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## The Perfect Pairing: Protecting U.S. Geographical Indications with a Sino-American Wine Registry

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# THE PERFECT PAIRING: PROTECTING U.S. GEOGRAPHICAL INDICATIONS WITH A SINO-AMERICAN WINE REGISTRY

Laura Zanzig

*Abstract:* Chinese counterfeiters have infiltrated the wine world, falsely labeling products and using fraudulent geographical indications (GIs). GIs, which function as a type of brand, are internationally protected designations of a product's origin and characteristics. Recently, United States GIs, such as Napa or Walla Walla, have appeared on bottles of wine composed of Chinese grapes. By misappropriating U.S. brands, Chinese counterfeiters deceive and confuse consumers, disadvantage legitimate businesses, and causes health concerns. Unlike other brands, GIs protect regions, rather than individual producers. This creates a particular void: no single winery can register a GI and no single winery is harmed by fraudulent use, making counterfeits difficult to prevent, detect, and address. This Comment argues that Chinese law currently provides insufficient protection for U.S. wine GIs. As a solution, it proposes a Sino-American wine registry to effectively preserve GIs and protect the affected wines, producers, consumers, and countries.

## INTRODUCTION

Splashy headlines around the world decry the rise of Chinese wine counterfeits. A London Telegraph headline reads, “Red Alert Over Bordeaux Wine Fraud,”<sup>1</sup> while a CNN.com headline laments the “Counterfeits in the Grape Wall of China.”<sup>2</sup> Meanwhile, the Australian Broadcasting Company's article, titled “Winemakers See Red Over Bogus Bottles,” describes counterfeiters who “rebadged” Chinese wines as Australian.<sup>3</sup>

With growing Chinese demand for foreign wines comes a corresponding increase in fraudulent products.<sup>4</sup> For example, counterfeiters pay thousands of dollars for empty French Bordeaux

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1. Peter Foster, *Red Alert Over Bordeaux Wine Fraud*, TELEGRAPH (May 2, 2010), <http://www.telegraph.co.uk/news/worldnews/asia/china/7669814/Red-alert-over-bordeaux-wine-fraud.html>.

2. Peter Shadbolt, *Counterfeits in the Grape Wall of China*, CNN.COM (Mar. 10, 2011), [http://articles.cnn.com/2011-03-10/world/china.wines\\_1\\_cheaper-wine-mouton-cadet-wine-tastings?\\_s=PM:WORLD](http://articles.cnn.com/2011-03-10/world/china.wines_1_cheaper-wine-mouton-cadet-wine-tastings?_s=PM:WORLD).

3. Jason Om, *Winemakers See Red Over Bogus Bottles*, AUSTRALIAN BROADCASTING COMPANY NEWS (Aug. 26, 2010), <http://www.abc.net.au/news/2010-08-26/winemakers-see-red-over-bogus-bottles/959368>.

4. Foster, *supra* note 1.

bottles, only to fill them with cheap Chinese wine and sell them at inflated prices.<sup>5</sup> Penfolds, an Australian wine that is popular and well-recognized in China, spurred a string of knockoffs marked “Benfolds” in the same typeface as the original.<sup>6</sup> Fake products bottled and packaged as “Canadian ice wine” are available on Chinese shelves, with frauds potentially comprising eighty percent of the ice wine in China.<sup>7</sup>

Counterfeit wines create a number of concerns. For example, their labels falsely convey a reputation, which can deceive or confuse consumers.<sup>8</sup> Unfortunately, fraudulent wines are often of much lower quality and sometimes even laced with chemicals.<sup>9</sup> This can lead to dilution of legitimate brands, harming their producers.<sup>10</sup> Meanwhile, counterfeiters receive an unfair advantage, benefitting from the reputation they are weakening.<sup>11</sup>

United States wines have not escaped the counterfeit plague. Recently, a Chinese winery attempted to register itself domestically as “Napa Valley.”<sup>12</sup> Though it didn’t obtain that particular brand, it ultimately assumed the name “Valley Napa”—despite the fact that its wine consisted entirely of Chinese-grown grapes—and marketed its wine to domestic consumers.<sup>13</sup> In late 2012, the Chinese government finally granted protected status to the term “Napa.”<sup>14</sup> However, this protection took fourteen years of work for the Napa Valley Vintners Association,<sup>15</sup> including a 2011 trade mission to China to promote and

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5. Shadbolt, *supra* note 2.

6. *Id.*

7. Ben O’Donnell, *China’s Fake Ice Wine Epidemic*, WINE SPECTATOR (Feb. 3, 2011), <http://www.winespectator.com/webfeature/show/id/44430>. Ice wine is a registered Canadian geographical indication (GI). Agri-Food Choice and Quality Act, B.C. Reg. 79/2005 § 48 (Can. 2005), available at [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/11\\_79\\_2005#section48](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/11_79_2005#section48) (providing protection for ice wine as a wine of a marked quality region).

8. See Michael Blakeney, *Proposals for International Criminal Enforcement of Intellectual Property Rights*, in THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION 23, 30 (Christoph Antons ed., 2011).

9. Mike Veseth, *The BRICs: Two Faces of Chinese Wine*, WINE ECONOMIST (Jan. 28, 2011), <http://wineeconomist.com/2011/01/28/the-brics-two-faces-of-chinese-wine/>.

10. Blakeney, *supra* note 8, at 30.

11. *Id.*

12. Mark J. Calaguas, *A Rosé By Any Other Name: Protecting Geographical Indications for Wines and Spirits in China*, 3 LOY. U. CHI. INT’L L. REV. 257 (2006).

13. Dan Berger, *Cabernet in China*, DAN BERGER’S VINTAGE EXPERIENCES: WKLY. WINE COMMENT., Apr. 21, 2011, at 2.

14. Press Release, Napa Valley Vintners, Napa Valley First International Wine Region to Receive Landmark Protection in China (Oct. 11, 2012), available at [http://www.napavintners.com/trade/tm\\_3\\_release\\_detail.asp?ID\\_News=3421228](http://www.napavintners.com/trade/tm_3_release_detail.asp?ID_News=3421228).

preserve the Napa name.<sup>16</sup>

The Napa Valley struggle illustrates the problem with protecting geographical indications (GIs). GIs are label designations that indicate a wine's origin and often denote certain qualities associated with that origin.<sup>17</sup> A form of intellectual property (IP), GIs function as brands, preserving reputation and truth in labeling.<sup>18</sup>

While brand protection benefits any product, the protection that GIs offer is especially crucial for wine. Consumers select wines based on reputation—not merely those of the wine's producer or its ingredients, but also the reputation of the wine's geographic region.<sup>19</sup> Strong regional reputations often result in economic profit, as was the case in Walla Walla, Washington. Once a dying agricultural town, the region is now booming thanks to its wine industry.<sup>20</sup> “Walla Walla has created a brand for itself,” says Richard Kinssies, a Seattle wine expert.<sup>21</sup> “It worked very hard for decades to create a viable and valuable wine industry. Where there's marketing success, someone will want to copy it. Truth in labeling protects that brand.”<sup>22</sup> Due in part to Walla Walla's brand, Washington now possesses a booming wine industry,<sup>23</sup> the second largest in the U.S.<sup>24</sup>

In addition to their domestic success, U.S. winemakers have set their

15. Aaron Romano, *China Officially Recognizes Napa Valley Wines*, WINE SPECTATOR (Dec. 3, 2012), <http://www.winespectator.com/webfeature/show/id/47739>.

16. Press Release, Napa Valley Vinters, Forty Napa Valley Vintners Head to China for Trade Mission: Promoting Napa Valley and its Wine to Important, Emerging Export Market (Apr. 20, 2011), available at [http://www.napavintners.com/trade/tm\\_3\\_release\\_detail.asp?ID\\_News=3221273](http://www.napavintners.com/trade/tm_3_release_detail.asp?ID_News=3221273).

17. BERNARD O'CONNOR, *THE LAW OF GEOGRAPHICAL INDICATIONS* 23 (2004); see also *About Geographical Indications*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/geo\\_indications/en/about.html](http://www.wipo.int/geo_indications/en/about.html) (last visited Mar. 31, 2013).

18. *Why Do Geographical Indications Need Protection?*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/geo\\_indications/en/about.html#whyprotect](http://www.wipo.int/geo_indications/en/about.html#whyprotect) (last visited Mar. 31, 2013).

19. Günter Schamel & Kym Anderson, *Wine Quality and Varietal, Regional and Winery Reputations: Hedonic Prices for Australia and New Zealand*, ECON. REC. 357, 358 (2003).

20. See WALLA WALLA VALLEY WINE CLUSTER ECONOMIC DEVELOPMENT PROJECT, SUMMARY: WALLA WALLA REGIONAL WINE CLUSTER-BASED ECON. DEV. PROJECTS (2007), available at <http://www.wvcc.edu/CMS/index.php?id=1759>.

21. Interview with Richard Kinssies, Owner, Greenlake Wines + wine bar, in Seattle, Wash. (Jan. 18, 2013). Kinssies is also an author and winemaker.

22. *Id.*

23. See Rebecca Thompson, *Pressing Washington's Wine Industry Into the Twenty-First Century: Rethinking What It Means to Be a Winery*, 87 WASH. L. REV. 851, 851–52, 855–56 (2012) (discussing the robust economic effect of the Washington wine industry).

24. Jon Talton, *Outlining the Business of Washington Wines*, SEATTLE TIMES, Mar. 17, 2013, at D1.

sights on exporting their wines.<sup>25</sup> China represents an enticing new market<sup>26</sup> with lips that are “thirsty” for wine.<sup>27</sup> In the past few years, Washington and Oregon wine sales in China have increased by an estimated eighty percent each year.<sup>28</sup> China’s rising wine consumption inspired a corresponding increase in domestic wine. Some estimates found that, in the past five years, revenue from the Chinese wine industry rose at an annual rate of over twenty percent, around \$7 billion.<sup>29</sup>

Both countries are signatories to the Trade Related Aspects of Intellectual Property (TRIPS) Agreement, which provides international protection for GIs.<sup>30</sup> The TRIPS Agreement regulates the use of geographical terms,<sup>31</sup> aiming to preserve regional brands and prevent GI dilution.<sup>32</sup> A diluted GI becomes “generic,” representing not a specific brand, but a type of product.<sup>33</sup> This dilution is arguably happening to “Champagne.” Traditionally, the term Champagne only described wine from the Champagne region in France.<sup>34</sup> To many customers worldwide, however, it now merely signifies sparkling wine.<sup>35</sup> Another familiar example is the word “Kleenex”—though it is actually a registered brand, consumers now widely use the word to refer generally to any brand of facial tissue.<sup>36</sup> The TRIPS Agreement aims to prevent this from

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25. See *The United States*, NAPA VALLEY VINTNERS, [http://www.napavintners.com/about/ab\\_4\\_us.aspx](http://www.napavintners.com/about/ab_4_us.aspx) (last visited Mar. 31, 2013) (reporting the U.S. as the world’s fourth-largest wine producer, exporting over \$560 million of wine in 2000).

