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SOUR GRAPES: THE COMPRIMISING EFFECT OF THE UNITED STATES’ FAILURE TO PROTECT FOREIGN GEOGRAPHIC INDICATIONS OF WINES

Mark Silva*

Abstract: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is the first significant multilateral agreement to expressly provide global protection to geographic indications (GIs) of wine. Although the United States is a party to this agreement, this Note argues that it has failed to bring domestic legislation in conformity with the mandates of the TRIPS Agreement regarding wine. While this has benefited many domestic vintners at the expense of their foreign counterparts, this Note also argues that the same failure may ultimately result in the exploitation of U.S. vintners as well. This point is illustrated by the current situation faced by the Napa Valley Vintners Association. Hongye Grape Wine Co., a winery in Beijing, has applied to register the GI “Napa Valley” as a trademark for use on wines that will be made from Chinese grapes and sold in China. Given the United States’ unwillingness to protect foreign GIs domestically, however, this Note concludes that in circumstances such as this, the United States cannot expect other countries to protect domestic GIs abroad.

Introduction

Many products consumers purchase each day identify themselves by referring to the geographic locations from where they originate.¹ Products that typically incorporate geographic phraseology into their names include such things as cheeses, wines, and even potatoes.² This

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popular practice, known as identifying products by using geographic indications (GIs), is an extremely valuable marketing tool in the present global economy.\(^3\) It allows products to be identified with the quality and reputation of a particular geographic region.\(^4\) Because of the latent value associated with this, countries throughout the world are attempting to negotiate trade agreements that ensure when a GI is used to identify a product, it accurately represents that product’s true place of origin.\(^5\)

So far, the most significant of these agreements has been the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which provides protection for GIs generally and protection for GIs of wine in particular.\(^6\)

While the United States is a party to the TRIPS Agreement, it has not brought U.S. domestic law into conformity with its obligations under the TRIPS Agreement, especially with regards to the protection of GIs of wines.\(^7\) The European Union (EU), which was the driving force behind the TRIPS provisions governing GIs, has been stern in its criticism of the United States for its failure to abide by the TRIPS Agreement.\(^8\) The EU’s collective discontent merely echoes that of European vintners who have long complained about the use of European GIs such as Champagne and Chablis on U.S. wines.\(^9\)

Ironically, however, some U.S. vintners have recently found themselves in the shoes of their EU counterparts.\(^10\) A winery in Beijing,
Hongye Grape Wine Co. (HGW), has applied to register the term “Napa Valley” as a trademark for use on wines that will be made from Chinese Grapes and sold in China.\textsuperscript{11} In response, the Napa Valley Vintners Association (NVVA) has filed actions in Chinese court to prevent this registration.\textsuperscript{12}

This Note discusses whether the United States can protect the GIs of domestic vintners like the NVVA, given its current position with respect to the TRIPS Agreement and ongoing resistance to EU pressure for greater protection for GIs. Part II provides background on the development of GIs and their incorporation into the TRIPS Agreement. Part III examines the relevant TRIPS GI provisions and U.S. GI legislation, analyzing the legislation’s shortcomings with respect to the United States’ obligations under the TRIPS Agreement. This Note then briefly discusses the current situation faced by the NVVA as a result of HGW’s attempted registration of “Napa Valley” as a trademark. Finally, Part IV concludes that the United States needs to change its current position on the TRIPS Agreement if it is to be able to maintain a tenable position in protecting GIs that domestic vintners use in foreign markets.

