Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications is at a Standstill

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As the individual regions and cities of the world begin to share more and more commercial similarities, such as ubiquitous "chain" stores and restaurants, it is natural that some consumers will strive to find products and foodstuffs that are somehow singular or are noted for their quality or rarity. On one level, trademark law protects products that have attained a certain reputation for just such qualities, but when the uniqueness of a region or the attributes of a certain geographic area are responsible for the special traits of a product, the tangential concept of geographic indications governs. Trademark law provides a consumer with the ability to choose between Chateau Ste. Michelle and Columbia Winery wines, trusting that the label of each indicates a certain level of quality based on that consumer's experience or knowledge of those brands. Geographic indications enable a consumer to choose between a Bordeaux and a Chianti with some assurance that he or she knows what those wines are.

The law and policies of geographical indications hold the potential of "re-linking production to the social, cultural and environmental aspects of particular places, further distinguishing them from anonymous mass produced goods, and opening the possibility of increased responsibility to place."[1] Both Bordeaux and Chianti are regions in Europe; Bordeaux is in France and Chianti is in Italy. That their names have come to signify types of red wine is something that Europeans and Americans, in particular, are struggling to regulate, qualify and quantify.

1 Elizabeth Barham, *Translating terroir: the global challenge of French AOC labeling*, JOURNAL OF RURAL STUDIES 19 (2003) 127-138, 129.

It is not necessarily seen as a struggle between developed and developing countries, but rather a friction between the sensibilities of the 'Old World' and the new,[2] as well as an ideological schism between different national perspectives in other realms of law, such as antitrust; some jurisdictions favor consumer protection over producer protection. This article will explore the friction in GI law through several examples, most prominent of which will be the current strain between France and the United States in the realm of wines and spirits. The debate is by no means limited to this narrow genre of goods nor to these two countries, but their opposite approaches to geographical indications and some current events regarding this particular conflict provide a useful overview of the issue. The lack of agreement about the importance and strength of geographic indications [hereinafter GIs] stalls advancement in other areas of intellectual property law, such as the Uniform Domain Name Dispute Resolution Policy,[3] an online procedure for resolving complaints made by trademark owners regarding domain names, which demonstrates the need for consensus on this issue. After a preliminary look at the situations in France and the United States, this writing will attempt a bird's-eye view of the international positions on GIs, then address the goals and actualities of treaties that address GIs on an international level and analyze how various jurisdictions are struggling with dissimilar aspects of their respective current systems.

I. A Framework for and Brief History of Geographic Indications

Geographically descriptive trademark. A trademark that uses a geographic name to indicate where the goods are grown or manufactured. This type of mark is protected at common law, and can be registered only on proof that it has acquired distinctiveness over time.[4]

2 Felix Addor and Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits*, 5 J.W.I.P. 6, 873, 883, Nov. 2002. *See also* Edgardo Bourgoing, *Everything You Always Wanted to Know About Geographical Indications*, Feb. 2003, available at http://www.inta.org/articles/everything.html (last visited Sep. 2, 2004). Geographical indications have been traced back to Naxos Wines and Sicilian Honeys in the fourth century B.C., Iberian Ham in Caesar Augustus' era, and later the Bordeaux Wines, Provoke Olive Oils and Russian Leather of the 18th century. *Id.*

3 "[I]n the absence of an international framework for the recognition of geographical indications, and the fact that the applicable laws at present relate to trade and goods, whereas domain name registrations are wider in scope, it is problematic to amend the UDRP to cover the improper use of geographical indications as domain names." *Intellectual Property on the Internet: A Survey of Issues*, 59. WIPO Publication No. 856, 2002.

4 BLACK'S LAW DICTIONARY, 1501. (7th ed. 2001).

Although this is the only reference to or definition of a geographic indication in a 2001 U.S. legal dictionary, recent international treaties have defined, mentioned, and discussed it more and more frequently over the past decade. A geographic indication is dissimilar to a trademark on many levels. Unlike a trademark, which usually protects the goodwill of a specific individual or entity, a GI is a collective right; each producer established in the geographical area specified by the GI may use the GI for its products from that specific region. Trademarks are protected either on a "first to use" or "first to file" basis, depending on the jurisdiction, but GIs are assigned based on who has a "better right" to that GI rather than who the first party was who decided to use it.[5] There are parts of traditional U.S. trademark law, however, that address some of the collectivity aspects of GIs; their respective similarities and differences will be discussed below.

For products ranging from wines to tobacco to couture perfume, some consumers are interested in the geographic origin of their purchases. The difference between a glass of red wine hailing from the Bordeaux region of France and one from Napa Valley is one of great import to some cooks, diners and connoisseurs.[6] In the perfume industry, the origin of the various aromatic notes in a scent are sometimes highlighted to inform the prospective buyer that the ingredients of the perfume are uncommon or of highest quality.[7] Whatever a consumer's proclivities may be, geographic indications may play some kind of role in his or her choice of goods. Whether those preferences are valid or reasonable is outside the scope of this analysis, but studies have shown that a product's geographical origin can definitely be a factor in which product a consumer chooses to buy.[8]

5 Addor and Grazioli, *supra* note 2 at 873. An example would be Parma ham. In Italy, and many other countries, it is presumed to come from Parma, Italy. In Canada, however, the term was trademarked. Under the "better right" maxim, the Canadian trademark would be invalid. There is a provision in TRIPS, however, that allows well-established (more than ten years before TRIPS was implemented) trademarks to remain valid.

6 See, e.g., James Suckling, *Bordeaux's Bold New Vintage*, WINE SPECTATOR, June 30, 2004, at 66.

7 A new perfume from Prada® is advertised on the Neiman Marcus® website: "The Prada Fragrance re-explores the spirit of amber in four characteristic ways, each based on one ancestral ingredient: Pure sandalwood oil from India; Addictive patchouli leaves from Indonesia; Precious labdanum resin from France; Profound benzoin from Siam." *See* http://www.neimanmarcus.com/store/catalog/prod.jhtml?itemId=prod14770328&parentId=cat000380&masterId=cat000339&grandMasterId=cat000293&cmCat=beauty1 (last visited July 10, 2004).

8 *See, e.g.*, Norbert Olszak, *Droit des appellations d'origine et indications de provenance*, Editions TEC & DOC, Paris, 2001, p.5.

A. INTERNATIONAL AGREEMENTS REGARDING GIS

International protection for GIs has wavered in strength in various countries since the Paris Convention for the Protection of Industrial Property [Paris Convention] of 1883.[9] The protection for GIs in the Paris Convention was relatively weak; signatories prohibited the import or sale of goods that falsely indicated their source, producer, manufacturer or merchant, but only in the event of serious fraud.[10] The United States was among the signatories to the Paris Convention because the level of protection provided GIs was fairly lax.[11] Indeed, the term "geographical indication" is not included in the Paris Convention; the idea therein is protected under Article 10, which describes false indications:

> Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.[12]

Chronologically, the next international treaty dealing with geographical indications was introduced eight years later as The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods [hereinafter Madrid Agreement].[13] Given the higher level of protection demanded in the Madrid Agreement, the United States is not a signatory. As of July 15, 2004, there are 34 countries[14] party to this Agreement; its impact, due to the low level of support from the international community, has been minimal.[15] France, perhaps the world's strongest supporter of GIs because of its wine industry, was an original signer of the Madrid Agreement, along with Spain, Switzerland,

9 Mar. 20, 1883, as last revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

10 *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, 184 (1968).

11 Stacy D. Goldberg, *Who Will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications*, 22 U. PA. J. INT'L ECON. L. 107, 112 (2001).

12 Paris Convention, *supra* note 8, Art. 10(2).

13 Apr. 14, 1891, as last revised Oct. 31, 1958, 828 U.N.T.S. 389.

14 The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Status, available at http://www.wipo.int/treaties/en/documents/word/f-mdrd-o.doc (last visited Aug. 1, 2004).

