Wine Law and Policy

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From National Terroirs to a Global Market

Edited by

Julien Chaisse, Fernando Dias Simões, Danny Friedmann

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Abbreviations

ADR	Alternative Dispute Resolution
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BRI	Belt and Road
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CPC	Cooperative Patent Classification
CSR	Corporation Social Responsibility
DOC	*Denominazione di Origine Controllata*
DOCG	*Denominazione di Origine Controllata e Garantita*
DSU	Dispute Settlement Understanding
EU	European Union
ECJ	European Court of Justice
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTZ	Free Trade Zone
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GI	Geographical Indications
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGO	Indications of Geographical Origin
IIA	International Investment Agreements
INAO	Institut National de l'Origine et de la Qualité
IPC	International Patent Classification
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
MNE	Multinational Enterprises
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
OBOR	One Belt One Road
OECD	Organisation for Economic Co-Operation and Development
OIV	International Organisation of Vine and Wine (*Organisation Internationale de la Vigne et du Vin*; OIV)

PRC	People's Republic of China
RCEP	Regional Comprehensive Economic Partnership
SOE	State-Owned Enterprise
SAR	Special Administrative Regions
TFEU	Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UPOV	International Union for the Protection of New Varieties of Plants
US	United States of America
USMCA	United States-Mexico-Canada Agreement
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Foreword: Apéritif

Christopher Heath

This is a book about culture and commerce, trade and trust, policy and passion.

Eccelente Marzimino![1]

Culture. When Rabelais' giant Gargantua is born, he immediately grasps the essence of life: "A boire, à boire, à boire" are his first words. His son Pantagruel in search of an answer to the ultimate question (that is, whether to marry or not), embarks "à la recherche del'Oracle de la Dive Bouteille"[2]. Also other grandees in literature search for bottles, large and small: "Vivan le femmine, viva il buon vino, sostegno e gloria d'umanità"[3]. Wine is for the holy and the lowly, for the connoisseurs, the amateurs and the others. Joseph Roth's holy drunkard[4] is as content with his Chateau ordinaire du bistrot as is Patrick Macnee with his Chateau Lafitte Rothschild 1909 – from the Northern end of the vineyard[5].

Euch soll sogleich Tokajer fließen[6]

Trade and Trust. The Paris Convention of 1883, Magna Charta of industrial property rights, obliges Member States to enact measures "against all acts of unfair competition". The doctrinal concept of Art. 10bis was devised by the Austro-Hungarian academic Friedrich (Fryderyk) Zoll[7] and adopted at the

1 Don Giovanni in Mozart's Don Giovanni. An early case of product placement: Marzemino is a red wine from the Trentino region, back then part of Austria-Hungary.

2 That is, in search of the Oracle of the Big Bottle.

3 Don Giovanni in Mozart's Don Giovanni: "Here is to women, here is to wine, support and glory of mankind". Apart from the wine issue, the lot only seems worried, as Pantagruel's friend friar (!) John puts it, "to die with their cods overgorged".

4 Joseph Roth, Die Legende vom Heiligen Trinker, Amsterdam 1939.

5 Patrick Macnee as John Steed in a blind tasting contest in: The Avengers, Dial a Deadly Number (1965). Emma Peel (Diana Rigg) was much impressed.

6 For you, I pour a Tokaj wine: Mephisto in Goethe's Faust, location: Auerbach's Keller. For centuries, Tokaj was the wine of kings (and queens, and tsars, and emperors), if not the king of wines. Today, the Tokaj region is located for its most part in Hungary, for a small part in Slovakia. The white dessert wine made of moulded resins is a unique product of terroir and savoir faire. The *Tokaji Eszencia* of 1811 was reportedly of excellent quality when drunk 150 years later.

7 Friedrich Zoll, Aus meinen Studien über die Bekämpfung des unlauteren Wettbewerbes, in: Festschrift für Hermann Isay, Berlin 1933, 229.

