ASSESSING MULTILATERAL VS. BILATERAL AGREEMENTS AND GEOGRAPHIC INDICATIONS THROUGH INTERNATIONAL FOOD AND WINE

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INTRODUCTION

Geographic indications designate the geographical origin of goods and function as trademarks within an intellectual property regime. Primarily, geographic indications protect image or brand as opposed to the traditional patents, design, and copyrights aims of creation, invention and innovation.

While some literature promotes the idea that geographic indications protect traditional knowledge and cultural heritage, very little evidence supports a presumptive corollary between traditional production methods and a particular geographic indication. Additionally, the relationship between geographic area and product quality is neither clear nor conclusive.

Geographical indications and trademarks evoke similar perceptions of quality in the minds of consumers. However, these perceptions have yet to be assessed under blind testing conditions, where local production practices have been exported to other areas.

Geographic indications are commonly associated with food products and a source of contentious debate for wine producers. While evidence of a scientific basis for the association of particular product qualities with geographic indications remains thin, food and wine producers invest significant levels of resources into the development and promotion of geographic branding.

This branding is achieved on a collective and often state-supported basis to prevent free riding among producers within a region or an area and to achieve economies of scale regarding return on investment. Examples of collective action include the mandatory industry levies paid by New Zealand winemakers to New Zealand Winegrowers to help promote wine from New Zealand as ‘clean and green,’ voluntary levies paid to small regional winemaking associations such as the McLaren Vale Winemakers Inc. in New Zealand, and in the United States, membership levies paid to regional associations such as the Napa Valley Winemakers Association and Sonoma County Wineries Association. Producers and states invest in such branding, because consumers differentiate between localized products and are willing, in an increasingly global and generic agricultural production market, to pay a premium for the cache associated with a region’s reputation for producing fine food products.

In short, profit margins are higher on boutique products than upon generic volume. The protection of collective investment in geographic indications by way of legal regulation is justified economically on two main grounds, information asymmetry and unfair competition.

As for information asymmetry, in the agro-food market, consumers find it difficult to ascertain the quality of goods and therefore find it difficult to optimize their choices. Producers are in an advantageous position because consumers are heavily dependent upon producer-supplied information in the determination of the quality of a particular good. Guarantee certificates of quality, geographic indications and other ‘quality’ signs provide consumers with some assurance. Without a system of regulation, the use of such signs of ‘quality’, could give rise to fraudulent labelling practices which would devalue any demarcation between...
high and lesser quality products. Ultimately consumers would be unable to differentiate various brands by quality and therefore eliminate the incentives for producers to supply high quality products.\textsuperscript{9}

Unfair competition manifests itself in regulations that restrict the use of geographic indications, protecting producers from the loss of valuable business and any damage to the established reputation of their products from other producers who “free-ride” on the established reputation of a geographic indication.\textsuperscript{10}

The weight attached to each of these grounds varies between jurisdictions, as does the type of regulation designed to achieve protection. In addition, there are a number of important international treaties which govern these concerns. Currently, the Agreement on Trade Related Intellectual Property Rights, known as “TRIPS,”\textsuperscript{11} is the most important of the multilateral treaties concerning the protection of geographic indications. TRIPS itself is supplemented by a variety of bilateral and regional agreements which frequently provide additional protection for geographic indications.

The purpose of this article is to examine the protection of geographic indications through the context and industry of food and wine. This article will focus on the relationship between the multilateral protection provided by TRIPS and various bilateral arrangements, principally between the European Union and other ‘New World’ wine producing countries.

\section*{The Importance of TRIPS}

The primary impact of the TRIPS agreement was to shift intellectual property regulation into the World Trade Organization framework and thereby permit the use of trade remedies to enforce intellectual property standards.\textsuperscript{12} It is widely accepted that the United States, the chief protagonist in favor of the assimilation of intellectual property and international trade rules, was dissatisfied with the lack of an international forum in which to protect American knowledge assets from misappropriation.\textsuperscript{13} The WIPO,\textsuperscript{14} a United Nations agency that had administered a number of international conventions and agreements on intellectual property (including the Paris,\textsuperscript{15} Madrid,\textsuperscript{16} and Lisbon\textsuperscript{17} Conventions) prior to TRIPS, did not provide an enforcement mechanism. Moreover many countries, especially technology importing countries, were not party to the conventions administered by WIPO. Even if they were party to the conventions, a number would not effectively enforce them.\textsuperscript{18}

The international trade milieu also provided an incentive for developing countries to agree to higher intellectual property standards, especially in light of the United States’ decision to unilaterally enforce intellectual property rights through Section 301 Trade Act of 1974\textsuperscript{19} until TRIPS came into force. From the perspective of developing countries, the benefits of higher intellectual property standards were hard to validate.\textsuperscript{20} However, by agreeing to higher standards, developing countries were able to gain concessions in agriculture and textiles and no longer had to contend with unilateral American retaliation.