15 Goldberg, *supra* note 11 at 114.

Tunisia, and the United Kingdom.[16] In fact, in 1824, almost 60 years prior to the Paris Convention, France was the first country to pass specific legislation on geographical indications of source; it imposed harsh criminal penalties on people who falsely designated their goods' origin.[17]

The Paris Convention and the Madrid Agreement governed geographical indications in international trade until the enactment of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration in 1958 [hereinafter Lisbon Agreement].[18] This is the first international agreement to define "appellation of origin:"

> [T]he geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are *due exclusively or essentially to the geographical environment, including natural and human factors*....The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.[19]

It also provides a specific rule prohibiting descriptive names, such as "Burgundy-style Beaujolais." Article 3 provides that "[p]rotection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as 'kind,' 'type,' 'make,' 'imitation,' or the like."[20] Furthermore, the Lisbon Agreement provides for a strict level of protection of geographical indications through an organized international registration system,[21] but none of its provisions has had the opportunity to be implemented in a way that would be effective internationally since, as of July 15, 2004, only 21 countries are party to the agreement.[22] Once again, France was an original member but the United States has not yet signed it.[23] These three treaties, the

16 Madrid Agreement, Status, *supra* note 14.

17 *See* Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 312-313 (1999).

18 Oct. 31, 1958, as last revised Jan. 1, 1994, available at http://www.wipo.int/clea/docs/en/wo/wo012en.htm (last visited Aug. 1, 2004).

19 *Id.*, Art. 2. (emphasis added).

20 *Id.*, Art. 3.

21 Article 5 of the Lisbon Agreement lays out a detailed registration system which would collect and disseminate registrations through a central bureau.

22 Lisbon Agreement, Status, available at http://www.wipo.int/treaties/en/documents/word/j-lisbon.doc (last visited Aug. 1, 2004).

23 *Id.*

Paris Convention, the Madrid Agreement, and the Lisbon Agreement, were the precursors to the articles governing GIs in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS Agreement] of 1994.[24]

II. Current International Definitions of GIs

"The relationship between trademarks and GIs is complex and the balance attempted by negotiators is tenuous and open to varied interpretations."[25] The TRIPS Agreement does not use the term "appellation of origin," as did the Lisbon Agreement, but rather defines and uses "geographical indication." It provides:

> Geographical indications are, for the purposes of this Agreement, 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.*[26]

What this definition does *not* include is a reference to a product's process or method of manufacture or other *human* factors, as did the Lisbon Agreement; rather it ties the product to its *place of origin.* But depending on the term's usage and the author of the term, "appellation of origin" can be a synonym for geographical indications[27] or a subset of it;[28] geographical indications can be a subset of "labels of origin,"[29] or, alternatively, they can be two separate concepts under the same general

24 Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M. 81.

25 Dwijen Rangnekar, *Geographical Indications: A Review of Proposals at the TRIPS Council,* UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, June 2002, 21-22.

26 TRIPS Agreement, *supra* note 24, Sec. 3, Art. 22(1) (emphasis added).

27 *See* Paul J. Heald, *Impact of the TRIPS Agreement on Specific Disciplines: Trademarks and Geographical Indications of Origin: Exploring the Contours of the TRIPS Agreement,* 29 VAND. J. TRANSNAT'L L. 635, 636 (1996).

28 *See* Goldberg, *supra* note 11 at 108. "Geographical indications include both indications of source...and appellations of origin..." *Id. See also* WIPO's Geographical Indications Frequently Asked Questions, available at http://www.wipo.int/about-ip/en/about_geographical_ind.html?printable=true (last visited Aug. 14, 2004).

29 *See* Barham, *supra* note 1 at 127. "Geographical indications are known more familiarly as labels of origin, of which they are one type." *Id.*

category of "indications of source,"[30] but cover different genres of products.[31] It is possibly the consolidation of these two terms in international parlance that renders some of the international conversation opaque; the parties' respective goals and understandings of the terminology is different from the outset, which makes negotiations that much more unclear.

As the title of this article suggests, it may be the case that traditional ideas ensconced in the *appellation d'origine controllée* [hereinafter AOC] system do not carry over into the modern understanding of geographical indications. Various parties, therefore, depending on their traditions in this field, or lack thereof, are misunderstanding each others' semantics in discussing a system upon which they are all trying to agree. On top of their different GI histories, countries have different understandings of consumer protection. "United States trade law traditionally has been concerned with protecting the consumer from deception, whereas French law centers on the interests of the products or manufacturers and the improper use of their marks by other producers."[32] Following a brief overview of GIs in the TRIPS Agreement, the remainder of this article will focus on the background and evolution of GIs and AOCs in France and the United States, analyze some other objections to the GI provisions in the TRIPS Agreement, and propose a foundational framework of compromise for moving forward in international negotiations.

A. THE TRIPS AGREEMENT

TRIPS is viewed as a minimum standards agreement because WTO member countries may legislate beyond the TRIPS minimums; TRIPS

30 An indication of source is a conveyance that a product originates in a specific geographical region. Examples are "made in France," and "product of the USA." *See* Organisation for an International Geographical Indications Network, available at http://www.origin-gi.com/faq.php?myfaq=yes&id_cat=1&categories=GI (last visited Sep. 5, 2004).

31 *See, e.g.*, Annexes AOC, l'Institut National des Appellations d'Origine, available at http://www.inao.gouv.fr/public/home.php (last visited Aug. 14, 2004). "Le règlement (CEE) n°2081/92 décrit dans son article 1er les produits faisant partie du champ d'application pour les AOP, qui diffère par certains points du champ d'application des AOC." According to certain EU definitions, an appellation d'origine (AOC) can only be granted to agricultural or dairy products.

32 Lori E. Simon, *Appellations of Origin: The Continuing Controversy*, 5 NW. J. INT'L L. & BUS. 132, 135 (1983), citing Michael Kirk, *Revision of the Paris Convention and Appellations of Origin*, 1979 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT L. 185, 186 (1979 summary of proceedings, app. F) (Symposium speech by Michael Kirk, Director, Office of Legislation and International Affairs, U.S. Patent and Trademark Office, given Aug. 15, 1979).

33 Goldberg, *supra* note 11 at 123.

made a "great effort not to disturb the status quo as much as possible."[33] Articles 22 through 24 of the TRIPS Agreement govern geographical indications. Article 22 covers all products and defines a standard level of protection in that geographical indications should be protected to avoid misleading the public and to prevent unfair competition. Article 23 provides enhanced protection for geographical indications for wines and spirits and Article 24 provides how international negotiations should take place and enumerates various exceptions to the general rules, such as allowing "generic" terms in one country that are classified as geographical indications elsewhere to escape that classification.[34] One such example is "cheddar cheese," which most often refers to a particular type of cheese that is not necessarily produced in Cheddar, UK.[35] The same escape from GI classification can occur if a term has already been registered as a trademark, such as "Parma ham;" in Italy, that denotes ham from the region of the city of Parma, but in Canada it is a registered trademark for ham made by a Canadian company.[36]

The current debate in the TRIPS Council[37] is, firstly, whether and how to create a multilateral register for wines and spirits and, secondly, whether to extend the higher-level Article 23 protection to other goods aside from wine and spirits. This writing will focus on the first issue but the second is also very contentious; several parties are opposed to the idea that wine and spirits deserve special treatment and propose that the value GIs in general would be harmed by inconsistent application. Article 22 protection would allow a vase to be sold as "Murano" glass, "made in Turkey," but Article 23 protection would require that Murano glass be made in Murano, Italy, regardless of any additional descriptors.[38] The TRIPS Agreement tries to take into account the fact that different countries use a gamut of legal means to protect geographical indications, ranging from specific GI laws to parts of trademark law to purely common law. These differences, however, coupled with ideological differences, account for the inability of many countries to come to an agreement regarding the strength and breadth of

34 TRIPS Agreement, *supra* note 24, Art. 24(6).

35 The World Trade Organization: TRIPS: Geographical Indications, available at http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited Aug. 15, 2004).

36 *Id.*

37 Under the Doha mandate, which was a result of the WTO Doha Ministerial Conference in 2001. *See* http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#agriculture (last visited Aug. 31, 2004).

38 *See, e.g.*, History of Murano Glass, available at http://www.boglewood.com/murano/history.html (last visited Aug. 16, 2004).

