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, claret from Virginia, or chablis from Ohio. An Australian consumer may purchase domestically produced burgundy, port, or claret. The wine shops in New Zealand sell national products labeled port, sherry, and champagne. 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. 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., Korbel 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.
in Counterfeit Goods of the Uruguay GATT (TRIPS)\textsuperscript{11} which provides for
the international protection and enforcement of intellectual property rights.\textsuperscript{12}

The Agreement covers a broad range of intellectual property rights.\textsuperscript{13} Included within this spectrum is protection for geographical indications of source.\textsuperscript{14} The inclusion of these provisions caused heated debates during the Uruguay GATT Rounds and continues to generate discussion.\textsuperscript{15} The article that causes the most debate is Article 23 which deals with the protection of geographical indications for wine and spirits.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} The European Union (EU),\textsuperscript{21} which is a staunch supporter of Article 23,
believes the new legislation clearly violates the TRIPS Agreement. 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. Producers use such designations to signify the place from which a good originates. Geographical indications, however, are not trademarks; trademarks, for example, Nike® or Coke®, inform the

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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. 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." 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.

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. Indications of source merely state where the product was made. The TRIPS Agreement created a single category for such indications. It is broader than indications of source but does not incorporate the natural and human factors of appellations of origin. 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. The legislation imposed criminal penalties on people who falsely
designated the origin of their goods. 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. Under the legislation, a product could bear the appellation of origin if all of its ingredients came from the geographical region indicated. Harvesters, distillers, wholesalers, and shippers of wine faced serious penalties for fraudulent misrepresentation of origin.

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. Many of these immigrants brought their wine-making skills and vine cuttings with them. For example, a vintner family emigrating from Champagne, France to the United States may have brought a vine cutting to grow grapes. These growers named the wines they produced after the regions from which they came. American wine producers at the end of the twentieth century continue to produce wines bearing these designations.

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

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

New Zealand also tried to lure European wine makers 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.

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. Under the Paris Convention, a member of the Convention must seize or prohibit imports with false indications of source, producer, manufacturer, or merchant. In its original form, countries prohibited such uses only in cases of serious fraud.

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

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45 See id. at 5.
46 See id. at 7; supra notes 4-6 and accompanying text.
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.
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.\textsuperscript{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.\textsuperscript{54} Only thirty-one countries signed the Madrid Agreement.\textsuperscript{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;\textsuperscript{56} however, this Agreement has only seventeen signatories and its registration system is burdensome.\textsuperscript{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.\textsuperscript{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.\textsuperscript{59} Other entities that eventually supported the U.S. position included the European Union, Japan, and Switzerland.\textsuperscript{60}

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

\textsuperscript{53} See Simon, \textit{supra} note 25, at 134.

\textsuperscript{54} See Madrid Agreement, \textit{supra} note 52, art. 1, 3bis.

\textsuperscript{55} See Hangard, \textit{supra} note 23, at 67. The United States never signed the Madrid Agreement. \textit{See id.}

\textsuperscript{56} See Lisbon Agreement, \textit{supra} note 29.

\textsuperscript{57} See Hangard, \textit{supra} note 23, at 67; Lisbon Agreement, \textit{supra} note 29.

\textsuperscript{58} See Demaret, \textit{supra} note 12, at 163.

\textsuperscript{59} See id.

\textsuperscript{60} See id.

\textsuperscript{61} See id. at 166.
The United States, Canada, and Australia remained staunchly opposed to their inclusion but the European Union insisted on protection. A compromise was eventually reached that provided a more forceful provision for wines and spirits than for other geographical indications.

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.

1. Article 22 - Protection of Geographical Indications

The first provision defines geographical indications and provides protection for such designations. Article 22 prohibits the use of false designations of origin and incorporates the unfair competition provisions of the Paris Convention into TRIPS. 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.

