and allows others to use the mark "in connection with their goods or services to certify quality, regional or other origin." 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:91 (4th ed. 1997). For example, ROQUEFORT is a registered certification mark in the United States. See *id.* at 19-164. The mark certifies that the product "has been manufactured by sheep's milk only, and has been cured in the natural caves of Roquefort, France, according to the time-honored Roquefort tradition." *Id.* (citing *Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 497 (2d Cir. 1962)).

consumer of the specific producer of a product.²⁶ Under the TRIPS Agreement, geographical indications are "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."²⁷ Thus, the TRIPS definition has two components: (1) the geographical location from which the product originates and (2) the recognized quality that derives from this geographical location.²⁸

Prior to TRIPS, source indications with geographical significance comprised two categories: (1) appellations of origin and (2) indications of source. Appellations of origin signify not only the geographical region from which the product originates but also specific features of the product that result from the natural and human factors in the particular locale.²⁹ Indications of source merely state where the product was made.³⁰ The TRIPS Agreement created a single category for such indications.³¹ It is broader than indications of source but does not incorporate the natural and human factors of appellations of origin.³² For this discussion, geographical indications of source as defined by TRIPS is the only relevant definition.

B. Evolution of Use and Misuse

In order to understand the need to protect geographical indications, understanding the evolution of their use is essential. In 1824, France became the first country to pass legislation to protect geographical indications of source.³³ The legislation imposed criminal penalties on people who falsely

²⁶ See 1 MCCARTHY, *supra* note 25, § 3:1.

²⁷ TRIPS, *supra* note 11, at art. 22(1).

²⁸ See *id.*

²⁹ See Hangard, *supra* note 23, at 66; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, as last revised Jan. 1, 1994 at art. 2(1) [hereinafter Lisbon Agreement] reprinted in 3 STEPHEN P. LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION, 1954 (1975).

³⁰ See Hangard, *supra* note 23, at 66.

³¹ See TRIPS, *supra* note 11, at art. 22(1).

³² See *id.*

³³ See Louis C. Lenzen, *Bacchus in the Hinterlands: A Study of Denominations of Origin in French and American Wine-Labeling Laws*, 58 TRADEMARK REP. 145, 175 (1968). Geographical indications have been used since antiquity to distinguish products. See Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK

designated the origin of their goods.³⁴ A century later, in 1919, the French legislature enacted a more protective measure that recognized quality as a factor in the production of certain goods, notably wine and cheese, and created designations for appellations of origin.³⁵ Under the legislation, a product could bear the appellation of origin if all of its ingredients came from the geographical region indicated.³⁶ Harvesters, distillers, wholesalers, and shippers of wine faced serious penalties for fraudulent misrepresentation of origin.³⁷

In the meantime, geographically significant designations began to evolve into generic indications for wine types. In the 1800s, the United States experienced a huge influx of immigrants from Europe.³⁸ Many of these immigrants brought their wine-making skills and vine cuttings with them.³⁹ For example, a vintner family emigrating from Champagne, France to the United States may have brought a vine cutting to grow grapes.⁴⁰ These growers named the wines they produced after the regions from which they came.⁴¹ American wine producers at the end of the twentieth century continue to produce wines bearing these designations.⁴²

Similarly, in the late eighteenth century Australian settlers brought vine cuttings with them.⁴³ During the 1840s, influential colonists encouraged European vintners to migrate to Australia to assist settlers in their wine-making efforts.⁴⁴ As a result of these migrations, Australians began to use

REP. 11 (1996). The first wine producing region recognized for its wine was Oporto, Portugal. See Richard Waddington, *Exports Fill Port Shippers with Christmas Cheer*, REUTER ASIA-PACIFIC BUS. REP., Dec. 27, 1995.

³⁴ See Lenzen, *supra* note 33, at 175.

³⁵ See *id.* at 175-76. France regulates such geographical regions through its appellation d'origine controlee [AOCs]. See Lorvellec, *supra* note 15, at 69 (citing Code de la consommation art. L.115-5 (Fr.)).

³⁶ See Lenzen, *supra* note 33, at 178.

³⁷ See *id.* at 180.

³⁸ See Roger Hernandez, *Los Ninos Will Change Face of Nation*, DALLAS MORNING NEWS, Feb. 26, 1998, at 23A.

³⁹ See *All Things Considered* (NPR radio broadcast, July 21, 1997).

⁴⁰ See *id.*

⁴¹ See *id.* Use of such names was first documented in the 1830s before there was an international trade in wines. See *id.*

⁴² See *supra* notes 1-3 and accompanying text.

⁴³ See Chris Schacht, Opening Address, in SYMPOSIUM, *supra* note 23, at 1, 4.

⁴⁴ See *id.* at 5. Subsequent migrations of European wine makers occurred in the 1920s and 1930s. See *id.* at 6. The last influx of these migrants took place between the 1950s and the 1970s. See *id.*

European geographical indications as wine types.⁴⁵ Some Australian wineries, like their American counterparts, continue to use European geographical indications to identify various domestically produced wines.⁴⁶

New Zealand also tried to lure European wine makers⁴⁷ to establish a wine industry. The New Zealanders, however, proved less successful in their endeavors, and many of the recruited vintners left New Zealand for Australia. Nevertheless, European geographical designations appear on wine currently produced in New Zealand as well.⁴⁸

III. INTERNATIONAL PROTECTION PRIOR TO TRIPS

Prior to the TRIPS Agreement, geographical indications received little international protection. Only three international treaties extended protection to such indications, and none dealt exclusively with wine or spirits.

The first international agreement to grant protection to geographical indications was the Paris Convention for the Protection of Industrial Property.⁴⁹ Under the Paris Convention, a member of the Convention must seize or prohibit imports with false indications of source, producer, manufacturer, or merchant.⁵⁰ In its original form, countries prohibited such uses only in cases of serious fraud.⁵¹

In 1891, the Madrid Agreement for the Repression of False or Deceptive Indications of Source came into force.⁵² This Agreement provided more

⁴⁵ See *id.* at 5.

⁴⁶ See *id.* at 7; *supra* notes 4-6 and accompanying text.

⁴⁷ See Michael Lonsford, *Emerging Wineries Make Strides During Industry's 15-Year History*, HOUS. CHRON., Feb. 4, 1998, at 1.

⁴⁸ See *supra* notes 7-9 and accompanying text. European immigrants to South America created the same problems there. See Peter Dirk Siemsen, *Protection of Trademarks and Geographical Indications in Brazil and Other South American Countries*, in SYMPOSIUM, *supra* note 23, at 213.

⁴⁹ See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

⁵⁰ *Id.* at arts. 9, 10.

⁵¹ See Lenzen, *supra* note 33, at 184.

⁵² Madrid Agreement for the Repression of False and Deceptive Indications of Source, Apr. 14, 1891, 828 U.N.T.S. 389 [hereinafter Madrid Agreement]. As of February 9, 1999, the following countries have signed the Madrid Agreement: Algeria, Brazil, Bulgaria, Cuba, Czech Republic, Dominican Republic, Egypt, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Lebanon, Liechtenstein, Monaco, Morocco, New Zealand, Poland, Portugal, San

precise protection for appellations of origin and indications of source.⁵³ Not only are members to seize imports bearing a false or deceptive indication, they also must prohibit those uses of indications that are capable of deceiving the public.⁵⁴ Only thirty-one countries signed the Madrid Agreement.⁵⁵ Thus, it has had minimal impact.

Last, the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration provides, as its title suggests, for an international registration system for appellations of origin;⁵⁶ however, this Agreement has only seventeen signatories and its registration system is burdensome.⁵⁷

Thus, the international community did not provide extensive protection for geographical indications prior to 1994. With the Uruguay Rounds of GATT came an opportunity to include geographical indications in an international agreement that would guarantee protection throughout a large part of the world.

IV. TRIPS AND GEOGRAPHICAL INDICATIONS

A. Background

The United States initiated the development of the TRIPS Agreement.⁵⁸ As a leader in the production and protection of intellectual property, the United States was firmly committed to the inclusion of intellectual property protection in Uruguay GATT.⁵⁹ Other entities that eventually supported the U.S. position included the European Union, Japan, and Switzerland.⁶⁰

This apparent coalition between the United States and the European Union faltered when the discussions moved to geographical indications for wine.⁶¹

Marino, Slovakia, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey and the United Kingdom.

⁵³ See Simon, *supra* note 25, at 134.

⁵⁴ See Madrid Agreement, *supra* note 52, art. 1, 3bis.

⁵⁵ See Hangard, *supra* note 23, at 67. The United States never signed the Madrid Agreement. *See id.*

⁵⁶ See Lisbon Agreement, *supra* note 29.

⁵⁷ See Hangard, *supra* note 23, at 67; Lisbon Agreement, *supra* note 29.

⁵⁸ See Demaret, *supra* note 12, at 163.

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.* at 166.