GI protection. Indeed, the TRIPS Agreement requires that its signatories negotiate to create a multilateral register for wines and spirits; work began in July of 1997, but no consensus has been reached.[39]

There are two main schools of thought on the issue; one proposes a voluntary system, whereby geographical indications would be registered in a database that individual countries could choose to participate in or not after being encouraged to consult the database.[40] The United States is a member of this contingent. The other perspective on the matter, the "EU Proposal,"[41] suggests that registration of a GI would create the presumption that the GI would be protected in all other countries and that, once it has been registered, no country could refuse protection after an 18-month grace period.[42] Because the European Union already has specific regulations in place governing GIs,[43] it stands to "benefit substantially from the economic gains derived from protecting its intellectual property rights in geographical indications."[44] Even so, the European regulations are not universally praised in Europe; there are different levels of understanding of the strength of a GI and, by streamlining the various laws into one, those countries with stronger GI regulations find their GIs have less value than beforehand because of inevitable dilution due to weaker overall GI laws.[45]

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39 *Id.*

40 See http://docsonline.wto.org, TN/IP/W/5. The countries in favor of this stance are Argentina, Australia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, the Philippines, Chinese Taipei and the United States.

41 *See* WTO, Geographical Indications, *supra* note 35.

42 *See* WTO documents, *supra* note 40, IP/C/W/107/Rev.1. Countries in favor of this proposal are Bulgaria, Cyprus, the Czech Republic, the European Union, Georgia, Hungary, Iceland, Malta, Mauritius, Moldova, Nigeria, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland and Turkey.

43 *See, e.g.*, Council Regulation No. 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 203) 1 (corresponding to the subject matter of TRIPS Article 22).

44 Goldberg, *supra* note 11 at 145.

45 *See, e.g.*, Robert Tinlot, *Le terroir: un concept à la conquête du monde*, Revue des Œnologues n°101, 11 (2001). "La Commission européenne, dans ses propositions de règlement, avait tenté aussi de supprimer la référence à l'origine géographique obligatoire quand on utilise le nom de la variété de vigne dans la désignation du vin. Elle n'hésiterait pas, ainsi à habituer les consommateurs à l'usage de ces quelques noms magiques qui, détachés de leurs terroirs, permettront d'ouvrir largement l'espace européen à la concurrence mondiale, au risque de limiter ainsi la valorisation des régions productrices de ces variétés privilégiées." The EC, in its regulation proposals, has tried to suppress any reference to a wine's geographic origin when using a wine varietal designation. The EC would not hesitate to get consumers accustomed to using these magical names which, detached from their territories, would allow the EU to compete globally in the wine market at the risk of stultifying the value of the names of these regions where these rare varietals are produced. *Id.*, translated by the author.

As was mentioned above, as a product of the WTO, the TRIPS Agreement effects a large portion of the world. The Agreement also mandates enforcement of its regulations. Part Three of TRIPS provides that members must ensure that enforcement procedures in every jurisdiction provide effective action against any act of infringement, including injunctive relief, money damages, strong border control measures, and remedies in criminal law including seizure, forfeiture and destruction of infringing goods.[46] Many commentators on the TRIPS Agreement have suggested that its enforcement provisions are some of its most promising sections.[47]

III. Reasons for Dissimilar Perspectives on Geographical Indications

Perhaps the most pronounced rift in thinking on GIs can be demonstrated by how the historic development of GI law, or lack thereof, has developed alongside the wine industries in France and the United States. The end goal in both jurisdictions is not dissimilar, but the development of intellectual property law in its context, the goals of antitrust law, and the resultant behavior by domestic consumers have colored the two countries' outlook on the role of GIs in international intellectual property law.

A. France

France has a long history of intellectual property prowess. French writers, for example, were the first to organize a copyright collection society in 1837.[48] The French were also on the forefront of GI protection, as was noted above.[49] The French AOC is controlled by the state to assure both territorial origin and conformity to precise rules for production, and to guarantee their typicity or distinctive character.[50] In France, an AOC guarantees a link between a product and the earth that produces it; that product cannot be grown outside a delimited geographic

46 The TRIPS Agreement, *supra* note 24, arts. 41-61.

47 Heald, *supra* note 27 at 649.

48 *See* Caslon Analytics: Copyright Collecting Societies Profile, available at http://www.caslon.com.au/colsocietiesprofile.htm (last visited Aug. 16, 2004).

49 *See, e.g.*, Lindquist, *supra* note 17.

50 Barham, *supra* note 1 at 128.

zone.[51] The AOC system is the oldest of the European label of origin systems and is widely regarded as the most strict and thorough.[52] In general, the definition of an AOC, regardless of its author or context, has higher compliance requirements than do GIs because it adds an element of verification or quality.[53] Mere reputation of a product is not sufficient to be worthy of AOC protection because specific qualities need to be expressed in the particular product. Furthermore, AOCs must be direct geographical names of countries, regions or localities. Therefore, from this point of view, "Jaffa" oranges from Israel would be AOC-compliant because Jaffa is part of the municipality of Tel Aviv-Yafo in Israel, but "Dôle" wine – from the Canton of Valais in Switzerland – would not be AOC- compliant because the name Dôle does not have a matching geographical counterpart.[54]

i. The French Wine Industry – History and Modern Context

"They say it is France's worst wine crisis in 35 years....French winemakers are confronting the realities of a changing world like never before."[55] Indeed, in the past few months, unprecedented changes have taken place in France. In late May of 2004, the president of the National Committee of Wines and Spirits established four working groups at the National Institute of Appellations of Origin [hereinafter "INAO," in accordance with the French acronym] in an effort to make French wine labels more accessible and understandable for the international marketplace.[56] Because the demand for French wines has declined to the point where owners of small and average-size vineyards are confronting bankruptcy, there is a movement amongst them to do away with traditional French labeling and to use common grape names, like merlot and chardonnay, on their wines.[57] In an emergency meeting in late July 2004, French Agricultural Minister Hervé Gaymard and a group of winegrowers decided to implement the plan of labeling bottles according to grape

51 *Classifications des vins français*, available at http://www.oenologie.fr/droit/classif/classif_home.shtml#1 (last visited Sep. 5, 2004).

52 *Id.*

53 *See, e.g.*, Addor and Grazioli, *supra* note 2 at 868.

54 *Id.*, at 869.

55 Joe Ray, *New World Order Has French Wine Industry Over a Barrel*, Newhouse News Service, Aug. 9, 2004.

56 Communiqué de Presse, Lancement d'une réflexion collective sur la segmentation des vins français, June 1, 2004, available at http://www.inao.gouv.fr/public/communiques/detailComm.php?id=33&pop=1 (last visited Aug. 17, 2004).

57 Frank J. Prial, *Much of Bordeaux Goes Begging*, THE NEW YORK TIMES, Aug. 11, 2004.

variety in order to "help clarify and simplify the presentation of the French offer on international markets."[58] This drastic measure, already being criticized by a number of major winegrowers, is seen as necessary for France to regain part of its declining market share.[59]

The French have taken great care to distinguish their quality wines over the past century, which is one reason this kind of shift in labeling is eliciting such strong reactions from several winegrowers. Following a series of crop-destroying plant diseases and insect problems in the late 1800's, French winegrowers were replanting and rebuilding their vineyards in the early 1900's. The shortage of wine at the time elicited fraudulent wine sales because low-quality wine could be passed off as being a high-quality wine from a premium region like Burgundy.[60] Owners of quality vineyards moved to protect consumers by guaranteeing the quality of their wines through a set of rules among regional growers. This preliminary agreement in the 1920's became a framework for the AOC rules mandated upon the creation of the INAO in 1937.[61] The AOC laws defined a wide range of standards for every production area it governed. They included geographical limits on the production area, the density of planting, the pruning standards, yields per hectare, compulsory tasting by a panel of experts, appropriate grape varieties, trellis systems, wine making techniques, lab analysis standards and other vineyard practices. French AOC authorities are sought out year after year by more and more international entities for an explanation of their AOC system.[62] Whether this trend will continue in the current climate of wine labeling remains to be seen.

ii. The French Wine Industry – Current Difficulties and Legislation

Article 23(4) of TRIPS requires negotiations regarding a registration system for wine and other issues relevant to a registration system for GIs for spirits.[63] France provides a good example for comparison to the

58 *France Names its Grapes to Keep a Place in Global Wine Market*, SOUTH AFRICAN WINE, July 26, 2004, *quoting* Hervé Gaymard.