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. These laws must also prevent uses of such indications where the true place of origin appears in conjunction with

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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 goods\textsuperscript{70} or where the geographical indication is accompanied by "'kind', 'type', 'style', 'imitation' [sic] or the like."\textsuperscript{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.\textsuperscript{72} Last, the Council for TRIPS will facilitate negotiations to establish a notification and registration system for geographical indications of wine.\textsuperscript{73}

3. Article 24 - International Negotiations; Expectations

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

Article 24 also details circumstances under which a member does not have to recognize geographical indications.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{70} See, e.g., California Chablis.
\textsuperscript{71} TRIPS supra note 11, at art. 23(1).
\textsuperscript{72} See id. at art. 23(2).
\textsuperscript{73} See id. at art. 23(4).
\textsuperscript{74} See id. at art. 24(1).
\textsuperscript{75} See id. at art. 24(3).
\textsuperscript{76} Id. at art. 24(1).
\textsuperscript{77} See id.
\textsuperscript{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).
\textsuperscript{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." A geographical indication that has become the common name for a good within a member country does not require protection under TRIPS. 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.

Member countries, however, must not use these grandfather provisions as a means to refuse to enter into negotiations with other member countries. 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. 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. 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.

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

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].

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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).
Under the Understanding of Dispute Settlement, a WTO panel mediates and arbitrates disputes between parties.\(^8\) Either party may appeal the panel decision to the Appellate Body.\(^9\) Once the Appellate Body makes its decision and the Dispute Settlement Body [DSB] adopts such decision, the compliance process begins.\(^10\) The DSB sets a reasonable time period within which the party found in violation of its obligations must comply with the decision.\(^11\) 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.\(^12\) WTO decisions, however, have no real enforcement mechanism; each member must be willing to comply with these decisions for the system to work.\(^13\)

V. EU EFFORTS TO FORCE COMPLIANCE BY OTHER MEMBERS\(^14\)

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.\(^15\) The European Union has targeted the United States, Australia, and New Zealand in its efforts to encourage compliance.\(^16\) These members

\(^8\) See id. at art. 2.1.
\(^9\) See id. at art. 17.1.
\(^10\) See id. at arts. 17.14, 19.1.
\(^11\) See id. at art. 22.2.
\(^12\) Id.
\(^13\) See Heald, supra note 78, at 650. Members could also attempt to force compliance through trade sanctions.
\(^15\) 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, and some of their wineries continue to use European geographical indications on domestically produced wine.

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." Under this legislation, brand names of wines that are also geographical indications may not be used to mislead the public. 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.

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.

See 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.

See supra notes 1-9 and accompanying text.


See id. at art. 40.

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. 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.

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, the Australian wine industry pushed its government to pass legislation to protect the names of Australian wine-growing regions. 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.

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.


with the Australian Wine and Brandy Corporation Amendment Act 1993. The enactment of this legislation, the government created the Geographical Indications Committee to establish geographical indications for wine.

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

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." An annex lists the relevant geographical names that each member agrees to protect. Article 8 allows Australia "transitional" periods during which to recognize certain European geographical indications.

As of December 31, 1993, Australian producers ceased using Beaujolais, Cava, Frascati, Sancerre, Saint-Emilion, Vinho Verde, and White Bordeaux. The transitional period for Chianti, Frontignan, Hock, Madeira, and Malaga ended on December 31, 1997. 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.

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108 See id. at § 17.40Q-40ZE.
109 See id. at art. 8(1)(a).
110 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. The legislation creates a registration system for geographical areas within New Zealand and abroad. If a producer uses any registered indication in a misleading manner, the government may prosecute the producer under the Fair Trading Act. 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.

The European Union and New Zealand have yet to conclude a wine agreement regarding geographical indications. Although the two entities have discussed such an agreement since 1995, they continue to negotiate the terms. 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. One current cause of debate involves the use of sherry and port in New Zealand. The European Union wants New Zealand to enact legislation to prevent continued use of such names; however, New Zealand believes that the current procedure that leaves enforcement to wine producers is sufficient.