The United States, Canada, and Australia remained staunchly opposed to their inclusion but the European Union insisted on protection.⁶² A compromise was eventually reached that provided a more forceful provision for wines and spirits than for other geographical indications.⁶³

B. TRIPS Provisions

Within TRIPS, three provisions deal with geographical indications; Article 22 covers the protection of geographical indications of source in general, Article 23 provides additional protection for wine and spirits and Article 24 encourages additional negotiations regarding geographical indications and establishes exceptions to the general prohibitions.⁶⁴

1. Article 22 - Protection of Geographical Indications

The first provision defines geographical indications⁶⁵ and provides protection for such designations.⁶⁶ Article 22 prohibits the use of false designations of origin and incorporates the unfair competition provisions of the Paris Convention into TRIPS.⁶⁷ Moreover, member countries must refuse registration of or invalidate any trademark that includes a geographical indication on goods that do not originate from the region identified and which is likely to mislead the public.⁶⁸

2. Article 23 - Additional Protection for Geographical Indications for Wines and Spirits

Under Article 23, each member must enact laws that prevent the use of geographical indications for wines or spirits that do not originate from the designated geographical location.⁶⁹ These laws must also prevent uses of such indications where the true place of origin appears in conjunction with

⁶² *See id.*

⁶³ *See id.*; TRIPS *supra* note 11, at arts. 22, 23.

⁶⁴ *See* TRIPS, *supra* note 11, at arts. 22, 23, 24.

⁶⁵ *See id.*, at art. 22(1); *supra* notes 27-28 and accompanying text.

⁶⁶ *See* TRIPS, *supra* note 11, at art. 22.

⁶⁷ *See id.* at art. 22(2); *see also supra* notes 49-51 and accompanying text.

⁶⁸ *See* TRIPS, *supra* note 11, at art. 22(3).

⁶⁹ *See id.* at art. 23(1).

the geographical designation on the goods⁷⁰ or where the geographical indication is accompanied by “ ‘kind’, ‘type’, ‘style’, ‘imitation’ [sic] or the like.”⁷¹

In addition, each member must ensure that its trademark laws deny registration to applicants whose trademarks incorporate geographical indications that identify wines or spirits.⁷² Last, the Council for TRIPS will facilitate negotiations to establish a notification and registration system for geographical indications of wine.⁷³

3. Article 24 - International Negotiations; Expectations

Article 24 calls for continued negotiations to further protect geographical indications for wines.⁷⁴ Moreover, members agree not to lessen protection for geographical indications that existed in their respective countries prior to the World Trade Organization Agreement.⁷⁵ This provision for negotiations is not voluntary. Article 24 specifically states, “[m]embers agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23.”⁷⁶ Therefore, members are required to enter into such negotiations.⁷⁷

Article 24 also details circumstances under which a member does not have to recognize geographical indications.⁷⁸ First, a member may allow a national to continue to label its products with such an indication if the national has used a geographical indication on the same or related products for (a) at least ten years prior to Uruguay GATT 1994 (i.e. April 15, 1994) or (b) in good faith prior to that date.⁷⁹ In the case of a trademark that is similar to or identical with an geographical indication, the application for registration must have been made in good faith or rights have been acquired

⁷⁰ See, e.g., California Chablis.

⁷¹ TRIPS *supra* note 11, at art. 23(1).

⁷² See *id.* at art. 23(2).

⁷³ See *id.* at art. 23(4).

⁷⁴ See *id.* at art. 24(1).

⁷⁵ See *id.* at art. 24(3).

⁷⁶ *Id.* at art. 24(1).

⁷⁷ See *id.*

⁷⁸ See *id.* at art. 24(4), (5), (6). These exceptions are known as the grandfather provisions. See Paul Heald, *Trademarks and Geographical Indications: Exploring the Contours of the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 635, 646-49 (1996).

⁷⁹ See TRIPS *supra* note 11, at art. 24(4).

in good faith either (a) before 1994 or (b) "before the geographical indication is protected in its country of origin."⁸⁰ A geographical indication that has become the common name for a good within a member country does not require protection under TRIPS.⁸¹ Last, where a geographical indication has become synonymous with "the customary name of a grape variety" in a member country, that member does not need to protect that geographical indication.⁸²

Member countries, however, must not use these grandfather provisions as a means to refuse to enter into negotiations with other member countries.⁸³ In addition to member obligations, Article 24 provides that the Council for Trade-Related Aspects of Intellectual Property Rights [Council] will review Members' progress in implementing the provisions of this section.⁸⁴ The Council can review compliance among members and can serve as a mediator/arbitrator in situations where members have been unable to arrive at a solution.⁸⁵ Thus, the Council plays a role in overseeing the transition of providing greater protection to geographical indications. This role, however, is minimal based on the infrequency of the Council's meetings and their minor involvement in disputes. In general, the burden of compliance and negotiation falls to members.⁸⁶

In sum, members do not have to provide protection to geographical indications in certain limited circumstances but must enter into negotiations with other members.⁸⁷

C. Adherence

If a member violates any of the above TRIPS provisions, a member country may file a complaint with the World Trade Organization [WTO].⁸⁸

⁸⁰ *Id.* at art. 24(5).

⁸¹ *See id.* at art. 24(6).

⁸² *See id.* at art. 24(6).

⁸³ *See id.* at art. 24(1).

⁸⁴ *See id.* at art. 24(2).

⁸⁵ *See id.*

⁸⁶ *See generally id.* at art. 24. Members must enter into negotiations with other members to increase the protection of geographical indications under TRIPS and must bring concerns about another member's compliance before the Council. *See id.*

⁸⁷ *See id.* at art. 24(1), (4), (5), (6).

⁸⁸ *See Understanding on Rules & Procedures Governing the Settlement of Disputes*, Dec. 15, 1993, 33 I.L.M. 112 (1994) [hereinafter DSU], art. 1.1.

Under the Understanding of Dispute Settlement, a WTO panel mediates and arbitrates disputes between parties.⁸⁹ Either party may appeal the panel decision to the Appellate Body.⁹⁰ Once the Appellate Body makes its decision and the Dispute Settlement Body [DSB] adopts such decision, the compliance process begins.⁹¹ The DSB sets a reasonable time period within which the party found in violation of its obligations must comply with the decision.⁹² If such party fails to implement the ruling, the complaining party "may request authorization from the DSB to suspend . . . concessions or other obligations" it has to that member.⁹³ WTO decisions, however, have no real enforcement mechanism; each member must be willing to comply with these decisions for the system to work.⁹⁴

V. EU EFFORTS TO FORCE COMPLIANCE BY OTHER MEMBERS⁹⁵

In the area of geographical indications for wines, compliance by some members is more essential than compliance by others. The member most interested in forcing countries to observe these provisions is the European Union.⁹⁶ The European Union has targeted the United States, Australia, and New Zealand in its efforts to encourage compliance.⁹⁷ These members

⁸⁹ See *id.* at art. 2.1.

⁹⁰ See *id.* at art. 17.1.

⁹¹ See *id.* at arts. 17.14, 19.1.

⁹² See *id.* at art. 22.2.

⁹³ *Id.*

⁹⁴ See Heald, *supra* note 78, at 650. Members could also attempt to force compliance through trade sanctions.

⁹⁵ This paper will only address compliance with Article 23 regarding wines and relevant portions of Article 24 of the TRIPS Agreement. The European Union enacted a regulation for the protection of agricultural products and foodstuffs which complies with Article 22. Commission Regulation 2081/92 of July 14, 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 208) 1. Goods protected under this regulation include Finnish Lapland potatoes, German Black Forest mushrooms, and French hay. See William Echikson, *When Cheese Is Not Just Cheese: Getting Picky About Origin*, CHRISTIAN SCI. MONITOR, Jan. 22, 1998, at 1.

⁹⁶ See *EU/Australia: Ministerial to Revive Relations*, EUR. REP., Sept. 10, 1997, available in WESTLAW, 1997 WL 13046471.

⁹⁷ One of the most plausible explanations for the EU's insistence on compliance by these countries is the expanding wine market in Asia. See generally Dottie Kubota-Cordery & Larry Walker, *Is the Asian Market for Real? Asian Wine Market*, WINES & VINES, May 1997, at 16. This expansion may be explained in part by the fact that China discourages the production of beverages made from grains thereby lessening the supply of grain alcohol and

have large and established wine industries,⁹⁸ and some of their wineries continue to use European geographical indications on domestically produced wine.⁹⁹

A. EUROPEAN UNION

Prior to the formation of the European Union, each European country regulated its own geographical indications.

However, in 1989, the European Union enacted a regulation entitled "Laying Down General Rules for the Description and Presentation of Wines and Grapes."¹⁰⁰ Under this legislation, brand names of wines that are also geographical indications may not be used to mislead the public.¹⁰¹ Moreover, the owner of a registered trademark for wine products that is identical to a geographical name protected within the European Union may continue to use the trademark only until December 31, 2002.¹⁰²

creating a market for wine producers. *Id.* France holds the largest share of the market in Asia, but Australia and Chile are extremely competitive. *See id.* However, California wines are viewed as the premier wines of New World Wines. *See* Larry Walker, *Don't Write Off Asia*, WINES & VINES, May 1998, at 20. New Zealand, by mere geography, is a competitor in this market as well. Kubota-Cordery & Walker, *supra* at 16.