Nonetheless, the tensions between developing and developed countries in relation to the protection of patents, copyrights and trademarks were not necessarily replicated in the negotiations over the TRIPS provisions on geographic indications. Although there were a number of well-known geographic indications from developing countries\textsuperscript{21} in comparison to those used in the then European Community, developing countries had relatively few products associated with particular geographic regions when TRIPS was under negotiation.\textsuperscript{22} Indeed, it was the European Community and Switzerland who were responsible for placing geographic indications on the TRIPS agenda.\textsuperscript{23} In the initial proposal, the Europeans sought to protect geographic indications from any use that constituted unfair competition. Under the European proposal, not only were false claims of geographic origin prohibited, but also claims which suggested that the product contained the character or was produced in the style of a product from a distinct geographic region.

The United States, Canada, Australia and many Latin American countries opposed prohibition on claims that a product was produced in the style or contained the character of a product of a protected geographic indication. These countries opposed the prohibition because they had imported European production methods, which had been adapted to local conditions.

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Instead they proposed a more limited form of protection based on ‘misleading use’ which would only prohibit false claims of geographic origin and which would exempt geographic indications that had become generic. As with many of the TRIPS provisions, the final outcome of negotiations on geographic indications was a compromise between competing positions.

Articles 22 and 23 of TRIPS require member states to provide affected individuals with the ability to enforce the protection of geographic indications. No specific regulatory system is mandated. This open-ended approach was designed to accommodate regulation ranging from the French appellation of origin system to simple passing off.

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Article 22 deals with geographic indications generally whereas Article 23 deals with wines and spirits. Under Article 22(1) geographical indications are defined as:

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.

Article 22 (2) requires member states to provide ‘interested parties’ with a legal remedy to prevent misuse of a geographical indication or to prevent any use constituting unfair competition. Article 23 goes further with respect to wine and spirits. It extends the prohibition on misuse of geographical indications to indications that show that the product is of the character or was produced in the style of a particular geographic region. Thus, use of the words ‘Produced in the Burgundy Style’ would be prohibited with respect to Australian wine.

As a result of European immigration, a number of well-established geographic indications are so homonymous that the same names are used to describe similar products originating from different regions. For example, ‘Rioja’ is a geographic indication designating wine producing regions in both Spain and Argentina. Article 22.4 provides that homonymous names cannot be used if that would falsely represent to the public that the goods originate in another territory. Hence it would not be possible for a watchmaker in Lucerne, Australia to claim that its watches were ‘Made in Lucerne’. However, with respect to wines and spirits, Article 23.3 requires members to protect each homonymous geographic indication. It is up to individual WTO members to determine how homonymous indications are to be differentiated, taking account of the need to treat producers equitably, and to protect consumers from being misled.

Under Article 22 (3) geographic indications trump trademarks except to the extent set out in Article 24(5). Article 24(5) exempts trademarks registered or acquired through use in good faith before the member state joined the WTO or before the geographical indication became protected in its country of origin. Non-trademarked terms applied to wine and spirits in a continuous manner for at least 10 years prior to 1994 are also exempted.

Importantly, Article 24(6) exempts terms that are customary in common language as a common name for particular goods. Hence, terms like ‘Champagne’ that have become generic in countries like Australia and the United States would fall outside the protection offered under Article 23 (1). In addition, members are exempt from protecting customary names of grape varieties in general use prior to TRIPS. ‘Cabernet Sauvignon’ would thus also fall outside of Art 23(1).

Apart from disagreements regarding the scope of protection for geographic indications, there was also disagreement among the negotiating parties about the relationship between bilateral treaties and the most-favored nation principle. The most-favored nation principle set out in Article 4 of TRIPS requires member states to provide the same level of intellectual property protection granted to the nationals of any other country to the nationals of all other WTO members. In a draft put forward by Chairman Anell in July 1990, two positions on bilateral treaties were exhibited, one advocating the exemption of bilateral treaties which provided greater levels of protection than TRIPS; the other advocating that TRIPS-plus bilateral treaties should be subject to the most-favored nation principle. However, neither were included. Instead, members agreed by Article 24(1) to continue negotiations aimed at increasing protection for geographical indications under Article 23 (i.e. in relation to wine and spirits). Article 24 (1) also refers to members’ willingness to enter TRIPS-plus bilateral treaties.