26. For example, in 2009, total wine consumption in China was 1.2 billion bottles, a 104 percent increase from 2005. EUROPEAN UNION SMALL & MEDIUM-SIZED ENTERS. CTR., WINE MARKET IN CHINA I (2011).

27. Mike Ives, *China: A Domestic Wine Industry Starts to Take Root*, L.A. TIMES (Jan. 15, 2012), <http://articles.latimes.com/print/2012/jan/15/travel/la-tr-chinawine-20120115>.

28. Anna King, *Northwest Winemakers Hope to Entice China’s Emerging Middle Class*, NORTHWEST NEWS NETWORK (Jan. 29, 2013), <http://www.nwnewsnetwork.org/post/northwest-winemakers-hope-entice-chinas-emerging-middle-class>.

29. IBISWORLD, WINE PRODUCTION IN CHINA: MARKET RESEARCH REPORT (2012).

30. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

31. TRIPS, *supra* note 30, arts. 22–24.

32. See Lindsey A. Zahn, *Australia Corked Its Champagne and So Should We: Enforcing Stricter Protection for Semi-Generic Wines in the United States*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 477, 487 (2012).

33. *About Geographical Indications*, *supra* note 17.

34. See Zahn, *supra* note 32, at 480.

35. Interview with Richard Kinssies, *supra* note 21.

36. See Ryan Barton, “Kleenex” is a Brand Name. . . , SMART MARKETING FOR SMALL BUS. SUCCESS, <http://www.thesmartmarketingblog.com/2009/09/kleenex-is-brand-name.html> (last visited Mar. 31, 2013).

happening to GIs, as well as to protect consumers and legitimate businesses.<sup>37</sup>

The TRIPS Agreement itself does not protect GIs, requiring instead that member countries create domestic legislation implementing TRIPS provisions.<sup>38</sup> In the European Union (EU), GIs enjoy specific protection.<sup>39</sup> By contrast, the United States regulates GIs primarily under its more general national trademark law.<sup>40</sup> A number of Chinese statutes offer GI protection,<sup>41</sup> forming a confusing regulatory system<sup>42</sup> that only one American winery has successfully navigated.<sup>43</sup> Napa Valley, perhaps the U.S.'s most recognizable indication, is the first non-domestic wine GI to receive recognition in China.<sup>44</sup>

Domestic implementation of the TRIPS Agreement often differs based on a country's legal culture. For example, the EU ardently protects GIs to preserve its traditional brands and its "rich history of local and specialist agricultural production and many famous products closely linked to their place of origin."<sup>45</sup> Accordingly, its domestic laws focus

37. See Zahn, *supra* note 32, at 480; see also *About Geographical Indications*, *supra* note 17.

38. TRIPS, *supra* note 30, arts. 22.2, 23.1.

39. Council Regulation 1601/91, 1991 J.O. (L 149) 1 (EEC).

40. Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051–72, 1091–96, 1111–27 (2006); see also *infra* Part II.A on U.S. wine regulations.

41. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983) [hereinafter Trademark Law], translated in *Trademark Law of the People's Republic of China*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=131395](http://www.wipo.int/wipolex/en/text.jsp?file_id=131395) (last visited May 23, 2013); Provisions for the Protection of Products of Geographical Indication (promulgated by the Gen. Admin. Of Quality Supervision, Inspection, and Quarantine, June 7, 2005, effective July 15, 2005) [hereinafter Provisions for Protection of GIs] (P.R.C.), translated in *Provisions for the Protection of Products of Geographical Indication*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=181517](http://www.wipo.int/wipolex/en/text.jsp?file_id=181517); Law of the People's Republic of China Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 2, 1993, effective Dec. 1, 1993) [hereinafter Unfair Competition Law], translated in *Law of the People's Republic of China Against Unfair Competition*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=125970](http://www.wipo.int/wipolex/en/text.jsp?file_id=125970); Law of the People's Republic of China on the Protection of the Rights and Interests of Consumers (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) [hereinafter Consumer Protection Law], translated in *Law of the People's Republic of China on the Protection of the Rights and Interests of Consumers*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=209069](http://www.wipo.int/wipolex/en/text.jsp?file_id=209069); see also *infra* Part III.C on Chinese protection of GIs.

42. Bradley M. Bashaw, *Geographical Indications in China: Why Protect GIs With Both Trademark Law and AOC-Type Legislation?*, 17 PAC. RIM L. & POL'Y J. 73, 86 (2008) (arguing that Chinese GI protection is confusing and should be simplified).

43. See Press Release, Napa Valley Vintners, *supra* note 14 (noting that Napa Valley is the only GI so far to receive Chinese protection).

44. *Id.*

45. *Geographical-indications*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating->

specifically on GIs and protect them more stringently than other World Trade Organization (WTO) members.<sup>46</sup> By contrast, the U.S. intellectual property scheme evolved to promote the spirit of innovation.<sup>47</sup> U.S. protection of GIs reflects this notion, falling under trademark law, which focuses heavily on a creator or innovator.<sup>48</sup> Due to China's cultural and political climate, its IP law developed relatively recently, motivated primarily by international—rather than domestic—considerations.<sup>49</sup> As a result, its GI protection is relatively young and reflects a compilation of various foreign systems.<sup>50</sup>

Because of these domestic differences, GI protection can be inconsistent. In response, some countries pursue “TRIPS-plus” measures,<sup>51</sup> which expand on the protection provided by the TRIPS Agreement. The EU embraced this strategy, entering several bilateral agreements with other members to achieve further protection.<sup>52</sup> In the interest of providing more extensive and consistent protection, TRIPS Article 23 also calls for negotiations on a multilateral system of GI registration.<sup>53</sup> However, member nations have disagreed over how the

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opportunities/trade-topics/intellectual-property/geographical-indications/ (last updated Mar. 22, 2013).

46. See *Doha Development Agenda*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/doha/> (last updated Feb. 28, 2013) (presenting the EU's objectives in current TRIPS negotiations, including greater protection of GIs).

47. See generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX L. REV. 1031 (2005).

48. See, e.g., Lanham Act, 15 U.S.C. § 1051 (2006) (provision on registration that is addressed to individual applicants as owners).

49. See *infra* Part III.A on Chinese IP development.

50. Compare Trademark Law, *supra* note 41, with Lanham Act, 15 U.S.C. § 1051; compare Provisions for Protection of GIs, *supra* note 41, with Council Regulation (EC) No 1234/2007, 2007 O.J. (L 299) 1.

51. The term “TRIPS-plus” is interchangeable with “extra-TRIPS”; essentially, both terms refer to steps taken by member nations to build upon TRIPS protection, including bilateral agreements.

52. See, e.g., Agreement Between the European Community and Australia on Trade in Wine, European Community-Austl., Jan. 30, 2009, 2009 O.J. (L 28) 3 (EC) [hereinafter Agreement Between the EC and Australia], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:028:0003:0087:en:PDF>; Agreement Between the European Community and Canada on Trade in Wines and Spirit Drinks, European Community-Can., Feb. 6, 2004, 2004 O.J. (L 35) (EC) [hereinafter Agreement Between the EC and Canada], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:035:0003:0093:EN:PDF>; Agreement Between the European Community and the Republic of South Africa on Trade in Spirits, European Community-S. Afr., Jan. 30, 2002, 2002 O.J. (L 28) (EC) [hereinafter Agreement Between the EC and South Africa], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:028:0004:0105:EN:PDF>.

53. TRIPS, *supra* note 30, art. 23.4.

system should operate, stalling the registry's implementation.<sup>54</sup>

This Comment argues that Chinese law currently fails to sufficiently protect U.S. wine GIs. It then proposes a bilateral wine registry as a TRIPS-plus solution to effectively regulate GIs. The registry would promote dispute avoidance, as it would reflect shared attitudes about GI protection and provide mutual benefits to the U.S. and China. Finally, the registry would further the goals of the TRIPS Agreement and serve as a model for future international GI protection.

Part I of this Comment addresses international protection of GIs. Part II discusses United States GI protection, particularly in terms of wine. Part III analyzes Chinese IP law and its interaction with wine GIs. Part IV argues that the current state of Chinese law provides insufficient protection for U.S. wine GIs. Part V proposes a bilateral wine registry as a solution to Sino-American gaps in GI protection.

## I. INTERNATIONAL LAW RECOGNIZES AND PROTECTS WINE GEOGRAPHICAL INDICATIONS

GIs denote the origin of goods, most commonly in the context of food and wine.<sup>55</sup> GIs receive international protection under the TRIPS Agreement, a WTO treaty that regulates the use and registration of geographical names.<sup>56</sup> While the TRIPS Agreement applies equally to all of its member nations,<sup>57</sup> it requires domestic implementation of its principles,<sup>58</sup> which can result in inconsistent protection.

### A. *Geographical Indications Preserve the Brand of a Specific Region*

Simply put, a GI designates a product's specific geographic origin.<sup>59</sup> Traditionally, this was the extent of a GI's significance.<sup>60</sup> Now, however, GIs typically function more like appellations of origin, designations that indicate both a product's region *and* that the product possesses the qualities or reputation "essentially attributable" to that

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54. See *infra* Part I.B discussing the present state of the multilateral registry negotiations. There are three proposals, one from the EU, one from China, and one from many countries, including the U.S.

55. O'CONNOR, *supra* note 17, at 23.

56. TRIPS, *supra* note 30, arts. 22–24.

57. *Id.* art. 1.

58. *Id.* arts. 22.2, 23.1.

59. O'CONNOR, *supra* note 17, at 23.

60. *Id.* at 21 (discussing European laws protecting GIs dating back hundreds of years).



region.<sup>61</sup>

Appellations of origin are technically a subset of GIs and are generally understood more narrowly in the international community.<sup>62</sup> However, the appellation system, which developed in France,<sup>63</sup> is becoming increasingly prevalent. Many countries—including the U.S. and China<sup>64</sup>—protect only those terms that indicate both a region and its qualities. International treaties, such as the TRIPS Agreement, treat GIs as essentially synonymous with appellations of origin.<sup>65</sup> Thus, in current common usage, GIs denote both a region and its attributable qualities.

By linking a product to its origin, a GI shows consumers that the product has the characteristics or level of quality associated with the region from which it derives its name.<sup>66</sup> The French dubbed this link “terroir”<sup>67</sup>: the concept that a product, usually wine, should reflect the climate, place, traditions, and production method of a location.<sup>68</sup> Essentially, terroir means that a geographical region necessarily contributes unique qualities to its products.<sup>69</sup>

Geographical indications are a form of IP. Much like trademarks, GIs identify sources, indicate quality, and implicate business interests.<sup>70</sup> However, GIs differ from most types of IP in one significant respect: instead of indicating a producer, GIs identify a geographical location and the recognized quality derived from this location.<sup>71</sup> Because GIs

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61. *About Geographical Indications*, *supra* note 17; *see also* O’CONNOR, *supra* note 17, at 22–23.

