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RETHINKING THE 2006 AGREEMENT ON WINE TRADE:  
PROTECTION OF PRODUCERS AND CONSUMERS  
THROUGH GREATER RECOGNITION OF GEOGRAPHICAL  
INDICATIONS IN THE U.S.

ALEXANDRE ARNAUD\*

*The wine industry is at the heart of the European agricultural sector and finds its main commercial outlet in the American market. Unfortunately, the two markets differ in one important matter, the protection and recognition of wine Geographical Indications (GI). The clash between the trademark oriented U.S. and the GI enthusiast E.U. has made the WTO a battle ground instead of a forum for bargains, concessions, and mutual understanding. Despite a bilateral Wine Trade Agreement signed in 2006, the European Union struggles to protect its wine GIs in the U.S. market. In this article, the author offers practical solutions to the current blockage in a revised bilateral agreement on wine trade. The necessity to convince the U.S. of the benefits of a solid GI system is the sine qua non condition to its development of a stronger GI system. The article outlines a strategy that the E.U. could pursue to get the U.S. moving towards a real protection of wine GIs.*

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## INTRODUCTION

If one product can be considered as the barometer of the diplomatic and commercial relations between the European Union and the United States, it would have to be wine. With over USD 3 billion worth of European wine exported to the United States in 2017, the beverage is often held hostage and used as a political pawn between the two Western powers.<sup>1</sup> In 2019, European wine was the collateral damage in the Boeing Airbus war<sup>2</sup>; the Trump administration inflicting a 25% tariff rate on imported European wines with an alcoholic percentage below 14%.<sup>3</sup> When Joe Biden was elected as President of the United States in June 2021, this tariff barrier was removed.<sup>4</sup> Nonetheless, European wines' lives on the American market remain troubled. As the question of tariff rates comes and goes with the fluctuation of international relations, one structural issue persists and centers on diverging understandings of Geographical Indications (GI) and their legal recognition.

<sup>1</sup> *Wine production and trade in the EU*, EUROSTAT (Nov. 12, 2018), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20181112-1>.

<sup>2</sup> Since 2004, the U.S. and the E.U. have successively accused each other before the WTO of supporting their regional plane constructors (Airbus for the E.U. and Boeing for the U.S.) with unfair subsidies. The dispute has seen both parties inflict severe retaliatory tariffs on each other. During 2019, Washington imposed tariffs of over USD 7.5 billion on European goods and services. Amongst these goods, E.U. wine was taxed by up to 25%. Richard Werly, *Airbus-Boeing: Joe Biden signe l'armistice*, LE TEMPS (June 15, 2021, 6:44 PM) <https://www.letemps.ch/economie/taxer-vins-francais-nouvelle-arme-trump>.

<sup>3</sup> Richard Werly, *Taxer les vins français, la nouvelle arme de Trump*, LE TEMPS, (June 11, 2019, 7:40 PM), <https://www.letemps.ch/economie/taxer-vins-francais-nouvelle-arme-trump>.

<sup>4</sup> *Suspension des taxes Trump sur le vin français: une excellente nouvelle pour la profession*, LE FIGARO (June 3, 2021, 1:48 PM), <https://www.lefigaro.fr/flash-eco/suspension-des-taxes-trump-sur-le-vin-francais-une-excellente-nouvelle-pour-la-profession-20210306>.

The concept of GIs is at the heart of the European wine market, but E.U. producers face a completely different environment when exporting their products to the U.S. Geographical Indications play a major role in the European agricultural and food sectors.<sup>5</sup> A GI is a product whose qualities and characteristics are linked to a specific geographic origin.<sup>6</sup> Once registered, the GI offers protection to producers against “misuse or imitation”.<sup>7</sup> Furthermore, it is a strong guarantee of traceability and quality for the consumer.

This European view of GIs finds only a muffled echo in the United States. The U.S. implement GI protections through its preexisting trademark regulations.<sup>8</sup> Before 2006, friction between the two systems lay in the absence of protection for the GIs “when embodied by a term or sign which was legally considered to be generic.”<sup>9</sup> However, the E.U. and U.S. addressed the issue with a bilateral agreement with the Agreement on Trade-Related Aspects of Intellectual Property Rights’ (TRIPS), designed to address previous persistent failures in providing a strong, harmonized International GI system.<sup>10</sup> The 2006 Agreement on Wine Trade signed by the U.S. and the E.U. is the fruit of 20 years of negotiations.<sup>11</sup> This long and hard-fought battle resulted in a crippling and unbalanced agreement that heavily favored the U.S. as the dominant economic power.<sup>12</sup> Nonetheless, the 2006 Agreement does not provide common recognition and protection for GIs, leaving E.U. GIs protected under complex U.S. trademark regulations rather than being recognized and protected as forthright GIs. Unable to find a balanced middle ground, the E.U. and the U.S. have deprived both the producers and the consumers of the protection they deserve.

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<sup>5</sup> Matilde Bellinazzi, *Toward a Better Understanding of U.S. and European Perspectives on Geographical Indications: The Case of Prosecco*, 57 WASHBURN L. J. 315 (2018).

<sup>6</sup> *Geographical indications and quality schemes explained*, EUR. COMM’N, [https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained\\_en#gi](https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en#gi).

<sup>7</sup> *Id.*

<sup>8</sup> Bellinazzi, *supra* note 5, at 320

<sup>9</sup> *Id.*

<sup>10</sup> See Amy P. Cotton, *123 Years at the Negotiating Table and Still no Dessert? The Case in Support of Trips Geographical Indication Protections*, 82 CHICAGO-KENT L. REV. 1295 (2007).

<sup>11</sup> M. Philippe-Armand Martin, *Rapport d’Information Déposé par la Délégation de l’Assemblée Nationale pour l’Union Européenne, Sur la Proposition de Décision du Conseil Relative à la Conclusion de l’Accord entre la Communauté Européenne et les Etats-Unis sur le Commerce du Vin*, ASSEMBLEE NATIONALE.

<sup>12</sup> *Id.*

Hereafter, this article proposes to strengthen the protection of wine consumers and producers by reinforcing the level of protection the U.S. offers to GIs. The creation of a bilateral register, the suppression of the grandfather clause for semi generics, and a clearer labeling system are at the center of the solution, which could be implemented of a bilateral agreement.

Part I of this article highlights the need for a revised agreement on wine GIs between the E.U. and the U.S. by examining the weaknesses of current legal tools. Part II proposes three articles to be added in a new bilateral agreement on wine trade. These articles will address the issues arising from the absence of consensus on the protection of wine GIs. They will create a bilateral register, suppress the current grandfather clause, and recognize American Viticultural Areas (AVAs) as GIs protectable under the standards of E.U. law. Part III sets out the potential limits and frailties of this proposal.

## I

### **THE NEED FOR A NEW BILATERAL AGREEMENT BETWEEN THE E.U. AND THE U.S. ON WINE GEOGRAPHICAL INDICATIONS**

Since the signing of the TRIPS agreement three decades ago, the question of GI protection has been discussed continuously with little progress.<sup>13</sup> Two strong visions oppose each other, and only unsatisfactory compromises seem to be in sight.<sup>14</sup> The struggle to find a global and international way out of the current blockage incites to reconsider the scale of the negotiations. Consequently, Part I describes the quagmire of GI negotiations at the WTO, before questioning the 2006 bilateral agreement itself between the E.U. and the U.S. The 2006 agreement embodies an unsatisfactory compromise resulting in a blurry registration and labeling system that has resulted in insufficient protection for European GIs.<sup>15</sup>

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<sup>13</sup> Christophe Charlier, *La protection européenne des indications géographiques face au principe du traitement national de l'OMC, économie rurale*, 33 (2007).

<sup>14</sup> Monique Bagal, *La Protection des Indications Géographiques dans un Contexte Global: Essai sur un Droit Fondamental*, ECOLE DOCTORALE DE DROIT (LYON) AVEC UNIVERSITE JEAN MOULIN (2016).