The European Union may also see South Africa as a potential competitor in Asia and in other parts of the world. The European Union is now attempting to negotiate a wine agreement with South Africa in which South Africa would agree to cease using "port" and "sherry" to describe the fortified wine it exports. *See* Caroline Southey, *Compromise Sought as Talks Break Down*, FIN. TIMES (London), Oct. 21, 1998, at 4. These attempts have been unsuccessful thus far. *See id.* These developments are occurring as wine consumption among Europeans declines. *See* John Tagliabue, *Today's Drinkers Make Europe's Vintners Whine*, INT'L HERALD TRIB., March 8, 1997, at 1.

⁹⁸ *See* Lonsford, *supra* note 47; *EU/Australia: Ministerial to Revive Relations*, *supra* note 96; "New World" Wine Exports from Australia, U.S. and Chile, WINES & VINES, May 1997, at 24.

⁹⁹ *See supra* notes 1-9 and accompanying text.

¹⁰⁰ *See* Council Regulation 2392/89 of 24 July 1989 Laying Down General Rules for the Description and Presentation of Wines and Grapes Musts, 1989 O.J. (L 232) 13.

¹⁰¹ *See id.* at art. 40.

¹⁰² *See id.* A separate provision allows continued use of such a trademark if it was registered twenty-five years before recognition of the appellation. *See* Council Regulation 3897/91 on 16 December 1991 Amending for the Third Time Regulation 2392/89 Laying Down General Rules for the Description and Presentation of Wines and Grape Musts, 1991 O.J. (L368) 5. This amendment was in response to a case involving the Spanish wine producer, Miguel Torres. *See* Floret Gevers, *Conflicts Between Trademarks and Geographical*

This regulation brought the European Union into compliance with Articles 23 and 24 immediately. The European Union's only remaining obligation under the geographical indication provisions was to enter into negotiations to ensure increased protection for such designations.¹⁰³ Consequently, the European Union attempted to negotiate wine agreements with individual countries. To date, the European Union has concluded wine agreements that include reciprocal protection and control of geographical indications with seven countries.¹⁰⁴

A brief discussion of the E.U.'s negotiations with Australia and New Zealand illustrates how two other TRIPS members with established and growing wine industries have attempted to comply with TRIPS obligations. These negotiations should serve as a model for future E.U.-U.S. discussions on the use of geographical indications for wine. This section concludes by detailing U.S. efforts to enter into negotiations with the European Union.

1. Australia

Even prior to TRIPS, Australian wine makers and legislators realized the value of geographical indications. As wine enthusiasts began to recognize Australian wines as wines of good, consistent quality,¹⁰⁵ the Australian wine industry pushed its government to pass legislation to protect the names of Australian wine-growing regions.¹⁰⁶ The government responded in 1993

Indications - The Point of View of the International Association for the Protection of Industrial Property, in SYMPOSIUM, *supra* note 23, at 143, 155. Torres has registered the trademark TORRES for wine around the world and has held a Portuguese trademark since 1962. *See id.* In 1989, the Portuguese government passed legislation recognizing a new wine producing region, TORRES VEDRAS. *See id.* Some Portuguese producers used the word TORRES alone on their labels. *See id.* Miguel Torres protested to the European Commission because, under the regulation, the Spanish producer would have to cease use of TORRES in the year 2002. *See id.* at 156. As a result, the Commission amended the regulation. *See id.*

¹⁰³ *See* TRIPS, *supra* note 11, at art. 24.

¹⁰⁴ The European Union has concluded a wine agreement with Australia. *See* Agreement Between the European Community and Australia on Trade in Wine - Protocol - Exchange of Letters, 1994 O.J. (L 86) [hereinafter Wine Agreement]. In addition, the European Union has concluded negotiations with Hungary, Bulgaria, Romania, the Czech Republic, Slovakia, and Slovenia. *See* A Historic View of Agriculture Relations with the Central and Eastern European Countries, EURO-EAST, Sept. 23, 1997, available in LEXIS, INTLAW Library, EUREAS File.

¹⁰⁵ *See* Schacht, *supra* note 43, at 7.

¹⁰⁶ *See* Ian Mackley, *Protection of Geographical Indications in Australia*, in SYMPOSIUM, *supra* note 23, at 20.

with the Australian Wine and Brandy Corporation Amendment Act 1993.¹⁰⁷ With the enactment of this legislation, the government created the Geographical Indications Committee to establish geographical indications for wine.¹⁰⁸

Australia's expanding wine exports and interest in cultivating the reputation of its wines underlay its willingness to conclude negotiations with the European Union.¹⁰⁹ Similarly, the Union was willing to recognize the newly created wine-growing regions of Australia for reciprocal recognition of the "Old World" designations.¹¹⁰

The Wine Agreement of 1994 provides that the European Union and Australia accord reciprocal protection to names "used for the description and presentation of wines originating in the territory of the Contracting Parties."¹¹¹ An annex lists the relevant geographical names that each member agrees to protect.¹¹² Article 8 allows Australia "transitional" periods during which to recognize certain European geographical indications.¹¹³

As of December 31, 1993, Australian producers ceased using Beaujolais, Cava, Frascati, Sancerre, Saint-Emilion, Vinho Verde, and White Bordeaux.¹¹⁴ The transitional period for Chianti, Frontignan, Hock, Madeira, and Malaga ended on December 31, 1997.¹¹⁵ A third group of names, Burgundy, Chablis, Champagne, Claret, Marsala, Moselle, Port, Sauternes, Sherry, and White Burgundy, are the subject of another transitional period but the two parties have yet to negotiate an "end" date for this transitional period.¹¹⁶

¹⁰⁷ See Australian Wine and Brandy Corporation Amendment Act 1993, AUSTL. C. ACTS No. 93 (1993).

¹⁰⁸ See *id.* at § 17.40Q-40ZE.

¹⁰⁹ See Wine Agreement, *supra* note 104. European wine consumption is the highest in the world, and Australia wants to expand its sales there. See Jeffrey Babb, *A Nice Job on the Rise*, IPA REV., Mar. 1, 1996, at 17.

¹¹⁰ See Wine Agreement, *supra* note 104, at arts. 6, 7. This reciprocal recognition may be seen as a mere formality. It is highly unlikely a European vintner would use an Australian wine region to designate a wine type.

¹¹¹ *Id.* Australia was the first country to negotiate a specific labeling agreement with the European Union. See Babb, *supra* note 109.

¹¹² See Wine Agreement, *supra* note 104, at annex. II.

¹¹³ See *id.* at art. 8.

¹¹⁴ See *id.* at art. at 8(1)(a).

¹¹⁵ See *id.* at art. at 8(1)(b).

¹¹⁶ See *id.* at art. at 8(1)(c); see generally Louise Cook, *South Africa Port Makers Will Resist EU Pressure Over Name*, AFR. NEWS SERV., Aug. 13, 1998, available in WESTLAW, 1998 WL 14363182; EU/Australia: Ministerial to Revive Relations, *supra* note 96.

2. *New Zealand*

New Zealand's Parliament enacted the Geographical Indications Act of 1994 in response to the growth of its wine industry and pressure from the European Union.¹¹⁷ The legislation creates a registration system for geographical areas within New Zealand and abroad.¹¹⁸ If a producer uses any registered indication in a misleading manner, the government may prosecute the producer under the Fair Trading Act.¹¹⁹ The legislation mirrors TRIPS in that it prohibits false designations of origin as well as use of such designations in conjunction with the terms kind, type, style, imitation, etc.¹²⁰

The European Union and New Zealand have yet to conclude a wine agreement regarding geographical indications.¹²¹ Although the two entities have discussed such an agreement since 1995,¹²² they continue to negotiate the terms.¹²³ Under the proposed agreement, New Zealand would recognize European indications such as Champagne, Chablis, and Burgundy while the European Union would protect names such as Gisborne and Marlborough.¹²⁴ One current cause of debate involves the use of sherry and port in New Zealand.¹²⁵ The European Union wants New Zealand to enact legislation to prevent continued use of such names;¹²⁶ however, New Zealand believes that the current procedure that leaves enforcement to wine producers is sufficient.¹²⁷

¹¹⁷ See Robert J. Lonergan, *Legal Developments in the New Zealand Wine Industry*, 8 WORLD REP. 1 (Mar. 1996) at <<http://www.hg.org/1410.html>> (visited Feb. 8, 1999).

¹¹⁸ See *id.*

¹¹⁹ See Lonergan, *supra* note 117 (such violation carries a maximum fine of US \$100,000).

¹²⁰ See *id.*

¹²¹ See *EU/New Zealand: Brussels and Wellington Consider Joint Declaration*, EUR. REP., Mar. 7, 1998, available in LEXIS, NewsLibrary.

¹²² See Annette Finnegan, *Port and Sherry Need New Names for New Zealand*, EVENING POST, Jun. 8, 1995, at 11.

¹²³ See *EU/New Zealand: Brussels and Wellington Consider Joint Declaration*, *supra* note 121.