59 Elaine Sciolino, *A Campaign to Drink Another Glass of Wine for France*, THE NEW YORK TIMES, July 23, 2004.

60 *See, e.g.*, The Appellation System in France, available at http://www.cellarnotes.net/appellation_system_in_france.html (last visited Aug. 17, 2004)

61 *Id.*

62 *See* The AOC Guide, Institut National des Appellations d'Origine, available at http://www.inao.gouv.fr/public/testesPages/Missions122.php?inc=1 (last visited Aug. 17, 2004).

63 *See* WTO, Report (1996) of the Council for TRIPS, WTO Doc. IP/C/8 (Nov. 6, 1996), available at http://docsonline.wto.org.

United States in this realm because the two countries' GI practices have been molded from very different beginnings. It is the general European concept that labels of origin belong to a region and are administered by state governments that prevent consumer fraud by overseeing certification systems and other controls.[64] Even within the EU, however, France is known to be especially strict in its awarding an AOC. "The AOC is particularly interesting to consider as a GI because it influenced the development of the European Union Protected Designations of Origin, to the point that once an AOC is awarded in France, there is very little questioning of its legitimacy at the level of the EU."[65]

Despite the current dip in the French wine market, France's high standards for its wine have translated into a very high level of international respect for French wines. It is a country where vine varieties have acclimatized over the centuries, and various methods of cultivation have developed, rendering France one of the most richly diverse and praised wine countries in the world; no other country has such a wide range of climates and soil types.[66] Wine is not exclusive to France, of course. There are over a thousand grape varieties produced throughout the world among which is a handful of 'international' grape varieties.[67] This is where the crux of the debate becomes apparent.

It is becoming more and more common for labels to indicate a wine's original grape variety. This is particularly true in more recently established winegrowing regions, such as California, where virtually all wines are named after their grape variety. In countries in which wine production is a longstanding tradition, however, the association between grape varieties and geographical origin is so well-entrenched that the latter suffices.[68]

France has twelve principal winegrowing regions, all of which produce a rich range of wines.[69] Not surprisingly, the French are unwilling to let go of a longstanding system for protecting the goodwill

64 Barham, *supra* note 1 at 129.

65 *Id.*, at 131.

66 André Dominé, WINE. Konemann Verlagsgesellschaft mbH (2001), 154.

67 François Collombet, THE FLAMMARION GUIDE TO WORLD WINES. Flammarion (2000), 22.

68 *Id.*, at 25. This author cites ten "great classic grape varieities." They are Cabernet Sauvignon, Pinot Noir, Merlot, Cabernet Franc, Syrah, Riesling, Chardonnay, Gewurztraminer, Sauvignon Blanc and Muscat.

69 *Id.*, at 29.

of their high quality wines from false advertising and freeloading. As mentioned above, even the EU, a general proponent of higher GI standards on the international level, has regulated in the area of GIs less stringently than has France.

EU Regulation EED 2081/92 provides two categories of Indications of Geographical Origin (IGOs); the first is a Protected Designation of Origin (PDO); the second is a Protected Geographical Indication (PGI).[70] With the various levels of protection layered on top of each other, as is the case with most European countries, the GI discussion becomes even more clouded. There is also an unresolved but critical debate regarding the wine appellation system in general; for example, whether the AOC protects the connection between a product and its place of origin or whether it protects a more science-based formula for an objective seal of quality approval — this remains a highly contested notion.[71] This distinction could in fact encapsulate of some of the misunderstandings in GI and AOC debates.

This semantic rift goes back to the general differences in international definitions. Does a GI protect a product solely because of its origin or is there also an element of human contribution, such as know-how or specific methodology? If so, which factor is more important? As the French wine market declines, some theorists – this one an American wine critic - are unsympathetic to France's plight and suggest it loosen its draconian AOC regulations.

> Controlled appellations have proliferated like aphids on a rose. The original idea was conservative... . But no sooner did (a) few acknowledged great wine zones get such protection – at a price of heavy regulation and bureaucratization – than every other winegrowing area, no matter how insignificant, clamored for similar status... . Does it matter whether a red Burgundy can legally contain Cabernet Sauvignon when its ancient tradition was exclusively Pinot Noir? You bet it does. But do we care about the sanctity of Coteaux du Languedoc? Hardly.[72]

While the writer's references to cabernet sauvignon and pinot noir are particular grapes with which most red wine drinkers are familiar, the reference to Coteaux du Languedoc is an AOC label. There are thirty-five appellations in the Languedoc region, each with its own specialized

70 For a succinct description of the EU's regulations on GIs, *see* Rangnekar, *supra* note 25, at 23.
71 *Id.*, at 24-25.
72 Matt Kramer, THE WINE SPECTATOR, Sep. 15, 2004, at 36.

menu of standards.[73] In comparison to the narrow and numerous AOCs protected in France, the United States has relatively few protected GIs, like "Napa Valley" for wine, "Washington State" for apples, and "Florida" for oranges.[74] One writer stated succinctly: "In the United States, neither culture nor positive law gives any meaning to many AOCs, and France should not expect to win legal protection for geographical indications that mean nothing to the American consumer."[75] This broad statement is slightly misleading, however, because the United States does indeed have some "positive law" that parallels many of the ideas, if not the nomenclature, of the French AOC system. And not all Americans disdain the French AOC system; one writer commented upon wine from Chablis, a small village to the southeast of Paris: "The reputation of Chablis, one the world's great wines, has been smeared ever since the California wine industry stole the name."[76] It is true, however, that most United States lawmakers tend to look at GI laws with skepticism.

B. The United States

At the outset of TRIPS negotiations, the United States' proposal did not so much as mention geographical indications.[77] "The United States is familiar and comfortable with trademarks as a way of protecting the intellectual property associated with a business, oriented as it is towards liberal economic theory based on individual ownership."[78] In the United States, the Bureau of Alcohol Tobacco and Firearms [hereinafter BATF] regulated domestic and international GIs until January 2003 under the Homeland Security Act;[79] it was also the governmental body responsible for establishing viticultural areas in the United States in 1979 and

73 Collombet, *supra* note 67, at 61.

74 Geographical Indications, United States Patent and Trademark Office, available at http://www.uspto.gov/web/offices/dcom/olia/globalip/geographicalindication.htm (last visited Aug. 23, 2004).

75 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, 53 (1996).

76 Michael Apstein, *Remember, Real Chablis Doesn't Come in a Jug*, The Boston Globe, Sep. 2, 2004.

77 Suggestion by the United States for Achieving the Negotiating Objective, MTN. GNG/NG11/W/14 (Oct. 1987), and Revision, 17 Oct. 1988, MTN.GNG/NG11/W14/Rev.1.

78 Barham, *supra* note 1 at 129.

79 *See* Department of the Treasury, Industry Circular, Jan. 21, 2003, available at http://www.ttb.gov/publications/ind_circulars/ic2003_02.htm (last visited Aug. 25, 2004).

approving future ones.[80] The BATF established over 150 American Viticultural Areas, ranging from Napa Valley to the Ohio River Valley.[81] As of January 2003, the new Alcohol and Tobacco Tax and Trade Bureau [hereinafter TTB] has been designated to administer the regulation of wine label content. It ensures proper grape variety representations and appellation designations and monitors the inclusion of health statements on wine labels.[82] With a greater focus on wine regulation than its predecessor, the TTB should demonstrate a more thorough monitoring of the wine industry than before.[83] Indeed, for a United States' state or county appellation of origin, not less than 75% of the volume of the wine must derived from grapes or other agricultural commodity that is grown in the labeled appellation of origin.[84]

It is still the case in the United States, however, that wine labels are not required to bear a varietal designator; descriptions such as "red wine" or "table wine" are sufficient. But designations referring to other geographical places, such as Chablis or Chianti, must also include an appellation of origin to indicate the true place of origin, such as "California Burgundy."[85] This type of descriptor is anathema and flatly incorrect to many European minds; a Burgundy wine should be produced in the Burgundy region of France.[86] Regarded in a different light, however, such a term is deferential to the uniqueness of the French Burgundy; perhaps a consumer who is somewhat knowledgeable about wine regions will reach for a 'genuine' French Burgundy before a California Burgundy.

The TRIPS Agreement could be argued as either supportive or non-supportive of names such as "California Burgundy," or terms the United

80 Lindquist, *supra* note 17 at 324.

81 *See* 27 CFR § 1.9 (2003).