There thus appears to be an implicit inconsistency between Article 4 and Article 24(1) to the extent that Article 24(1) supposes that entry into TRIPS-plus bilateral treaties is a permissible possibility at least in relation
to Article 23. However, in practice, because geographical indications are confined to particular regions, it would be very difficult to apply the most-favored nation principle to any single indication. For example, if Australia protects ‘Marlborough’ wine produced in New Zealand, it cannot effectively extend that protection to China, because China does not produce Marlborough wine. Arguably, therefore, the most favored nation principle ought to apply to protections over classes of goods. Otherwise its application across State boundaries would be confined to generic terms or pre-existing trademarks, both of which are exempt from TRIPS protection. Moreover, as the protection provided by Article 23 is already very high, the scope for TRIPS-plus treaties is not as great as it might be for super-added protection of terms such as ‘feta’ or ‘prosciutto,’ which only enjoy protection against false claims of origin. Rather, the main scope for TRIPS-plus protection under Article 24(1) arises in relation to the exemptions for generic terms, existing trademarks and existing fair use.

Much of the difficulty in Australia in relation to the interpretation of Article 24(1) remains theoretical because Australia and the then European Community entered into a Wine Treaty prior to TRIPS coming into force. Article 4(d) specifically exempts international agreements operating prior to TRIPS, provided these are notified to the TRIPS Council and do not constitute unjustified or arbitrary discrimination. Under the Wine Treaty, a whole list of geographic indications from the European Union are protected from use in Australia, including terms like ‘Champagne,’ which had become generic and which might have escaped TRIPS protection pursuant to Article 24(6).

In relation to non-wine and spirit products the picture is less clear. Article 24(2) envisages ongoing review, but this appears confined to matters related to member compliance. By limiting Article 24(1) to Article 23 only, arguably bilateral treaties that offer additional protection to particular countries in relation to other products offend Article 4, unless offered to all WTO members. Hence, if Australia entered into a treaty with the United States that offered TRIPS-plus protection to geographical indications for corn or potatoes, the same level of protection for that class of goods would have to be offered to all other WTO members.

The above is reflected in a WTO Panel Ruling in March 2005 regarding a dispute initiated by the United States and Australia against the European Union regarding European Regulation 2081/92, which deals with the protection of geographical indications for agricultural products and foodstuffs. Under Regulation 2081/92, the European Union provides extensive monitoring and enforcement of European geographical indications. However, the Union fails to provide the same level of protection for non-European geographical indications unless the other WTO member provides reciprocal TRIPS-plus protection. Furthermore, under the Regulation, geographic indication protection was not available for foreign geographic indications unless the hosting foreign government applied on the producers’ behalf. By contrast, European holders of geographic indications could apply directly to register and protect their geographic indications. The disparity in application procedures meant that geographic indication protection was effectively unavailable to foreign producers in the European Union. Australia and the United States challenged Regulation 2081/92 under Article 4 of TRIPS, arguing that non-discrimination applies unconditionally, and that it does not depend upon reciprocity. The complaints were upheld. However, the panel did not condemn the regulation as a whole. Instead it recommended that the regulation be amended to correct the violations.

**Increased interest in geographic indications has also coincided with efforts to reduce agricultural subsidies.**

The uncertainty surrounding the application of bilateral treaties to other WTO members in relation to non-wine and spirits after TRIPS has added fuel to an intensification of interest in the protection of geographic indications during the Doha Development Round. Increased interest in geographic indications has also coincided with efforts to reduce agricultural subsidies. However, many issues arise. Should market support by way of subsidies be removed or substantially reduced leading to a rise in prices? Will this sustain demand solely on the basis of a product’s special characteristics? Lastly, will this become an important competitive advantage? As this article outlined earlier, consumers value the reputation associated with certain geographic indications very highly. As a result, geographical indications have become an important bargaining ‘leverage’ between the European Union, whose agricultural markets are heavily subsidised, and ‘new world’ and developing nations seeking access to or competing with
those markets.\textsuperscript{39}

Geographic indications have also emerged as an important means for promoting rural development.\textsuperscript{40} Consequently, the appeal of geographic indications has broadened from a Eurocentric base to include a wider range of developing economies interested in protecting indigenous knowledge and in capturing the economic rent embedded in local products where traditionally local farming has either been small scale or where large multinational agro-business has otherwise secured profits. Protecting geographic indications encourages rural producers to invest in the quality, authenticity, and reputation associated with their product. Rural areas also enjoy important spill-over effects in terms of increases in agricultural tourism and spin-offs to related industries, such as those enjoyed by olive oil processors and cheese makers in wine producing areas.\textsuperscript{41}

Because geographic indications are collective rights, the costs of establishing them, promoting them and protecting them can be spread over the community . . .

registered, including a generic term like 'Champagne', no WTO member could refuse to provide legal protection of that term unless it had challenged the initial registration within 18 months. Although WTO members are obliged to enter into negotiations on the establishment of a multilateral register under Article 23(4) for wines, there is no obligation to establish such a system and there is no obligation to negotiate beyond wines and spirits.