<sup>15</sup> Lucas S. Michels, *A Blueprint for International TRIPS Plus Geographical Indication Protections? An Analysis of Geographical Indication Protection Proposals in the European Union - India Bilateral Trade and Investment Agreement*, GONZ. J. INT'L L. 2 (2012).



A. *The International Recognition of Geographical Indication Under the TRIPS*

GIs do not benefit from a unique and internationally shared conceptual understanding; all TRIPS members have their own perspective on the matter.<sup>16</sup> By trying to appease all TRIPS members, TRIPS has been forced to limit the potential influence of the agreement.<sup>17</sup>

1. *The TRIPS' Provisions on Geographical Indications*

The TRIPS agreement tackles the question of Geographical Indications in its third section. Article 22 offers a definition of GIs<sup>18</sup> and describes the necessary tools that member states should implement in their protection of GIs. Article 23, in turn, grants stronger protection to wine and spirits, adapted to their specificities.

Article 22 of the TRIPS agreement defines Geographical Indications as the “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>19</sup> Thus, a GI is the combination of a product and its origin.<sup>20</sup> This definition, inspired by French law, captures the spirit of the concept.<sup>21</sup> It explains how GIs are different from trademarks. The geographic environment (through its soil, climate, fauna, and flora) must have an impact on the product.<sup>22</sup> French courts have always denied protection to appellation such as Camembert and Dijon Mustard, as their qualities have no link with their terroir of origin.<sup>23</sup> Wine, more than any other product, is

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<sup>16</sup> Kal Raustiala, Stephen R. Munzer, *The Global Struggle over Geographic Indications*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, 339 (2007).

<sup>17</sup> Jacques Audier, *Accord ADPIC Indications Géographiques*, Office des Publications Officielles des Communautés Européennes, 46 (2000).

<sup>18</sup> “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.”

<sup>19</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299, 315 (hereinafter TRIPS Agreement).

<sup>20</sup> Jacques Audier, *supra* note 17, at 7.

<sup>21</sup> *Id.*

<sup>22</sup> Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADEMARK REP. 11, 32-33 (1996).

<sup>23</sup> *Id.*

the fruit of the environment in which it is produced. Indeed, by nature, the vine's roots dig deep in a soil which passes on all its specificities.<sup>24</sup>

Article 23 of the TRIPS Agreement implements a stronger standard for the protection of wine and spirit GIs, the only two goods to benefit from this special provision.<sup>25</sup> Article 23 further prevents the use of GIs' names to identify wines not originating from the place indicated, even when the true origin of the good is stated on the label.<sup>26</sup> The provision also forbids the registration of trademarks for wines that use the name of recognized GIs.<sup>27</sup> Article 23 grants protection even in the absence of a risk of the public being misled. Herein lies the strength of this provision.<sup>28</sup> Article 23 is filled with good intentions and shows a true aim towards stronger protection. Nonetheless, it is plagued by the weaknesses inherent to the compromising nature of the agreement.

## 2. *The Harmful Lack of Constraints*

The genericness of GIs reveals the first weakness of the special provision for wine. To better understand this issue, Article 23 has to be read in combination with Article 24(6).<sup>29</sup> Indeed, the latter states that “[n]othing (...) shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods (...) in the territory of that Member.”<sup>30</sup> As a result, any GI that in some countries no longer relates to a geographical origin but to the product itself, may be deprived of protection. This exception leads to questionable situations such as the production of “champagne” by Argentinian and Californian vintners.<sup>31</sup>

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<sup>24</sup> Clémence Georgelin, *Fonction Identitaire et Protection Juridique du Terroir: Etude des Rapports Entre les Sciences du Vin et le Droit Vitivinicole*, UNIVERSITE DE REIMS CHAMPAGNE ARDENNES, (2017).

<sup>25</sup> Conrad, *supra* note 22, at 31.

<sup>26</sup> TRIPS Agreement, *supra* note 15, at 309.

<sup>27</sup> *Id.*

<sup>28</sup> 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, 120 (2001).

<sup>29</sup> *Id.* at 122.

<sup>30</sup> TRIPS Agreement, *supra* note 15, at 310.

<sup>31</sup> Ana B. Ramos, *Argentinian Champagne: Emerging Bubbles*, AZUREAZURE (May 15, 2013), <https://www.azureazure.com/gastronomy/food-drink/argentinian-champagne-emerging-bubbles-972/>.

Further, a grandfather clause limits the effects of Article 23. Article 24(5) states that “where a trademark has been (...) acquired (...) before the date of application of these provisions (...) measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.”<sup>32</sup> This grandfather clause is necessary in the context of an international agreement. It helps to reach a middle ground and prevent already existing economic actors from being dispossessed of their trademarks. Nonetheless, this significantly reduces the impact of Article 23’s provisions.

The issues raised above could have led to the start of a solution: the creation of an international register for Geographical Indications. Yet again, this idea is subject to intense debate and no corresponding register has been created so far.<sup>33</sup> The partisans of free trade, led by the United States, would only agree to a notification register.<sup>34</sup> Such a register would have no effect on the level of protection. The countries using this register would only consult it before qualifying a new GI under the terms of their own national law.<sup>35</sup> The European Union, however, is pressing for multilateral registers that would offer absolute international protection to registered GIs.<sup>36</sup> Thus, the U.S./E.U. divide on GIs completely hinders any form of improvement. The absence of a register, whether for notification or registration, embodies the inability of the TRIPS agreement to provide a functional GI protection system.

As the provisions of TRIPS relating to GIs are peeled away, it appears that little international systematization can be implemented. Rather, every country is implementing its own national law, leaving the different users of GIs under considerable uncertainty when operating on the global market.<sup>37</sup> The friction between the United States and the European Union demonstrates the inability to

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<sup>32</sup> TRIPS Agreement, *supra* note 15, at 310.

<sup>33</sup> See Mai-Anh Ngo, *La protection des indications géographiques: les enjeux du mandat de Doha*, 294-95 *ECONOMIE RURALE* 117 (2006). Signatories are bound to negotiate over the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection. TRIPS Agreement, *supra* note 15, at 329.

<sup>34</sup> Kevin M. Murphy, *Conflict, Confusion, and Bias under TRIPS Articles 22-24*, 19 *AM. U. L. REV.*, 1181, 1226 (2003).

<sup>35</sup> *Id.*

<sup>36</sup> Ngo, *supra* note 33.

<sup>37</sup> *Id.* at 6.

find mutual understanding. The two powers, each standing their ground, are battling for two fundamentally different visions of GIs.

*B. The U.S. and the E.U.: Two Clashing Conceptions of Geographical Indications*

The United States and the European Union exemplify two different conceptions of GI protection. The first is reluctant to regulate the market and its actors. In contrast thereto stands the latter, believing in the necessity of protecting its high-quality food and agricultural products, whose general small scale of production renders them ill-equipped to battle against international competitors.<sup>38</sup>

*1. The E.U.'s Strong Protection of Geographical Indications*

The control and management of GIs in the European Union comes down to several actors. At the top of the pyramid stands the European Parliament. Through its regulation, it sets the quality thresholds for both registration and protection of Geographical Indications. The European Commission also plays an important role by reviewing registration requests.<sup>39</sup> E.U. regulations are observed by member states themselves.

*i. Protected Designation of Origin and Protected Geographic Indications*

The European Union recognizes different types of GIs. Regarding the protection of wine GIs, two stand out specifically: the Protected Designations of Origin (PDOs) and the Protected Geographical Indications (PGIs).<sup>40</sup> PDOs are products justifying a very strong link with their terroir of production.<sup>41</sup> The concept of terroir corresponds to the link between a specified geographical area and the quality of the products produced in these area.<sup>42</sup> The PDO regulation strongly emphasizes the interaction between a physical and biological environment, and human factors such as skills and traditions.<sup>43</sup> PDOs testify to very specific characteristics of production and are a strong guarantee of quality. Thus, the

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<sup>38</sup> Bagal, *supra* note 14.