82 Margaret L. Wickes, *A Toast to the Good Life: Exploring the Regulation of Champagne*, LEDA at Harvard Law School, Apr. 2003, available at http://leda.law.harvard.edu/leda/data/609/wickes.html. (last visited Aug. 25, 2004). With the creation of the TTB, taxation and trade regulation duties were left in the Treasury Department, while the responsibility for regulation and enforcement of laws and investigation of crimes concerning bootlegging and smuggling, along with firearms, explosives and arson, were turned over to the Justice Department. *See* Jim LaMar, Professional Friends of Wine, Appellations of Origin, Feb. 2003, available at http://www.winepros.org/consumerism/appellation.htm (last visited Aug. 25, 2004).

83 *Id.*

84 TTB, Alcohol, Appellations of Origin, available at http://www.ttb.gov/appellation/index.htm (last visited Sep. 2, 2004).

85 *What the Wine Label Tells You*, BATF, Dec. 1999, available at http://www.atf.gov/pub/alctob_pub/p51901.pdf (last visited Aug. 20, 2004).

86 *See, e.g.*, Barham, *supra* note 1, at 127-128.

States calls "semi-generic."[87] The United States has not historically condoned an AOC system, but rather differentiated between certain terms as being generic, semi-generic, or non-generic designations of geographic significance.[88] Only recently has the United States included a definition for and requirements for when and how to use American AOCs.[89] Just as there are different degrees of strength when describing various types of trademarks,[90] so has the United States utilized a multi-tiered approach to geographical indications. An officer of the BATF had the authority to deem a certain name as belonging to one of these categories; some examples of now-generic names are "vermouth" and "sake."[91] It is still the case that a semi-generic designation may be used to designate wines of an origin other than that indicated by their once-geographical names if they are used as combinatorial terms, such as "California Burgundy," indicating to the consumer that the wine has some similarity to a Burgundy varietal produced in Burgundy, France, but that it is actually made in California.

As noted above, however, many Europeans take exception to this type of labeling. The United States also has a category of nongeneric names that are distinctive designations of specific grape wines, i.e., that comport with the European ideal of AOCs. Some examples are Chateau Y'quem, Chateau Margaux, Pommard, Montrachet, Schloss Johannisberger and Lacryma Christi,[92] so "California Pommard" would be unacceptable. Article 24(4) of the TRIPS Agreement provides that if nationals in one country have used a geographical indication on the same product and in a continuous manner for a period of ten years prior to the conclusion of the TRIPS Agreement in 1994, they may continue to use that GI on that product. This provision creates a possible advantage for older wineries, however; a newer winery may have to sell its red wine as "red table wine," for example, while an established winery could continue to sell the same product as "madeira," if it had been doing so since 1984 or before.[93]

87 "The following names shall be treated as semi-generic: Angelica, Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine or Hock, Sauterne, haut Sauterne, Sherry, Tokay." 27 CFR § 24.257 (2003).

88 27 CFR § 4.24 (2004).

89 Appellations of Origin, TTB, available at http://www.ttb.gov/appellation/index.htm (last visited Aug. 25, 2004).

90 For example, a trademark that is fanciful and arbitrary is likely to receive stronger trademark protection than is one that is descriptive or generic.

91 27 CFR § 4.24 (2004).

92 *Id.*

93 *See, e.g.*, Lindquist, *supra* note 17, at 330.

Arguably, the United States does not entirely adhere to the TRIPS Agreement provision, however; it sidesteps much of the "grandfather-in" issue by permitting the classification of semi-genericism,[94] which would ostensibly permit a label such as "California Madeira."

i. Despite Historical Differences, the Lanham Act and Case Law are Analogous to France's System

Aside from the TTB, however, the United States has applicable legislation to govern false designations of origin within the Lanham Act. There are several concepts wrapped in the French AOC system that have analogous counterparts in current American legislation and case law. Two special types of marks, certification and collective marks, have comparable goals to the French AOC concept. Perhaps more importantly, section 43 of the Lanham Act, "False Designations of Origin, False Descriptions, and Dilution Forbidden,"[95] offers a thorough means by which to refute the registration of a mark that misleads consumers based on GI concepts. This section of the Act provides a claim for a civil action against any person who uses any "word, term, name, symbol, or device, or any combination thereof, or any false designation origin," in commerce, that is likely to "cause confusion or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods... ."[96] It goes on to ban commercial advertising or promotion that misrepresents the "nature, characteristics, qualities, or geographic origin of his or her of another person's goods, services, or commercial activities."[97] The verbiage addresses both the *quality* and *place* aspects important to the French.

A certification mark is a word, symbol, or device used on goods or services to certify the place of origin, material, mode of manufacture, quality, or other characteristic.[98] Certification marks are most often used

94 *See* 26 USCS § 5388 (c) (2004). "Semi-generic designations may be used to designate wines of an origin other than that indicated by such name only if—

(A) there appears in direct conjunction therewith an appropriate appellation of origin disclosing the true place of origin of the wine, and

(B) the wine so designated conforms to the standard of identity, if any, for such wine contained in the regulations under this section or, if there is no such standard, to the trade understanding of such class or type." *Id.*

95 See 15 U.S.C. § 1125.

96 *Id.*

97 *Id.*

98 *See* 15 U.S.C. § 1127.

by trade associations or other commercial groups to identify a specific kind of goods; this type of mark cannot be limited to a single producer, but must be open to anyone who meets the set of standards set out for a specific certification.[99] Two examples of certification marks registered with the United States Patent and Trademark Office are the encircled "K" for kosher foods, and "Grana Padano D.O.C." for cheese coming from regions specified by Italy and in accordance with standards codified by the Italian government. Indeed, the "D.O.C." is the Italian version of the French "A.O.C.," standing for controlled denomination of origin.

A collective mark is a trademark or servicemark used by an association or other type of group to either identify the group's products or to signify membership in that group.[100] The "collective" itself does not sell goods or perform services under a collective mark, but may advertise or other promote goods or services sold or rendered by its members under that mark.[101] Some examples of collective marks placed on products which have reached a threshold of specified quality or other type of approval from the collective are "OAA" for Opticians Association of America, "FLO" for the Fairtrade Labelling Organizations International, and "FM" for the Factory Mutual Insurance Company. This "stamp of approval" approach is analogous to French wine AOCs, for which a panel of tasters are often required to endorse every wine with an AOC.

ii. The Napa Valley Case

Just as France is more interested in protecting the goodwill of its wine producers than are other European countries that produce less wine, so is California more protective of the goodwill of its wine producers than other states. California produces more than 90 percent of the nation's wine and its regulation of alcoholic beverages dates back to 1860.[102] The California Supreme Court recently unanimously decided that labeling practices in California must adhere to certain high standards promulgated by the state, and not be trumped by federal regulations,

99 Robert Merges, Peter Menell, and Mark Lemley, eds. INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE (Aspen Publishers, 3d ed., 2003), 544.

100 *See* 15 U.S.C. § 1127.

101 *See Aloe Crème Laboratories, Inc. v. American Society for Aesthetic Plastic Surgery, Inc.*, 192 U.S.P.Q. 170, (TTAB 1976).

102 Mike McKee, *California Justices Buck Bronco's Right to Napa Wine Name*, The Recorder, Aug. 6, 2004.

which are less stringent for established winegrowers.[103] A California law was passed in 2000,[104] requiring that wines sold under a "Napa" label must be made from at least 75 percent Napa-grown grapes. The federal rules also have a 75 percent requirement but, as noted above, there is a loophole or "grandfather" clause for brands established before 1986, and the contested brand names have been in existence since the early 1970s and 1980s.