62. *Geographical Indications: From Darjeeling to Doha*, WORLD INTELL. PROP. ORG. MAG., [http://www.wipo.int/wipo\\_magazine/en/2007/04/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2007/04/article_0003.html) (last visited Mar. 31, 2013).

63. Jeff Ikejiri, *The Grape Debate: Geographic Indicators vs. Trademarks*, 35 SW. U. L. REV. 603, 606 (2007).

64. *See infra* Part II.B on U.S. regulation of wine labels and Part III.C on Chinese GI protection.

65. *See* TRIPS, *supra* note 30, art. 22.1 (defining GIs as “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”).

66. *About Geographical Indications*, *supra* note 17.

67. CAROL ROBERTSON, *THE LITTLE RED BOOK OF WINE LAW: A CASE OF LEGAL ISSUES* 150 (2008).

68. Emily Nation, *Geographical Indications: The International Debate Over Intellectual Property Rights for Local Producers*, 82 U. COLO. L. REV. 959, 989 (2011).

69. ROBERTSON, *supra* note 67, at 149–51.

70. *WTO’s Agricultural Negotiations: Committee Meeting before the H. Comm. on Agriculture*, 108th Cong. (July 22, 2003) [hereinafter *WTO’s Agricultural Negotiations*] (statement of Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the U.S. Patent and Trademark Office), available at <http://www.uspto.gov/news/speeches/2003/stratplan2003apr03.jsp>.

71. Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to*

represent a geographic region rather than a particular product,<sup>72</sup> the GI belongs to the region, rather than an individual producer.

Sometimes common usage transforms terms that once indicated geographic origin into designations for a general type of product.<sup>73</sup> When this happens to GIs, they become “generic” and no longer warrant international protection.<sup>74</sup> This is the present concern with Champagne. In the EU, the term still strictly indicates only wine from the French region of the same name.<sup>75</sup> However, products such as “Cook’s California Champagne” demonstrate the dilution of this term worldwide.<sup>76</sup> While the EU continues to fight GI dilution,<sup>77</sup> it may not be able to cure the perception of international consumers who no longer consider terms such as Champagne to have geographical significance.<sup>78</sup> As consumer perception is central in determining whether a GI has become generic, it can be difficult to determine when a GI has truly become generic.<sup>79</sup>

While GIs are not limited to agricultural products,<sup>80</sup> they most commonly describe food and drink.<sup>81</sup> Well-known GIs include international terms such as Champagne,<sup>82</sup> Scotch,<sup>83</sup> or Feta cheese<sup>84</sup> and familiar American GIs such as Washington State apples, Florida oranges, Idaho potatoes, or Napa wine.<sup>85</sup> Internationally, wines and

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*Comply With the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT’L & COMP. L. 309, 312 (1999).

72. *Id.*

73. *What is a “Generic” Geographical Indication?*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/geo\\_indications/en/about.html#generic](http://www.wipo.int/geo_indications/en/about.html#generic) (last visited Mar. 31, 2013). For example, the word “cologne” now commonly represents a type of perfume, whereas the term once referred only to perfumes from the German city of Cologne (Köln). *Id.*

74. *Id.*

75. Council Regulation 1234/2007, 2007 J.O. (L 299) 1 (EC).

76. *About, COOK’S CHAMPAGNE*, <http://www.cookschampagne.com/CBICMS/cookschampagne/about.html> (last visited Mar. 31, 2013) (explaining that Cook’s “champagne” is produced in Madera, CA).

77. *See* bilateral agreements discussed *supra* at note 52.

78. Interview with Richard Kinssies, *supra* note 21.

79. *See* Nation, *supra* note 68, at 976–78 (presenting Fontina cheese as an example).

80. *About Geographical Indications*, *supra* note 17.

81. *See e.g.*, Lindquist, *supra* note 71; Nation, *supra* note 68; Zahn, *supra* note 32.

82. Zahn, *supra* note 32, at 478.

83. Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 305 (2006).

84. *Id.* at 306.

85. *WTO’s Agricultural Negotiations*, *supra* note 70 (statement of Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the U.S. Patent and

spirits have received both the most attention<sup>86</sup> and the highest GI protection,<sup>87</sup> due in part to wine's particular reliance on regional reputation.

GIs primarily protect consumers and producers.<sup>88</sup> GIs inform customers about the origin and quality of products, allowing them to make educated purchases.<sup>89</sup> Products labeled with false GIs confuse or deceive customers, often extorting a higher price from customers who would not otherwise be willing to pay as much for a lower quality product.<sup>90</sup> Counterfeit food products in particular also pose health risks.<sup>91</sup> Recently, a Chinese sales manager admitted that some of his wines were only twenty percent grape, with sugar and chemicals composing the other eighty percent.<sup>92</sup> Food fraud is especially significant in today's globalized world, where one country's food safety incidents can put others at risk.<sup>93</sup>

GI protection also helps producers—many of which have acquired valuable reputations—by preventing competitors from gaining an unfair advantage and by protecting brand integrity.<sup>94</sup> When businesses use false GIs, they start with a lower cost basis than legitimate producers, which have expended time, money, and effort on development and marketing.<sup>95</sup> As a result, legitimate producers suffer from loss of sales, loss of goodwill, and dilution of their brands.<sup>96</sup> Furthermore, GI fraud discourages investors by reducing confidence in a region's reputation.<sup>97</sup> A strong GI regime builds a region's standing in consumers' minds and protects that standing going forward.<sup>98</sup>

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Trademark Office).

86. See Hughes, *supra* note 83; Lindquist, *supra* note 71; Nation, *supra* note 68; Zahn, *supra* note 32.

87. See, e.g., TRIPS, *supra* note 30, art. 23 (providing heightened protection for wine).

88. See *Why Do Geographical Indications Need Protection?*, *supra* note 18.

89. *Id.*

90. Blakeney, *supra* note 8, at 30.

91. *Id.* at 35.

92. Veseth, *supra* note 9.

93. Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, 51 VA. J. INT'L L. 637, 639 (2011).

94. See *Why Do Geographical Indications Need Protection?*, *supra* note 18.

95. Blakeney, *supra* note 8, at 33.

96. *Id.* at 30.

97. *Id.* at 32.

98. Calaguas, *supra* note 12, at 278.

*B. The TRIPS Agreement Provides International Recognition and Protection of GIs, Particularly for Wine and Spirits*

International GI protection falls under the TRIPS Agreement, a major multilateral treaty on IP rights.<sup>99</sup> The WTO administers the TRIPS Agreement, which became effective in 1995.<sup>100</sup> While the TRIPS Agreement covers many areas of IP, it devotes three articles specifically to GIs.<sup>101</sup> These articles aim to prevent the use of false or misleading GIs and to avoid the degeneration of GIs into generic terms.<sup>102</sup>

The first of the three is Article 22, titled “Protection of Geographical Indications (GIs).”<sup>103</sup> This article requires member nations to provide a certain standard of domestic protection for GIs, which it defines as “indications [identifying] 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 product is essentially attributable to its geographic origin.”<sup>104</sup> Article 22 directs member nations to implement domestic legal recourse preventing GI use that would be misleading or constitute unfair competition.<sup>105</sup> For example, U.S. regulations prevent an American winemaker from fraudulently labeling its product as “Spanish.”<sup>106</sup>

Article 23, titled “Additional Protection for GIs for Wines and Spirits,” specifically addresses alcoholic beverages.<sup>107</sup> Much like Article 22, it requires members to provide legal recourse for GI misuse,<sup>108</sup> as well as to refuse trademark registration for false or misleading GIs.<sup>109</sup> In addition, Article 23’s protections apply regardless of a specific showing that the GI misuse was unfair or deceptive to consumers.<sup>110</sup> Wine GIs

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99. There are other international treaties that apply to IP, such as the Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1583, 828 U.N.T.S. 305, and the Madrid Agreement for the Repression of False or Misleading Indications of the Source of Goods, 828 U.N.T.S. 163. However, the TRIPS Agreement is the most prevalent among them.

100. *Overview: the TRIPS Agreement*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Mar. 31, 2013).

101. TRIPS, *supra* note 30, arts. 22–24.

102. Zahn, *supra* note 32, at 487.

103. TRIPS, *supra* note 30, art. 22.

104. *Id.* art. 22.1.

105. *Id.* art. 22.2(a), (b).

106. 27 C.F.R. § 4.24(c)(1) (2006).

107. TRIPS, *supra* note 30, art. 23.

108. *Id.* art. 23.1.

109. *Id.* art. 23.2.

110. *Id.* arts. 23.1, 23.2.

thus receive stronger protection than others, as they apply “even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.”<sup>111</sup>

Article 23 also requires member nations to negotiate the terms of a multilateral GI registry.<sup>112</sup> Both the negotiations and the intended registries serve to “facilitate the protection of geographical indications for wines.”<sup>113</sup> Though negotiations began in 1997 and held an original deadline of 2003, they have yet to produce a consensus.<sup>114</sup> WTO members continue to address this issue in their current negotiation session, the Doha round.<sup>115</sup>

The negotiation roadblock stems primarily from dispute over the registry’s proper application. Currently, there are three proposed approaches: the EU proposal,<sup>116</sup> the Chinese proposal,<sup>117</sup> and the joint proposal, which the U.S. supports.<sup>118</sup> The crucial distinction between the three is how strictly member countries must recognize GIs. Under the EU proposal, participation would effectively be mandatory and registered GIs would enjoy a rebuttable presumption of protection in other WTO member countries.<sup>119</sup> The joint proposal offers a less

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111. *Id.* art. 23.1.

112. *Id.* art. 23.4.

113. *Id.*

114. *The Multilateral Register for Wines and Spirits*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_background\\_e.htm#wines\\_spirits](http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm#wines_spirits) (last visited Apr. 13, 2013).

115. *The Doha Agenda*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/doha1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm) (last visited Apr. 13, 2013).

116. Council for Trade-Related Aspects of Intellectual Property Rights, *Geographical Indications: Communication from the European Communities*, TN/IP/W/11 (June 14, 2005) [hereinafter EU Proposal].

117. Council for Trade-Related Aspects of Intellectual Property Rights, *Multilateral System of Notification and Registration of Geographical Indications Under Article 23.4 of the TRIPS Agreement: Communication from Hong Kong, China*, TN/IP/W/8 (Apr. 23, 2003) [hereinafter China Proposal].

118. Council for Trade-Related Aspects of Intellectual Property Rights, *Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits: Submission by Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Japan, Korea, Mexico, New Zealand, Nicaragua, Paraguay, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, South Africa and the United States (Revision)*, TN/IP/W/10/Rev.4 (Mar. 31, 2011) [hereinafter Joint Proposal].