<sup>39</sup> EUR. COMM'N, *supra* note 6.

<sup>40</sup> *Id.*

<sup>41</sup> Institut National de l'Origine et de la Qualité, *Les Signes de Qualité*, <https://www.inao.gouv.fr/institut-national-de-l-origine-et-de-la-qualite> (last visited Oct. 28, 2022).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

mandatory requirements associated with their use are strict and constraining. On the contrary, PGIs identify products whose quality and reputation are linked to a geographic origin. The concept of terroir does not apply in the context of PGIs. Their only requirement is that from the harvest of the grape to the making of the wine, all operations must have taken place in the same geographic area.<sup>44</sup> As the concept of terroir does not apply to PGIs, the production specifications are not as stringent as those for PDOs. Still, matter from a legal standpoint, these two different GIs share the same protection.

ii. A Strong Protection

Public law offers wide protection to GIs, which are “protected against imitations and misuses” in the E.U.<sup>45</sup> If the registrant is European, the protection itself will be delivered by the member states through national institutions. The member states have the right to “prevent and stop the unlawful production or marketing of products using such a name.”<sup>46</sup> According to E.U. regulations, “a GI must comply with a series of technical specifications in order to benefit from protection.”<sup>47</sup> Technical specifications will guarantee the product’s high level of quality and are further accompanied by a control structure to ensure their implementation.<sup>48</sup> This high-quality threshold and requirements are the main rationales for the very strong protection from which E.U. GIs benefit.

Thus, the scope of protection is very wide. E.U. GI names are not only protected against “unauthorized uses in the same category of products but also against any commercial use likely to divert or weaken the renown” of the GI.<sup>49</sup> In compliance with this strong protection, the name, e.g., *Champagne* (a PDO), cannot be used as the name of, e.g., a perfume, as held by the Paris Appellate Court.<sup>50</sup> It is also important to note that once a GI is indexed in the European Union’s register, it acquires protection in every member state of the European Union.

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<sup>44</sup> *Id.*

<sup>45</sup> EUR. COMM’N, *supra* note 6.

<sup>46</sup> *Id.*

<sup>47</sup> Christophe Charlier, *supra* note 13.

<sup>48</sup> *Id.*

<sup>49</sup> Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications*, 58 HASTINGS L. J. 299, 308 (2006).

<sup>50</sup> *Id.* at 347-48.

## 2. *The Maze of the American Wine GI Protection*

The American GI protection system is highly trademark oriented; the United States Patent and Trademark Office (USPTO) states as a reminder that TRIPS does not require member states to implement an independent GI protection system.<sup>51</sup> This freedom allows the United States to develop their protection of Geographical Indications through the preexisting scope of their trademark scheme. Nonetheless, GIs remain a specific category of trademark and are subject to diverse adaptations, especially in the case of wine.

### i. The Lanham Act and the Regulations on Generic Names

The American GI system is part of the U.S. trademark system, standardized by the Lanham Act under the institutional authority of the USPTO.<sup>52</sup> GIs are often registered under a specific category deriving from trademarks, namely, certification marks.<sup>53</sup> These marks bear two special characteristics. First and foremost, they obey the “anti-use-by owner” rule, which means that they must be used and managed by one institution, often state governed.<sup>54</sup> The certifying entity will set the standards attached to the use of the certification mark. Certification marks are then used by others, mainly economic operators. In the case of wine production, these could be vintners and distributors.<sup>55</sup> Mark registration can also be recognized through common law, as it was held in *INAO v. Forman Corp.*<sup>56</sup> Additionally, protection for GIs can also be granted through collective marks, defined in section 45 of the Lanham Act to be used by the members of a cooperative or other collective group.<sup>57</sup> The collective must show “bona fide” intention to use the mark in commerce and apply to register on the Principal Register established by the

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<sup>51</sup> *Geographical Indications*, USPTO, <https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications> (last visited Dec. 17, 2022).

<sup>52</sup> Andrew M. Reeves, *Protecting Our Barefoots: Policy Problems in the International Wine Market*, 27 ARIZ. J. INT'L & COMP. L. 835, 837 (2010).

<sup>53</sup> *Id.*

<sup>54</sup> D. Peter Harvey, *Geographical Indications: The United States' Perspective*, THE TRADEMARK REP. 960, 967 (2017).

<sup>55</sup> *Id.* at 846.

<sup>56</sup> Hughes, *supra* note 49, at 310.

<sup>57</sup> Harvey, *supra* note 54, at 974.

Lanham Act, including marks indicating membership in a union, an association, or other organization.<sup>58</sup> These certifications are subject to very few constraints.<sup>59</sup>

Wine GIs are also classified by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) according to four categories, the most important being the semi-generics and non-generics.<sup>60</sup> Semi-generics have crystallized all tensions between the E.U. and the United States, e.g., American vintners are allowed to label their productions if it “appears in direct conjunction therewith an appropriate appellation of origin disclosing the true place of origin of the wine, and if the wine so designated conforms to the standard of identity.”<sup>61</sup> Although the 2006 Agreement put an end to the issuance of new labels using semi-generic names, owners of these labels from before 2006 are still allowed to use them in commerce.

## ii. The American Viticultural Areas, a Scent of Europe

AVAs are specific GIs offered to wines in the U.S. The Alcohol and Tobacco Tax and Trade Bureau (TTB) defines the AVA as “a delimited grape-growing region having distinguishing features as described in and a name and a delineated boundary.”<sup>62</sup> For a wine to be granted a label with a viticultural area appellation, the latter must positively answer several formalities. The most important requirement is that “no less than 85 percent of the wine is derived from grapes grown within the boundaries of the viticultural area”<sup>63</sup> and that “it has been fully finished within the State, or one of the States, within which the labeled viticultural area is located.”<sup>64</sup> AVAs are indexed in a federal register.<sup>65</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> State and county GIs only require that not less than 75 percent of the wine must be derived from fruit or agricultural products (as applicable) grown in the named county or state.

<sup>60</sup> Reeves, *supra* note 52, at 842-43.

<sup>61</sup> *Id.* at 843.

<sup>62</sup> Appellations of Origin, 27 C.F.R. § 4.25(e)(1)(i) (2023), <https://www.ecfr.gov/current/title-27/chapter-I/subchapter-A/part-4/subpart-C/>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> TTB, TTBGov - Established AVAs, <https://www.ttb.gov/wine/established-avas> (last visited Mar. 10, 2023)

C. *The 2006 Agreement on Wine Trade and Protection Between the United States and the European Union*

The United States and the European Union have very different conceptions of GI protection. Their diverging views have not yet found conciliation in the TRIPS agreement. Nonetheless, outside the scope of the WTO, a bilateral agreement was signed in 2006 between the two rivals, known as the “Agreement between the United States of America and the European Community on Trade in Wine.”<sup>66</sup> The agreement comes as an attempt to find a middle ground, but it has multiple weaknesses and limitations. The first of these limitations is the grandfather clause, leaving 16 so-called “semi-generics” subject to misuse. The other issue lies in the lack of clarity offered by the concomitance of two labeling systems as well as the absence of a common registration system.