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118 See id.
119 See Lonergan, supra note 117 (such violation carries a maximum fine of US $100,000).
120 See id.
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.
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. The Bureau of Alcohol Tobacco and Firearms (BATF), regulates the use of geographical indications, both domestic and foreign, through its labeling power. The BATF enacted regulations for the establishment of American viticultural areas in 1979. In 1994, the United States amended its trademark law, effective January 1, 1996, to comply with the geographical indication provisions of TRIPS. 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. This creates an absolute bar to registration.

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

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132 See id.
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. The United States recognized the EU’s willingness to examine its certification requirements for imported wines. 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. The European Union agreed to recognize various U.S. viticultural areas. The United States, in turn, agreed to strive to prevent the erosion of non-generic designations as defined in the U.S. regulations. The accord originally was set to expire on December 31, 1997; however, an EU Council Regulation extended the accord provisions for one year. The extension to December 31, 1998 was an effort to facilitate the negotiation process. 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. 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. 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.
142 See id.
143 See id.
VI. BATF REGULATIONS

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

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

Semi-generic indications are wine classes and types, and wineries may use these designations on wines which do not originate from the geographical indication. The regulations state that semi-generic indications continue to function as geographically significant indications. 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. 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.

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

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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.
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.\textsuperscript{157} Examples of distinctive non-generic indications include: Bordeaux Blanc, Graves, Medoc, Pommard, Rhone, Schloss Johannisberger, and Lagrima.\textsuperscript{158}

VII. U.S. LEGISLATION OF 1997

The real rift between the parties occurred in August 1997\textsuperscript{159} after the passage of the Taxpayer Relief Act of 1997 which codified a portion of the BATF regulations.\textsuperscript{160}


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.\textsuperscript{161} The Secretary of the Treasury determines if a name of geographical significance is semi-generic.\textsuperscript{162} The names listed in the BATF regulations as semi-generic are now listed in the U.S. Code as semi-generic indications.\textsuperscript{163} As a result of this legislation, U.S. compliance with Article 23 and 24 of TRIPS is more difficult.\textsuperscript{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.\textsuperscript{165} Both wine associations and individual

\begin{flushright}
\textsuperscript{157} See id. § 4.24(c)(1).  \\
\textsuperscript{158} See id. § 4.24(c)(3).  \\
\textsuperscript{159} See Pat Wechsler, A Good Year for Buffalo Beaujolais, BUS. WK., Sept. 1, 1997, at 4.  \\
\textsuperscript{161} See id. at (c)(1)(B).  \\
\textsuperscript{162} See id. at (c)(2)(A).  \\
\textsuperscript{163} See id. at (c)(2)(B); supra note 153 and accompanying text.  \\
\textsuperscript{164} See Wechsler, supra note 159.  \\
\end{flushright}
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

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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.


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 Lenzien, 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).


172 See Wells, supra note 165.
sold in the United States.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{176}

\section*{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.\textsuperscript{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.\textsuperscript{178} With the extension of the Wine Accord and agreement to begin negotiations, this seems an unlikely action.

\footnotesize
\begin{itemize}
\item \textsuperscript{174} See Wells, supra note 165.
\item \textsuperscript{175} See id.
\item \textsuperscript{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.
\item \textsuperscript{177} See Weschler, supra note 159.
\item \textsuperscript{178} See id.
\end{itemize}
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.\textsuperscript{179} The United States, in contrast, acted to decrease protection for such uses of geographical indications.\textsuperscript{180} Article 24, however, provides exceptions to Article 23’s general prohibition of the continued use of geographical indications.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”

\textsuperscript{179} See TRIPS supra note 11, art. 23(1).
\textsuperscript{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.
\textsuperscript{182} See TRIPS supra note 11, at art. 24(4).
\textsuperscript{183} TRIPS supra note 11, at art. 24(4).
\textsuperscript{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. Instead of distinguishing between older and newer wineries, the law allows any U.S. wine producer to use these semi-generic designations. Under the U.S. law, there is no requirement of good faith or ten years use. 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. Each of the semi-generic indications listed in the new legislation is commonly defined as a wine type in the United States. These designations have fallen into common usage. The average consumer orders a glass of sherry or burgundy. 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. The court concluded that "Chablis" when used on wine in the United States does not indicate that the wine originated from Chablis, France.