119. EU Proposal, *supra* note 116, Annex art. 4(a). While the language of the clause is “voluntary,” the effect of the system is arguably mandatory. The proposal allows opponents of a proposed GI to challenge its registration within a certain period of time; however, members are unable to refuse protection to that GI if they do not object during that period.

stringent method with a straightforward voluntary registry.<sup>120</sup> This system would encourage—but not require—member participation, protecting GIs only for and within those countries that opted to participate.<sup>121</sup> China advocated a compromise, echoing the joint proposal’s voluntary participation provision, but providing a rebuttable presumption of validity similar to (though more limited than) the EU proposal’s presumption.<sup>122</sup> In April 2011, the WTO issued a report recognizing that, while the current proposals provide “a good basis on which to continue negotiations,” they still have “a long way to go.”<sup>123</sup>

Finally, TRIPS Article 24, “International Negotiations; Exceptions,” discusses how Article 23’s provisions should be implemented.<sup>124</sup> First, it instructs members to be open to negotiations for GI protection.<sup>125</sup> It also establishes two exceptions to Article 23, permitting otherwise false GI registrations where, prior to the Agreement, the GI had either been in continuous use for ten years or applied for in good faith.<sup>126</sup>

### C. *The TRIPS Agreement Requires Member Countries to Ensure GIs Are Domestically Protected*

The TRIPS Agreement is not self-executing, meaning that member countries must create and pass compliant domestic legislation to provide protection not only for their national GIs, but international ones as well.<sup>127</sup> Both the U.S.<sup>128</sup> and China<sup>129</sup> use their existing trademark law to regulate GIs.<sup>130</sup> The EU, a major advocate for GI preservation, operates a community-wide, GI-specific system of protection.<sup>131</sup>

The WTO mediates and arbitrates disputes between countries,<sup>132</sup> but

120. Joint Proposal, *supra* note 118, art. X.1(A).

121. *Id.*

122. China Proposal, *supra* note 117, art. III(4)(iv); *see also* Calaguas, *supra* note 12, at 276–77.

123. Council for Trade-Related Aspects of Intellectual Property Rights, *Report by the Chairman, Ambassador Darlington Mwape (Zambia) to the Trade Negotiations Committee*, TN/IP/21 (Apr. 21, 2011).

124. TRIPS, *supra* note 30, art. 24.

125. *Id.* art. 24.1.

126. *Id.* art. 24.4.

127. *Id.* arts. 22.2, 23.1; *see also* Andrew M. Reeves, *Protecting Our Barefoots: Policy Problems in the International Wine Market*, 27 ARIZ. J. INT’L & COMP. L. 835, 850 (2010).

128. *See, e.g.*, 27 C.F.R. § 4 (2006) (regulating the labeling and advertising of wine).

129. Trademark Law, *supra* note 41, art. 16.

130. *See infra* Parts II.A and B on U.S. wine label regulations and section III.B on Chinese protection of GIs.

131. Council Regulation (EC) No 1234/2007, 2007 O.J. (L 299) 1.

132. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867

has no true enforcement mechanism.<sup>133</sup> Instead, it issues a panel report<sup>134</sup> that indicates whether a disputed behavior breaks a WTO agreement or obligation.<sup>135</sup> If the panel determines that a country is in breach, it first allows that country to amend its behavior or policies and then it may impose trade sanctions.<sup>136</sup> However, the difficulty of enforcing these reports, paired with the cost and complexity of disputes, can be discouraging to WTO member countries.<sup>137</sup>

As a result, some states create TRIPS-plus agreements—bilateral treaties between WTO members that go beyond the protection that the TRIPS Agreement offers.<sup>138</sup> In the wine realm, the EU is a leading proponent of TRIPS-plus measures. The EU assigns GI preservation more weight than do many New World countries, and it finds TRIPS protection of GIs too lenient.<sup>139</sup> The perceived misuse of European GIs has thus been a source of contention for the EU.<sup>140</sup> To achieve its desired level of protection, the EU turned to extra-TRIPS measures, pursuing bilateral treaties with the U.S.,<sup>141</sup> Canada,<sup>142</sup> South Africa,<sup>143</sup> and Australia.<sup>144</sup>

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U.N.T.S. 154, art. IV(2); TRIPS, *supra* note 30, art. 64.

133. Reeves, *supra* note 127, at 850.

134. For an example of a panel report, see Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R15 (Mar. 15, 2005), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds174\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm) (dispute settlement between U.S. and EU over GI protection).

135. *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Apr. 13, 2013).

136. *Id.*

137. PAUL C. IRWIN CROOKES, *INTELLECTUAL PROPERTY REGIME EVOLUTION IN CHINA AND INDIA* 35–36 (2010).

138. TRIPS, *supra* note 30, art. 24.2 (providing for bilateral agreements and subsequent TRIPS Council review where agreements are insufficient).

139. *See Doha Development Agenda*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/doha/> (last visited Mar. 31, 2013) (presenting the EU's objectives in current TRIPS negotiations, including greater protection of GIs).

140. *See, e.g.*, Panos Kakaviatos, *US Wines Blocked By EU Over Name Agreement*, DECANTER (June 1, 2009), <http://www.decanter.com/news/wine-news/484767/us-wines-blocked-by-eu-over-name-agreement>; Press Release, Europa, EU-Australia Wine Trade Agreement Enters Into Force (Aug. 31, 2010), available at [http://europa.eu/rapid/press-release\\_IP-10-1078\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1078_en.htm).

141. Agreement Between the European Community and the United States of America on Trade in Wine, European Community-U.S., Mar. 24, 2006, 2006 O.J. (L 87) 2 (EC) [hereinafter Agreement Between the EC and the U.S.], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:087:0002:0074:EN:PDF>.

142. Agreement Between the EC and Canada, *supra* note 52.

143. Agreement Between the EC and South Africa, *supra* note 52.

144. Agreement Between the EC and Australia, *supra* note 52.

These agreements further protect European GIs beyond the regulations that the TRIPS Agreement provides.<sup>145</sup> For example, TRIPS Article 24.4 permits non-European producers to use European GIs, such as “Champagne,” in limited circumstances.<sup>146</sup> By contrast, the recent bilateral agreement between the EU and Australia<sup>147</sup> prohibits all Australian use of established European GIs, regardless of the time or nature of registration.<sup>148</sup>

The EU and the U.S. entered a similar agreement in 2006.<sup>149</sup> However, the U.S. resisted total prohibition on the use of certain geographical terms, including Champagne, Chianti, and Port.<sup>150</sup> Citing differing attitudes towards GI preservation<sup>151</sup> and the need to protect its domestic businesses,<sup>152</sup> the U.S. stood by previously registered trademarks using these specific European GIs.<sup>153</sup> Thus, while future businesses may not use European GIs, the Agreement permits prior trademark holders to continue using these otherwise false geographical terms.<sup>154</sup>

## II. THE U.S. PROTECTS DOMESTIC AND FOREIGN WINES THROUGH ITS GI REGULATION

The U.S. protects wine GIs through a combination of federal trademark law and labeling regulations. U.S. law establishes a number of requirements for wine labels; most importantly in the GI context, most labels must indicate an appellation of origin.<sup>155</sup> Appellations of origin

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145. Agreement between the EC and Australia, *supra* note 52, art. 13 (prohibiting use of certain European GIs in Australia); Agreement Between the EC and the U.S., *supra* note 141, art. 6 (establishing a grandfather clause prohibiting use of wine labels not originating in the European Community pre-December 2005); Agreement Between the EC and Canada, *supra* note 52, art. 12 (providing dates by which Canadian wines will cease using certain European GIs).

146. *See* TRIPS, *supra* note 30, art. 24.4 (creating grandfather and good faith clauses).

147. Agreement Between the EC and Australia, *supra* note 52.

148. *Id.* art. 13(1).

149. Agreement Between the EC and the U.S., *supra* note 141.

150. *Id.* art. 6, Annex II; *see also* Zahn, *supra* note 32, at 478 (detailing the current state of U.S.-EU wine relations and arguing that the U.S. should more stringently protect European GIs).

151. *See WTO's Agricultural Negotiations*, *supra* note 70 (statement of Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the U.S. Patent and Trademark Office).

152. *See id.*

153. *See* Agreement Between the EC and the U.S., *supra* note 141, art. 6.

154. *Id.*

155. 27 C.F.R. § 4.24 (2006); *see also* *When an Appellation of Origin is Required*, ALCOHOL & TOBACCO TRADE & TAX BUREAU, <http://www.ttb.gov/appellation/index>.



are technically a subset of GIs: at their most basic, GIs merely denote region,<sup>156</sup> while appellations of origin indicate both a product's region and its specific qualities.<sup>157</sup> However, the two terms are becoming increasingly synonymous.<sup>158</sup> In the U.S., domestic wine appellations of origins are called American Viticultural Areas (AVAs).<sup>159</sup>

U.S. law protects both AVAs and foreign wine GIs.<sup>160</sup> The level of protection a geographical name receives depends on whether that name is considered "generic."<sup>161</sup> The Bureau of Alcohol, Tobacco and Firearms (BATF) makes this determination, placing geographical terms into one of three categories: generic, semi-generic, or nongeneric.<sup>162</sup> The more generic a term, the less protection it receives.<sup>163</sup> These protections benefit both foreign wines and the U.S. wine industry, which has gained international prestige.<sup>164</sup>

#### A. *The U.S. Controls Alcohol Labeling Through Trademark Law and Agency Regulations*

Though GIs are not technically trademarks, the U.S. protects them under its national trademark law.<sup>165</sup> This is largely due to GIs' characteristics and purpose: GIs, like trademarks, identify sources, indicate quality, implicate business interests,<sup>166</sup> and serve to avoid consumer confusion.<sup>167</sup> In addition, GIs are also sometimes part of a trademarked name.<sup>168</sup>

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shtml#when\_appellation\_required (last updated Feb. 12, 2013) (explaining rare cases where appellation of origin not required).

156. O'CONNOR, *supra* note 17, at 23.

157. *Id.* at 22.

158. *See, e.g.*, TRIPS, *supra* note 30, art. 22.1 (defining GIs as terms that indicate both region and attributable characteristics).

159. 27 C.F.R. § 9.1.

160. *See id.*

161. *See id.*; *see also infra* Part II.C on BATF categories.

162. *See* 27 C.F.R. § 4.24.

163. *See infra* Part II.C on BATF categories.

164. *See* NAPA VALLEY VINTNERS, *supra* note 25 (reporting the U.S. as the world's fourth-largest wine producer).

165. Lanham Act, 15 U.S.C. § 1125 (2006).

166. *WTO's Agricultural Negotiations*, *supra* note 70 (statement of Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the U.S. Patent and Trademark Office).

167. *See* 27 C.F.R. § 4.39(a); *see also* *Sociedad Anonima Vina Santa Rita v. U.S. Dep't of Treasury*, 193 F. Supp. 2d 6, 12 (D.D.C. 2001) (discussing AVAs).

168. *See* *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504 (6th Cir. 2007).