1. *The Agreement’s Provisions*

i. The Semi-generics

Semi-generics are at the heart of the clash between the U.S. and the E.U. Before 2006, E.U. GIs listed as generic in the United States were deprived of any protection when entering the U.S. market. To find a remedy to this issue, the U.S. agreed to change the status of 16 so-called generics into “semi-generics.”<sup>67</sup> Article 6 of Title III of the Agreement requires “the United States . . . [to] change the legal status of the terms in Annex II [semi-generics] to restrict the use of the terms on wine labels solely to wine originating in the Community.”<sup>68</sup> Wines not conforming to this requirement would thus be blocked from the market. Yet although this provision reflects an intention to protect European GIs, it is strongly limited by the existence of a grandfather clause.<sup>69</sup> As already seen in TRIPS Article 24, the Agreement also notes that the reclassification of the 16 discussed names would have no effect “where such use has occurred in the United States before December 13, 2005, or the date of signature of this Agreement, whichever is later.”<sup>70</sup>

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<sup>66</sup> Brian Rose, *No More Whining About Geographical Indications: Assessing the 2005 Agreement Between the United States and the European Community on the Trade in Wine*, 29:3 HOUS. INT’L L. 731, 759 (2007).

<sup>67</sup> *Id.* at 760.

<sup>68</sup> Agreement Between the United States of America and the European Community on Trade in Wine, tit. III (hereinafter U.S.-E.U. Wine Agreement), art. 6(1), Mar. 10, 2006, T.I.A.S. No. 06-310.1.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at art. 6(2).



The question of how to protect the E.U. GIs' names, despite the U.S.' generics rule, finds another solution in Article 7 of the Agreement. The Article provides that "certain names may be used as names of origin for wine only to designate wines of the origin indicated by such a name, and shall include (...) those listed in Annex IV, Part A, names of quality wines produced in specified regions and names of table wines with geographic indications, and (...) names of Member States."<sup>71</sup> The names included in this section are not inherently distinctive according to BATF regulation. Nonetheless, such names are granted protection and are prevented from becoming generic.<sup>72</sup> Thus, the Agreement shields additional GIs from becoming generics. This section is mainly directed towards PGIs, which are classified according to areas of production and do not involve the concept of terroir as applied to PDOs. Some of these PGIs enjoy names with debatable distinctiveness, like the striking examples of the French PGIs "Méditerranée"<sup>73</sup> and "Atlantique."<sup>74</sup>

Both of these concessions from the U.S. come with E.U. counterweights. Specifically, the E.U. has offered an equivalent treatment for AVAs. By limiting the scope of protection for each other's GIs and by listing them, both parties walk away from creating a systemic protection scheme.

## ii. The Mutual Recognition of Two Different Labeling Systems

The question of labeling regulations is addressed in Article 8 of the Agreement.<sup>75</sup> The first paragraph is only a restatement of the TRIPS requirement that requires labels to "not contain false or misleading information in particular as to character, composition or origin."<sup>76</sup> The article recognizes the labeling system of each party as sufficient in the other market. The agreement also offers "a list of approved vine variety names that may appear on a wine label, which enables the listing of a single variety so long as 75% of the wine is produced from grapes of that variety."<sup>77</sup> Finally, the agreement prevents both parties from requiring "processes,

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<sup>71</sup> *Id.* at art. 7(1).

<sup>72</sup> Rose, *supra* note 66, at 761 (2007).

<sup>73</sup> VIN DE L'ATLANTIQUE, <https://www.vinsigpatlantique.fr> (last visited Nov. 14, 2022).

<sup>74</sup> INTER-MED FEDERATION, <https://www.igpmed.fr/> (last visited Nov. 14, 2022).

<sup>75</sup> US-EU Wine Agreement, *supra* note 63, at art. 8.

<sup>76</sup> *Id.*

<sup>77</sup> Rose, *supra* note 66, at 762.

treatments or techniques used in winemaking [to] be identified on the label.”<sup>78</sup> This final provision clearly favors producers applying the lower quality standards of production, i.e., American wine producers. The real and hidden victim of these labeling provisions is the average consumer who will be misled by the partial overlap between the parallel labeling systems.

## 2. *An Unbalanced Agreement Failing to Implement a Shared System of Protection and Recognition*

### i. *An Agreement Largely in Favour of the American Producers*

Looking at the limited progress the European Union has made towards the protection of its wine GIs on U.S. territory, the concessions it has made cause the 2006 Agreement to largely favor the U.S. The most significant concession made by the E.U. is the final acceptance of U.S. oenological practices. Indeed, the thresholds and requirements in wine making are very different in the U.S. and the E.U. Practices such as the addition of sugar or water are strictly forbidden in Europe while they are widespread in the U.S.<sup>79</sup> By acknowledging the U.S.’ practices, the E.U. in return gains the status modification of the 16 semi-generics.<sup>80</sup>

Furthermore, the change in the status of the 16 European semi-generic GI names has multiple limitations. As previously shown, the grandfather clause in Article 6 § 2 allows preexisting trademarks using a semi-generic term to keep their right despite the new agreement. In this regard, the agreement does not differ from the TRIPS provision and the exceptions granted by article 24.<sup>81</sup> The protection of the “names of origin” (which correspond to the PGI) provided by Article 7 is also heavily flawed. Certainly, it is not granted through intellectual property rights but through labeling regulation.<sup>82</sup> The level of protection is inferior to the prescriptions of TRIPS Article 22 which “recognize the PGIs as an autonomous IP right, to be protected as such”.<sup>83</sup> Nevertheless, the American position is far from unreasonable

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<sup>78</sup> U.S.-E.U. Wine Agreement, *supra* note 62, at art. 8(3).

<sup>79</sup> Catherine Bioteau, *Aux Etats-Unis L'Art de Changer l'Eau en Vin*, REUSSIRVIGNE (Dec. 9, 2005), <https://www.reussir.fr/vigne/lart-de-changer-leau-en-vin>.

<sup>80</sup> M. Philippe-Armand Martin, *supra* note 11.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *Id.*

regarding its own economic position as recognizing and protecting European GIs in their entirety would jeopardize the interests of U.S. trademark owners.

ii. The Need for a Bilateral Register

After studying the 2006 Agreement and highlighting its limits, the dominating sentiment is that it is not sufficiently comprehensive. As the above analysis has shown, it remains a delusion to believe that both parties could agree on abandoning their vision regarding the protection of wine GIs. Nonetheless, one can advocate for a solution offering protection to GIs under the scope of a common scheme ruling over the two different systems. This shared foundation could take place in the form of a bilateral register. The registered GIs would benefit from a presumption of protection in both systems.<sup>84</sup> There would no longer be a question over which GIs are protected and which GIs, according to the specificities of each parties' production, are exempted from this presumption. The register should come with an opposition procedure, allowing economic actors and name users to assert the generic character of certain denominations.<sup>85</sup> This opposition procedure could be the counterweight required to obtain the U.S.' cooperation.

The first benefit of the register would concern the names of origin not stated by the 2006 Agreement. While most of the E.U. and U.S. names of origins are already enumerated under the 2006 Agreement, the names of origins not considered by the 2006 provisions would, upon registration, benefit from a presumption of eligibility for GI protection. Thus, in the case of litigation, the burden of proof would lie with the challenger of a given trademark. The second benefit of the register would affect all names of origin: the register would "offer timely information" allowing public administrations "not to grant registration to trademarks misusing a GI."<sup>86</sup> The logical result of this source of information for trademark offices would be the diminishment of litigations.<sup>87</sup>

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<sup>84</sup> Ngo, *supra* note 33, at 119.

<sup>85</sup> *Id.* at 120.

<sup>86</sup> Daniel C.K Chow & Edward Lee, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS, at 809 (4th ed. 2021).

<sup>87</sup> *Id.*

## II

**REDRAFTING THE 2006 BILATERAL AGREEMENT ON WINE TRADE AND GIS  
PROTECTION IN THE SEARCH FOR COMPROMISES**

As developed in Part I, GIs regulated by the European Union benefit from a low level of protection in the U.S. market. The 2006 Agreement attempts to find elements that could convince the U.S. to engage further in GI protection. The E.U.'s key focus follows the previously identified failures of the 2006 Agreement: its priority should be the suppression of the grandfather clause for the 16 semi-generics and the creation of a bilateral register recognizing the GIs under the provision of TRIPS. Only by loosening its very strong views and prioritizing its most valuable GIs can the E.U. succeed in this negotiation process. The United States cannot realistically be asked by the E.U. to overturn its entire system, as the result for the U.S. would be to endanger the rights of trademark owners with few benefits offered by the E.U. in return.