¹²⁴ See *EU/New Zealand: Butter, BSE and Trade Dominate Meeting With Foreign Minister*, EUR. REP., Sept. 17, 1997, available in LEXIS, NewsLibrary.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

3. *United States*

The United States resembles both Australia and New Zealand in its protection of geographical indications. Like Australia, the United States began to recognize domestic geographical indications for wine as U.S. wines entered world markets.¹²⁸ The Bureau of Alcohol Tobacco and Firearms [BATF], regulates the use of geographical indications, both domestic and foreign, through its labeling power.¹²⁹ The BATF enacted regulations for the establishment of American viticultural areas in 1979.¹³⁰ In 1994, the United States amended its trademark law, effective January 1, 1996, to comply with the geographical indication provisions of TRIPS.¹³¹ The Trademark Office will refuse to register a trademark for a geographical indication that is used in connection with wines or spirits and identifies a place other than the true place of origin.¹³² This creates an absolute bar to registration.¹³³

In 1983, the European Union and the United States concluded a wine accord.¹³⁴ The Accord dealt with a number of issues and briefly addressed geographical indications.¹³⁵ The main focus of the Accord was to expand U.S. wine imports into the European Union. In the Accord, the European

¹²⁸ See Cindy Skrzycki, *Maybe BATF Stands for Bouquet, Acidity, Tannins and Finnish*, WASH. POST, Apr. 17, 1997, at G1.

¹²⁹ See 27 C.F.R. § 4.1 (1998).

¹³⁰ See 27 C.F.R. § 9.3 (1998). "Viticultural area" is the term used in the BATF regulations to designate a grape growing region in the United States. See 27 C.F.R. § 4.25a(e)(1) (1998).

¹³¹ See 15 U.S.C. § 1052(a) (1994).

¹³² See *id.*

¹³³ See Eleanor Meltzer, *Wine & Spirits, With Abandonment! GATT's Impact on U.S. Trademark Law*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 69, 70 (1996).

¹³⁴ See Letter from John M. Walker, Jr., U.S. Treasury Department, and Stephen E. Higgins, Bureau of Alcohol, Tobacco and Firearms, to Leslie Fielding, Commission of the European Communities (July 26, 1983) [hereinafter Wine Accord]. The Wine Accord between the United States and the European Union is detailed in a letter from the U.S. Department of the Treasury to the Commission of the European Communities. The letter confirms U.S. understanding regarding the results of wine discussions between the United States and European Union. This letter is the official understanding between the two entities.

¹³⁵ See *id.* Under the Wine Accord, the European Union allowed the importation of U.S. wines that did not have the exact ion content mandated by EU law. See *id.*; *Status of U.S. Efforts to Reduce Barriers to Trade in Agric.: Comments to the Subcomm. on Trade of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Robert P. Koch, Wine Institute), available in WESTLAW, 1998 WL 8992068.

Union agreed to permit the importation of U.S. wines treated with various additives.¹³⁶ The United States recognized the EU's willingness to examine its certification requirements for imported wines.¹³⁷ Additional acknowledgements were made regarding the need for harmonization of labelling requirements in the United States and the European Union and the need for collaboration on investigations into the wine sector.¹³⁸ The European Union agreed to recognize various U.S. viticultural areas.¹³⁹ The United States, in turn, agreed to strive to prevent the erosion of non-generic designations as defined in the U.S. regulations.¹⁴⁰ The accord originally was set to expire on December 31, 1997;¹⁴¹ however, an EU Council Regulation extended the accord provisions for one year.¹⁴² The extension to December 31, 1998 was an effort to facilitate the negotiation process.¹⁴³ In late December 1998, the two entities agreed to enter into negotiations on all wine issues, and the European Union extended the wine accord for five years.¹⁴⁴ These negotiations, however, will be hampered by U.S. regulations and new legislation.

B. UNITED STATES

In the United States, the BATF regulates the use of geographical indications, both domestic and foreign, through its labeling power.¹⁴⁵ The present debate between the European Union and the United States flows from these regulations.

¹³⁶ See Wine Accord, *supra* note 134.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See Council Regulation 2612/97 of 15 Dec. 1997 Amending Regulation No 1873/84 Authorizing the Offer or Disposal for Direct Human Consumption of Certain Imported Wines Which May Have Undergone Oenological Processes Not Provided for in Regulation No 822/87, 1997 O.J. (L 353) 2.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ European Union Council Grants U.S. Wine Industry Five-Year Extension of the Wine Accords, PR NEWSWIRE, Dec. 18, 1998, available in WESTLAW, ALLNEWSPLUS database.

¹⁴⁵ See 27 C.F.R. § 4.1 (1998).

VI. BATF REGULATIONS

The BATF regulations divide geographical indications for wines into categories and base their protection on these divisions.¹⁴⁶ The regulations classify designations of geographic significance as (1) generic, (2) semi-generic, and (3) non-generic.¹⁴⁷

Generic names are those that the Director of the BATF finds designate a class or type of wine and originally possessed geographical significance.¹⁴⁸ The regulations list vermouth and sake as generic identifications for wine.¹⁴⁹

Semi-generic indications are wine classes and types, and wineries may use these designations on wines which do not originate from the geographical indication.¹⁵⁰ The regulations state that semi-generic indications continue to function as geographically significant indications.¹⁵¹ Their use, then, is conditional; the BATF permits such use only if the label bears the actual place of origin in conjunction with the geographical name and the wine conforms to either the regulated standard of identity or the identity established by trade.¹⁵² Examples of semi-generic indications include: Angelica, Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauterne, Haut Sauterne, Sherry, and Tokay.¹⁵³

The regulations divide non-generic designations into two categories.¹⁵⁴ First, those designations that the Director has not found to be generic or semi-generic may be used to designate a wine's origin.¹⁵⁵ Such designations include: American, California, Lake Erie, Napa Valley, New York State, French, and Spanish.¹⁵⁶ Second, the Director may find a designation distinctive if the name is known to consumers and in trade as a designation

¹⁴⁶ See 27 C.F.R. § 4.24 (1998).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* § 4.24(a)(1), (2).

¹⁴⁹ See *id.* § 4.24(a)(2).

¹⁵⁰ See *id.* § 4.24(b)(1).

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See 27 C.F.R. § 4.24(b)(2).

¹⁵⁴ See *id.* § 4.24(c)(1).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* § 4.24(c)(2).

of origin and is distinguishable from all other wines.¹⁵⁷ Examples of distinctive non-generic indications include: Bordeaux Blanc, Graves, Medoc, Pommard, Rhone, Schloss Johannisberger, and Lagrima.¹⁵⁸

VII. U.S. LEGISLATION OF 1997

The real rift between the parties occurred in August 1997¹⁵⁹ after the passage of the Taxpayer Relief Act of 1997 which codified a portion of the BATF regulations.¹⁶⁰

A. Designation of Wines - 26 U.S.C. § 5388

The new legislation provides that U.S. wine makers may use semi-generic designations on wine not produced in that area if they disclose the true place of origin in direct conjunction with the borrowed indication and the wine, "conforms to the standard of identity" as set forth in the regulations.¹⁶¹ The Secretary of the Treasury determines if a name of geographical significance is semi-generic.¹⁶² The names listed in the BATF regulations as semi-generic are now listed in the U.S. Code as semi-generic indications.¹⁶³ As a result of this legislation, U.S. compliance with Article 23 and 24 of TRIPS is more difficult.¹⁶⁴

B. Reasons for Legislation

The U.S. Congress codified these BATF regulations in response to the lobbying efforts of the wine industry. There is an active and wealthy wine lobby in Washington, D.C.¹⁶⁵ Both wine associations and individual

¹⁵⁷ See *id.* § 4.24(c)(1).

¹⁵⁸ See *id.* § 4.24(c)(3).

¹⁵⁹ See Pat Wechsler, *A Good Year for Buffalo Beaujolais*, BUS. WK., Sept. 1, 1997, at 4.

¹⁶⁰ See 26 U.S.C.A. § 5388 (West Supp. 1998). Senator Alfonse D'Amato of New York sponsored this provision.

¹⁶¹ See *id.* at (c)(1)(B).

¹⁶² See *id.* at (c)(2)(A).

¹⁶³ See *id.* at (c)(2)(B); *supra* note 153 and accompanying text.

¹⁶⁴ See Wechsler, *supra* note 159.

¹⁶⁵ See Rob Wells, *Bill's Provision Would Aid Winemakers in Trade Talks*, SAN DIEGO UNION-TRIB., Jul. 17, 1997, at A3.

wineries participate in and have been very successful in the lobbying process.¹⁶⁶

These lobbyists defend their lobbying activities as consumer protectionist measures. One wine association spokesperson argued that consumers depend on semi-generic names to make their wine purchases.¹⁶⁷ In fact, twenty-five to thirty-four percent of all wine sold in the United States is marketed under semi-generic names.¹⁶⁸ In addition, wineries have used these names with Congressional approval since 1936 when Congress first enacted federal legislation.¹⁶⁹ The BATF has controlled the use of such designations through its regulations since 1938.¹⁷⁰

The ability to use these names has contributed to the growth of the U.S. wine industry. California based Ernest & Julio Gallo Winery Inc. [Gallo] is the world's largest producer of wine.¹⁷¹ The bulk of Gallo's sales are of wines labeled with semi-generic indications.¹⁷² New York-based Canandaigua Wine Company produces 25 percent of all semi-generic labeled wine

¹⁶⁶ See *id.* Canandaigua Wine Company formed its own political action committee in 1996 to support candidates who favor the beverage-alcohol industry. See Catherine Roberts, *Canandaigua Wine Starts Own PAC*, ROCHESTER BUS. JOUR., July 26, 1996, at 2. At one point, the legislation called for pre-Congressional approval before negotiators were able to discuss increased protection for semi-generic indications in the United States. See *All Things Considered* (NPR radio broadcast July 21, 1997), available in WESTLAW, 1997 WL 12831511.