Reaction to the European proposal has tended to split again between 'old world' and 'new world' producers. The United States, Argentina, Australia, New Zealand, Canada and other new world producers oppose the creation of a statutory registration system arguing that it would impose unnecessarily expensive and oppressive supervisory burdens on member countries. They also fear that the registration system amounts to a vehicle for reappropriation of generic terms that have since become valuable brands politically difficult to divest. Instead, 'new world' producers proposed a voluntary system of notification, which member countries would be required to consult prior to deciding on the level of domestic protection for geographical indications.\textsuperscript{43} Under this proposal, protection would be facilitated, but WTO members would not be compelled to provide protection because a term appeared on the database. Compromises have been suggested by Hungary, Hong Kong, and China. Promisingly, consultations between parties are continuing.

**BILATERAL AGREEMENTS IN RELATION TO WINE**

The European Union has entered into a number of treaties with 'new world' wine producing countries. The features of four of these treaties are outlined below. All of the agreements replicate the protection afforded by TRIPS to geographic indications for wine but provide added protection in relation to trademarks, grape varieties and generic names. In addition, protection is extended to 'traditional expressions'. 'Traditional expressions' are words used to refer to the method of production, quality, color or type of wine. Words such as ‘Methode Champenoise,’ ‘Port,’ or ‘Sherry’ fall into this category. 'Traditional expressions' are not protected by TRIPS and constitute a considerable broadening of the category of wine and spirit terms subject to monopoly protection. Arguably, 'traditional expressions' present greater difficulties than geographic indications for wine producers and consumers because these terms are more likely to be generic and closely associated with product category. This may have a deleterious impact on international trade in
wine and spirits, and further underscores the need to fully understand the costs and benefits of intellectual property rights governing geographic indications and traditional expressions, especially now that there are proposals to extend TRIPS Article 23 protection to all products or at least all agricultural products.

Despite the broadening of protection beyond geographic names to production methods traditionally associated with geographic areas, the agreements appear to have benefited 'new world' countries. Their success has paved the way for the finalization of a very important agreement between the United States and Europe on wine trade, which has been 20 years in the making. The EU-United States agreement is discussed further at 3.5 below.

AUSTRALIA

The Australian Agreement with the European Union was one of the earliest bilateral agreements in relation to the protection of geographical indications. It was concluded on January 31, 1994. Under the Agreement, the parties are required to protect their respective geographical indications defined generally in terms similar to Article 22 TRIPS, and also specified in Annex II of the Agreement. The names set out in the Annex are exclusively reserved to wines originating in the respective territories of the parties, and may only be used in accordance with the laws of their member states. In addition, the parties are also required (in principle) to protect each other's traditional expressions, although at this stage there has been no agreement regarding which traditional expressions will be mutually protected. Australia has a small list of protected traditional expressions on the Register of Protected Names pursuant to the Australian Wine and Brandy Act 1980, but these are protected names in Australia only.

The Agreement also provides for the mutual recognition of oenological practices of the parties. An added benefit of the Agreement is the establishment of a simplified administrative process for the authorization of wine imports into the European Union.

SOUTH AFRICA

An Agreement on Trade in Wine between South Africa and the European Community came into force in January 2002. Unlike TRIPS, which preserves trademark priority, protection for geographic indications under the South African Agreement can be extended to pre-existing trademarks, subject to transitional periods, until the trademark is eliminated. Further, a number of names previously regarded as generic, are brought within the rubric of geographic indication

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protection under a specified list annexed to the Agreement. Protected European names include Moselle, Burgundy, Chablis, Sherry and Port. There are also a number of protected South African names including Springfield, Jacaranda and Bellevue. The number of protected European names (listed in over 80 pages) far exceeds the number of protected South African names (listed in over 10 pages).

Under Art 7.4 of the Agreement, wines imported into the European Union from third countries, for example, Australia, will no longer be able to use any name from the protected list on their wine labels. Since a number of the names on each list are generic or common names in other countries, this may have a considerable impact on trade outside of the bilateral agreement.

In addition to an agreement regarding use of terms, the parties also agreed to mutually recognize oenological practices, and a procedure was established for accepting future practices introduced by either party on the basis of health, consumer protection and the promotion of good winemaking.

CHILE

The agreement between the European Union and Chile came into effect on February 1, 2003. Under this agreement, the parties agreed to protect their geographic indications in the same way as in TRIPS. Like the other bilateral agreements, the Chilean Agreement also annexed lists of protected terms (including generic names) from each jurisdiction.