*A. The Proposed New Articles Modifying the 2006 Bilateral Agreement on Wine Trade and GI Protection*

The following three articles are developed to recognize the AVAs as PGIs under E.U. law as well as to create a new bilateral register held by the two powers. Finally, a solution to the semi-generics issue is found.

Article 1

*Under this agreement, all American Viticultural Areas (AVAs) are recognized as equivalent to E.U. Protected Geographic Indications.*

*As such AVAs can use the PGI's logo on both E.U. and U.S. markets.*

*As such AVAs benefit from the same level of protection on the E.U. market as the one offered to E.U. PGIs.*

Article 2

*The modification of Certificates of Label Approval (COLAs) containing mention of one of the 16 semi-generics: Angelica, Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle,*

*Port, Rhine, Sauternes, Haut-Sauternes, Sherry, and Toka shall be stopped.*

*All applications for the modification of COLAs issued before this agreement enters into force shall be declined by the TTB. Application for additions and removals of any mentions on the label, and any other modifications of previously authorized labels shall be turned down.*

### Article 3

*This agreement engages both parties in the creation of a bilateral register for Geographical Indications, indexing both the AVAs and the E.U. PGIs and PDOs.*

*PGIs and AVAs will acquire the status of Geographical Indications under the definition of TRIPS Article 22 and benefit from no level of protection inferior to the one prescribed by said article.*

*PDOs and any American GIs justifying of an extreme level of quality control shall be protected as wine GIs under the definition of TRIPS Article 23 and benefit from the level of protection prescribed by said article.*

*The protection of the registered GIs is subject to the exceptions of TRIPS Article 24.*

*Both parties to this register benefit from veto power and can contest registrations on the three following grounds: absence of protection in the country of origin, genericness, or misleading nature of a GI.*

*Each party shall contribute to the register's expenses proportionally to the number of GIs they own.*

### B. *Explanations of the Provisions*

As the 2006 Agreement on Wine Trade proves, the protection of European wine GIs can only come through a long process of concessions and bargaining.<sup>88</sup> The three newly drafted Articles shall be added in a redraft of the bilateral agreement on wine trade between the E.U. and the U.S. They pair elements from the two systems that would promote new efforts from the U.S. to protect E.U. wine GIs, such as in the case of semi-generics and the creation of a bilateral register. While in 2006 the E.U. bargained the protection of the generic wines in exchange for the acknowledgement of the U.S.' viticultural practices, it is now the marriage between AVAs and PGIs that is being used as a bait.

#### 1. *The European Compromises*

The compromises of the E.U. consist of offering the PGI status to the AVAs as well as agreeing on a limited level of protection for E.U. PGIs in the U.S.

##### i. The Recognition of AVAs as Protected Geographical Indications, Generalizing the Napa Valley Example

The AVA resembles the E.U. PGI. The former is described by the TTB as a “delimited grape growing region with specific geographic or climatic features that distinguish the wine from others,” and therefore could easily fit into the European GI system.<sup>89</sup> The main limit of AVAs lies in the absence of a statutory quality threshold on the wine making process itself.<sup>90</sup> If the areas of production are precisely defined, no common wine making practices are attached to their use. On the one hand, the AVA is, at first glance, closer to a strict geographic classification tool than a guarantee of quality. On the other hand, the PGI is subject to common regulations on winemaking.<sup>91</sup>

Success and freshly acquired renown have driven AVAs producers towards better winemaking processes. In doing so, they are slowly closing the gap between

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<sup>88</sup> IGP MEDITERRANEE, 10 ANS DE RECONNAISSANCE DE NOS VINS EN IGP (2019) [http://www.igpmed.fr/sites/igpmed/files/upload/bilan\\_10ans\\_igp\\_vdef.pdf](http://www.igpmed.fr/sites/igpmed/files/upload/bilan_10ans_igp_vdef.pdf).

<sup>89</sup> Azzedine Chaouch, et al., *Les Vins Californiens en Quête d'Une Image Territoriale*, GEOCONFLUENCE, (June 11, 2007).

<sup>90</sup> *Id.*

<sup>91</sup> Direction Générale de la Concurrence, de la Consommation, et de la Répression des Fraudes, *Les Cahiers des Charges des Appellations d'Origines Viticoles Françaises*, <https://www.economie.gouv.fr/dgccrf/les-cahiers-des-charges-des-appellations-viticoles-francaises> (last visited Feb. 6, 2023).

U.S. and E.U. standards and this new search for quality was also triggered by the competition of the other “new world” countries.<sup>92</sup> The likes of Australia, New Zealand, and Chile can market wines at prices difficult to challenge. Instead of competing with the “new world” wines on price, American vintners have tended to increase the quality of their wines to differentiate their products from competitors.<sup>93</sup> Family-sized producers, i.e., “cottage wineries,” lead the rise in organoleptic standards in the U.S.<sup>94</sup> This march towards quality found its turning point in the California Supreme Court decision *Bronco Wine Company v. Jolly*.<sup>95</sup> The court ruled in favor of Napa Valley Vintners, an association of small winemakers, in their suit against a wine conglomerate for fraudulently and deceptively using the Napa Valley name.<sup>96</sup> In their ruling, the judges affirmed that the appropriate use of an AVA is not only necessary for consumer protection but also to protect the label itself and the quality it stands for.<sup>97</sup>

The will to take AVAs down a quality-oriented path finds means of expression through lobby groups such as Wine Origins Alliance.<sup>98</sup> The group describes itself as a unified force in the global industry working to “eliminate lack of protection for wine region names.”<sup>99</sup> The lobby, created in the U.S., counts in its rank the most prestigious AVAs in the country.<sup>100</sup> However, the E.U. has not been left out in the cold by this American shift in perspective. In 2007, the E.U. granted the PGI label

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<sup>92</sup> Chaouch et al., *supra* note 89.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004).

<sup>96</sup> *Id.* at 448, n.58 (explaining that the industrials failed to meet the requirement that at least 85% of the wine’s grapes were grown in the claimed viticultural area).

<sup>97</sup> *Id.* at 457 (“California is recognized as a preeminent producer of wine, and the geographic source of its wines — reflecting the attributes of distinctive locales, particularly Napa Valley — forms a very significant basis upon which consumers worldwide evaluate expected quality when making a purchase. We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry.”).

<sup>98</sup> *Wine Region Names*, WINE ORIGINS ALLIANCE, <https://www.origins.wine/wine-region-names> (last visited Feb. 6, 2023).

<sup>99</sup> *Wine Origins History*, WINE ORIGINS ALLIANCE, <https://www.origins.wine/history> (last visited Feb. 6, 2023).

<sup>100</sup> *Id.*

to Napa Valley, the first AVA to be granted the label and the protection that comes with it.<sup>101</sup> In July 2021, the Willamette Valley in Oregon was registered as well.<sup>102</sup>

For the purposes of harmonizing GI regulatory systems, it appears that the E.U. could generalize its registration and protection of AVAs. If AVAs and PGIs were to be merged, they could turn into a valuable tool in unifying the E.U. and U.S. systems. This would nonetheless come at a price for the E.U.: As the quality of AVAs is inconsistent, some would argue that such a marriage would damage the credibility of the E.U. PGI.<sup>103</sup> Finally, in favor of this provision is the fact that the E.U. has already recognized American viticultural practices and that these wines are already present on the E.U. market. Moreover, it could be argued that the freedom which U.S. producers enjoy in the winemaking process is part of a product's DNA and should not presume lower quality.