¹⁶⁷ See *id.* Karen Ross, president of the California Association of Wine Grape Growers, states that a number of wine markets developed from the use of semi-generic names. See *id.*

¹⁶⁸ See *id.*; Michael D. Fibison, *Winemakers Do Battle Over the Bottle in Clash of the Chardonnays; Sour Grapes, Says Gallo*, CORP. LEGAL TIMES, Dec. 1996, at 17. Wine makers use semi-generic indications on wines that are a mixture of grapes. See Chris Knap, *U.S. Makers Take License with Labels*, ORANGE COUNTY REG., Aug. 7, 1997, at 1.

¹⁶⁹ See *All Things Considered*, *supra* note 166. A heated debate ensued on the Senate floor during deliberations concerning whether or not to enact legislation for semi-generic names. See Lenzen, *supra* note 33, at 157-61 for a discussion of these debates. The California wine lobby appears to have been as active in the 1930s as it is today. See *All Things Considered*, *supra* note 166 (stating that the California Senators introduced this legislation).

¹⁷⁰ See, e.g., Notice of Request for Comment, 48 Fed. Reg. 51,333 (1983).

¹⁷¹ See John Lichfield, *French Wine Hit By Second Scandal*, INDEP. (London), Jun. 18, 1998, at 15; Wells, *supra* note 165; Barry Stavro, *A New Vintage Gallo; Wine is a Tough Business, and the World's Largest Winery is Intent on Staying on Top. The Third Generation is Playing a Big Part in the Plan—After all, It's Their Future, Too.*, L.A. TIMES, Mar. 2, 1997, at 12.

¹⁷² See Wells, *supra* note 165.

sold in the United States.¹⁷³ Bob Kalik, an attorney for Canandaigua, described the situation if the United States were to prohibit the use of semi-generics on domestically produced wines: "It would be devastating to New York wine production [and] . . . extremely harmful to California wine production."¹⁷⁴

The codification of the BATF regulations makes it more difficult for the U.S. Trade Representative to "trade away" the semi-generic names in trade discussions with the European Union.¹⁷⁵ The legislation would have to be amended or repealed by Congress. The wine lobby would be aggressive in urging members of Congress not to amend or repeal the 1997 codifications.¹⁷⁶

C. *European Response*

The legislation thwarts the EU's efforts to reach an agreement with the United States whereby the United States would recognize the semi-generic names as protected geographical indications. Shortly after enactment of the legislation, the EU Agriculture Commissioner, Franz Fischler, wrote a letter to U.S. Trade Representative Charlene Barshefsky denouncing the new law as a violation of TRIPS.¹⁷⁷ Although the European Union has yet to file a formal complaint with the World Trade Organization, the European Union was considering such a measure.¹⁷⁸ With the extension of the Wine Accord and agreement to begin negotiations, this seems an unlikely action.

¹⁷³ See *id.* Canandaigua markets wine under the Inglenook, Almaden, Paul Masson, Taylor California Cellars, Richards Wild Irish Rose, Manischewitz, Marcus James, Deer Valley, Dunnewood, and Cook's brands. See *Canandaigua Wine Company Announces Preliminary Estimate of Year End Sales and Earnings*, PR NEWSWIRE, Oct. 21, 1994, available in WESTLAW, ALLNEWSPLUS database.

¹⁷⁴ See Wells, *supra* note 165.

¹⁷⁵ See *id.*

¹⁷⁶ Previously, the BATF would have issued a notice of proposed rulemaking to amend its regulations. See 5 U.S.C. § 553 (1994 & Supp. 1997). The rulemaking process is long and involved. However, BATF officials are not subject to the pressures faced by an elected official. There is no re-election campaign that requires enormous amounts of money which can be supplied by lobbying organizations and private enterprises.

¹⁷⁷ See Weschler, *supra* note 159.

¹⁷⁸ See *id.*

VIII. IS THE UNITED STATES IN VIOLATION OF ITS TRIPS OBLIGATIONS?

At first glance, the U.S. legislation appears to violate TRIPS. Article 23 compels members to enact laws that bar the continued use of geographical indications on wines produced in areas other than that of the named indication.¹⁷⁹ The United States, in contrast, acted to decrease protection for such uses of geographical indications.¹⁸⁰ Article 24, however, provides exceptions to Article 23's general prohibition of the continued use of geographical indications.¹⁸¹

If nationals in one country have used a geographical indication on the same goods in a continuous manner for ten years prior to the conclusion of TRIPS, April 15, 1994, or in good faith, they may continue to use the geographical indication on their goods.¹⁸² The good faith exception is easily eliminated—no vintner could argue that he did not realize Burgundy, France was a region known for its wines. The ten year exception, however, is only available for “nationals . . . who have used that geographical indication . . . for at least 10 years preceding 15 April 1994.”¹⁸³ Thus, it appears vintners who began their production in 1985, nine years before TRIPS, may not use the semi-generic names as wine types under the TRIPS Agreement.¹⁸⁴ This difference in treatment creates a situation where older wineries could have an unfair advantage. Newer wineries could view such an advantage as anti-competitive, and a rift could develop among U.S. wineries. A purchaser of Cribari Madeira may be willing to try another brand of “madeira” within the same price range because she knows she likes “madeira.” She is probably less willing to purchase a new brand of wine labeled “red table wine” which she does not recognize as a substitute for “madeira.”

¹⁷⁹ See TRIPS *supra* note 11, art. 23(1).

¹⁸⁰ See 26 U.S.C. § 5388 (1994).

¹⁸¹ See TRIPS *supra* note 11, at art. 24. Even though the United States obligations under TRIPS did not become effective until January 1, 1996, the exceptions provided in Article 24 apply as of April 15, 1994. See TRIPS *supra* note 11, art. 24(4); see also 2 MCCARTHY, *supra* note 25, § 14:19.

¹⁸² See TRIPS *supra* note 11, at art. 24(4).

¹⁸³ TRIPS *supra* note 11, at art. 24(4).

¹⁸⁴ This raises an interesting question. Could a vintner who used such a designation on one brand of wine introduce a new wine in 1998 and claim the ability to use the geographical indication on that wine?

The new U.S. legislation, however, does not incorporate these grandfather provisions.¹⁸⁵ Instead of distinguishing between older and newer wineries, the law allows any U.S. wine producer to use these semi-generic designations.¹⁸⁶ Under the U.S. law, there is no requirement of good faith or ten years use.¹⁸⁷ By failing to incorporate these exceptions, the U.S. Congress created legislation that clearly falls outside TRIPS.

The United States, however, will likely argue that the legislation falls into an exception found in Article 24, which provides that geographical indications which have become the customary terms for particular goods and services do not warrant protection.¹⁸⁸ Each of the semi-generic indications listed in the new legislation is commonly defined as a wine type in the United States.¹⁸⁹ These designations have fallen into common usage.¹⁹⁰ The average consumer orders a glass of sherry or burgundy.¹⁹¹ Gallo, as the leading wine producer, has succeeded in establishing these names as wine types. The Federal Circuit has found at least one of these semi-generic indications to be generic.¹⁹² The court concluded that "Chablis" when used on wine in the United States does not indicate that the wine originated from Chablis, France.¹⁹³

¹⁸⁵ See 26 U.S.C. § 5388.

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See TRIPS *supra* note 11, art. 24(6); see Peter M. Brody, *Protection of Geographical Indications in the Wake of the TRIPS: Existing United States Laws and the Administration's Proposed Legislation*, 84 TRADEMARK REP. 520, 530 (1994).

¹⁸⁹ See 27 C.F.R. §4.24(b)(2) (1998) (giving examples of semi-generic names which are also type designations such as chablis, chianti, port and sherry).

¹⁹⁰ See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 299 (1993) (noting that burgundy is "a table wine that resembles the red Burgundy of France but is produced elsewhere").

¹⁹¹ See 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, 57-58 (1996) (noting that the "ordinary wine-chugging Philistine" does not know that 'chablis' wine comes from 'chablis' grapes grown in the 'Chablis' region of France, 260 kilometers southeast of Paris).

¹⁹² See *The Institut National Des Appellations D'Origine v. Vinners International Company, Inc.*, 958 F.2d 1574, 1581 n.5 (Fed. Cir. 1992) (noting that the Institut National [INAO], a group of wine growers and wine merchants which ensures that appellations of origin are correctly used and which suppresses misuse of such appellations worldwide, acknowledged that chablis when used in the United States does not refer to Chablis, France).

¹⁹³ See *id.* at 1581.