In addition to the usual prohibition against registering geographical indications as trademarks, the agreement also cancelled certain existing Chilean trademarks. Thirty-six trademarks were cancelled over various periods of time and where other trademarks are found which are identical or similar to an European geographic indication, either party can request their removal from the trademark register for up to 2 years after the Agreement comes into force.

The Chilean Agreement also extends
Article 42 provides that the dispute can be referred to a Joint Committee comprised of representatives from each party. If the Joint Committee is unable to reach consensus within 30 days, and Canada continues to allow the geographic indication to be used, the European Union may take proportionate countermeasures, unless the European Union has already agreed to allow a third country to use the disputed geographic indication. To ensure proper protection of geographic indications and traditional expressions, the Agreement requires the parties to establish a registration system and label integrity program.

The Canadian Agreement also includes provisions regarding production and quality standards for wines and spirits and establishes greater transparency in Canadian Liquor Board practices by requiring independent audits.

**THE SIGNIFICANCE OF BILATERAL TREATIES**

On its face, the bilateral agreements between the European Union and ‘new world’ producing countries in relation to wine appear contrary to the non-discrimination principle set out in Article 4 since the benefits they inhere are not applied to all WTO members. However, as noted earlier, Article 24(1), at least insofar as trade in wine and spirits is concerned, appears to permit such TRIPS-plus arrangements. Yet it remains questionable why countries like Australia, South Africa, Chile and Canada would agree to higher levels of protection. Arguably, by doing so, they are transferring ‘economic rent’ to the European Union. The most favored nation principle was designed to prevent larger and more powerful entities like the European Union from extracting economic rent through its bargaining leverage. However, instead of referring access to European Union markets to the WTO Dispute Settlement Body, Australia, South Africa, Chile and Canada have preferred to allow the European Union to take back and monopolise the use of certain terms used to identify its wine products.

In the context of a globalized trading
system the inducements for entering into multilateral as opposed to bilateral agreements are significant. One obvious advantage with multilateral arrangements is reduced negotiation costs. Once a multilateral negotiation has been concluded, the results apply to all and there is no need to duplicate the cost of bargaining with many individual countries. Monitoring and enforcement costs are also reduced, since the same standards apply to all, instead of a myriad of different standards applying between each bilateral partner. Further, if all are subject to the same minimum standards, there is no potential for 'free-riding' giving rise to the classical problem of the 'prisoner's dilemma.' Nonetheless, there are a number of plausible reasons why 'new world' countries might agree to TRIPS-plus protection on a bilateral basis and act outside of the spirit of multilateral trade.

First, it is by no means clear that the European Regulations protecting geographic indications and 'traditional expressions' applicable to wine violate TRIPS and amount to technical barriers to trade. Although Australia put forward a TBT notification in relation to EU regulation 753/2002 regarding wine labelling insofar as it purported to apply to wine imported into the EU, subsequent to amendments that broadened the range of traditional expressions that could be used by non-EU countries, Australia has implemented the EU requirements under Regulation 6AA Australian Wine and Brandy Corporation Regulations 1981. Indeed, some commentators have put forward the obverse view, that failure to protect generic terms violates TRIPS, because the generic terms have been traditional European geographic indications for a long period of time.

Article 24(1) clearly envisages TRIPS-plus arrangements including those in regional agreements like the European Union.

Second, there may be advantages in dealing with the European Union en bloc that are similar to those applying to multilateral negotiations generally. There are currently 25 member states in the European Union, each with their own localized method of protecting geographic indications and each with their own recognized oenological practices. Dealing with the European Union in relation to both of these areas is clearly less costly than dealing with each EU member individually.

Third, although a dispute over access to markets under the DSB or the WTO's committee structure has significant advantages compared to formal litigation, it is by no means an easy undertaking. Initially members are required to attempt to resolve their disputes through bilateral consultations with the assistance of conciliation or mediation of the WTO Director-General if required. If the parties cannot secure a resolution of their dispute through consultation, one may request the establishment of a panel by the Dispute Settlement Body (DSB). The DSB determines the constitution of the panel and drafts terms of reference. The panel examines the facts and arguments put forward by the parties, meets with the parties and any interested third parties, formulates an interim review which it then discusses with the parties, and then drafts conclusions and recommendations which are issued to the parties. Additionally, the panel report must be adopted by the DSB within 60 days unless a consensus exists among the DSB not to adopt it or a party appeals the report. Appeals are only available on questions of law and must be heard and completed within 90 days.

If the panel report is adopted or upheld on appeal, the offending country is given a 'reasonable period of time' to comply. The amount of time can be determined by binding arbitration. If the offending country still fails to comply, parties must then negotiate compensation, pending full implementation. If compliance still cannot be achieved, the complainant can request authorization from the DSB to engage in counter-measures. The proportion of retaliation is determined by the DSB, usually as a result of the recommendation of the original panel. Further arbitration is available with respect to the level of retaliation and its implementation.