I. Background

GIs have long been recognized as an effective method by which to identify goods that possess some unique qualities because of environmental factors, processing methods, or manufacturing skills specific to the region from where they originate.\textsuperscript{13} Wine is a quintessential example of a product that relies on a GI because, as it is well known, different environments produce different wine grapes and, thus, wines of different characteristics.\textsuperscript{14}

As particular regions, and their GIs, became associated with desirable products, competitors sought to exploit this recognition by marketing their products under the famed GIs.\textsuperscript{15} Consequently, in an effort to protect both consumers and legitimate producers from this type of false advertising, regulation of GIs emerged.\textsuperscript{16}

Because GIs are understood by consumers to denote the origin and quality of products, laws prohibiting the use of false GIs are intended to protect consumers from being misled into believing that

\textsuperscript{11} See Didier’s, \textit{supra} note 10; Emert, \textit{supra} note 9.
\textsuperscript{12} See Didier’s, \textit{supra} note 10; Emert, \textit{supra} note 9.
\textsuperscript{13} See Lindquist, \textit{supra} note 1, at 312; Rangnekar, \textit{supra} note 2, at 1.
\textsuperscript{14} See Maher, \textit{supra} note 5, at 1884.
\textsuperscript{15} See id. at 1884.
\textsuperscript{16} See id. at 1885–86; Rangnekar, \textit{supra} note 2, at 13, 14.
what they are buying is a genuine product with specific qualities, when in fact they are getting a mere imitation.\textsuperscript{17} Thus, the guarantees of origin provide consumers assurances against deception and confusion.\textsuperscript{18}

The producer-protection element has its basis in unfair competition.\textsuperscript{19} Since the price these products command can depend a great deal on where they originated, protection of GIs prevents imitators from free-riding on the reputation of genuine products.\textsuperscript{20} By assuring producers of their products’ unique identity, GIs can be used by producers as a way to market their products, limit the areas of production, and provide monopolistic protection to the regional notoriety.\textsuperscript{21}

Countries began protecting GIs as early as the 18th century, when trade began to expand and the value of GIs became apparent.\textsuperscript{22} Although some international agreements were consummated on the matter, on the whole, GIs received little international protection prior to the TRIPS Agreement.\textsuperscript{23} Moreover, none of the agreements specifically dealt with wine or spirits.\textsuperscript{24} The TRIPS Agreement is the first attempt at offering global protection for GIs both generally and for wine in particular.\textsuperscript{25}

The protection of GIs for wines was a very controversial issue during the negotiation of the TRIPS Agreement.\textsuperscript{26} The EU fought hard for this protection, pitting it against many of the other major wine producing countries in the World Trade Organization (WTO), including the United States.\textsuperscript{27} In the end, the EU’s persistence resulted in a provision which required WTO members to develop laws to prevent the use of GIs on wines that do not originate from the geographical area indicated.\textsuperscript{28} Debate still lingers, however, over how

\begin{thebibliography}{99}
\bibitem{17} See Maher, \textit{supra} note 5, at 1885–86; Rangnekar, \textit{supra} note 2, at 13, 14.
\bibitem{18} See Maher, \textit{supra} note 5, at 1885–86.
\bibitem{19} Rangnekar, \textit{supra} note 3, at 14.
\bibitem{20} Id.; see Maher, \textit{supra} note 5, at 1885–86.
\bibitem{21} See Maher, \textit{supra} note 5, at 1885–86; Rangnekar, \textit{supra} note 2, at 14.
\bibitem{23} Lindquist, \textit{supra} note 1, at 314–15.
\bibitem{24} Id. at 314
\bibitem{26} See id. at 166; Lindquist, \textit{supra} note 1, at 310, 315–16.
\bibitem{27} See Demaret, \textit{supra} note 25, at 166; Lindquist, \textit{supra} note 1, at 310, 315–316.
\bibitem{28} See TRIPS Agreement, \textit{supra} note 6, at arts. 23–24.
\end{thebibliography}
much protection should be given to GIs that have long been used beyond their boundaries.\textsuperscript{29}