Article 24, however, also requires that countries negotiate increased protection for names of wine-producing regions.¹⁹⁴ Furthermore, the above exceptions "shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements."¹⁹⁵ In December 1998, the United States was unable to argue that its legislation or the common usage of geographical indications in the United States precluded negotiations. It seems unlikely that the Europeans would have allowed the United States to avoid these negotiations so easily.¹⁹⁶ Furthermore, in the aftermath of the TRIPS Agreement, commentators agreed that the United States was obliged to enter negotiations.¹⁹⁷ These obligations remain. The United States must now enter into negotiations with the European Union with a goal of increasing protection for geographical indications.

The new legislation, however, frustrates the compliance process by creating Constitutional obstacles. If negotiators were able to conclude an agreement in which the United States recognized the semi-generic designations as protected geographical indications, Congress would have to repeal the new legislation. Previously, the BATF would have amended its regulations without Congressional action.¹⁹⁸

Thus, it appears the United States is in violation of the TRIPS Agreement. It has chosen to decrease the protection for geographical indications in the United States and has created legislation that frustrates its obligation to engage in negotiations with other members.

IX. COMPLIANCE WITH TRIPS

In deciding how to proceed in its negotiations with the European Union, the U.S. government should consider the advantages and disadvantages of compliance with its obligations.

¹⁹⁴ See TRIPS *supra* note 11, at art. 24(1).

¹⁹⁵ TRIPS *supra* note 11, at art. 24(1). See also J.H. Reichman, *Universal Minimal Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 364 (1995) (stating that "[t]he stage has, therefore, been set for mandatory future negotiations").

¹⁹⁶ See Brody, *supra* note 188, at 530; Heald, *supra* note 78, at 647-49.

¹⁹⁷ See Reichman, *supra* note 195, at 364; Heald *supra* note 78, at 648-49. Compare Chen, *supra* note 191, at 57-58 (stating that U.S. law does not need to be amended for TRIPS; U.S. law fits within the exceptions in Article 24).

¹⁹⁸ See *supra* note 176 and accompanying text.

A. Reasons to Provide Increased Protection to Controversial Geographical Indications for Wines

There are a multitude of reasons for all wine-producing members of TRIPS to increase their protection for geographical indications of wines. The following discussion highlights some of the reasons the United States should provide such protection and follow the example set by Australia.

1. Domestic Wine Industry

The U.S. wine industry resembles Australia's industry on a number of levels. Both the United States and Australia have expanding wine industries.¹⁹⁹ To protect their domestic markets, both countries created regulations that deal with the establishment of geographical regions.²⁰⁰ Today, people around the world recognize the Napa Valley as a wine-growing region that produces quality wines.²⁰¹ Similarly, wine drinkers know Coonawarra as a premier wine area of Australia.²⁰² The BATF regulations recognize one hundred and thirty-four American viticultural areas.²⁰³ By identifying domestic areas as regions where quality products are produced, the United States and Australia allow wine producers to market their wines under names that imply quality and consistency.²⁰⁴

Moreover, the United States and Australia would like to export more wine to the largest wine-drinking region of the world, the European Union. The Australian government was partially motivated to negotiate with the European Union in order to guarantee an increased market for their wine products in Europe.²⁰⁵ If the United States persists in its refusal to negotiate with the European Union regarding recognition of geographical indications, European producers could retaliate by using American names on

¹⁹⁹ See *EU/Australia: Ministerial to Revive Relations*, *supra* note 96; Robert M. Nicholson, "New World" Wine Exports Surged in 1996; *Wine Exports from Australia, U.S. and Chile*, WINES & VINES, May 1, 1997, at 24.

²⁰⁰ See *supra* notes 105-106, 128 and accompanying text.

²⁰¹ See *Hotlist: Wine*, HOUS. CHRON., Aug. 31, 1997, at 6; Andrew Quinn, *Living Well, California Style*, WASH. POST, Apr. 9, 1998, at B6.

²⁰² See ROBERT M. PARKER, JR., *PARKER'S WINE BUYER'S GUIDE* 854 (1989).

²⁰³ See 27 C.F.R. §§ 9.21-9.159 (1999).

²⁰⁴ See Skrzycki, *supra* note 128.

²⁰⁵ See Joanna Simon, *Down Under but Not Out*, SUNDAY TIMES (London), Feb. 20, 1994.

their products in an attempt to create generic indications.²⁰⁶ U.S. wine producers have a vested interest in ensuring that they are able to market their products under protected names that identify the origin of their wines.

In order to promote its wines as consistent, high-quality products and to protect the U.S. wine industry, the United States should recognize the BATF semi-generic designations as protected geographical indications. Even though the average American may believe these names are generic, the BATF Director has not found any of the terms to be generic.²⁰⁷ The Director recognized that these names continue to serve dual roles as geographical indications and type designations.²⁰⁸ The United States should consider the long-term consequences of such notice—broader markets and enhanced reputation of U.S. wines—and recognize the semi-generic indications as protected geographical indications.

2. *Sophistication of the Consumer*

Throughout much of the world, people live in an environment more luxurious than that of their parents or grandparents. As people have more money, they become more sophisticated in their purchasing decisions.²⁰⁹ Manufacturers recognize these changes and market their products accordingly. Brands bombard consumers around the world. Many consumers base their purchasing decisions solely on brand recognition.²¹⁰ As mobility continues to increase, brands will only become more important to consumers—as they travel and live around the world, many people are still more comfortable purchasing the brands with which they are most familiar.

The wine market, however, has not traditionally been a “branded” market.²¹¹ Wine consumers usually enter a store without any idea as to the

²⁰⁶ See Simon, *supra* note 25, at 154-55. Admittedly, the likelihood of this occurring is slim.

²⁰⁷ See 27 C.F.R. § 4.24(b)(1) (1998).

²⁰⁸ See *id.* “A name of geographic significance, which is also the designation of a class or type of wine, shall be deemed to have become semi-generic.” *Id.*

²⁰⁹ See Simon *supra* note 25, at 153; *Wine Test. Wine Without Fuss*, CONSUMER REP., Oct. 1997, at 10.

²¹⁰ See John Willman, *Wine Industry Still Trying to Create Brand Names*, PLAIN DEALER (Cleveland), Mar. 4, 1998, at 4F. “The promise of a brand is that it will be the same quality every time . . . A brand is a contract with a consumer.” *Id.*

²¹¹ See *id.* There is a movement among some wine producers to develop a branded wine market. See *id.* A recent advertisement for Fortant wine states “[I]abled by grape variety rather than complex French geography.” WASH. POST, Apr. 8, 1998, at E11.

type of wine they wish to purchase.²¹² Sophisticated wine purchasers “look for something they haven’t heard of . . . there is almost an anti-branding mentality.”²¹³ Instead, in the wine market, geographical indications function as brands.

Origin is an important consideration in wine purchases because a wine’s quality is linked to its origin.²¹⁴ Particular areas are known for their ideal wine-making climate or for their suitable soil.²¹⁵ The Champagne wine-growing region has a cool climate that enables vintners to produce a unique product.²¹⁶ Shaley soil in the Oporto region of Portugal contributes to the distinctive grape used to make Port.²¹⁷ Wine consumers are able to distinguish wines not only by brand but also by origin.²¹⁸ Origin is an important consideration in wine purchases because “the land becomes the brand.”²¹⁹ Sophisticated wine purchasers know that Franzia Mountain Chablis in a box from California is not equivalent to most white wines produced in Chablis, France.²²⁰ Sophisticated consumers do not buy wine according to brand²²¹ but by region.

The labeling movement in the United States is evidence of the increasing numbers of sophisticated American wine purchasers. In the 1980s, the majority of wine sold in the United States bore generic labels.²²² U.S. vintners now market the majority of their wines under grape varieties, for example, Pinot Noir, Merlot, and Fume Blanc.²²³ Even Ernest and Julio Gallo Winery has entered the varietal grape market and introduced its

²¹² See Willman, *supra* note 210.

²¹³ *Id.*

²¹⁴ See Skrzycki, *supra* note 128. Viticultural areas serve two functions. *See id.* They allow wineries to accurately describe the origin of their products while assisting consumers in their purchasing decisions. *See id.*

²¹⁵ See R.W. Apple, Jr., *For Wine Lovers, A Distant Paradise; New Zealand’s Vines Yield a Voluptuous Harvest*, N.Y. TIMES, Oct. 15, 1997, at F1.

²¹⁶ See Joanna Simon, *Method in Their Madness*, SUNDAY TIMES (London), Apr. 28, 1996.

²¹⁷ See Waddington, *supra* note 33.

²¹⁸ See Skrzycki, *supra* note 128.

²¹⁹ *See id.*

²²⁰ See Chen, *supra* note 191, at 57-58.

²²¹ See Willman, *supra* note 210.

²²² See *Wine Test. Wine Without Fuss*, *supra* note 209.

²²³ See Barry Stavro, *A New Vintage Gallo*, L.A. TIMES, Mar. 2, 1997, at 12.

Turning Leaf wine.²²⁴ In its attempt to attract a more sophisticated wine purchaser, Gallo chose not to include its name on the label and thus disassociate its new product from the well-known Gallo brand.²²⁵

The increasing number of sophisticated purchasers in the United States is also seen in the recent increases in wine sales which are a direct result of buyers purchasing higher-priced wines²²⁶ marketed under grape variety. The U.S. government should recognize these trends and negotiate an agreement accordingly.