Studies have revealed that major cases before the DSB have taken much more time than the DSB Schedule. For example, the WTO Panel Ruling on the European Union's protection of geographical indications for agricultural products in March 2005 was originally initiated by the United States in June 1999. It was not until April 2005, when the DSB determined to adopt the panel ruling, that the matter was settled. Even then, the Panel Report left it open to the European Union to cure the default via subsequent amendment.

Significantly, most of the major disputes before the DSB have been appealed on
broad-based grounds, and the Appellate Body has frequently reversed the legal interpretation of panels. The studies have also shown that the disputes before the DSB have required the parties to marshal substantial amounts of institutional resources over long periods of time. Going before the DSB is thus an expensive and drawn-out process that may not yield the expected compliance. Should any of the listed countries be faced with non-compliance by a disproportionately stronger European Union, the threat of possible counter-measures emanating from Australia, Chile, South Africa or Canada may not be an effective deterrent. In fact it would probably be counter-productive for any of these countries to take countermeasures. Such countermeasures may in turn provoke counter-retaliation or cause harm by closing off much needed imports. Not surprisingly, so far the WTO has been relatively unsuccessful in securing superpower compliance. Examples of failures include the Beef Hormone Dispute and the Banana Dispute where the EU managed to evade compliance in both cases.60

Thus, the systemic difficulties associated with the recurring series of panels and arbitrations coupled with the uncertainty of ultimate enforcement provide little incentive for weaker countries like Australia, Chile and South Africa to resist guaranteed access to European markets in exchange for concessions on generic terms and pre-existing trade marks. Australian experience with its European wine agreement indicates that while initial costs of compliance with European regulations are high, profits from increased access to European markets substantially outweigh those costs.61 Since entering into its agreement with the European Union, Australian wine trade with Europe has increased exponentially.62 At the same time, the European Union’s share of the world wine trade has actually fallen,63 suggesting that the exclusion of European names from Australian wine labelling has failed to lead to large transfers of economic rent. However, it is unclear how much the increase in value in Australian exports is due to the Agreement or how much is due to better product development and increased investment in sophisticated marketing.

In fact it would probably be counter-productive for any of these countries to take countermeasures.

In a recent paper to the Worldwide Symposium on Geographical Indications, one Australian commentator remarked that monopolizing the use of a traditional geographic indication or ‘traditional expressions’ may paradoxically advantage competitors.64 In particular, the commentator argued that extending geographic indication protection to traditional expressions pursuant to the bilateral treaties would dramatically reduce the size of the potential market for products like ‘sherry’ and ‘port’ outside of the European Union and create innovative product niches for new world wine producers marketing fortified wines in local and international markets under alternative names such as ‘liqueur shiraz’ or ‘vintage liqueur’. According to the commentator, as a result of Europe’s restrictive and archaic appellations system, in the future port and sherry might become obscure European brands unable to compete with new world wines made using modern, market driven viticultural and oenological techniques. The commentator’s views are supported by the decline in prestige and value of some well known European wine appellations in favor of modern wine blends, such as the ‘Super Tuscans,’ which have overtaken traditional Chianti Classico wines in both high and low price point markets throughout Europe.65

Apart from lack of evidence of economic rent transfer, there may be gains through a reciprocal protection arrangement, which may not be as easily established on a multilateral basis. TRIPS does not mandate the creation of a dedicated geographic indication registration system, the creation of bureaucratic machinery to monitor that system, nor the creation of specific geographic indication enforcement mechanisms. One important consequence of the agreement with the European Union was the reciprocal formation of an Australian system for the creation and protection of geographical indications. Cases such as the controversy surrounding Coonawarra66 indicate that as a result of the creation of a sui generis system of protection, Australian wine geographic indications have become as valuable as many European indications. The Coonawarra controversy concerned the demarcation of an area used for viticulture in the South-East of Australia pursuant to Part VIB Australian Wine and Brandy Corporation Act 1980. Under the Act, only land falling within the demarcated area could use the appellation ‘Coonawarra’. The Coonawarra appellation was very valuable to grape grower and winemakers. Since the 1950s local winemakers had heavily promoted the distinctive Terra Rossa soil in the area as a special attribute, which helped to produce high quality wine. Proceedings to determine
the boundaries of the Coonawarra were commenced in 1996 before the Geographical Indications Committee, which issued an interim determination in 1997 and then a final determination in 1999. Forty-six grape growers and winemakers excluded from the area then appealed to the Administrative Appeals Tribunal, which heard evidence from the applicants, opponents, grape growing and wine making associations, geographers, meteorologists and other viticultural and oenological experts. Following a review of the original determination, several parties then appealed to the Full Court of the Federal Court. The extent to which the various parties were willing to employ legal advisers and experts to prosecute their case, which eventually settled following a decision of the Full Federal Court to quash the decision of the Administrative Appeals Tribunal, demonstrates the importance to producers of exclusive use of well-recognized and highly regarded geographic naming rights.