The Lanham Act<sup>169</sup> is the primary U.S. federal statute on trademarks.<sup>170</sup> Section 43(a) addresses the major concerns that GI protection seeks to address: consumer confusion and economic benefit to free riders. The Act prohibits the use of:

[A]ny false designation of origin . . . which (A) is *likely to cause confusion, or to cause mistake, or to deceive* as to the affiliation, connection, or association of such person with another person, or *as to the origin*, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or *geographic origin* of his or her or another person's goods, services, or commercial activities.<sup>171</sup>

In addition to the Lanham Act, many U.S. agencies and statutes address wine labeling. This includes the BATF, which monitors and enforces trademarks as they relate to wine labels.<sup>172</sup> The BATF operates under the Federal Alcohol Administration Act of 1935,<sup>173</sup> which governs the methods and content of wine labeling. To register their products, wine producers must apply to the Alcohol and Tobacco Tax and Trade Bureau for a Certification/Exemption of Label/Bottle Approval and follow the relevant labeling and advertising regulations.<sup>174</sup> Many states also have their own requirements, some more stringent than the federal government's.<sup>175</sup>

Correct viticultural labeling is a critically important aspect of wine marketing. In *Bronco Wine Co. v. Jolly*,<sup>176</sup> Bronco Wine Company challenged California labeling requirements that prevented it from using

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169. 15 U.S.C. §§ 1051–72, 1091–96, 1111–27.

170. See *Lanham Act*, LEGAL INFO. INST., CORNELL U. LAW SCH. (Aug. 19, 2010, 5:18 PM), [http://www.law.cornell.edu/wex/lanham\\_act](http://www.law.cornell.edu/wex/lanham_act) (“The Lanham Act . . . was enacted by Congress [to provide] for a national system of trademark registration and [to protect] the owner of a federally registered mark . . .”).

171. 15 U.S.C. § 1125 (emphasis added).

172. 27 U.S.C. §§ 201, 205(e) (2006).

173. *Id.* §§ 201–19. 27 C.F.R. § 4, which covers appellations of origin and generic terms, is a subpart of this Act.

174. 27 C.F.R. § 13 (2006).

175. See SUSAN M. JOHNSON & CHRISTOPHER R. HERMANN, STOEL RIVES LLP, *THE LAW OF WINE: WINE LABELING REQUIREMENTS* (2011), available at [http://www.stoel.com/files/WEB\\_WA%20Law%20of%20Wine%202011.pdf](http://www.stoel.com/files/WEB_WA%20Law%20of%20Wine%202011.pdf) (noting that Washington and Oregon have more restrictive labeling requirements than the federal government).

176. 29 Cal. Rptr. 3d 462 (Cal. Ct. App. 2005), *cert. denied*, 546 U.S. 1150 (2006).

brand names containing the word “Napa.”<sup>177</sup> While Bronco purchased these valid brands from defunct wineries, much of its wine was made entirely from grapes grown outside of Napa County.<sup>178</sup> The California Court of Appeals rejected Bronco’s claims, explaining that “[w]hile a brand name generally does not have intrinsic meaning, a brand name of geographic or viticultural significance conveys information about the geographic source of the grapes used to make the wine.”<sup>179</sup> Though this case addressed California law—not federal regulations—it covered significant issues surrounding viticultural area protection: recognition, reputation, and consumer information.<sup>180</sup> The state law, much like the Lanham Act and the BATF’s wine labeling regulations, sought to prevent misleading geographic brand names. Here, because the disputed wine label falsely indicated that its grapes were from Napa,<sup>181</sup> it impermissibly deceived and confused consumers.<sup>182</sup>

*B. U.S. Law Protects Wine GIs as Appellations of Origin*

U.S. law requires wine labels to indicate an appellation of origin.<sup>183</sup> As mentioned above, domestic wine appellations of origin are called American Viticultural Areas (AVAs).<sup>184</sup> A number of areas qualify as AVAs, including a particular state, a group of contiguous states, a county or group of counties, or another approved grape-growing area.<sup>185</sup> The BATF recognizes and defines these boundaries based on information from applicant petitions,<sup>186</sup> including name evidence,<sup>187</sup> boundary evidence,<sup>188</sup> distinguishing features,<sup>189</sup> and map and boundary description.<sup>190</sup> There are roughly 200 AVAs, including Napa Valley, Sonoma Valley, and Walla Walla.<sup>191</sup> When a wine label indicates an

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177. *Id.* at 467.

178. *Id.* at 467–69.

179. *Id.* at 473.

180. *Id.*

181. *Id.* at 468–69.

182. *Id.* at 473.

183. 27 C.F.R. § 4.24 (2006).

184. *Id.* § 4.25(e).

185. *Id.* § 4.25(a)(1).

186. *Id.* § 9.12(a).

187. *Id.* § 9.12(a)(1).

188. *Id.* § 9.12(a)(2).

189. *Id.* § 9.12(a)(3).

190. *Id.* § 9.12(a)(4).

AVA, the BATF imposes a composition requirement that at least eighty-five percent of the wine's grapes come from that region.<sup>192</sup>

Through this system, the U.S. also recognizes a number of international appellations of origin.<sup>193</sup> The BATF divides foreign wine appellations into two groups: (1) those that denote viticultural areas, as recognized in the country of origin; and (2) those that denote countries or the foreign equivalent of a state or county.<sup>194</sup> The first group shares the AVA grape composition requirement that at least eighty-five percent of the wine's grapes be grown in that area, while the second group requires only seventy-five percent of the wine's grapes.<sup>195</sup> International wines must also comply with the foreign country's laws and regulations governing composition, production, and designation.<sup>196</sup> Dozens of countries, ranging from Argentina to Uzbekistan, have protected appellations under U.S. law.<sup>197</sup> Among those registered are nine Chinese GIs, including the regions of Hebei and Tsingtao.<sup>198</sup>

C. *The BATF Grants Varying Levels of Protection to Geographic Names Based on Whether they Are Considered Generic*

The BATF divides names of geographical significance into three categories: generic, semi-generic, and nongeneric.<sup>199</sup> Nongeneric names are then subdivided between those terms that refer to a specific blend and those that do not.<sup>200</sup> These categories, which apply both to wines from AVAs and those from other regions, determine whether a term receives protection.<sup>201</sup> The distinction between the three is based on the BATF administrator's discretion as to what a term signifies to a wide consumer base.<sup>202</sup>

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191. *Id.* § 9(C). Walla Walla is one of thirteen Washington AVAs. *Regions*, WASH. ST. WINE, <http://www.washingtonwine.org/wine-101/regions/> (last visited May 1, 2013).

192. *Id.* § 4.25(e)(3)(ii).

193. *Authorized Wine Appellations of Origin: Foreign Appellations*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, <http://www.ttb.gov/appellation/index.shtml> (last visited Apr. 15, 2013).

194. *Id.*

195. *Id.*

196. 27 C.F.R. § 4.25(b)(2).

197. *Authorized Wine Appellations of Origin: Foreign Appellations*, *supra* note 193.

198. *Authorized Wine Appellations of Origin: China*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, [www.ttb.gov/appellation/china.pdf](http://www.ttb.gov/appellation/china.pdf) (last visited Apr. 15, 2013).

199. 27 C.F.R. § 4.24.

200. *Id.* § 4.24(c).

201. *Compare id.* § 4.24(a), with § 4.24(b), and § 4.24(c).

202. *See* 27 C.F.R. § 4.24.

Names that the administrator deems generic, like “vermouth” or “sake,”<sup>203</sup> receive the least protection. These terms may be used on labels even if the product did not come from that geographic region<sup>204</sup> and regardless of the composition of the grapes. This is because their generic names are now so far removed from their origins that consumers think of them as types of wine, rather than geographic regions, and are not confused.<sup>205</sup>

Semi-generic names, such as Champagne, Chianti, and Port,<sup>206</sup> are more restricted. Like generic names, the BATF administrator determined that semi-generic names have become commonly used so that consumers no longer associate the name only with the place.<sup>207</sup> However, winemakers may only use semi-generic names if they also indicate the wine’s true origin and if the wine “conforms to the standard of identity, if any, for such wine . . . or . . . to the trade understanding of such class or type.”<sup>208</sup> In this context, semi-generic names are thus not treated as appellations of origin, but as descriptive terms, and do not require a certain percentage of grape composition.<sup>209</sup>

This treatment of semi-generic names is a matter of conflict between the U.S. and the EU.<sup>210</sup> Many terms in this category are European GIs<sup>211</sup> that the EU is fighting to protect against dilution.<sup>212</sup> The 2006 U.S.-EU Agreement addressed this concern, prohibiting future use of European semi-generic names on products of non-European origin.<sup>213</sup> However, a “grandfather” clause allows winemakers to continue to use such names if they previously appeared on an approved label.<sup>214</sup>

Finally, the BATF determined that nongeneric names may be used only on bottles of wine who meet the grape composition requirements.<sup>215</sup> These names are “known to the consumer and to the trade as the

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203. *Id.* § 4.24(a)(2).

204. *Id.* § 4.24(a).

205. Reeves, *supra* note 127, at 843.

206. 27 C.F.R. § 4.24(b)(2).

207. Reeves, *supra* note 127, at 844.

208. 27 C.F.R. § 4.24(b)(1).

209. *See id.*

210. Zahn, *supra* note 32, at 483.

211. Examples include Champagne, Chianti, and Port. Agreement Between the EC and the U.S., *supra* note 141, at Annex II.

212. *See supra* section I.C on international GI protection.

213. *See* Agreement between the EC and the U.S., *supra* note 141, art. 6 (limiting the use of certain semi-generic names).

214. *Id.* art. 6(2).

215. 27 C.F.R. § 4.24(c) (2006).

designation of a specific wine of a particular place or region, distinguishable from all other wines.”<sup>216</sup> This group is further subdivided between those that refer to a specific grape or blend, like Bordeaux Blanc or Rhone,<sup>217</sup> and those that do not, like Napa Valley, New York State, or Spanish.<sup>218</sup> These names, having the purpose of appellations of origin, must meet the aforementioned grape composition requirements.<sup>219</sup>

### III. CHINA’S INTELLECTUAL PROPERTY LAW HAS GROWN TO RECOGNIZE AND ADDRESS WINE GIS

China’s IP law developed far later than that of Western regimes, and, as a result, triggered significant international pressure and concern.<sup>220</sup> While the U.S. was historically a source of this pressure, Sino-American relations on this issue are improving.<sup>221</sup> Currently, China protects GIS through a number of legal systems, including its trademark law.<sup>222</sup> This protection has become more significant and successful as China witnesses increasing consumer demand for wine and a corresponding growth of its domestic wine industry.<sup>223</sup>

#### A. *China’s IP Structure Is Relatively New but Has Progressed Quickly*

Due to China’s cultural and political history, its IP development occurred relatively late compared to the West.<sup>224</sup> Confucianism, once an official Chinese ideology, favors good conduct based on personal virtue over adherence to legal rules.<sup>225</sup> Laws and rules thus played a less

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216. *Id.*

217. *Id.* § 4.24(c)(2).

218. *Id.* § 4.24(c)(1). AVAs fall within this latter group.

219. *See id.* § 4.25(e)(3)(ii).

220. *See infra* Part III.A on IP development.