The United States and the EU have been at the forefront of this long-standing debate.\textsuperscript{30} Having one of the most diverse portfolios of protected GIs, the EU has continually pushed the United States to comply with the TRIPS provisions on GIs since its passage.\textsuperscript{31} The EU has targeted the United States in particular because U.S. vintners continue to use a significant number of European GIs on wine produced in the United States.\textsuperscript{32} Instead of succumbing to the EU’s pressure, the U.S. Congress passed the Taxpayer Relief Act of 1997, which included provisions that further protected U.S. vintners’ use of European GIs in spite of the mandates of the TRIPS Agreement.\textsuperscript{33} The EU has insisted that the U.S. legislation violates the mandates of the TRIPS Agreement, but the United States has remained steadfast in its position.\textsuperscript{34}

Now, years after shrugging off the concerns of the European vintners and passing legislation that undercuts the TRIPS Agreement, the United States is facing a situation where it is relying on adherence to TRIPS by China, another WTO member, to protect the interests of U.S. vintners.\textsuperscript{35} Because China only recently joined the WTO, it is still in the process of modifying a host of domestic laws in order to conform with WTO requirements.\textsuperscript{36} While China has stated its intention to fully comply with its international obligations, including the TRIPS Agreement, it is nonetheless an open question as to how China will handle HGW’s registration of “Napa Valley” as a trademark.\textsuperscript{37} The result of the NVVA actions in Chinese court will not be known for a while since Chinese courts usually take two years to rule on the validity of a trademark.\textsuperscript{38}

\textsuperscript{29} Lindquist, \textit{supra} note 1, at 310.
\textsuperscript{30} \textit{Id.} at 310, 329.
\textsuperscript{31} See Lindquist, \textit{supra} note 1, at 319; Rangnekar, \textit{supra} note 2, at 11.
\textsuperscript{32} Lindquist, \textit{supra} note 1, at 319–20.
\textsuperscript{33} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; Lindquist, \textit{supra} note 1, at 310, 327.
\textsuperscript{34} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; Lindquist, \textit{supra} note 1, at 329.
\textsuperscript{35} See Didier’s, \textit{supra} note 10; Emert, \textit{supra} note 9.
\textsuperscript{36} \textit{See United States Trade Representative, 2002 Report to Congress on China’s WTO Compliance}, at 34–35 (2002) [hereinafter USTR Report].
\textsuperscript{38} Emert, \textit{supra} note 9.
II. Discussion

A. Geographic Indications and the TRIPS Agreement

The TRIPS Agreement contains three provisions that deal exclusively with GIs. Article 22 of the TRIPS Agreement provides general protection for GIs, Article 23 provides additional protection for GIs for wines and spirits, and Article 24 imposes an obligation on participating countries to further negotiate to increase protections for GIs for wines and spirits. In addition, Article 24 establishes exceptions to the general prohibitions.

1. Article 22—Protection of Geographical Indications

Article 22 defines GIs as “indications which identify a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” The Article requires member countries to provide legal means to prevent the use of any means in the designation or presentation of a good that indicates or suggests a false GI that would mislead the public as to its true geographical origin. In addition, members must refuse or invalidate the registration of a trademark that contains or consists of a GI that would mislead the public as to the true place of origin.

2. Article 23—Additional Protection for Geographic Indications for Wines and Spirits

Article 23 requires member countries to enact laws that prohibit the use of false GIs on wines and spirits, even where the true origin of a good is indicated or the GI is accompanied by expressions such as “kind,” “type,” “style,” or the like. Furthermore, Article 23 allows for the refusal or invalidation of trademarks that contain or consist of GIs identifying wines or spirits when they do not originate in the place indicated. Article 23, however, is significantly different from Article

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39 See TRIPS Agreement, supra note 6, arts. 22–24; Lindquist, supra note 1, at 316.
40 See TRIPS Agreement, supra note 6, arts. 22–24; Lindquist, supra note 1, at 316.
41 See TRIPS Agreement, supra note 6, arts. 22–24; Lindquist, supra note 1, at 316.
42 TRIPS Agreement, supra note 6, art. 23.
43 Id.
44 Id.
45 Id. art. 23.
46 Id. art. 23.
22 because it does not require that the trademark be misleading for the provision to be invoked.\textsuperscript{47} Rather, it is only in the case of homonymous GIs for wines or spirits that misconception in the public eye is considered.\textsuperscript{48} Finally, Article 23 requires negotiations to be undertaken in the Council of TRIPS (Council) to establish a multilateral system of notification and registration.\textsuperscript{49}