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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").
192 See The Institut National Des Appellations D'Origine v. Vintners 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.\footnote{See TRIPS supra note 11, at art. 24(1).} Furthermore, the above exceptions "shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements."\footnote{See J.H. Reichman, Universal Minimal Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, 29 INT'L L. 345, 364 (1995) (stating that "[t]he stage has, therefore, been set for mandatory future negotiations").} 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.\footnote{See Brody, supra note 188, at 530; Heald, supra note 78, at 647-49.} Furthermore, in the aftermath of the TRIPS Agreement, commentators agreed that the United States was obliged to enter negotiations.\footnote{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).} 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.\footnote{See supra note 176 and accompanying text.}

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.
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. To protect their domestic markets, both countries created regulations that deal with the establishment of geographical regions. Today, people around the world recognize the Napa Valley as a wine-growing region that produces quality wines. Similarly, wine drinkers know Coonawarra as a premier wine area of Australia. The BATF regulations recognize one hundred and thirty-four American viticultural areas. 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.

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. 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

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200 See supra notes 105-106, 128 and accompanying text.
204 See Skrzycki, supra note 128.
their products in an attempt to create generic indications. 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. The Director recognized that these names continue to serve dual roles as geographical indications and type designations. 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. 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. 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. 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.


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.


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 "[l]abled by grape variety rather than complex French geography." WASH. POST, Apr. 8, 1998, at E11.
type of wine they wish to purchase. Sophisticated wine purchasers "look for something they haven’t heard of . . . there is almost an anti-branding mentality." 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. Particular areas are known for their ideal wine-making climate or for their suitable soil. The Champagne wine-growing region has a cool climate that enables vintners to produce a unique product. Shaley soil in the Oporto region of Portugal contributes to the distinctive grape used to make Port. Wine consumers are able to distinguish wines not only by brand but also by origin. Origin is an important consideration in wine purchases because "the land becomes the brand."

Sophisticated wine purchasers know that Franzia Mountain Chablis in a box from California is not equivalent to most white wines produced in Chablis, France. Sophisticated consumers do not buy wine according to brand 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. U.S. vintners now market the majority of their wines under grape varieties, for example, Pinot Noir, Merlot, and Fume Blanc. Even Ernest and Julio Gallo Winery has entered the varietal grape market and introduced its

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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.
216 See Joanna Simon, Methode 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.
Turning Leaf wine. 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.

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 wines 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. The United States has assured the world that it is a committed member to the Agreement.

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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.

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. The developed countries, as the holders of the majority of intellectual property, wanted to provide the utmost protection for intellectual property. In contrast, developing countries believed increased protection for intellectual property would unreasonably burden their economies.

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. 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. If the United States refuses to adhere to the WTO decision, TRIPS could be jeopardized. Because members implement WTO decisions, the European Union could retaliate by requesting that the DSB suspend some of the obligations it owes the United States under TRIPS. 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.
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.

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\(^{236}\) See id.


\(^{238}\) 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. They have not reclaimed the most controversial names such as Champagne, Chablis, Burgundy, etc., 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. In 1896, the U.S. Supreme Court found the trademark SINGER generic for sewing machines. 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. The Singer Company was able to recapture its mark “only by ‘educating’ buyers.”

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.
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. 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. A second court interpreted the decision as clearly stating that the words were generic and incapable of ever functioning as a trademark. Today, however, people associate GOODYEAR RUBBER with one company.

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. 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. 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. Who would bear the economic burden of reclamation is a valid concern in deciding whether to protect geographical indications.

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. 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. Gallo’s success as the world’s largest wine producer evidences its consumer brand loyalty. 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. The U.S. government is unlikely to provide greater subsidies to wine producers to fund these activities. 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.
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.
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. This imitation proved the establishment of Europe as a great society worthy of emulation. For years, this practice continued. 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. 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. A trademark owner fails to police a mark. Competitors begin to use the mark without fear that the trademark owner will initiate an infringement action. 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. 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

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.