At issue was whether Bronco Wine Company, which makes Napa Ridge, Rutherford Vintners and Napa Creek wines from grapes grown outside the Napa Valley, could continue to label its wines with the word "Napa." The actual origin of the grapes – from other regions of California - is printed on the front and back labels, but in smaller print than the brand names.[105] Amongst other reasons for deciding that the labeling was misleading, the Court cited California State wine regulations from 1934 which had been put in place to protect both the consuming public and the wine industry as a whole.[106] These regulations provided many specific rules, and declared that a wine would be considered misbranded and in violation of the law if a wine produced in California was labeled "Burgundy," or any other foreign place name, without displaying – with equal prominence – the name of the place of actual production.[107] The Court carried this reasoning over into American AOCs; namely, Napa. Interestingly, the term "geographic indication" was not used ones, but rather "geographic source," and "geographic brand name." The latter term is defined in the Code of Federal Regulations as "a brand name of viticultural significance [that] may not be used unless the wine meets the appellation of origin requirements for the geographic area named."[108]

The case has been remanded to the court of appeals to consider Bronco's remaining claims; Bronco has proposed that the California law violates the United States Constitution's Commerce Clause, that it limits its First Amendment right to free speech, and that it violates due process by seriously compromising its brand value without just compensation. Bronco's attorney has emphasized that it is not the province of a State to

103 *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943 (2004).
104 California State Business and Professions Code § 25241.
105 33 Cal. 4th 943, 951.
106 *Id.*, at 971.
107 *Id.*
108 27 CFR 4.39(i).

authorize conduct that a federal regulatory agency has addressed and that Bronco may consider petitioning the U.S. Supreme Court.[109] The issue that was decided, then, has to do with constitutional parameters of state preemption, but the outcome of the case could have a direct impact on wine labeling practices. The attorneys for the Napa Valley Vintner's Association point out that a survey has shown that consumers who purchased the wines in question believed they were buying Napa wines,[110] although Bronco's attorney suggests that consumers who purchase Bronco's wines do so because they appreciate the quality and value, not because they are misled as to the origin.[111] Whether trademarks, GIs, AOCs, or an amalgamation of different legal theories from common law apply, it seems the basic idea of avoiding consumer deception is a common thread throughout the international tapestry of GI and GI-like law.

iii. The United States Continues to Balk at European Suggestions for TRIPS

In July of 2003, the House Agricultural Committee reviewed the issue of GIs in World Trade Organization negotiations.[112] Several representatives expressed their point of view that the United States should not make any more concessions to France or to Europe than it has already:

> Make no mistake, what the EU is asking for is not fair treatment; it's preferential treatment, it's nothing less than a subsidy of European agriculture interests through claw back of generic terms. If adopted, the EU's demands could undermine the world's systematic approach to intellectual property protections, and not just for GIs.[113]

The TRIPS Agreement made a great effort not to disturb the status quo and to enable individual countries to retain most, if not all, of their current legal mechanisms for dealing with GIs.[114]

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109 Daniel Sogg, *California Supreme Court Rules That Napa-Named Wines Must Come from Napa*, Wine Spectator Online, Aug. 5, 2004, available at http://www.winespectator.com/Wine/Daily/News/0,1145,2558,00.html (last visited Sep. 5, 2004).

110 Horvitz & Levy, LLP, available at http://www.horvitzlevy.com/rewibron.html (last visited Sep. 5, 2004).

111 McKee, *supra* note 102.

112 Hearing of the House Agricultural Committee, July 22, 2003.

113 *Id.*, quoting Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director, U.S. Patent and Trademark Office.

114 Goldberg, *supra* note 11 at 123.

The United States, therefore, is able to argue that the European perspective is too radical in its push to bring other countries in line with its stronger level of GI protection, or "clawing back" now-generic names into a realm of GI protection.[115] "[A] threat...arises from the clear preference the European Union gives to geographic indications over trademarks in their efforts to impose their system on the United States....If they succeed, they will have changed the core principals of our intellectual property systems and expropriated the trademark property of U.S. companies."[116] Speaking on behalf of the United States Wine Institute, Mr. James B. Clawson emphasized his past experience with the European Union regarding their policies and negotiation tactics on GIs and suggested that, in their efforts to restrict the international use of their protected GIs, the EU is carrying out a "very calculated plan."[117]

Whether there is a calculated plan or simply a rift in understanding, there is virtually no international consensus on the appropriate framework of protection for GIs. "While the TRIPS Agreement sets out minimum standards, it does not dictate the system that WTO members must implement to protect GIs."[118] Perhaps the desired outcome of an eventual system - to protect consumers and producers from fraud – is similar for every party involved; it is just the *mechanism* and *semantics* that are dissimilar.

In the WTO's Decision Adopted by the General Council on August 1, 2004, GIs were noted as an issue of interest that has not been agreed upon.[119] Clearly, European, and particularly French, winegrowers are becoming aware that the differences in international labeling practices are having a direct impact on their ability to market and sell their wines.[120] This is not, perhaps, a triumph for the United States, but rather a reality for a global market with different kinds of consumers. While the French may be accustomed to buying wine based on their knowledge of or familiarity with AOCs, American buyers may be less likely to look for that mechanism for quality verification. And maybe the AOC system

115 *Id.*, at 123-124.

116 Hearing of the House Agricultural Committee, *supra* note 112, *quoting* Mr. Frank Z. Hellwig, Senior Associate General Counsel, Anheuser-Busch Companies, Inc.

117 *Id.*, *quoting* Mr. James B. Clawson.

118 Statement of Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office before the Committee on Agriculture, U.S. House of Representatives, July 22, 2003.

119 World Trade Organization, Doha Work Programme, WTO Document No. WT/L/579, Aug. 2, 2004, at page A-7.

120 *See, e.g.*, Sciolino, *supra* note 59.

is not working for the French any more either; René Renou, head of the INAO's wine section, said it was surprising "how many AOCs have decrees that are empty of meaning, how many are not living up to their reputation."[121] That being said, GIs in general have often been reported as playing an important role in marketing and sales, and their strength as an intellectual property asset is significant.

C. *Other Perspectives*

The above discussions of France and the United States have focused on the wine industry. An interesting and recent situation concerning "spirits" sheds some light on other points of view and other products: Mezcal and Tequila in Mexico. In another situation where international policies are layered onto domestic laws, the North Atlantic Free Trade Agreement bestowed legal recognition to both terms as GIs at the urging of Mexico so that only products made in Mexico under their national regulations may be marketed as Tequila or Mezcal in the United States and Canada.[122] Mezcal is an alcoholic distillation from maguey plant leaves; its name originates from the Aztec Nahuatl word for "cooked pineapple," since the plant has thick leaves with hard spines.[123] Tequila is a distillation of only the blue agave maguey plant, whereas Mezcal is distilled from a number of different agaves.[124] Mezcal is an AOC controlled by the government; it can only be exported by bottle, not bulk, but it can be distilled from any of about ten species of agave plants.[125] Tequila is Mexico's best-known AOC, as well as its first, in 1974;[126] the blue agave maguey plant from which it is distilled takes seven years to mature and marker growth demands huge quantities.

The Mexican government is a proponent of strong GI protection for the few AOCs it has and, given the international recognition and consumption of Tequila, the Mexican government and its Tequila

121 Roger Voss, *France's Last-Chance Saloon?*, Wine Magazine, Aug. 2004, quoting René Renou.

122 Linda E. Prudhomme, *The Margarita Wars: Does the Popular Mixed Drink 'Margarita' Qualify as Intellectual Property?*, 4 SW. J. OF L. & TRADE AM. 109, 114 (1997).

123 Suzan Herzeg, Bryan Rund and Jim Lee, *Mezcal and Protection as a Geographic Indication*, TED Case Studies 2003, available at http://www.american.edu/ted/mezcal.htm (last visited Aug. 24, 2004).

124 Rangnekar, supra note 25 at 32.

125 Herzeg, Rund and Lee, *supra* note 123. *See also* Jorge Larson Guerra, *Geographical Indications and Biodiversity: Bridges Joining Distant Territories*, Feb. 2004, available at www.iprsonline.org/ictsd/docs/GeogIndicatiosnLarsonYear8-2.pdf (last visited Aug. 25, 2004).

126 *See* Guerra, *supra* note 125. *See also* Eduardo Orendain Giovannini, Worldwide Symposium on Geographical Indications, July 3, 2003, at 3, available at http://www.wipo.int/meetings/2003/geo-ind/en/documents/pdf/wipo_geo_sfo_03_7.pdf. (last visited Aug. 25, 2004).

regulatory council would prefer that it remain the sole legitimate producer.[127] As of 2003, 86 brands of false tequila had been eliminated;[128] demonstrating the rampant frequency of GI infringement. Strong GI protection could facilitate the eradication of similar infringement. As the Coordinator of the Collective Biological Resources Programme at the National Commission for the Knowledge and Use of Biodiversity in Mexico says: "Geographical indications may underlie, much more than we think, our long-term ability to sustain viable rural and culturally diverse urban societies."[129] Much like the European Union, Mexico views AOCs and GIs as a means by which to ensure the longevity of cultural traditions that have been developed and perfected in various regions, as a result of that culture's individual values, traditions and geographical uniqueness.[130] But, as shown above, perhaps the particular mechanism in European GI laws is not so different from that of the United States, and the real issue is a miscommunication about what defines a GI; what qualities it should have.