3. Article 24—International Negotiations; Exceptions

Article 24 explicitly obligates member countries to enter into negotiations aimed at increasing the protection for GIs for wines and spirits, and, as a precautionary measure prevents member countries from using the exceptions listed in Article 24 as an excuse to avoid further negotiations.\textsuperscript{50} In addition, in order to protect the status quo in countries that provide greater protection for GIs than what is called for under TRIPS, Article 24 prohibits member countries from diminishing protection for GIs that existed prior to the TRIPS Agreement coming into force.\textsuperscript{51}

Article 24 provides several exceptions to the general rules stated in Articles 22 and 23.\textsuperscript{52} First, a member country does not need to prevent the continued use of a GI of another member country identifying wines or spirits if that GI has been used continuously by a national of that country for (a) at least ten years prior to April 15, 1994, or (b) in good faith prior to that date.\textsuperscript{53} Second, in the case of a good faith application or registration of a trademark which incorporates a GI, Article 24 provides that the validity or eligibility will not be prejudiced if the trademark is acquired or registered (a) prior to the date of application of its provisions, or (b) before the GI has been protected in its country of origin.\textsuperscript{54} Finally, in the case where a GI has become a common name for a good, or the GI has become synonymous with the customary name of a grape variety within the country, that member country does not need to protect the GI.\textsuperscript{55}

Article 24 also grants the Council the power to review implementation of these provisions from time to time and allows the Council to

\textsuperscript{47} See TRIPS Agreement, supra note 6, art. 23; Rangnekar, supra note 2, at 4.
\textsuperscript{48} TRIPS Agreement, supra note 6, art. 23; see Rangnekar, supra note 2, at 4.
\textsuperscript{49} TRIPS Agreement, supra note 6, art. 23.
\textsuperscript{50} Id. art. 24.
\textsuperscript{51} Id.
\textsuperscript{52} See id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} TRIPS Agreement, supra note 6, art. 24.
take action (upon agreement) to facilitate and further the objectives of the Article.\textsuperscript{56} Thus, the Council is empowered to actively oversee compliance with these provisions.\textsuperscript{57} This oversight is minimal in practice, however, because the Council meets infrequently and takes only a minor role in resolving disputes.\textsuperscript{58} As a result, member countries are expected to comply with the Article’s provisions and carry out negotiations on their own initiative.\textsuperscript{59}

B. \textit{Protection for GIs Under Current U.S. Legislation}

U.S. legislation, thus far, has fallen woefully short of incorporating the broad-based protections outlined in the TRIPS Agreement.\textsuperscript{60} Although Congress amended U.S. trademark law in 1996 so that it would comply with the TRIPS Agreement, it failed to do the same for existing Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulations dealing with GIs.\textsuperscript{61} In fact, not only did Congress fail to amend the ATF regulations, but it actually codified the portion of the ATF regulations that is in direct conflict with the GI provisions of the TRIPS Agreement.\textsuperscript{62} The present debate between the EU and the United States regarding GIs has its roots in these now codified ATF regulations.\textsuperscript{63}

1. 27 C.F.R. §§ 4.1, 4.24—ATF Regulations on Labeling and Advertising of Wine

The ATF regulates the use of GIs on wines in the United States through its control over labeling and advertising of wines.\textsuperscript{64} The regulations classify GIs as either generic, semi-generic, or non-generic, de-