221. *See infra* Part III.A on IP development.

222. *E.g.*, Trademark Law, *supra* note 41; Provisions for Protection of GIS, *supra* note 41; Unfair Competition Law, *supra* note 41; Consumer Protection Law, *supra* note 41.

223. *See Ives*, *supra* note 27.

224. In the interest of providing basic background, this section offers a very brief summary of a complicated subject. For a more detailed explanation of this area, consult ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES: LAW AND POLICY IN THE POST-TRIPS ERA (2010) and Peter Ganea & JIN Haijun, *China*, in INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS 17 (Goldstein & Straus eds., 2009).

225. Ganea, *supra* note 224, at 34.

significant role in China than in Western countries.<sup>226</sup> Furthermore, in the mid-twentieth century, political leader Mao Zedong led a communist revolution.<sup>227</sup> Communism, by definition, rejects personal property rights, rendering any existing IP laws meaningless.<sup>228</sup>

After Mao's death in 1976, Deng Xiaoping assumed leadership of the country and performed an overhaul of China's IP system, instituting a number of basic IP laws.<sup>229</sup> In 1980, China became a member of World Intellectual Property Organization (WIPO),<sup>230</sup> signaling its gradual inclusion in several international agreements.<sup>231</sup> China joined the WTO in 2001, which required bringing all of its domestic laws into full compliance with WTO agreements, including TRIPS standards.<sup>232</sup>

Throughout this evolution, China was embroiled in a thorny conflict with the U.S. over the sufficiency of China's IP protection and enforcement.<sup>233</sup> From this conflict came three bilateral agreements on IP issues. The first, the 1979 Agreement on Trade Relations, provided that the parties would provide reciprocal recognition and protection of IP rights.<sup>234</sup> However, in 1992, and again in 1995, the countries found themselves at the cusp of a trade war over IP rights.<sup>235</sup> As a resolution, they established two memorandums of understanding (MOUs), one in each year.<sup>236</sup> Pursuant to these MOUs, China enhanced its protection schemes<sup>237</sup> and committed to joining several international IP

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226. *See id.* at 36.

227. *Mao Zedong*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/363395/Mao-Zedong> (last visited Apr. 1, 2013).

228. *See Communism*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/129104/communism> (last visited Apr. 1, 2013).

229. Ganea, *supra* note 224, at 18.

230. *Contracting Parties: China*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=1&country\\_id=38C](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=1&country_id=38C) (last visited May 13, 2013) (demonstrating China's accession on Mar. 3, 1980).

231. *E.g.*, The Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1583, 828 U.N.T.S. 305, in 1985; The Madrid Agreement for the Repression of False or Misleading Indications of the Source of Goods, 828 U.N.T.S. 163, Paris Convention in 1985, in 1989.

232. Report, *Working Party on the Accession of China*, WT/ACC/CHN/49 (Oct. 1, 2001).

233. Peter K. Yu, *The US-China Dispute Over TRIPS Enforcement*, in *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION*, *supra* note 8, at 239; *see also* ENDESHAW, *supra* note 224, at 43.

234. Agreement on Trade Relations, U.S.-China, July 7, 1979, 31 U.S.T. 4651.

235. Ganea, *supra* note 224, at 34.

236. *Id.*

237. Memorandum of Understanding on the Protection of Intellectual Property, U.S.-China, art. 6, Jan. 17, 1992, T.I.A.S. 12036.

conventions.<sup>238</sup>

Trade remains a critical aspect of the relationship between the U.S. and China. Since the 1992 MOU, Sino-American trade has increased from \$33 billion to over \$503 billion.<sup>239</sup> Currently, China is the U.S.'s fourth-largest trade partner, and the U.S. is China's second largest.<sup>240</sup> At the 2012 East Asia Summit, President Barack Obama and Chinese Premier Wen Jiabao discussed bilateral relations, acknowledging that the Sino-American relationship is crucial.<sup>241</sup> The two agreed that the best strategy going forward was one of mutual respect and benefit, with an emphasis on bilateral mechanisms.<sup>242</sup>

### B. *Modern Chinese Law Provides Multi-Layered Protection for GIs*

China now enforces GIs through a combination of legal systems. Chinese GI protection falls primarily under two bodies of Chinese law: (1) Trademark Law and (2) Provisions for the Protection of Products of Geographical Indication. The first is reminiscent of U.S. trademark law, while the second more closely resembles European GI-specific legislation.<sup>243</sup> However, the two have overlapping functions and protections, which can lead to conflict.<sup>244</sup> Furthermore, China's Unfair Competition, Product Quality, and Consumer Protection laws offer some additional protection.<sup>245</sup> Because China's system provides many avenues of GI protection, and because it is often unclear which avenue to pursue, the system can be confusing and complicated.<sup>246</sup>

Chinese trademark-based GI protection bears many similarities to its U.S. counterpart.<sup>247</sup> For example, Article 16 of China's Trademark Law defines GIs as indications of the "origin of the goods, the special qualities, credibility or other characteristics of the goods . . . necessarily determined by the natural factors or other humanistic factors of the place

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238. *Id.* art. 3.

239. *U.S. Relations With China*, U.S. DEPARTMENT ST., <http://www.state.gov/r/pa/ei/bgn/18902.htm> (last visited Apr. 1, 2013).

240. *Id.*

241. Anne Tang, *Chinese Premier Meets Obama on Ties*, GOV.CN (Nov. 20, 2012), [http://english.gov.cn/2012-11/20/content\\_2271261.htm](http://english.gov.cn/2012-11/20/content_2271261.htm).

242. *Id.*

243. *Compare* Trademark Law, *supra* note 41, with Provisions for Protection of GIs, *supra* note 41.

244. *See* Bashaw, *supra* note 42, at 86.

245. *Id.* at 85.

246. *See id.* at 86 (arguing that China should simplify its GI regime).

247. *Compare* Trademark Law, *supra* note 41, with 27 C.F.R. § 4.25 (2006).



indicated.”<sup>248</sup> This definition mirrors U.S. appellations of origin.<sup>249</sup> Article 16 also prohibits GI registration where an indicated region is not the product’s true origin.<sup>250</sup> The prohibition aims to properly inform the public,<sup>251</sup> sharing its purpose with the U.S.’s “false or misleading” standard.<sup>252</sup> Furthermore, the Chinese system permits otherwise false GI registration where the registration is obtained in goodwill<sup>253</sup>—a leniency reminiscent of U.S. treatment of semi-generic names.<sup>254</sup> Finally, those applying for Chinese protection are typically governmental or agricultural associations,<sup>255</sup> much like the associations that apply for AVA registration.<sup>256</sup>

China further provides GI protection under its GI-specific legislation, the Provisions for the Protection of Products of Geographical Indications.<sup>257</sup> These regulations aim to effectively protect GIs, regulate their use, and preserve product quality and characteristics.<sup>258</sup> The legislation defines GIs much like the Trademark Law, emphasizing that indications denote a region, as well as its materials and techniques.<sup>259</sup> As with the Trademark Law, those seeking protection must file an application,<sup>260</sup> though the GI-specific application process mandates greater government involvement.<sup>261</sup> Eligible applicants are limited to governmentally-designated organizations,<sup>262</sup> though the provisions specifically permit foreign applicants as well.<sup>263</sup>

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248. Trademark Law, *supra* note 41, art. 16.

249. *See* 27 C.F.R. § 4.25 (using the term appellation of origin, rather than GI); *see also* O’CONNOR, *supra* note 17, at 25 (noting that appellations of origin require linking characteristics, not merely a region).

250. Trademark Law, *supra* note 41, art. 16.

251. *Id.*

252. *See* Lanham Act, 15 U.S.C. § 1125(a)(1) (2006).

253. Trademark Law, *supra* note 41, art. 16.

254. *See* 27 C.F.R. § 4.25(b).

255. Bashaw, *supra* note 42, at 80.

256. *E.g.*, Napa Valley Vintners. *See supra* discussion in Introduction.

257. Provisions for Protection of GIs, *supra* note 41.

258. *Id.* art. 1.

259. *Id.* art. 2.

260. *Compare* Provisions for Protection of GIs, *supra* note 41, art. 8, *with* Trademark Law, *supra* note 41, art. 19.

261. *See* Provisions for Protection of GIs, *supra* note 41, arts. 9–12 (requiring involvement of government entities); *cf.* Trademark Law, *supra* note 41, arts. 20–26 (noting requirements for applicant, but not mentioning government entity involvement).

262. Provisions for Protection of GIs, *supra* note 41, art. 9.

263. *Id.* at 26.

Though still relatively new, Chinese GI protection is becoming increasingly significant domestically. Since incorporating GIs into its legal framework, China has registered more than 250 indications under its Trademark Law,<sup>264</sup> and more than 700 under its GI legislation.<sup>265</sup> Enforcement agencies have also cracked down on domestic infringements. In 2011, the Chinese government partnered with the French Bordeaux Wine Council (CIVB) to fight wine fraud,<sup>266</sup> and in late 2012, the Shanghai Police Department raided major counterfeiting circles, seizing thousands of fake wines.<sup>267</sup>

Chinese leadership continues to express its commitment to improving China's current GI protection. In late 2004, the State Administration for Industry and Commerce (SAIC) and the Ministry of Agriculture began a campaign to promote GI use and understanding among farmers and rural businesses.<sup>268</sup> According to Li Dongsheng, SAIC Vice Minister, "GIs provide a possibility for peasants engaged in individual production and who lack the funds and capabilities to originate trademarks, to share the brand benefits without setting up a brand, and without mass production."<sup>269</sup> Vice Minister Li also praised GI protection as a way to "'accelerat[e] the new socialist countryside construction' and develop international trade."<sup>270</sup> At a 2007 WTO symposium, Vice Premier Minister Wu Yi indicated that China values GI protection as a means of boosting its economy and adding value to its agricultural products, including wine.<sup>271</sup>

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264. *GI Protection System Established in China*, INTELL. PROP. PROTECTION CHINA (June 29, 2007), [http://www.chinaipr.gov.cn/newsarticle/news/headlines/200706/238052\\_1.html](http://www.chinaipr.gov.cn/newsarticle/news/headlines/200706/238052_1.html).

265. *1200 GI Products to Be Protected in 11th Five Year Plan Period*, INTELL. PROP. PROTECTION CHINA (Sept. 26, 2007), [http://www.chinaipr.gov.cn/newsarticle/news/government/200709/243879\\_1.html](http://www.chinaipr.gov.cn/newsarticle/news/government/200709/243879_1.html).

266. *Bordeaux Trade Body Helps Fight Chinese Wine Fraud*, DITTON WINE TRADERS (Sept. 28, 2011), <http://www.dittonwinetraders.co.uk/fine-wine-news/2011-09/bordeaux-trade-body-helps-fight-chinese-wine-fraud/>.

267. Rupert Millar, *Shanghai Police Crack Wine Counterfeiting Ring*, DRINKS BUS. (Aug. 24, 2012), <http://www.thedrinksbusiness.com/2012/08/shanghai-police-crack-wine-counterfeiting-ring/>.