## ii. Sacrificing Protected Geographical Information

In 2009, the European Commission reformed the wine sector to offer greater protection to winemakers. As part of the reform, the Commission created the wine PGI. At this time, wine PDOs were already protected under E.U. law, but a large portion of the wines put on the market were protected and managed nationally. The reform was addressed to wines whose names of origin were not protected under the European scheme.<sup>104</sup> Wine PGIs owe their creation to the need to fill the gap left by the rigid Designation of Origin system.

As previously discussed, the PGI system is subject to a lower threshold of quality and controls in comparison to those observed by PDOs.<sup>105</sup> The second-class nature of PGIs makes the justification for high standards of protection difficult. The naming of several PGIs is also questionable. The geographic areas covered by PGIs are wider than that covered by PDOs. Hence, the E.U. recognized the

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<sup>101</sup> *WV in the EU*, OR. WINE PRESS (Aug. 1, 2021), <https://www.oregonwinepress.com/wv-in-the-eu>. (last visited Feb. 6, 2023).

<sup>102</sup> *Id.*

<sup>103</sup> RENEE JOHNSON, CONG. RSCH. SERV., R44556, GEOGRAPHICAL INDICATIONS (GIs) IN U.S. FOOD AND AGRICULTURAL TRADE 18 (2017).

<sup>104</sup> Council Regulation 510/2006, 2006 O.J. (L 93) 12, 13.

<sup>105</sup> The most striking example is the authorized Hectoliter per Hectare ratio. The PDO ratio generally averages 50 hecto/hectare, whereas for PGIs this ratio goes up to 150 hecto/hectare. The higher the ratio, the more diluted the wine; the more diluted the wine, the lower the quality.



likes of “Méditerranée”<sup>106</sup> or “Atlantique”<sup>107</sup> as valid. PGI names like these directly conflict with the American concept of fair use. Battling for higher levels of protection for PGIs seems to be a lost cause. How could the E.U. both properly and efficiently prevent American winemakers from making fair use of names as broad and common as the ones stated above? The economic performance of the PGIs also pleads for its sacrifice on the altar of consensus. For example, in France, the volume of wine exports during 2018 under PGIs was half the volume of wine exports under PDOs.<sup>108</sup>

Because they bear a lower quality threshold, because some of their names are hardly protectable and because they contribute less to the total exportation value of E.U. wines, it is justified for PGIs to suffer the downshift in value resulting from their merger with AVAs. For the same reasons the minimum level of protection sought by the E.U. for its PGIs on the U.S. market would be inferior to the one of PDOs.

## 2. *The American Compromises*

The American compromises consist of further restrictions on the use of E.U. semi-generic GIs and on participating in a bilateral GI register.

### i. The Exhaustion of the Grandfather Clause for the 16 E.U. Wines Recognized as Semi-Generics

The 2006 Agreement offered to stop the usurpation of 16 “semi-generic” GIs. While the flood of deceptive COLAs was partially stopped, the Agreement had no effect on the labels previously registered.<sup>109</sup> The grandfather clause made it impossible for the E.U. to track down labels they issued to brands before signing the Agreement. This is how, ten years after the signing of the 2006 Agreement, Donald Trump celebrated his success in the 2016 General Election with Californian

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<sup>106</sup> See FEDERATION INTER-MED, *Territoire*, <https://www.igpmed.fr/territoire> (last visited Jan. 30, 2023).

<sup>107</sup> See SYNDICAT DES PRODUCTEURS DE VIN DE PAYS DE L'ATLANTIQUE, *IGP Atlantique* (accessed Jan. 30, 2023), <https://www.vinsigpatlantique.fr/>.

<sup>108</sup> FranceAgriMer, *Les chiffres de la filière viti-vinicole, données statistiques 2008/2018*, (Dec. 10, 2019).

<sup>109</sup> Labeling authorization issued in the United States by the TTB; see ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *Certification/Exemption of Label/Bottle Approval (COLA)*, TTB (May 12, 2022), <https://www.ttb.gov/alfd/certificate-of-label-approval-cola>.

Champagne.<sup>110</sup> The suppression of the grandfather clause is an indispensable step for semi-generic PDOs to regain control over their name and image.<sup>111</sup> The reason semi-generics are so important is because of their fame, quality, and export value.<sup>112</sup> In addition, they bear symbolic importance in the global battle for recognition of the E.U. GI system.

By suppressing the grandfather clause, the redrafted agreement will put an end to the remaining use of the generic names through COLAs issued before the 2006 Agreement. As it stands, the mention of one of the 16 E.U. semi-generics is still possible if attached to a trademark where the COLA was delivered before 2006, and if the fanciful words accompanying the trademark are still attached. This means that a wine maker who continued to use the same trademark and the same fanciful words on its labels will never face any of the effects of the 2006 Agreement.<sup>113, 114</sup> As it stands, only the trademark and the fanciful word modification can lead to the loss of rights when using the semi-generic. Any other modification of the label is tolerated. This agreement proposes that any modification of the wine label itself, whether it be the alcohol percentage, the variety of grape used, the vintage of the bottle, or any other specification on the label, would prevent the issuance of a new COLA using the semi-generic. This modification would slowly dry out the use of the 16 semi-generics for American-made wine labels. The solution offers the advantage of being progressive and consequently not too aggressive. The American winemaker will be able to use the already issued COLAs as long as they want. The impracticability of modifying the labels will make them obsolete and lead to their natural abandonment.

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<sup>110</sup> Chris Mercer, *Here's the Wines on Trump's Inauguration Lunch Menu*, DECANTER (Jan. 20, 2017), <https://www.decanter.com/wine-news/trump-inauguration-menu-wines-353341/>.

<sup>111</sup> Caroline Le Goffic, *Les règles Internationales de Protection des Indications Géographiques Viticoles: Perspectives Passées, Présentes et Futures*, TERRITOIRES DU VIN (Dec. 15, 2021), <http://preo.u-bourgogne.fr/territoiresduvin/index.php?id=2097>.

<sup>112</sup> In 2021, France exported wine worth EUR 15.5 billion, with the Champagne and Burgundy PDOs comprising one third of the total exports; Champagne accounted for 3.5 billion euros, and Burgundy accounted for just under EUR 1.3 billion. Alice Liang, *French wine export hit new high in 2021*, DRINKS BUSINESS (Feb. 23, 2022), <https://www.thedrinksbusiness.com/2022/02/french-wine-export-hit-new-high-in-2021/>.

<sup>113</sup> Le Goffic, *supra* note 111.

<sup>114</sup> E.g., an American winemaker who was issued a COLA for a wine labeled “Taylor Subtle Chablis” can use the semi-generic for as long as the trademark (Taylor) and the fanciful name (Subtle) are present on the label; the present redraft is designed to address this loophole. *See* Le Goffic, *supra* note 111.

ii. Taking Part in the Creation of a Bilateral Register for Wine GIs

The U.S. has always rejected the E.U.'s maximalist registration approach with a simple notification system.<sup>115</sup> This article proposes a bilateral registration system for the wine GIs of both the E.U. and the U.S., with levels of protection depending on the GIs quality thresholds. AVAs and PGIs will be presumed to be Geographical Indications, as defined by the TRIPS Agreement Article 22(1).<sup>116</sup> As such they should benefit from a level of protection at least as high as the one prescribed by the same article.<sup>117</sup> Only the GIs registered as PDOs, and potential American names of origin subject to the same high-quality requirements, would benefit from the protection granted by TRIPS Article 23.<sup>118</sup> All registered GIs would be protected under the GIs IP rights as defined by TRIPS and no longer through the scope of the labeling system.<sup>119</sup> The register would be implemented in compliance with all exceptions offered by TRIPS Article 24.