\textsuperscript{56} See id.
\textsuperscript{57} See id.; Lindquist, \textit{supra} note 1, at 318.
\textsuperscript{58} Lindquist, \textit{supra} note 1, at 318.
\textsuperscript{59} Id.
\textsuperscript{61} See U.S.C. § 1052(a) (2000). Section 1052 provides that a trademark shall be refused if it consists of “a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement enters into force with respect to the United States.” Id.; see 27 C.F.R. § 4.24. The relationship between trademarks and GIs is unsettled and will not be addressed in this Note. See RANGNEKAR, \textit{supra} note 2, at 7.
\textsuperscript{63} Lindquist, \textit{supra} note 1, at 325.
\textsuperscript{64} Id.; see 27 C.F.R. §§ 4.1, 4.24.
pending on the significance of the geographic designation. How a GI is classified is important because the classification determines the level of protection the GI will receive.

Protection afforded to non-generic and generic GIs appear to be consistent with the mandates of the TRIPS Agreement. The ATF’s prohibition on the use of non-generic GIs is consistent with the TRIPS Agreement’s general prohibition of GIs that indicate a location other than a wine’s true origin. In the case of the ATF allowing the use of generic GIs, it is consistent with the TRIPS Agreement because such GIs have become a common name for a type of wine, and thus, they fall within the ambit of exemptions to the general prohibition. The inconsistencies with the TRIPS Agreement only arise with respect to the middle category, what the ATF considers to be semi-generic.

The ATF defines semi-generic GIs as those names that have retained their geographic significance, but at the same time, in a generic sense, describe types of wines. The ATF allows such semi-generic designations to be used to designate wines that do not originate from the location indicated by the GI so long as the actual place of origin appears in conjunction with the GI. The ATF gives sixteen examples of what it considers to be semi-generic GIs. Fifteen of these GIs are European in origin. Included among them are the famous wine-producing regions of Champagne, Chablis, Burgundy, and Chianti. Thus, the ATF allows use of these GIs on American wines made

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66 See id.
67 Compare 27 C.F.R. § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24.
69 Compare 27 C.F.R. § 4.24, with TRIPS Agreement, supra note 6, art. 24. Examples of geographical terms that the ATF considers as being generic GIs are “Vermouth” and “Sake.” See 27 C.F.R. § 4.24.
70 Compare 27 C.F.R. § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24; see Lindquist, supra note 1, at 327.
71 Maher, supra note 5, at 1899; see 27 C.F.R. § 4.24.
73 See id. (listing Angelica, Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauterne, Haut Sauterne, Sherry, and Tokay as semi-generic GIs).
74 See id.
75 See 27 C.F.R. § 4.24; Maher, supra note 5, at 1899.
from American grapes so long as the actual place of origin appears in conjunction with the semi-generic GI.\textsuperscript{76}

2. Codification of ATF Regulations

The U.S. Congress codified the ATF’s regulations regarding semi-generic classification of GIs in the Taxpayer Relief Act of 1997 in response to a strong lobbying effort by the U.S. wine industry.\textsuperscript{77} Like the ATF regulations, 26 U.S.C. § 5388(c) provides that semi-generic GIs may be used to designate wines of an origin other than that indicated by such name if the true place of origin is indicated in direct conjunction with the GI.\textsuperscript{78} Furthermore, Section 5388 lists exactly the same examples of semi-generic GIs as those listed in the ATF regulations.\textsuperscript{79}

III. Analysis

A. Shortcomings in the Current U.S. Legislation

The inconsistencies between the ATF regulations governing semi-generic GIs and the mandates of the TRIPS Agreement governing GIs of wines are glaring.\textsuperscript{80} First, Article 23 compels member countries to enact laws that prevent the use of GIs for wines not originating in the place indicated even where the true origin is indicated in conjunction with the GI.\textsuperscript{81} The framework contemplated by the TRIPS Agreement is fairly black and white.\textsuperscript{82} It divides GIs into two groups: terms that are generic and those that are not.\textsuperscript{83} In light of the purpose of the TRIPS Agreement (to offer increased protection for GIs of wines), it can only be assumed that GIs that retain geographic significance even when they arguably have a generic component fall into the latter grouping, and therefore should be prohibited.\textsuperscript{84} Thus, by allowing semi-generic GIs to be used when they appear in conjunction with the true place of origin, the ATF regulations are completely at odds with the intentions and spirit of the TRIPS Agreement.\textsuperscript{85} Secondly, the