3. *Setting an Example*

Although the economic advantages to American vintners should be enough for the United States to grant protection to geographical indications, the most compelling reason for the United States to do so stems from its position among TRIPS members. The United States has an obligation to adhere to the TRIPS Agreement even if compliance may mean initial costs that could devastate some wineries. As a strong proponent of the TRIPS Agreement, the United States should not engage in any activity that suggests members may ignore certain provisions of TRIPS. As of March 1998, the United States has aggressively supported TRIPS and used the WTO Dispute Settlement system on thirty-five occasions.²²⁷ The United States has assured the world that it is a committed member to the Agreement.

²²⁴ See Fibison, *supra* note 168. Gallo first entered the premium varietal wine market in August 1994 with Gallo Sonoma. *See id.* Gallo Sonoma proved unsuccessful, and, in fall 1995, Gallo introduced Turning Leaf which is very successful. *See id.* According to one official from a competing winery, Gallo has a reputation for allowing "somebody else to develop a market and then mov[ing] in to seize it." *Id.* Gallo's decision to enter this market probably stems from a number of factors, most notably that its "market share [has] dropped from . . . forty-two percent in 1990 to . . . thirty-five percent in 1995." *Id.* *See also* Wells, *supra* note 165. Dubbed "the greatest marketing company in the world" by one California winemaker, (Bruce Schoenfeld, *Wine Fit to be Tried*, L.A. MAG., Aug. 1, 1998, at 8) Gallo will dominate the premium wine industry as it continues to expand its varietal and premium lines. *See* Jancis Robinson, *Fast Footwork to Keep High Ground*, FIN. TIMES (London), Oct. 10-11, 1998, at 14.

²²⁵ See Fibison, *supra* note 168.

²²⁶ See Tagliabue, *supra* note 97.

²²⁷ *See* WTO Settlement Body: *Subcomm. on Int'l Econ. Policy and Trade of the House Comm. on Int'l Relations*, 105th Cong. (1998) (statement of Susan G. Esserman, General Counsel, Office of the U.S. Trade Representative), available in WESTLAW 1998 WL 153495.

Nevertheless, the United States has now created an environment where members may question U.S. support for TRIPS.

During the TRIPS negotiations, there was a divide between developed countries and developing countries.²²⁸ The developed countries, as the holders of the majority of intellectual property, wanted to provide the utmost protection for intellectual property.²²⁹ In contrast, developing countries believed increased protection for intellectual property would unreasonably burden their economies.²³⁰

If the United States continues to deny protection for geographic indications, developing countries may choose not to recognize other provisions of TRIPS which in turn may harm other U.S. industries. Industries in which intellectual property rights are paramount are prospering in the United States, for example, the music, film, semi-conductor, pharmaceutical, and computer industries. These industries need developing countries to adhere to their TRIPS obligations.²³¹ A decision not to recognize the controversial European geographical indications could create an unwanted standard of only partial compliance. In a similar fashion, developing countries could decide to adhere only to the TRIPS provisions that most benefit their domestic industries.

Last, in the unlikely event the European Union decides to take the United States before the WTO, the WTO will likely find that the United States is in violation of its obligations.²³² If the United States refuses to adhere to the WTO decision, TRIPS could be jeopardized. Because members implement WTO decisions,²³³ the European Union could retaliate by requesting that the DSB suspend some of the obligations it owes the United States under TRIPS.²³⁴ The European Union would probably consider such suspension an unlikely last resort given that other markets, for example, technology, are more valuable than wine. The threat and possibility of a

²²⁸ See Demaret, *supra* note 12, at 163.

²²⁹ See *id.*

²³⁰ See generally Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. TRANS. TRANSNAT'L L. 735 (1996).

²³¹ Ironically, the U.S. Congress recognized this need in October 1998. See S. Con. Res. 124, 105th Cong. (1998). On October 14, 1998, the Senate passed a concurrent resolution to deny benefits to developing countries which failed to meet their TRIPS obligations by January 1, 2000. See *id.*

²³² See Heald, *supra* note 78, at 648-49.

²³³ See *supra* note 94 and accompanying text.

²³⁴ See DSU, *supra* note 88, at art. 22.2.

WTO action continues to exist.

Thus, the United States must set an example for other countries, especially developing countries that were leery of TRIPS and the initial costs associated with compliance. If the initiator of the Agreement believes it does not have to comply with all provisions, no country will adhere to the entire Agreement.

B. Reasons to Allow Continued Use of Controversial Geographical Indications for Wine

Supporters of the continued use of semi-generic indications also offer various arguments as to why the United States should maintain the status quo. They argue that in practice, the European wine market is closed to American wines that do not meet the European standards, the cost of eliminating generic uses of geographical indications would be fatal to many American wineries, and that European countries have abandoned their right to enforce rights they long ago opted not to protect.

1. Wine Agreement

In their dealing with the European Union, American wine makers have found the EU market closed to a variety of wines that do not meet European standards.²³⁵ Even after the conclusion of the 1983 Accord, American wine makers claim the European Union enacted regulations that continually impeded U.S. wine imports.²³⁶ The wine industry wants to participate in future negotiations to avoid such problems.²³⁷ Although the wine industry failed to have a specific provision included in the new legislation that would have required Congressional approval before negotiators "traded away" semi-generic names, the wine lobby continues to try to influence enactment of such legislation.²³⁸ Until the European Union is willing to address U.S.

²³⁵ See *Status of U.S. Efforts to Reduce Barriers to Trade in Agric.: Comments to the Subcomm. on Trade of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Robert P. Koch, Wine Institute), available in WESTLAW. 1998 WL 8992068.

²³⁶ See *id.*

²³⁷ See *Deals Aplenty as the White House Seeks Votes for Fast Track*, INVESTOR'S BUS. DAILY, Nov. 10, 1997, at A26.

²³⁸ The wine lobby tried to have such a provision included in a subsequent trade bill. See *id.* In November 1997, the U.S. Congress failed to pass a bill that would have given the President "fast track" negotiating authority and allowed the President to make trade deals that Congress could reject but not change. See *id.* The Clinton Administration, however, assured

concerns regarding the possibility of further barriers to U.S. wine imports, one could argue that there is little reason to participate in serious wine agreement negotiations. Moreover, the new negotiations should ensure such recognition is an ultimate goal.

2. Reclaiming Generic Terms

Yet another problem with U.S. recognition of such names involves reclaiming the semi-generic terms. If American negotiators agreed to recognize the terms now considered semi-generic as non-generic names, an immense amount of time and money would have to be spent to teach the public that these names were indications of origin and were not descriptive of a wine's type.

This obstacle is, however, not insurmountable. The Australian wine industry has managed to reclaim many of the contested terms.²³⁹ They have not reclaimed the most controversial names such as Champagne, Chablis, Burgundy, etc.,²⁴⁰ and it is these terms that will be the most difficult for the wine industry to reclaim. The cost and time will be monumental, and the domestic wine industries' resistance will be strong. To understand the problems that U.S. wineries will face in reclaiming the semi-generic terms, two cases involving the reclamation of trademarks provide an illustration.

Only two companies have successfully invested the expense and effort necessary to reclaim trademarks that fell into the public domain.²⁴¹ In 1896, the U.S. Supreme Court found the trademark SINGER generic for sewing machines.²⁴² Almost sixty years later, the Fifth Circuit Court of Appeals held that the Singer Manufacturing Company had reclaimed the mark SINGER through its extensive and continuous use and varied advertising.²⁴³ The Singer Company was able to recapture its mark "only by 'educating' buyers."²⁴⁴

California representatives that the President, before entering negotiations for trade deals, would consult with Congress on wine issues. *See id.*

²³⁹ *See supra* notes 114-115 and accompanying text.

²⁴⁰ *See supra* note 116 and accompanying text.

²⁴¹ *See* 2 MCCARTHY, *supra* note 25, § 12:30.

²⁴² *See* Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 21-23 (1896).

²⁴³ *See* Singer Mfg. Co. v. Briley, 207 F.2d 519, 520 n.2 (5th Cir. 1953).

²⁴⁴ *See* 2 MCCARTHY, *supra* note 25, § 12:31.

Similarly, the U.S. Supreme Court held that GOODYEAR RUBBER could not be adopted as a trademark.²⁴⁵ Later courts have varying interpretations of this Supreme Court decision. One believed GOODYEAR RUBBER was capable of functioning as a trademark if secondary meaning could be found.²⁴⁶ A second court interpreted the decision as clearly stating that the words were generic and incapable of ever functioning as a trademark.²⁴⁷ Today, however, people associate GOODYEAR RUBBER with one company.²⁴⁸

Both of these companies spent immense sums of money to accomplish their goals. The advertising effort cost millions of dollars in the early part of this century.²⁴⁹ The same advertising effort needed to reclaim the use of European geographical indications for wines would possibly cost billions of dollars. Some U.S. wine makers believe various American vineyards would close as a result of this reclamation process.²⁵⁰ In the two above examples, individual companies reclaimed their property. Geographical indications, in contrast, are not owned by corporations in the same way as trademarks. These designations function more like U.S. certification marks but without an owner.²⁵¹ Who would bear the economic burden of reclamation is a valid concern in deciding whether to protect geographical indications.