IV. A Bird's Eye View of the International Community and GIs Today and Why a Clearinghouse Approach to an International Register May Work as an Interim Solution to Homogenous Law

Geographical indications are currently a fascinating, if inconsistent, area of law. Most Americans would likely have an idea of what "Swiss cheese" is, and not expect that it comes from Switzerland, but less ubiquitous food products, wines and spirits, such as "sherry" and "madeira," fall into a gray area of law right now, while WTO parties try to understand, compromise, or overpower each other. As the world's rare and quality products become more sought after and more accessible no matter where the buyer and seller are located, thanks to technological advances in e-commerce, a single international choice is called for. "GIs are widely accepted as a proof of quality, safety, tradition and know-how. More than 80% of EU spirits and 60% of French wines exported bear a GI."[131] Clearly, GIs are meaningful to some, if not all, of the

127 Giovannini, *supra* note 126, at 7.

128 *Id.*, at 13.

129 Guerra, *supra* note 125.

130 Giovannini, *supra* note 126, at 17.

131 Paul Vandoren, *The EU Geographical Indications Labeling System*, Tokyo-Osaka, March 10-12, 2004, available at http://jpn.cec.eu.int/english/whatsnew/20040209-gi-vandoren.htm (last visited Aug. 25, 2004).

international market. Inconsistencies in international labeling will lead to consumer confusion and mistrust. As the global market becomes less dependent on vendor locations, thanks to tools such as the Internet, it would be in the best interest of all parties to find a reliable GI system that would satisfy some of each party's wishes so that "Chablis" would mean the same thing on a French menu as it would on an American menu. As TRIPS Article 1(2) provides, GIs are a form of intellectual property, and intellectual property deserves protection.[132]

Inconsistency on the international level is not infrequent within other intellectual property domains. The same types of issues the world is looking at now for GIs have been true for trademarks, for example; it would therefore be beneficial to treat GIs like other similar forms of intellectual property that have had historical problems in international cohesion. For this reason, the best solution for the immediate future insofar as establishing an international register of GIs would be something similar to the Madrid System for the International Registration of Marks.[133] The Madrid System, administered by the World Intellectual Property Organization [WIPO], gives a trademark owner the possibility to protect his mark in several countries by simply filing one application with a single Office, in one language, with one set of fees in one currency.[134] The advantage of this clearinghouse-type system is that registration produces the same effects as an application for registration of the mark made in each of the countries designated by the applicant. If protection is not refused by the trademark Office of a designated country within a specified period, the protection of the mark is equivalent to having been registered by that Office. The Madrid system also simplifies the trademark's future management, since it is possible to record subsequent changes or to renew the registration through a simple single procedural step with the International Bureau of WIPO. This type of system would benefit GIs because it would compile and disseminate information at one non-partisan office, and possibly

132 TRIPS Agreement, supra note 24, Art. 1(2): "For the purposes of this Agreement, the term 'intellectual property' refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II." Geographical Indications constitute section

133 The Madrid Agreement Concerning the International Registration of Marks of April 14, 1891, as last revised at Stockholm July 14, 1967 and as amended September 28, 1979. *See* WIPO Publication No. 204 (E), 2002.

134 *See* The World Intellectual Property Organization, Madrid System, available at http://www.wipo.int/madrid/en/ (last visited Sep. 7, 2004). The United States just joined this system in November of 2003.

pave the way for a closer alignment of GI law since it will educate countries as to whether and how GIs are protected in other countries. This is the type of system the International Trademark Association recommends as a necessary point of departure for discussing a more legal-based system for GIs.[135] Until a better level of comprehension is reached between the various parties through a Madrid-like system, an iron-clad legal framework would be impractical, unmanageable, and the current impasse between countries demonstrates that a single legal framework in the near future would never reach consensus.

A. Different Cultural and Historical Traditions

Centuries of tradition culminating in unique and sought-after products deserve protection. As was mentioned at the beginning of this article, the battle is not necessarily one between developing and developed countries, but rather between the Old World and the New. United States trademark law suffices for most United States businesses because that is the model under which they were organized. If Napa Valley had developed more like France's Burgundy vineyards, we might think differently about how to protect its wines. At the time that French winegrowers were organizing the wine industry to inaugurate the INAO, the United States was just repealing alcohol prohibition;[136] there has clearly been a different historical basis for the evolution of French AOCs and American trademark-based GIs. Having seen that there is an international standstill regarding any kind of consensus on the issue of GIs, a compromise solution seems imperative yet elusive. The sheer member size of the WTO would seem to indicate that a solution would need to be feasible for countries with very different points of view on GIs. Perhaps the middle ground could be found in an international effort to condone and regulate GIs while at the same time finding a way to keep GIs meaningful. If French AOCs have truly "proliferated like aphids on a rose,"[137] and if many of them have meaningless or unenforced criteria,[138] a clearinghouse mechanism, like the Madrid

135 Burkhart Goebel, International Trademark Association, Worldwide Symposium on Geographical Indications, July 9-11, 2003, WIPO Document WIPO.GEO/SFO/03/11, July 4, 2003, at Annex, p. 2.

136 *See* U.S. Const. amends. XVIII, XXI (imposing a nationwide prohibition of all "intoxicating liquors" in 1919 and then repealing it in 1933.)

137 Kramer, *supra* note 72.

138 Voss, *supra* note 121.

System, would enable the collection of data necessary to come up with the best legal foundation for an eventual international register and relevant processes. Whether that register would be tiered with varying degrees of protection and how GI protection would be enforced are, of course, vital issues that would require some level of bureaucracy and international cooperation.

Inconsistency in international recognition of and protection for GIs is an issue of paramount importance. The global market is becoming more accessible to more people in more places every day, which renders individual domestic GI and AOC laws less important because the market for a given product is often much wider than a single jurisdiction. Case law is inconsistent; several cases from 2003 demonstrate the lack of coherency: In Colombia, a trademark registration for apparel called "Saint Emilion" was rejected because Saint Emilion is a region in France where wine is produced and has been a French AOC since 1936.[139] In Venezuela, however, the trademark "Bodegas Pomar" was applied for to refer to vines, and accepted. France's INAO opposed the trademark application, arguing that "Pomar" was likely to be confused with Pommar or Pommard, AOCs in France since 1936,[140] but the Venezuelan Ministry decided that the Venezuelans would not confuse the two terms since the Pomar trademark is widely known as the first Venezuelan industrial grape and vine producer. On the other side of the world, a writer from India takes a European-type attitude with regard to the international GI situation:

> Coming to the international level, at a time when further trade liberalisation is being striven for under the purview of the WTO, it seems to be a natural corollary, particularly in relation to the negotiations going on in the field of agriculture, that members should be able to reap fully the advantages emanating from their GIs, while competing in the liberalized global markets.[141]

To complicate things further, bilateral and multilateral GI agreements, domestic law and, for the EU, Community regulations, are often layered onto an analysis of GIs alongside the TRIPS Agreement.

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139 Clifford W. Browning and Rosemarie Christofolo, editors. TRADEMARK LAW HANDBOOK 2003, Vol. II, International, at 29. International Trademark Association. New York, NY 2003.

140 *Id.*, at 37.

141 Kasturi Das, *Geographical Indications in Jeopardy*, indiatogether.org, April 2004, available at http://www.indiatogether.org/2004/apr/eco-tradeGIs.htm (last visited August 25, 2004).

In a 1995 decision, the Court of Justice of the European Communities decided that the terminology "méthode champenoise" for German sparkling wines was inappropriate since "the use of a delocalizing designation such as 'method'...is not sufficient to prevent consumers...from being misled as to the origin of the product and, in any event, the designation is liable to create the impression that the inherent qualities of the product are on a par with those of champagne."[142] The court referred to EEC Council Regulations in its decision, without touching on the then-new TRIPS Agreement.