\textsuperscript{76} See 27 C.F.R. § 4.24.
\textsuperscript{77} See 26 U.S.C. § 5388(c); Lindquist, supra note 1, at 327–29
\textsuperscript{78} See 26 U.S.C. § 5388(c).
\textsuperscript{79} See id.
\textsuperscript{80} Compare 27 C.F.R § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24.
\textsuperscript{81} TRIPS Agreement, supra note 6, art. 23.
\textsuperscript{82} See id. arts. 23–24.
\textsuperscript{83} See id.
\textsuperscript{84} See id.
\textsuperscript{85} Compare 27 C.F.R § 4.24, with TRIPS Agreement, supra note 6, arts. 23–24.
ATF regulations do not incorporate any of the grandfather clauses of the TRIPS Agreement which allow the use of GIs only in particular circumstances.\textsuperscript{86} Nor do they have the ten year or good faith requirements.\textsuperscript{87} Thus, instead of allowing the use of protected GIs in limited circumstances, the ATF regulations allow any U.S. vintner to use these semi-generic designations.\textsuperscript{88} The regulations make no distinctions between a vintner who used such a GI for fifty years and one who began using the GI a month ago.\textsuperscript{89}

Because the current ATF regulations were in place well before the TRIPS Agreement, these inconsistencies existed from the time the TRIPS Agreement came into force.\textsuperscript{90} The negotiations contemplated by the TRIPS Agreement along with the regulatory nature of the ATF, however, left open, in theory, the possibility of a relatively quick and easy resolution between the EU and United States to bring the U.S. regulations into compliance with the international obligations of the TRIPS Agreement; the ATF could have simply amended its regulations.\textsuperscript{91}

This is not the case anymore.\textsuperscript{92} By codifying the ATF regulations in 1997, the United States has created a much more pronounced rift between it and the EU.\textsuperscript{93} While this legislation was not a departure from the status quo, it now makes the status quo much more difficult to depart from.\textsuperscript{94} That is, the regulations that once could have been easily changed by the ATF now require Congressional action because they have been codified.\textsuperscript{95} Thus, U.S. compliance with the TRIPS Agreement will be much more difficult to accomplish.\textsuperscript{96}

By passing this legislation in spite of the TRIPS mandate that member countries enter into negotiations that attempt to increase the protection of individual GIs under Article 23, the United States is showing that it is disingenuous about complying with its TRIPS obligations.\textsuperscript{97} As a result, its actions work to discredit any arguments the

\textsuperscript{86} See 27 C.F.R. § 4.24; TRIPS Agreement, \textit{supra} note 6, art. 24.
\textsuperscript{87} See 27 C.F.R. § 4.24; TRIPS Agreement, \textit{supra} note 6, art. 24.
\textsuperscript{88} See 27 C.F.R. § 4.24.
\textsuperscript{89} See \textit{id}.
\textsuperscript{90} See \textit{id}; Maher, \textit{supra} note 5, at 1893–1894.
\textsuperscript{91} See 27 C.F.R. § 4.24; TRIPS Agreement, \textit{supra} note 6, art. 24; Lindquist, \textit{supra} note 1, at 329.
\textsuperscript{92} See 26 U.S.C. § 5388(c); Lindquist, \textit{supra} note 1, at 329.
\textsuperscript{93} See 26 U.S.C. § 5388(c); Lindquist, \textit{supra} note 1, at 327.
\textsuperscript{94} See 26 U.S.C. § 5388(c); Lindquist, \textit{supra} note 1, at 332.
\textsuperscript{95} Lindquist, \textit{supra} note 1, at 332.
\textsuperscript{96} See \textit{id} at 327.
\textsuperscript{97} See 26 U.S.C. § 5388(c); TRIPS Agreement, \textit{supra} note 6, art. 23; Lindquist, \textit{supra} note 1, at 332.
United States may advance claiming that its current laws are in conformity with the objectives of the TRIPS Agreement.\textsuperscript{98} To illustrate this point, take the most likely argument that the United States will make: the semi-generic GIs listed in the current legislation fall into the exception in Article 24 for GIs that have become customary terms for particular goods.\textsuperscript{99} As the ATF regulations and Section 5388(c) acknowledge, however, these GIs are far from being simply generic.\textsuperscript{100} They contain both a generic component in that they have come to identify a type of wine and they contain a non-generic component in that they are terms with geographic significance.\textsuperscript{101} Presented with these two competing aspects of a particular GI, if the United States was intent on upholding the spirit of the TRIPS Agreement, it would not place its thumb on the side of the GIs generic aspect to tip the scale in favor of lowering protection.\textsuperscript{102}