The proposed register has been inspired by a proposal of the E.U. in the context of the Doha round of negotiation in June 2005.<sup>120</sup> In an attempt to create an international register for wine GIs, the E.U. proposed a register based on a "rebuttable presumption".<sup>121</sup> The proposal in this article follows a similar way of thinking. If a party has good grounds to oppose a registration, the registration could be denied. The grounds to oppose registration would come in the form of the absence of protection in the country of origin, genericness, or the misleading nature of a GI.<sup>122</sup> The greater protection offered to GIs by the register requires a balancing power in the form of a veto power. To operate, the register will not need to set rules for GIs' registrations. As described above, requirements differ drastically between the U.S. and the E.U. Thus, according to this agreement, both parties will recognize

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<sup>115</sup> Chow & Lee, *supra* note 86.

<sup>116</sup> TRIPS Agreement, *supra* note 15, at 328 (defines "geographical indications" as: "Indications which identify a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.")

<sup>117</sup> WORLD TRADE ORGANIZATION, *TRIPS: GEOGRAPHICAL INDICATIONS: Background* (Nov. 2008) [https://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_background\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm).

<sup>118</sup> See TRIPS Agreement, *supra* note 15, at 329 ("Additional Protection for Geographical Indications for Wines and Spirits," stating that GIs are protected even in the absence of deception risks for the consumers).

<sup>119</sup> M. Philippe-Armand Martin, *supra* note 11.

<sup>120</sup> WORLD TRADE ORGANIZATION, *supra* note 117.

<sup>121</sup> *Id.*

<sup>122</sup> Chow & Lee, *supra* note 86, at 805.

each other's GI issuance system. The register will not assess the registrability of the candidates but recognize the registration made through both systems.

Opponents to a multilateral register on the international scene have often argued that the administrative and logistic cost of such an enterprise would be too high and unmanageable.<sup>123</sup> The present article proposes allowing each party to contribute to a level equal to the portion of registered GIs they own. Evidently, the E.U. would at first have a higher number of registered GIs and therefore bear most of the running costs. Finally, the E.U. would make available its PGI's and PDO's logo to the registered GIs according to their level of quality.

### *C. Reasons to Adopt the Provisions*

The reasons to even partially adopt this proposal are mainly economic in nature. The register is a source of transparency, offering stability and certainty to all the economic actors concerned. The adoption of the PGI logo by the AVAs is beneficial for both the winemakers and the consumers. Winemakers are offered the possibility to assert the quality of their products while consumers benefit from an easy way to identify quality as they seek to make informed consumption choices.

#### *1. A Common Register Synonym for Transparency*

For E.U. GIs, the common register equals certainty of protection and definite recognition. The money spent on U.S. litigation to defend GIs could be spent elsewhere in the interest of the vintners themselves. For example, every year the share of the budget allocated to the defense of the PDO Champagne by its management and defense organism reaches approximately EUR 2,000,000.<sup>124</sup> This is as much money as could go towards other expenses, like research in greener methods of production.

For American vintners, it is in the interest of the registrant to have a public register that clarifies the registration process. The U.S. has long viewed the E.U. GI

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<sup>123</sup> Dorothée Franjus-Guigues, *Nature et Protection Juridiques des Indications Géographiques l'Avènement d'un Droit à l'Épreuve de sa Mise en Œuvre* (May 19, 2012), <https://www.theses.fr/2012AIXM1017.pdf> (Doctorat - Droit Prive, Aix-Marseille Université Faculté de Droit et de Sciences Politiques d'Aix-Marseille).

<sup>124</sup> Alexandre Abella, *Appellation Champagne: une défense à 2 millions d'euros pour l'interprofession*, VITISHPERE (Feb. 12, 2013), <https://www.vitisphere.com/actualite-61051-appellation-champagne-une-defense-a-2-millions-deuros-pour-linterprofession.html>

registration process as a vague institution whose bureaucratic delays are nothing but a half-concealed way to exert discrimination against foreign GIs willing to be registered in the E.U.<sup>125</sup> With a common register, the rules are clear: All actors in the sector know what to do to access the level of protection they seek. By making the rules clear, the register can influence U.S. vintners to continue their efforts towards better quality and greater identification of the wine within their zone of production.

## 2. *A Common Logo System for Consumer Protection*

In the wine market, consumers face an incredible number of variables when selecting a product. The color of the wine, the variety of the grapes, the brand, the alcohol percentage, U.S. AVAs, European PGIs and PDOs, and, of course, prices are all important considerations for the average consumer when making their purchase. All these variables complicate the decision-making process and limit the certainty over which product to purchase.

With a common logo system, the consumer is freed from one of many concerns: the wine's origin. The logo associated with the PGI or PDO offers the consumer the certainty that the name of origin labeled on the bottle is indeed the region where the wine has been produced. Additionally, the logo offers the guarantee of a certain level of quality. Overall, logos are important markers that reduce the uncertainty of the wine market.<sup>126</sup> According to the lobby group Wine Origins, the market is in need of such markers: "GIs respond to new trends in consumer demand, including the growth in a 'foodie' culture; a consumer-driven interest in wine education; the search for food with a story and a greater demand for regional products."<sup>127</sup>

## 3. *Opportunity for American Viticultural Areas to Further Penetrate the European Market*

As the E.U. ambassador to the United States explained to the Willamette Valley Winemakers, "as a registered Protected Geographical Indication, the

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<sup>125</sup> See JOHNSON, *supra* note 103.

<sup>126</sup> Roland Herrmann, *The Socio-Economics of Geographical Indications* at WIPO Worldwide Symposium on Geographical Indications (June 23-23, 2011), [https://www.wipo.int/edocs/mdocs/geoind/en/wipo\\_geo\\_lim\\_11/wipo\\_geo\\_lim\\_11\\_8.pdf](https://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_lim_11/wipo_geo_lim_11_8.pdf)

<sup>127</sup> JOHNSON, *supra* note 103 (quoting N. Potenza Denis, *Industry Speaks Up as GI Talks Continue in DC*, SPECIALTY FOOD NEWS (June 5, 2014)).

Willamette Valley name is secured throughout the E.U. market of 27 countries counting 450 million consumers. Any operator seeking to sell non-originating wine using the registered Oregon name or using labeling devices to evoke ‘Willamette Valley’ in the mind of the consumer, will be stopped.”<sup>128</sup> PGIs not only offer the product a guarantee of security when operating on the E.U. market but they are also a well-renowned GI whose aura and distinctiveness will attract the educated European consumer and dismiss doubts over the quality of American wine.

### III

#### POTENTIAL CRITICISM OF THE PROPOSED REDRAFTED BILATERAL AGREEMENT

Two weaknesses potentially hinder the implementation of the proposed agreement. One threatens the very existence and survival of the bilateral agreement. The other, while minor, is related to the efficiency of the created tool. First, the Most Favored Nation (MFN) rule found in TRIPS makes the survival of bilateral agreements providing for special favors between two states very precarious. The absence of a clear international definition of wine as a product and its deceptive effect on consumers raises additional uncertainty.

##### *A. The Most Favored Nation Principle: A Sword of Damocles Hanging Over the Agreement*

Although the MFN principle will raise concerns, they will be brushed away after its actual implementation has been studied.

##### *1. The Clash Between the Most Favored Nation and IP Bilateral Agreements*

The WTO defines the MFN as a tool granting equality to the WTO members on the global market.<sup>129</sup> Article 4 of the TRIPS agreement offers an intellectual property focused definition of the concept. The MFN provides that “any advantage, favor, privilege or immunity granted by a Member to the nationals of any other

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<sup>128</sup> Joseph v. Micallef, *Oregon’s Willamette Valley Receives Coveted European Union PGI Designation*, FORBES (Aug. 1, 2021 9:14 AM), <https://www.forbes.com/sites/joemicallef/2021/08/01/oregons-willamette-valley-receives-coveted-european-union-pgi-designation/?sh=3cd621936e8e> (quoting E.U. Ambassador to the U.S., Stavros Lambrinidis).