The EC has concluded several bilateral agreements referring to GI protection; for example, agreements with Australia, Chile, Mexico and South Africa.[143] In May of 2002, the EU adopted a set of regulations intended to make the labels on wines produced in its member countries more consistent and easier to understand.[144] The new rules require that European producers include the alcoholic strength of the wine, the name of the producer and the name of the importer on the label. European wines exported to the United States must show this information already in order to meet U.S. regulations. Standards have also been set for certain other information that producers can choose to list on wines with a geographical indication, such as varietal, vintage and sugar levels.[145] Under TRIPS, however, AOCs and definitions for many other terms still remain the responsibility of individual member countries. The EC had a functioning protective system for geographical indications in place already when the TRIPS Agreement was accepted. As such, the European Court of Justice [ECJ] works from the foundational tenets of the EC, "specifically the free movement of goods, creating and effecting a uniform community-wide common law, agricultural policy and protection measures, fair competition and protection of geographical indications of origin."[146] Unless consumers are familiar with national, regional and

142 Case C-306/93, Opinion of Mr. Advocate General Gulmann, *SMW Winzersekt GmbH v. Land Rheinland-Pfalz*.

143 TRIPS and Development Resource Book, Part II. UNCTAD/ICTSD, June 2003, at 50, available at http://www.iprsonline.org/unctadictsd/docs/2.3_GIs_final_June03.pdf (last visited Aug. 25, 2004).

144 Jacob Gaffney, *European Union Standardizes Wine Labels*, THE WINE SPECTATOR ONLINE, May 18, 2002, available at http://www.winespectator.com/Wine/Daily/News/0,1145,1709,00.html (last visited Aug. 25, 2004).

145 *Id.*

146 Jacqueline Nanci Land, *Global Intellectual Property Protection as Viewed Through the European Community's Treatment of Geographical Indications: What Lessons can TRIPS Learn?*, 11 CARDOZO J. INT'L & COMP. L. 1007, 1020 (Spring 2004).

international policies, therefore, the required information on a given bottle of wine will vary and inevitably cause some degree of confusion. That variance may have nothing to do with the level of quality or government control, but rather where the wine is from, how it is sold in that country and how it is sold in the country of ultimate consumption. Inconsistent protection of GIs is a barrier to efficacious international trade.

B. Different Points of View on Competition Law

Differences in perceptions of the purpose of competition law affect the GI conversation as well. Modern United States antitrust law is often talked about in terms of consumer welfare; i.e., it is "*for* consumers and efficiency,"[147] For the European Community, however, the "first objective of competition policy is the maintenance of competitive markets."[148] The EU focuses on free movement of goods and services and the opportunity for businesses without substantial resources to compete on the merits of their products.[149] For the ECJ, a central foundation of the EC common law and an overarching tenet they adhere to in deciding cases is the protection of the free movement of goods, one of the well-known 'four freedoms' or 'pillars' of the EC.[150] Article 28 of the EC Treaty specifically prohibits the restraint of trade movement by disallowing restrictions on imports and all similar measures.[151] The crux of the difference between the EU and the United States in this regard as it relates to GIs is that GIs are often aligned specifically with trademark law in the United States[152] but are under the broader auspices of industrial and commercial property rights in the EU;[153] GIs therefore have something of a *sui generis* law in Europe and are perhaps more respected as a category of intellectual property in and of themselves.

147 Eleanor M. Fox, Lawrence A. Sullivan, Rudolph J.R. Peritz, editors. CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT, 2. (Thomson West, 2d ed., 2004).

148 European Community, Competition Policy Reports, XXIXth Report on Competition Policy, para 2. 1999.

149 Fox et. al, *supra* note 147, at 644.

150 *See Schutzverband Gegen Unwesen in Der Wirtschaft E.V. v. Warsteiner Brauerei Haus Cramer Gmbh & Co. Kg*, 2000 ECJ Celex Lexis 3139.

151 *See* Treaty Establishing the European Community, Nov. 10, 1997, Art. 28 (1997).

152 *See, e.g., In re Nantucket, Inc.*, 677 F.2d 95 (C.C.P.A. 1982): "Geographic terms are merely a specific kind of potential trademark, subject to characterization as having a particular kind of descriptiveness or misdescriptiveness." *Id.*

153 Modern American authorities often prefer or substitute the generic title 'intellectual property rights' to define 'industrial and commercial property rights.' *See* George A. Bermann, Roger J. Goebel, William J. Davey and Eleanor M. Fox, editors, CASES AND MATERIALS ON EUROPEAN UNION LAW, at 744. West Group, 2002.

In the United States, the Lanham Act, governing trademark law, adopts limited recognition of the European AOC concept by providing that terms which are primarily geographically deceptively misdescriptive can never be registered, whether they acquire secondary meaning or not.[154] In the EU, a system of Community registration for designations of origin is in place and the accompanying regulations are tied tightly to the EU's strong policy of the internal market's free movement of goods.[155] The relevance of these differences ties in with the historical and cultural differences of the various member nations of the WTO to produce the stalemate in international GI policy discussions.

V. CONCLUSION

While individual domestic laws and traditions governing geographical indications run the gamut from very specific legislation to none at all, there seems to be a common goal in most countries to promote the quality and uniqueness of traditional or unique products while at the same time protecting against consumer deception. As the World Intellectual Property Organization suggests, to summarize international protection of GIs, "unauthorized parties may not use geographical indications if such use is likely to mislead the public as to the true origin of the product."[156] I suggest that GIs and AOCs are respected as intellectual property assets to some degree in all WTO member countries. To truly have a workable international system, the first logical step would be to define "geographical indication" more explicitly so that all countries are referring to the same idea when debating the GI issue on an international scale and to implement a clearinghouse mechanism so that individual jurisdictions can get a flavor for the GIs, AOCs, and general legal frameworks followed by other countries.

Insofar as definition is concerned, if a product's quality or reputation are "essentially attributable to its geographical origin,"[157] as per the TRIPS definition of a GI, does that mean that only grapes grown in Chianti soil can qualify as acceptable for the Chianti appellation? If so, does it also mean that traditional Italian vineyard systems must be

154 Lanham Act, 15 U.S.C. § 1502 (a).

155 Bermann et. al, *supra* note 153, at 750.

156 *See* WIPO, What is a Geographical Indication?, available at http://www.wipo.int/about-ip/en/about_geographical_ind.html#P44_4428 (last visited Sep. 6, 2004).

157 TRIPS Agreement, *supra* note 24, Sec. 3, Art 22(1).

used? What if Chianti grapes are transported to South Africa? Does it become an entirely different type of wine because of the climate? Or is it because of the terrain? Or the winegrowers? Is sparkling wine from Champagne, France, impossible to replicate because of the unique combination of soil, sub-soil, climate and grape varieties? Those who believe so cite the harshness of the northern climate, coupled with a deep chalk sub-soil that allows easy drainage, as well as the way in which the grape vines are planted on the vineyard slopes as evidence that a truly unique product comes from Champagne, France, and can only come from Champagne, France.[158]

When a definition for GIs has been reached, the particulars of various countries' systems can be analyzed within that context. Perhaps "Montrachet," a region in France that produces pinot noirs and chardonnays, could retain its reputation as a French AOC and therefore an internationally-protected GI because it has not been diluted by trademarking or genericism and because it fits into a confirmed definition of GI for TRIPS standards. Whether "Champagne" and some other "semi-generic" terms would be protected on the same level would doubtless be contentious. While much work must still be done to even broach the topic of GIs in international conversation, and discrepancies for individual terms will doubtless arise due to the historical lack of international cohesion on this issue, GIs can and should be recognized as intellectual property assets that deserve a definition and a level of worldwide protection. Individual domestic GI schemes must be studied and understood by WTO members so that individual countries are not talking "apples and oranges," but are capable of reaching a consensus on what a GI means and what kind of legal system might be feasible on the international scale. GIs need not be lost in the shuffle of trade discussions that focus on other intellectual property protection; they simply need to be given their due recognition as an intellectual property right with an erratic past but a promising future.

158 *See* Terrior, The Office of Champagne, USA, available at http://www.champagne.us/terroir/champagneterrior.html (last visited Sep.6,2004).