**B. Hongye Grape Wine Co.**

Since Chinese law is undergoing a vast makeover to comply with its WTO obligations, the laws regulating GIs have not yet settled.\textsuperscript{103} As a result, the attempted registration of “Napa Valley” as a trademark by HGW may not be an open and shut case.\textsuperscript{104}

If China complies fully with its obligations under the TRIPS Agreement, as it says it will, this situation is not likely to pose a terrible problem for the NVVA or the United States.\textsuperscript{105} A strict evaluation of this case under the mandates of the TRIPS Agreement will likely yield a favorable ruling for the NVVA.\textsuperscript{106} The fact that Western-style wines in general, including Napa Valley wines, are still a fairly new product in the Chinese market would preclude a Chinese court from holding that Napa Valley wines have become so pervasive in the Chinese wine industry, that now, the term “Napa Valley” has fallen into common

\textsuperscript{98} See 26 U.S.C. § 5388(c); TRIPS Agreement, supra note 6, art 23; Lindquist, supra note 1, at 332.

\textsuperscript{99} Lindquist, supra note 1, at 331.

\textsuperscript{100} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24.

\textsuperscript{101} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24.

\textsuperscript{102} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, arts. 23–24.


\textsuperscript{105} See TRIPS Agreement, supra note 6, arts. 23–24; WTO Report, supra note 37, at 55.

\textsuperscript{106} See TRIPS Agreement, supra note 6, art. 23.
usage for a type of wine in China.\textsuperscript{107} Furthermore, none of the grand-
father clause exceptions would apply in this case because this is the first
known attempt to register or use “Napa Valley” as a name for a
wine produced outside of the United States using foreign grapes.\textsuperscript{108}

Even if China were to employ a law regarding GIs that was
friendly to domestic producers, like the United States, the outcome is
unlikely to change for much the same reason.\textsuperscript{109} The justifications the
United States has used with respect to those European GIs that it clas-
sifies as being semi-generic are absent in this case.\textsuperscript{110} “Napa Valley”
does not have the generic component in China that terms like Chianti or Champagne could arguably be said to have.\textsuperscript{111} Unlike the term
“Napa Valley” in China, terms like Chianti and Champagne have been
used for a significant length of time in the United States.\textsuperscript{112}

While either of these two possibilities would produce a satisfac-
tory result for the United States and the NVVA, China may utilize
regulations with respect to GIs that will lead to incoherent results that
are contradictory to any semblance of compliance under the TRIPS
Agreement.\textsuperscript{113} There are a number of reasons why this may occur.\textsuperscript{114}
First, Chinese legislation tends to be drafted in vague terms that leave
interpretive bodies (comprised of Chinese bureaucrats) with
significant discretion in interpreting laws.\textsuperscript{115} Second, as a result of the
ill defined power of China’s legislative bodies, sometimes overlapping
and contradictory laws are passed at all levels of government.\textsuperscript{116} Lastly,
a point closely related to the first, those that are vested with the broad
discretion to interpret and implement laws tend not to be neutral.\textsuperscript{117}
They are influenced by a range of extralegal factors, including the