Without the European agreement, there may not have been the same incentive to legislate and set up an administrative bureaucracy concerned with the creation, monitoring and protection of geographical indications found in the Australian Wine and Brandy Corporation Act 1980. Such systems assist producers because they obviate the need to establish the time-consuming and costly legal proof required to demonstrate that the use of a geographic indication misleads consumers or amounts to unfair competition. In order to enforce protections, producers only need to show that the competing products wrongfully identified themselves with a false geographic indication.

Nevertheless, studies have not yet attempted to quantify the costs of administering and monitoring the registration system of protection against the benefits to consumers and trade generally. Although unquantified, it is likely that the costs of administering and monitoring geographic indication claims in wine labelling are high given the thoroughgoing nature of wine label integrity programs. The costs of establishing and maintaining the registration system are also likely to be high, as many of the applications for registration are highly contentious and require considerable investigation.

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Although TRIPS plus arrangements are specifically permitted in relation to wine and spirits, it may also be the case that the value of geographic indications to consumers in relation to wine and spirits is higher than applicable to other products as wine geographic indications are more entrenched, more widely understood, more widely used by wine producers and more culturally accepted as indications of quality than geographic indications applicable to other products. For example, prior to 1992 there was no common approach in the different EU member states on how to protect geographic indications applicable generally, although a common market for wine and regulation of geographic designations with respect to wine had been in force since 1970. Accordingly, it may be that consumers are more willing to bear the cost of maintaining a registration system with respect to wine and less willing to bear the cost of administering registration systems over all agricultural products. In turn, this may explain why individual States are more willing to grant TRIPS plus concessions through bilateral arrangements with respect to wine trade but resist the strengthening of geographic indication protection over other products.

However, as consumer sophistication increases, the demand for guaranteed provenance is rapidly spreading to other agricultural products. Already, there are numerous examples of increased profits for European producers who enjoy stronger geographic indication protection. Examples cited by the European Commission include Toscano Oil, which earns a 20% premium in price over commodity oil; Bresse Poutry, which is priced at quadruple the price of ordinary chicken; and Parma Ham, which is priced at 50% above the price of ordinary ham. Consequently, the momentum for strengthening and broadening protection for geographic indications is becoming stronger, even from within new world producing countries, which to date have resisted this on the basis of high compliance costs and lack of empirical information regarding benefits to trade. Experience with the bilateral wine agreements can provide new world policy makers with an indication of the impact upon markets and trade where stronger European practices are adopted. Although the impact of differentiation according to geographic indication may vary across products, the general consensus in relation to wine appears to be positive. It would therefore be useful if the costs and benefits of entry into these Agreements could be quantified more definitively.
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**Conclusion**

The major stumbling block to a multilateral consensus on geographic indications is the potential damage to producers' interests in new-world producing countries that have adopted European production and naming practices. While there may be a transfer of economic rent to the European Union in the short term if the protection for geographic indications currently applied to wine and spirits was extended to other goods, the experience in Australia with respect to its bilateral treaty does not support a conclusion of a large imbalance in trade as a result. Certainly, that experience has encouraged rather than deterred other new-world wine producing countries to enter similar Agreements of their own. Further, while protection may favor older and more numerous European geographic indications initially, the creation of the bilateral schemes demonstrates reciprocal benefits in relation to the development of new non-European geographic indications.

There are, however, concerns that the bilateral agreements may provide an opportunity for over-reaching especially in relation to the extension of protection to non-TRIPS protected traditional expressions, generic terms and pre-existing trademarks. Further, these issues may be exacerbated should Article 23 TRIPS protection apply more broadly. Ideally, however, the most favored nation principle should prevent widespread over-protection beyond what is necessary to promote global trade and international commerce.

**End Notes**


4. Chen, supra note 2; Hughes, supra note 2.

5. Chen, supra note 2, at 58; Annick Vigore & Olivier Gergou, Twilight of the Taboo in the Market of Champagne: Disincentive to Consumers in Consumer Preference? (Feb. 3, 2003) (unpublished report, on file with L'Universite Paris II), available at http://a-parist2.terem.es/docvres/trav0301.pdf. Protection of geographic indicators does not protect producers from appropriation of production practices or styles. Legal restrictions on the use of geographic indications only prevent other producers from falsely labeling their products to suggest that they emanate from or are produced in the style of a particular area.