²⁴⁵ See *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 603 (1888).

²⁴⁶ See *Goodyear Tire & Rubber Co. v. H. Rosenthal Co.*, 246 F. Supp. 724, 727 (D. Minn. 1965). Generally, in trademark law, a term which is descriptive of the goods it identifies does not function as an indication of source. See 2 MCCARTHY, *supra* note 25, § 11:16. Such a term, however, may function as a trademark if the owner shows secondary meaning. See *id.* Secondary meaning is shown when consumers associate a term with a particular source even though the particular word may describe the goods on which it is used. See *id.* § 11:25.

For example, COCA-COLA was held to have acquired secondary meaning in *Coca-Cola Co. v. Koke Co. of Am. et al.*, 254 U.S. 143 (1920). In 1920, the Coca-Cola product contained extracts from coca leaves and cola nuts. See 254 U.S. at 146. Nevertheless, the Court found that most people associated Coca-Cola with the beverage as opposed to the particular substances found within the drink. *Id.*

²⁴⁷ See *Rettinger v. FTC*, 392 F.2d 454 (2d Cir. 1968).

²⁴⁸ See also 2 MCCARTHY, *supra* note 25, § 12:30 (stating that GOODYEAR was reclaimed from the public domain).

²⁴⁹ See *id.*

²⁵⁰ See Wells, *supra* note 165.

²⁵¹ See *supra* note 25 and accompanying text.

There are two segments of the wine drinking population: the ordinary wine purchaser and the wine connoisseur.²⁵² The only consumer of concern in terms of education is the ordinary wine purchaser; the oenologist knows these terms as geographical indications, not as wine types. To reach the ordinary wine consumer, wineries would have to develop an advertising campaign that included point of purchase information and radio or television spots; ordinary wine consumers are unlikely to read wine magazines or food publications.

Although many wine purchasers tend to ignore brands, the ordinary wine purchaser relies on brands when making wine purchases.²⁵³ Gallo's success as the world's largest wine producer evidences its consumer brand loyalty.²⁵⁴ To change the name of a product creates rifts in consumer loyalty. Consumer confusion could ensue. People may not believe that the Gallo Hearty Burgundy they have purchased for many years is the same as the Gallo Red Table Wine now available.

While the BATF would be responsible for ensuring that wine labels did not include such semi-generic indications as wine types, the actual responsibility for the costs of reclamation, such as advertising costs, would probably fall to the individual wineries. Moreover, the cost of such a campaign would have to be passed on to the consumer. This places an unreasonable burden on the wine industry. The European Union heavily subsidizes its wine industry in comparison to the subsidies given by the U.S. government to its domestic wineries.²⁵⁵ The U.S. government is unlikely to provide greater subsidies to wine producers to fund these activities.²⁵⁶ Thus, American

²⁵² See Chen, *supra* note 191, at 57-58.

²⁵³ The ordinary wine purchaser knows which brands are the best value based on volume and price. This is the jug wine market.

²⁵⁴ See Barry Stavro, *A New Vintage Gallo; Wine is a Tough Business, and the World's Largest Winery is Intent on Staying on Top. The Third Generation is Playing a Big Part in the Plan—After all, It's Their Future, Too.*, L.A. TIMES, Mar. 2, 1997, at 12.

²⁵⁵ See *Prepared Testimony of Robert Koch, The Wine Institute*, before the House Committee on Ways and Means, Feb. 12, 1998; Tagliabue, *supra* note 97.

²⁵⁶ The U.S. government has provided "subsidies" to other industries facing similar problems although the government "denies the legitimacy" of them. See Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 568 n.75 (1987). In 1971, the U.S. Congress enacted the Emergency Loan Guarantee Act to save Lockheed's TriStar commercial jumbo jet. See Robert J. Samuelson, *Government Bailouts Are Successful, But They Hide Industrial Problems*, AM. BANKER, Jun. 1, 1983, at 4; see 15 U.S.C. §§ 1841-1852 (1997). A decade later, the Chrysler Corporation secured Congressional approval of a bill with \$1.5 billion in federal loan guarantees. See Samuelson, *supra*, at 4.

vintners would be at a distinct economic disadvantage.

3. *The French Abandoned Their Rights*

When the "New World," in its development, began to copy the Old World, Europeans were flattered.²⁵⁷ This imitation proved the establishment of Europe as a great society worthy of emulation.²⁵⁸ For years, this practice continued.²⁵⁹ Now, the New World economy dominates the world, and the European Union, partially formed to compete with this economic power, suddenly wants to enforce rights it long ago opted not to protect. The Europeans, especially France, abandoned their rights to use such geographical indications in the U.S. market.

Trademark law provides a useful illustration. In trademark law, the theory of abandonment encompasses a broad range of activities.²⁶⁰ One type of abandonment occurs when a trademark ceases to function as a source identification; the trademark becomes the generic name for a good or service.²⁶¹ A trademark owner fails to police a mark.²⁶² Competitors begin to use the mark without fear that the trademark owner will initiate an infringement action.²⁶³ As these competitors overwhelm the market place with a particular good and each uses the trademark to describe the good, the

See 15 U.S.C. §§ 1861-1875 (1997); Robert Reich, *Bailout: A Comparative Study in Law and Industrial Structure*, 2 YALE J. ON REG. 163, 180-87 (1985). These were both unusual measures that only occurred as a last result. See Reich, *supra* at 163-64, 180-83. In contrast, U.S. wineries have not reached the point of "distressed businesses." See *id.* Until that happens, it seems unlikely that the U.S. government would assist wineries in their attempt to comply with TRIPS. Even if some wineries reached the "distressed" point, the government would probably not provide increased subsidies. Individual wineries do not employ the number of people Chrysler or Lockheed do. Many wine workers are migrant workers of whom the government takes little notice. See Alan Goldfarb, *The Pick of the Crop*, WINES & VINES, Oct. 1, 1997, at 16. Although the wine lobby is a powerful organization, it is extremely unlikely any winery could secure federal loans for compliance with TRIPS.

²⁵⁷ See Simon, *supra* note 25, at 152.

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 152-53.

²⁶⁰ See 2 MCCARTHY, *supra* note 25, § 17:5.

²⁶¹ See *id.* § 17:8.

²⁶² See 2 MCCARTHY, *supra* note 25, § 17:8.

²⁶³ See 2 MCCARTHY, *supra* note 25, § 17:8.

public begins to associate the trademark as the generic name for the good.²⁶⁴ Analogously, the Europeans failed to preserve their geographical indications in the U.S. market. For many years, U.S. wine makers used European geographical indications to designate particular types of wine. The terms are now generic; the “owners” have abandoned their “property.”

X. CONCLUSION

When the United States began the process of negotiating the TRIPS Agreement, it should have realized that some U.S. markets would be adversely affected by the eventual Agreement. The wine industry is such an industry. The United States reached a compromise with the European Union and agreed to increased protection of geographical indications. In doing so, the United States sealed its obligation to adhere to such provisions. Now, the U.S. government has jeopardized its compliance with TRIPS by allowing the wine lobby to influence new legislation that clearly violates U.S. obligations under TRIPS.

Although the wine lobby and many wine drinkers may believe this legislation is justified because semi-generic indications have become generic in the United States, the TRIPS Agreement prohibits such legislation. Even though the United States and the European Union have finally reached an agreement to begin negotiations, the United States has to address this problematic legislation.

The United States must consider the ramifications of its present legislation in a global context. The legislation does not merely allow domestic wine makers a privilege; it sets an example for the world. To disregard the true impact of this legislation would require analysis in a vacuum environment. Other TRIPS members may refuse to adhere to provisions they find difficult to implement. In addition, the United States has a vested interest in further cultivating the world-wide reputation of its wines and wineries to appeal to an ever-increasingly sophisticated purchaser.

The impact within the United States will be substantial. The wine lobby and the U.S. government are ignoring the trends in the wine industry. The

²⁶⁴ See *id.* For example, “escalator” was once a trademark. See Daniel N. Christus et al., *Intellectual Property in the Americas*, 13 AM. U. INT’L L. REV. 1095, 1119 (1998). Similarly, “aspirin” and “cellophane” once functioned as trademarks. See Mary A. Donovan et al., *Letting the Chips Fall: The Second Circuit’s Decision on Toll House*, 52 BROOKLYN L. REV. 1029, 1037 (1986).

varietal grape market is increasing while the generic market continues to lose ground. The U.S. wine industry has matured to a point where wine consumers, both the enthusiast and the occasional sipper, purchase more wine labeled by grape variety than that labeled under generics. By enacting this legislation, the United States has overlooked the changes in the industry.

Thus, the United States should adhere to its TRIPS obligations regardless of the costs associated with compliance. Other members must enact and enforce laws to enjoy the benefits of TRIPS. Why should the United States not change a segment of its industry? The wine industry is moving toward compliance, although very slowly, on its own. It would not be onerous to implement a compliance plan similar to the Australia-EU Wine Agreement in which transitional periods are established. The United States should reaffirm its TRIPS obligations and acknowledge the market trends by recognizing semi-generic indications as protected geographical indications of origin.