usda.gov/info/agexporter/1998/January%201998/winein.html (last modified Feb. 25,
2003). Total U.S. wine exports, not just Napa Valley wines, to China seven years ago
amounted to less than $200,000. See id; see generally TRIPS Agreement, supra note 6, art. 24.
\textsuperscript{108} TRIPS Agreement, supra note 6, art. 24 (allowing the use of the ten year exception
and good faith exception only where registration and/or use preceded April 15, 1994);
Emert, supra note 9.
\textsuperscript{109} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; TRIPS Agreement, supra note 6, arts. 23–24.
\textsuperscript{110} See Lindquist, supra note 1, at 313, 331.
\textsuperscript{111} See 26 U.S.C. § 5388(c); 27 C.F.R. § 4.24; Lindquist, supra note 1, at 313, 331.
\textsuperscript{112} See Lin, supra note 107; Lindquist, supra note 1, at 313 (describing the process by
which some of these semi-generic names were introduced to the United States).
\textsuperscript{113} See Halverson, supra note 103, at 352-53 (discussing the skepticism expressed by
scholars of Chinese law regarding China’s ability to meet its WTO obligations).
\textsuperscript{114} See id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
political pressure of the Chinese Communist Party, dependence on local governments for funding, financial interests in decisions at the local level, the pull of personal relationships, and outright corruption.\textsuperscript{118} The clear implication of all this is that there is no guarantee that China will live up to its obligations under the TRIPS Agreement and vindicate the American interests in this case.\textsuperscript{119} In fact, the confluence of strong local ties, broad discretion, and contradictory laws may result in a cold legal atmosphere for the NVVA.\textsuperscript{120}

Whatever the chances may be, if China fails to uphold its obligations under TRIPS and does not protect the GI “Napa Valley,” the United States will have to take some form of action if it wants to prevent erosion of the NVVA’s interests in China.\textsuperscript{121} The possible avenues of recourse available to the United States include pressuring China to comply with TRIPS (just as the EU has pressured the United States) and/or submitting the matter to the Council for resolution.\textsuperscript{122} In either case, however, given the cavalier attitude taken in the past by the United States in complying with the TRIPS Agreement, the forcefulness of the United States’ arguments will be severely limited.\textsuperscript{123} Credibility will naturally depend a great deal on the United States’ adherence to the spirit and goals of the TRIPS Agreement.\textsuperscript{124} Thus, it would be unrealistic for the United States to expect to pass opportunistic legislation to protect its own rights and then turn around and argue that others should not do the same.\textsuperscript{125}

\textbf{Conclusion}

To this day, the United States position with regard to GIs of wine and the TRIPS Agreement has been short-sighted. While many U.S. vintners benefit from the use of European GIs on their wines today, the tides are beginning to turn. As illustrated by HGW’s attempted registration of “Napa Valley” as a trademark, it is only a matter of time until the U.S. vintners eventually occupy the roles that their European counterparts have played for decades. If the Unites States hopes to prevent such a result, it must show that it is willing to play by the rules that it helped estab-

\textsuperscript{118} Halverson, \textit{supra} note 103, at 353.
\textsuperscript{119} See id.
\textsuperscript{120} See id.
\textsuperscript{121} See Lindquist, \textit{supra} note 1, at 319; Didier’s, \textit{supra} note 10.
\textsuperscript{122} Lindquist, \textit{supra} note 1, at 319, 320–23.
\textsuperscript{123} See id. at 330–332, 337.
\textsuperscript{124} See id. at 337.
\textsuperscript{125} See id. at 333–34.
lish. The United States must protect the use of foreign GIs in its domestic market. If this does not happen, the United States cannot expect, nor can it ask, other countries to respect the interests of U.S. vintners abroad.