7. Rangnekar, supra note 1, at 20.


the United States determined that failure to properly protect patents, copyrights and trademarks constituted unfair trade practice that could invoke unilateral trade retaliation. If developing countries failed to agree to higher intellectual property standards via TRIPS they might still be subject to US retaliatory action through section 301 Trade Act 1974, as amended (19 U.S.C. 2411).


21. For example, ‘Basmati’ rice and ‘Darjeeling’ tea.


26. Regions spanning a number of countries such as the ‘Caribbean’ would fall outside of Art. 22 because they belong to more than one WTO member: B. O’Connor, The Law of Geographical Indications (2000) at 53.

27. WTO Dispute Panel Report. there are three independent criteria for the protection of geographical indications: quality, reputation or other characteristic attributable to geographical origin. Hence, there need be no link between the quality of goods or geographical and geographical indications.

28. TRIPS, supra note 16, art. 23.2. Trademarks must also be available for signs that contain or consist of a geographical indication identifying wines and spirits.


35. See also TRIPS: Agreement on Trade-related Aspects of Intellectual Property Rights, WTO, April 15, 1994, http://www.wto.org/english/trp和发展/int/trips_e/trips_e.htm (referred to Article 24.5 where preserving the higher level of geographical indication protection that existed in the national legislation of member countries prior to TRIPS comes from WTO law).


41. See Wine, Food, And Tourism Marketing (Colin Michael Hall ed., Hawthor Hospitality Press, 2004); See Wine Tourism Around The World: Development, Management And Markets (C. Michael Hall, Brock Cambouche, Niki Macioros & Liz Sharpley eds., Butterworth-Heinemann, 2000); see also, Moran, supra note 1, at 266.


45. For example, Orlando markets wine under the label Jacaranda Ridge in Australia. Jacaranda is one of the South African protected names.

46. 12 years internally and 5 years for export. Listed trademarks include Algarves, Champana Grandier, La Rioja and Toro.

47. EC Regulation No. 753/2002, 2002 O.J. (L 118) 1-54.

48. Burgundyu, Chablis, Champagne, Chianti, Claret, Haut-Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay.

49. Chateaus, classic, clos, cream, cured/

50. The excess of total payments gives to any factor of production over and above its transfer earnings is above.

51. Initially it would appear that most of the benefits of improved protection for geographic indications and traditional expressions for wine flow to the European Union. However, as access to markets in the EU is opened up, GI's are established and developed in new world countries, producers from both the EU and new world wine producing countries can benefit from premium prices generated by GI protected products.


53. A technical barrier to trade is a regulation that operates as a trade barrier even though subject matter is directed toward the promotion of a social goal such as the protection of the environment, promotion of health or quality standards. Under the WTO agreement, technical barriers to trade are permissible provided they do not extend beyond what is objectively justifiable to promote the social goals alluded to above.


56. DSU, Art. 21.3.

57. DSU, Art. 22.2.

58. DSU, Art 22.6.


65. Broads, supra note 2, at 27.


68. See also, e.g., C A Henschke Co. v. Rosemount Estates Pty. Ltd. (1999) 47 IPR 63 (Austl.) (An example of the expense and complexity of the proof required to demonstrate consumer deception in relation to a contested trademark was considered).

69. Note that the registration and monitoring system in respect of wine established by the EU-Australia Wine Trade Agreement is not mandated by TRIPS. WTO members are only required to ensure that the legal means to enforce geographic indications are available to producers. Instead of implementing a full-blown registration and auditing monitoring scheme, the cost of simply broadening existing passing off and unfair competition regimes to accommodate geographic indication protection may be negligible. Felix Addor & Alexandra Grazioti, Geographic Indications Beyond Wine & Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPS Agreement, 5 J. WORLD INT'LL & COMP. L. 865, 881 (2002). Hong Kong is one of the few countries, which has attempted to quantify the costs of establishing a scheme. Recent data in Hong Kong are estimated at $253,000 (U.S. dollars) per annum (based on a maximum 10,000 registered Geographical Indications and 1,000 applications per year. See Bruce A. Babcock & Rozanne Clemens, Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products, MATRIC BRIEFING PAPER 04-MB 7, (2004), http://www.cardia.state.edu/publications/synopsis.asp?id=523.


71. E.g., Biringer Blass Wine Estates Ltd, 125 FCR at 155.

72. Addor v. Grazioti, supra note 72, at 875 n.16.

73. The willingness of consumers to bear the cost of administering a geographic indication registration system will vary. In a survey conducted in 1999, 40% of European consumers indicated that they would be willing to pay a 10% premium price for origin-guaranteed products. EU Background Note, 01/04 - 2004/02/10, "by do Geographical Indication Matter to Us?, http://ipn.ccc.eu.int/home/news_en_newsobj553.php.