<sup>129</sup> *Principles of the Trading System*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm?msclkid=38e6096ab44911ecbad7f2d2f4e79b73](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm?msclkid=38e6096ab44911ecbad7f2d2f4e79b73) (last visited Jan. 26, 2023).

country shall be accorded immediately and unconditionally to the nationals of all other Members.”<sup>130</sup> The consequences of this provision are the following: A WTO member offering advantages to another WTO member in respect of the protection of its Geographical Indications would be obliged to offer the same level of protection to all other WTO members.<sup>131</sup> If the provision is being followed strictly, all provisions found in a bilateral agreement between two WTO members should be, under the TRIPS MFN rule, extended to each WTO member.

The General Agreement on Tariffs and Trade (GATT), the cornerstone of the WTO scheme, recognizes exceptions to the MFN, the most important of them being “the possibility of member countries of the WTO forming regional agreements for preferential access.”<sup>132</sup> This general exception to the MFN provided by Article XXIV of the GATT has no equivalent in the TRIPS agreement, where only very limited exceptions provided by Article 4 can be found. Therefore, a bilateral agreement between the U.S. and the E.U. remains under the threat of the Most Favored Nation principle. The French Senate Commission who reviewed the 2006 Agreement on Wine Trade was concerned by the MFN question at the time of it becoming a signatory.<sup>133</sup>

## 2. *The Reassurance Offered by the Long and Serein Life of the 2006 Bilateral Agreement*

Despite the threat posed by the MFN, “more than 300 bilateral and multilateral free trade and partnership agreements have been concluded”<sup>134</sup> since 1994. The proliferation of bilateral agreements is the materialization of the slow decay, or “erosion”, of the MFN principle.<sup>135</sup> When focusing on the question of international protection and recognition of GIs, the same conclusion is seen with a significant

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<sup>130</sup> WTO Analytical Index, TRIPS Agreement – Article 4 (Jurisprudence), WORLD TRADE ORGANIZATION, [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/trips\\_art4\\_jur.pdf?msclkid=ba601ad0b44e11ecaa422312d2fc2e06](https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art4_jur.pdf?msclkid=ba601ad0b44e11ecaa422312d2fc2e06) (last visited Jan. 26, 2023).

<sup>131</sup> J.A.L. STERLING, *Part II. National, International, and Regional protection, Chapter 22. TRIPS Agreement*, in WORLD COPYRIGHT LAW (4TH ED.) (Trevor Cook ed., 2015).

<sup>132</sup> Prabhash Ranjan, *Bilateralism, MFN, and TRIPS: Exploring Possibilities of Alternative Interpretation*, 13 INT’L TRADE L. & REG., 74 (2010).

<sup>133</sup> M. Philippe-Armand Martin, *supra* note 11.

<sup>134</sup> Djeri Oktafyan Wowilling, *Most Favoured Nation Obligation, Bilateral/Multilateral Agreement or WTO agreement and its supplementary*, UNIVERSITAS GADJAH MADA (2018).

<sup>135</sup> *Id.*

worldwide increase of bilateral agreements.<sup>136</sup> In the very specific GIs case, it is easy to identify the element triggering this reliance on the bilateral tool. Indeed, the undoubtable failure of TRIPS in the creation and adoption of an internationalized GI registration and protection scheme has favored the reliance on a more malleable tool. Logically, reducing the number of parties involved to two increases the likelihood of arriving at a comprehensive and mutually beneficial agreement.

This appeal for bilateral agreements in the context of GI protection has created an international web connecting all the major GI-owning countries through multiple ad hoc arrangements. The European Union alone has concluded “agreements on wines with Australia (1994, 2008), South Africa (1999, 2002), Chile (2002), Canada (2004); the USA (2005); Mexico (1997) and Switzerland (1999).”<sup>137</sup> With the multiplication of these GI agreements, a great number of countries see their economic interests being bound to their continued existence and implementation. Consequently, the challenges of these agreements to the WTO on the ground of an MFN Principal violation are almost nonexistent. This widely shared interest in the survival of the bilateral agreements on the protection of Geographical Indication explains the absence of challenges against the 2006 bilateral Agreement between the U.S. and the E.U. after almost 20 years of existence.<sup>138</sup> It also reinforces confidence over the sustainability and viability of the proposed bilateral agreement at the center of this article.

### B. *The Absence of an International Definition for Wine*

The International Organization of Vine and Wine (OIV)<sup>139</sup> defines wine as “the beverage resulting exclusively from the partial or complete alcoholic fermentation of fresh grapes, whether crushed or not, or of grape must. Its actual alcohol content shall not be less than 8.5% vol. Nevertheless, considering

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<sup>136</sup> Delphine Marie Vivien, Estelle Bienabe & Denis Sautier, *Bilateral Agreements for Geographical Indications: The Evaluation of the Local by the Local*, CONFERENCE PAPER (July 2013).

<sup>137</sup> *Id.*

<sup>138</sup> *Overview of the EU's active dispute settlement cases: WTO cases involving the EU as a complainant or respondent, cases under bilateral agreements, and cases under the Trade Barriers Regulation*, at 28, 42, <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/a7faf6ef-3a86-487f-8e09-cb22a24826b4/details?download=true> (last visited Apr. 2, 2023).

<sup>139</sup> “The OIV is an intergovernmental organization of a scientific and technical nature of recognized competence for its works concerning vines, wine, wine-based beverages, table grapes, raisins and other vine-based products.”



climate, soil, vine variety, special qualitative factors, or traditions specific to certain vineyards, the minimum total alcohol content may be able to be reduced to 7% vol. by legislation particular to the region considered.”<sup>140</sup> This definition is the only international reference to grasp the technical nature of wine. There is no need to be a technical expert in the field to fathom how broad the definition is. An international code, published by the OIV, establishes all authorized winemaking practices. These very technical requirements are nevertheless not binding. Thus, in the U.S., Canada, and Australia alone, no less than 80 authorized winemaking practices violate the standards set by the OIV.<sup>141</sup> In the absence of a definition as well as internationally recognized and regulated practices in the making of the wine itself, how could the proposed agreement offer any reassurance or certainty to the consumers vis-à-vis what they buy and consume as *wine*.

Wine, as a uniform product, does not exist, and labeling completely different wines under the same GI scheme risks greater confusion for the consumer. However, this view is the reflection of the old European mindset, deeming all different winemaking practices to be bad. Conversely, the very purpose of a GI is to allow the consumer to identify products whose quality is connected to the territory of production. Each territory of production has its own wine practices, which form an essential part of each wine’s very own identity. If indeed the GIs discussed in the proposed agreement are indicators of quality, they are above all the certification of the link between a wine and its area of production.

### CONCLUSION

Although a bilateral agreement is far from the global solution the WTO seeks in solving the current blockage of wine GI protection, it nonetheless grants the U.S. and E.U. the opportunity to move towards a higher level of protection. A bilateral agreement offers the necessary flexibility to satisfy both actors and strengthen the protection of wine producers and consumers. GIs, long seen by the U.S. as a protectionist and trade disturbing tool, find a renewed attraction thanks to the proposals made by this article. Instead of trying to impose the European point of view in a country that has long rejected it, it offers new economic incentives to

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<sup>140</sup> INT’L ORG. OF VINE & WINE, *International Code of Oenological Practice*, 3. Wines, 3.1 Basic Definition, <https://www.oiv.int/public/medias/3921/e-code-i-31.pdf> (last visited Apr. 6, 2022).

<sup>141</sup> *International oenological practices*, VITISPHERE (Apr. 7, 2022), <https://www.vitisphere.com/actualite-76142-les-pratiques-oenologiques-internationales.html#>.

the reluctant party. Thus, this article shows that only dialogue and concessions can lead to progress in the better protection of Geographical Indications on a global market. This process, which was at the heart of all great WTO victories, seems to have been neglected by the different actors in the context of GIs.