268. *Tasting Success in China*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipo\\_magazine/en/2007/04/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2007/04/article_0003.html) (last visited Apr. 1, 2013).

269. *Id.*

270. *Id.* (internal quotation marks omitted).

271. *GIs: From Darjeeling to Doha*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipo\\_magazine/en/2007/04/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2007/04/article_0003.html) (last visited Apr. 1, 2013).

#### IV. CHINESE LAW INSUFFICIENTLY PROTECTS AMERICAN GIS

Despite presenting many potential avenues of protection, Chinese domestic laws expose U.S. wine GIs to fraudulent use and dilution. China's intricate legal scheme complicates GI preservation and causes confusion. In addition, the nature of trademark law—one of China's major avenues of protection—leaves many GIs vulnerable because it targets individual producers rather than whole regions. Thus, in practice, Chinese law insufficiently protects U.S. wine GIs.

##### A. *China's Complex Protection Schemes Cause Complications and Confusion*

China's complex, multi-layered system protects GIs under a combination of its trademark law, its GI-specific legislation, and various other statutes.<sup>272</sup> While in some ways this provides added protection for GIs, it also creates significant uncertainty as to what is registered and where. When attempting to register a GI, applicants may be uncertain about which system to use. Chinese producers may also overlook a GI that is registered in one system rather than the other, and how the two systems interact is unclear.<sup>273</sup> China's system is an attempt at comprehensive protection, but in practice, GI protection remains insufficient.

The U.S. system is admittedly complicated as well.<sup>274</sup> As outlined above in Section II, GIs fall primarily under trademark law,<sup>275</sup> but labels must also comply with the Federal Alcohol Administration Act<sup>276</sup> and various agency regulations.<sup>277</sup> Additionally, wine GIs must obtain appellation of origin status.<sup>278</sup> The BATF regulations create further confusion, categorizing geographic terms based on whether they are generic.<sup>279</sup> Often, these determinations seem arbitrary or confusing. While the U.S. system would not be impossible for a wine maker to navigate, it carries with it many of the same issues as China's multi-

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272. *See supra* Section III.B on Chinese protection of GIs.

273. *See* Bashaw, *supra* note 42, at 88.

274. One could argue that these complications necessitate domestic reform as well. While this may be true, it is outside of the scope of this Comment.

275. Lanham Act, 25 U.S.C. § 1125 (2006).

276. 27 U.S.C. § 8 (2006).

277. *E.g.*, 27 C.F.R. §§ 4, 9, 13 (2006).

278. *Id.* § 4.25.

279. *Id.* § 4.24.

layered system. These legal schemes create significant hurdles for GI applicants and provide GIs insufficient protection.

*B. The Nature of Trademark-Style Protection Creates Hurdles for International Wine GI Registration*

One of China's two primary schemes of GI protection is its national Trademark Law. Trademark-style registration, by its very nature, creates difficulties in protecting GIs.<sup>280</sup> Though trademarks and GIs share many characteristics, leading to their regulation under the same bodies of law,<sup>281</sup> there is an important difference. Trademarks belong to a particular producer;<sup>282</sup> GIs, despite lending great benefit to producers, belong to no particular person.<sup>283</sup> Instead, GIs belong to a region,<sup>284</sup> conferring a shared interest on producers, consumers, and the country in which the GI is located. This presents registration hurdles for GIs under the Chinese trademark system—hurdles that the U.S. system shares.

The inherent practicalities of obtaining regional protection are complicated and prevent registration for many GIs. Many questions arise: Who can register the GI? Who must pay for the costs incurred? Who receives benefits going forward? While some winemakers are sophisticated or wealthy enough to acquire international trademarks, other regions may not have the resources or organization to pursue protection in other countries. Many GIs are thus left unprotected internationally.

Even if these hurdles are not prohibitive, they can cause delays.<sup>285</sup> A prime example is the Napa Valley Vintners' recent struggle to obtain GI status in China. Though the group finally succeeded, the process took fourteen years, and Napa is still the only non-domestic wine GI that

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280. The TRIPS Agreement itself places GI protection under trademark in Article 22, instructing member countries to "refuse or invalidate the registration of a trademark" with a misleading or false GI. TRIPS *supra* note 30, art. 22. This may also be flawed, but the correctness of the TRIPS Agreement is outside the scope of this Comment.

281. See *WTO's Agricultural Negotiations*, *supra* note 70 (statement of Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the U.S. Patent and Trademark Office); see also *supra* Sections II.B, C on American protection of GIs.

282. See *What Is a Trademark or Service Mark?*, U.S. PTO, <http://www.uspto.gov/trademarks/index.jsp> (last visited Mar. 31, 2013).

283. See *About Geographical Indications*, *supra* note 17.

284. *Id.*

285. This is also a problem that could apply to the domestic system, an issue that is outside the scope of this Comment. However, I will point out that domestic systems are easier for protection seekers to navigate and only require them to make one application (rather than potentially dozens in the international market).

China recognizes.<sup>286</sup> A major goal of GI protection is preventing GIs from devolving into generic terms that no longer warrant protection. The delay caused by a trademark-style registration increases the likelihood that a term will become generic.

Despite sharing characteristics and purposes with other forms of IP, GIs are unique in that they effectively belong to a region, rather than a producer. This central feature of GIs creates different protection needs. By recognizing GIs under its trademark-style registration system,<sup>287</sup> the Chinese legal system leaves many GIs without international protection.

#### V. A BILATERAL WINE REGISTRY WOULD PROTECT BOTH U.S. AND CHINESE GIS AND ADHERES TO INTERNATIONAL PRINCIPLES

To fill the gaps left by domestic legislation, the U.S. and China should establish their own TRIPS-plus agreement: a bilateral registration system for wine GIs. This registry would essentially be a treaty between the two countries, establishing reciprocal recognition and protection. This would correct current flaws in bilateral protection. In addition, by reflecting shared attitudes toward GI protection and providing mutual benefits, the registry would prevent future disputes. Finally, this solution would promote the aims of the TRIPS Agreement and potentially serve as a model for GI protection among other nations.

##### A. *A Bilateral Wine Registry Would Correct Flaws in Current Sino-American GI Protection*

A bilateral wine registry would effectively protect international GIs and fill the gaps left by the domestic legal schemes. The registry would include each country's existing GIs, and going forward automatically enter domestically registered GIs. Furthermore, it would house all wine GIs from each country, concentrating them in a central location.

This solution would address the problems created by the current Chinese systems—problems that, to some extent, the U.S. system shares. First, registration would prevent international GI dilution because it would operate automatically. As soon as a GI was domestically registered, it too would be registered in the other country, not leaving GIs vulnerable to becoming generic. Second, through the treaty, heads of state would achieve international GI protection for domestic regions.

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286. See Romano, *supra* note 15.

287. Trademark Law, *supra* note 41, art. 16.

This would eliminate many of the questions that come with a trademark-style registration system and would protect regions that lack resources or organization. Finally, it would provide a single database identifying international GIs, resolving complexity issues.

TRIPS-plus measures are an effective—and sometimes necessary—method of achieving comprehensive protection. For example, the EU successfully uses extra-TRIPS tools to boost its international GI protection.<sup>288</sup> The EU's bilateral treaties function much like this registry would, addressing specific concerns between two countries and establishing additional protection that the TRIPS Agreement does not provide.<sup>289</sup> First, these treaties allow the EU to more specifically identify violations—such as the use of the term “Champagne”<sup>290</sup>—thus ensuring protection for them. In addition, the agreements allow the EU to gain GI protection at varying levels based on practical considerations.<sup>291</sup> Where it was not feasible to make a broad international change,<sup>292</sup> the EU's bilateral treaties established some protection in prominent member nations.<sup>293</sup> Through bilateral action, the EU reduced improper use of its wine GIs around the world.<sup>294</sup>

A Sino-American wine registry would be similarly effective. Though Chinese law textually conforms to TRIPS requirements,<sup>295</sup> in effect it does not adequately protect international GIs. The registry would enumerate specific protected GIs and clearly establish their protected status.

Furthermore, this bilateral measure would allow the U.S. and China to negotiate mutually agreeable terms, ones that might be impossible to

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288. See *supra* Section I.C and discussion on EU TRIPS-plus methods (noting agreements between the EU and Canada, South Africa, and Australia).

289. *Id.*

290. See, e.g., Agreement Between the EC and the U.S., *supra* note 141, Annex II; Agreement Between the EC and Australia, *supra* note 52, art. 13.

291. For example, under its bilateral agreement with Australia, the EU achieved full protection for its GIs, while it was unable to reach complete protection in U.S. for the reasons discussed *supra* Section I.C.

292. The multilateral registry illustrates this point—it is difficult to reach an international agreement, resulting in a decades-long negotiation stall.

293. E.g., Agreement Between the EC and Australia, *supra* note 52; Agreement Between the EC and Canada, *supra* note 52; Agreement Between the EC and South Africa, *supra* note 52.

294. See, e.g., Agreement Between Australia and the EC, *supra* note 52 (forbidding all use of European GIs on Australian products); see also *supra* Section I.C on international protection.

295. The TRIPS language provides that “[e]ach Member shall provide the legal means for interested parties to prevent [fraudulent] use of a geographical indication . . . .” TRIPS, *supra* note 30, art. 23.1.

achieve worldwide.<sup>296</sup> The registry may not be a complete solution due to issues of enforcement and domestic registration. However, it would be a significant and appropriate step toward creating a legal system that provides comprehensive international protection.

*B. A Bilateral Wine Registry Would Prevent Disputes*

Several principles govern international law, chief among which is dispute avoidance.<sup>297</sup> While countries need not disregard their own interests,<sup>298</sup> nations should avoid disputes when possible<sup>299</sup> and peacefully settle them when they arise.<sup>300</sup>

A bilateral wine registry would align with this principle. In the past few decades, the U.S. and China have encountered continued disputes over IP protection, as their repeated negotiations and MOUs reflect. The bilateral registry proposed here would help ease future disputes because of two practical aspects: First, the U.S. and China share many ideas about GI protection, and second, a bilateral wine registry would provide them mutual benefits.

*1. The U.S. and China Share Many Attitudes on GI Protection, and a Bilateral Wine Registry Reflecting Those Attitudes Would Reduce Disputes*

Though Sino-American IP relations have been rocky in the past,<sup>301</sup> the two countries are becoming increasingly similar in their attitude towards GI protection. Their common approach toward both domestic GI protection and the TRIPS multilateral registry reflect this convergence of attitudes. The two define GIs similarly, both demonstrate a shared leniency and reasonability, and each supports a notification system. Thus, a registry reflecting these shared attitudes would help avoid further disputes over protection.

The U.S. and China provide protection to GIs with similar parameters. Under the U.S. system of appellations of origin, protected

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296. As discussed *supra*, achieving mutually agreeable terms with the EU would likely be the largest hurdle.

297. *See, e.g.*, U.N. Charter, Chapter VI; Manila Declaration on the Peaceful Settlement of Disputes Between States, G.A. Res. 37/10 (Nov. 15, 1982).

298. Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 27 (2010).

299. Manila Declaration art. I, para. 1.

300. U.N Charter, art. 1, para. 1.

301. *See supra* Part III.A briefly discussing the U.S.-China conflict.

terms must indicate not simply a geographic origin, but also characteristics associated with that region.<sup>302</sup> This resembles the Chinese definition of GIs: indications of the “origin of the goods, the special qualities, credibility or other characteristics of the goods . . . necessarily determined by the natural factors or other humanistic factors of the place indicated.”<sup>303</sup> These definitions speak to the countries’ shared desire to avoid customer confusion by preserving truth in labeling. In addition, they mirror the TRIPS definition of a GI.<sup>304</sup> The Sino-American wine registry should thus protect only appellation of origin-style indications, requiring both a region and its characteristics.

Both countries demonstrate a tendency toward leniency and reasonability in their GI protection. Their respective domestic laws illustrate these shared attitudes. Under U.S. law for example, winemakers may use otherwise false semi-generic terms under certain conditions. First, BATF regulations permit such use where additional information prevents consumer confusion.<sup>305</sup> Second, in its 2006 agreement with the EU, the U.S. negotiated the use of certain semi-generic terms under a grandfather clause.<sup>306</sup> Chinese law similarly provides for an exception to GI protection where a registrant previously obtained an otherwise misleading mark in good faith.<sup>307</sup>

The Chinese and U.S. approaches toward the TRIPS multilateral registry also suggest a shared level of leniency and reasonability. Both proposals incorporated a voluntary participation provision,<sup>308</sup> demonstrating a forgiving approach to the multilateral registration.<sup>309</sup> However, the joint proposal encourages participation,<sup>310</sup> and the Chinese

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302. See 27 C.F.R. § 4.25 (2006) (using the term appellation of origin, rather than GI); see also O’CONNOR, *supra* note 17, at 25 (noting that appellations of origin require linking characteristics, not merely a region).

303. Trademark Law, *supra* note 41, art. 16. The language in Provisions for Protection of GIs, *supra* note 41, art. 2 also mirrors this definition.

304. Geographical indications under TRIPS are “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” TRIPS, *supra* note 30, art. 22.1.

305. 27 C.F.R. § 4.24(b).

306. Agreement between the EC and the U.S., *supra* note 141, art. 6.

307. Trademark Law, *supra* note 41, art. 16.

308. Joint Proposal, *supra* note 118, art. A.1; China Proposal, *supra* note 117, art. E.

309. See EU Proposal, *supra* note 116, art. 3.2. Though Article 1 describes the registry as “voluntary,” Article 3.2 essentially requires participation by giving members a narrow window in which to make objections or else be automatically obligated to protect a GI.

310. Joint Proposal, *supra* note 118, art. D.2.



system included a rebuttable presumption of GI validity.<sup>311</sup> These provisions suggest that the countries are amenable to a registration system that allows for appropriate leniency. The Sino-American wine registry should accordingly allow for good cause exceptions.

Finally, each of the countries proposed a method of notification in its multilateral proposal, which would serve to alert other countries that a GI has been registered.<sup>312</sup> In the context of the TRIPS registry, notification functioned as multilateral notice that a GI received official TRIPS protection. Notification included various details, such as the region a GI identifies and its characteristics.<sup>313</sup> The Sino-American registry should apply this concept, requiring a country to alert the other when it domestically registers a GI.

In both their domestic legislation and their multilateral registry proposals, the U.S. and China demonstrate several common ideas about GI protection. A registry that incorporates these shared ideas would allow for mutually agreeable and reciprocal GI recognition, thus promoting dispute avoidance.

2. *This Registry Would Mutually Benefit the U.S. and China, Reducing the Likelihood of Future Conflicts*

A bilateral wine registry reflecting shared attitudes would benefit both countries and, accordingly, reduce future disputes. First, this registry creates individual benefits for each country. For the U.S., a bilateral wine registry would be an effective tool against one element of Chinese counterfeiting, helping the U.S. move toward comprehensive IP protection in the Far East. The registry would also prevent future American wineries from encountering a Napa-like struggle for protection; though the Vintners Association eventually achieved Chinese recognition for the Napa name, it took extensive time and effort.<sup>314</sup> For China, the registry would demonstrate good faith and attract more foreign investment and trade. As a result, it would promote international business and incentivize domestic innovation. By protecting its domestic producers, China also would promote economic development at home.

A bilateral wine registry also would create benefits applicable to both countries. GI protection benefits whole nations by preserving and

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311. China Proposal, *supra* note 117, art. III(4)(iv).

312. Joint Proposal, *supra* note 118, art. B.1; China Proposal, *supra* note 117, Annex A, art. A(2).

313. Joint Proposal, *supra* note 118, art. B.2(b); China Proposal, *supra* note 117, Annex A, art. A(2)(a).

314. *See* discussion *supra* Introduction.

promoting their regional reputations. Each country has a wine industry striving to compete in an international market. Though the U.S.'s industry is more established, China's wine industry is on the rise and both must compete with internationally renowned European wines. Furthermore, bilateral trade is crucial to both countries, but IP disputes have historically plagued Sino-American relations. A mutually beneficial solution such as this registry creates further shared benefits by ameliorating trade relations and reducing future disputes.

Despite its many benefits, this solution would encounter hurdles. For example, spotty enforcement and rampant counterfeiting are major, inescapable problems. Numerous local Chinese economies rely heavily on counterfeit goods and pose a serious barrier to enforcement.<sup>315</sup> However, China continues to publicly indicate its commitment to greater IP protection, including GIs. China's multilateral registry proposal, its cooperation with the French Bordeaux Council, and its continued enforcement crackdowns all reflect this commitment. A Sino-American registry would allow China to provide greater international IP protection, and due to the automatic registration of GIs, does not further complicate enforcement.

Furthermore, convincing another sovereign to institute policy can be difficult, and China is an increasingly powerful member of the international community.<sup>316</sup> However, this proposal would be a constructive approach that would mitigate such difficulty. In the past, China faced external condemnation from other nations stressing its failure to meet international obligations.<sup>317</sup> While that method produced some results, it also caused strife.<sup>318</sup> As a result, some scholars argue that the more workable approach is to acknowledge that Chinese IP protection will foster domestic production and foreign investment.<sup>319</sup> The bilateral wine registry recognizes flaws that the U.S. system shares and avoids condemning China, while instead encouraging Chinese domestic innovation and international trade. This solution is thus a workable first step to comprehensive Sino-American IP protection.

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315. Leroy J. Pelicci Jr., *China and the Anti-Counterfeiting Trade Agreement—ACTA Faith, or ACT Futility?: An Exposition of Intellectual Property Enforcement in the Age of Shanzhai*, 1 PENN. ST. J.L. & INT'L AFF. 121, 149 (2012).

316. See, e.g., Martin Fackler, *China Is Seen Nearing U.S.'s Military Power In Region*, N.Y. TIMES (May 1, 2013), [http://www.nytimes.com/2013/05/02/world/asia/china-likely-to-challenge-us-supremacy-in-east-asia-report-says.html?\\_r=0](http://www.nytimes.com/2013/05/02/world/asia/china-likely-to-challenge-us-supremacy-in-east-asia-report-says.html?_r=0).

317. See *supra* Section III.A.

318. See *supra* Section III.A.

319. See, e.g., Ganea, *supra* note 224, at 52.

C. *A Sino-American Wine Registry Would Promote the Goals of the TRIPS Agreement and Serve As a Model for Future GI Protection*

A bilateral wine registry would further the TRIPS Agreement's objectives. The TRIPS Agreement exists to provide multilateral IP protection, aiming to protect producers and consumers and prevent GI dilution. The Agreement devotes three articles specifically to GIs.<sup>320</sup> In line with wine's greater reliance on regional reputation, the TRIPS Agreement elevates wine and spirits above other products, providing them greater GI protection under Article 23.<sup>321</sup> TRIPS Article 24 specifically directs member nations to be open to negotiations for GI protection.<sup>322</sup> This registry creates effective wine GI protection between two of its member states, reflecting compliance with Article 23 and promoting the intent of Article 24.

A Sino-American registry also could guide future international GI protection, including the currently stalled multilateral registry. While a workable multilateral registry would be ideal worldwide, the conflict over its application prevents it from becoming a reality in the near future. The U.S. and China are influential members of the WTO and major world powers.<sup>323</sup> By taking the initiative and forming this alliance, their actions would reduce international friction and can serve as an example to other countries. Nineteen other countries joined the U.S.'s multilateral registry proposal,<sup>324</sup> meaning that the bilateral registry reflects attitudes shared not only by the U.S. and China, but many more nations as well. As a result, the bilateral registry proposed here could both provide immediate GI protection between the U.S. and China and additionally jumpstart the stagnant Doha negotiations. At the very least, the bilateral wine registry can serve as guidance for future bilateral and multilateral GI protection.

## CONCLUSION

By representing a product's origin and characteristics, GIs benefit several parties. First, they protect consumers from deceit and confusion. They also reward and protect producers that have worked to build a

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320. TRIPS, *supra* note 30, arts. 22–24.

321. *Id.* art. 23.

322. *Id.* art. 24.1.

323. *See Who's Bigger?*, ECONOMIST (June 14, 2012), <http://www.economist.com/blogs/graphicdetail/2012/06/daily-chart-8> (discussing America and China as major world powers).

324. *See* Joint Proposal, *supra* note 118.

reputation. Finally, and perhaps most importantly, they prevent regional brands from dilution and degeneration into generic terms.

Chinese misappropriation of U.S. wine GIs negatively affects U.S. producers, international consumers, and the regions those GIs represent and brand. Regional brands are especially crucial in the wine industry, where reputation derives not only from a producer, but from a geographic origin. The U.S. wine industry, a growing domestic and international force, relies on GI protection, both at home and worldwide.

The TRIPS Agreement offers some international protection; however, it requires domestic implementation. As a result, differences in domestic legal cultures can leave GI protection inconsistent and spotty. Extra-TRIPS measures act as a supplement, establishing bilateral protections that extend beyond TRIPS provisions.

Current Chinese law ineffectively protects U.S. wine GIs. China's protection scheme is complicated enough to confuse applicants and perhaps even conceal protected GIs. Furthermore, it employs a trademark-style registration method that does not address the unique aspect of GIs in the IP world. To an extent, the U.S. system shares these flaws. Thus, international wine GIs are effectively left without sufficient protection.

In light of China's increasing trend toward stronger IP protection and the U.S.'s desire to protect its products and consumers, a bilateral wine registry would be an effective solution. As a practical TRIPS-plus measure, a registry would fill gaps existing in domestic legislation. The registry would reflect shared attitudes toward GI protection and provide mutual benefits to the U.S. and China in discouraging disputes. Finally, a bilateral wine registry would further the TRIPS Agreement's goals and possibly serve as a model for future GI protection.