Hague Revision Conference 1925 at the proposal of a working group headed by the legendary Albert Osterrieth[8]. The level thereby introduced amounted a protection against passing-off and was thus limited to well-known or well-reputed geographical indications[9]. The third paragraph of Art. 10bis (3), already conceptualised by Friedrich Zoll, was added in the Lisbon Revision Conference 1958 at the suggestion of Austria. Due to an objection of the US and Australian delegations, no mention was made of misleading indications "of origin"[10] – honi soit qui mal y pense! Member States were thus obliged to protect domestic consumers against all sorts of misconceptions. This tied protection to how domestic consumers interpreted a term and thereby limited an "export" of indications: Where Russian consumers regard the indication "champanske" as either generic or as geographical (from Crimea), the French must meet their Beresina.

> Ou está estragado, ou é de Colares[11]

Policy and passion, and too much commerce. The WTO/TRIPS Agreement shifts the objective from an equality of domestic consumers to an equality of international investors. This interest can arguably only be served by a supranational register that ensures a level playing field and legal certainty. But unlike patents, such indications do not extinguish after 20 years and come laden with passion, pride and sometimes prejudice. Australian Chianti? No grazie! Brazilian Rheinriesling? Echt jetzt? It was here that discussions turned as sour as Aceto Balsamico[12]. Tempers flared "fin ch'han dal vino calda la

8 Albert Osterrieth, Die Hager Revisonskonferenz 1925, Berlin 1926.

9 A case in point is the protection of French Champagne against its Spanish impostors: *Bollinger v. Costa Brava*, English High Court, 16 December 1960, [1961] RPC 116, 127. See also *Bollinger v. Costa Brava*, English High Court, 13 November 1959, [1960] RPC 16.

10 Stefan Ladas, Patents, Trademarks and Related Rights, Cambridge Mass.1974, vol 3 p. 1685.

11 "Or it's gone sour, or it's from Colares": A somewhat ambivalent endorsement from the Portuguese writer Eça de Queiroz about the white Malvasia wine from the windswept dunes of Colares, close to the Atlantic Ocean.

12 Aceto Balsamico is an example where protection based on registration achieves less than protection based on preventing misconceptions: While the German courts found "Aceto Balsamico" originating from Germany misleading, the European Court of Justice in case C-432/18 held that these parts of the registered denomination Aceto Balsamico di Modena were unprotected and free for all to use. Earlier examples of protection based on misconceptions include denial of registration of the trade mark "Hoefelmayrs Silber Camembert" for cheese by the German Patent Office (decision of 21 January 1919, BlPMZ 1919, 11), although the French courts had regarded Camembert as generic (e.g. Cour d'Appel d'Orléans, 20. January 1926, Gazette du Palais 1926 I, 595). In the same vein, the German Imperial Supreme Court, decision of 2 Februar 1934, MuW 1934, 206 held that the

testa[13]" as in Mozart's *Champagne* Aria – but can we still call it that?[14] Must it now be the *sparkling wine* aria? International "harmonisation" is a euphemism in that the question of what a word means depends on which is master. This becomes a nuisance where geographical indications are invented arbitrarily for reasons of marketing rather than cultural identity. Prosecco[15] is one of these lamentable examples, as mediocrity is perhaps the only quality this bubbly has in common with its ancient namesake: "Is it worth describing this wine, my lord?"[16] Even more annoying where such profit-driven attitude leads to what can be called administratively sanctioned consumer deception[17] that undermines credibility in a world-wide registration system.[18]

Puro[19]

Puro. A wine, and a concept. Perhaps we are ourselves to blame for the overcommercialisation of a natural product. Our fascination with labels. With

term "Whisky" should be reserved for products originating from the UK., a perception not shared by consumers in the UK or elsewhere.

13 Until the wine makes heads reel, from Mozart's Don Giovanni, of course.

14 Not such a rhetorical question given the numerous decisions involving traditional terms as "Elderflower Champagne" in the UK: *Taittinger and Others v. Allbev Limited and Another,* English Court of Appeal, 25 June 1993, 25 IIC 278 [1994]; or "Champagner Bratbirne" in Germany: Federal Supreme Court, 19 May 2005, GRUR 2005, 957.

15 Prosek/Prosecco just above Trieste (a place that belonged to the Austro-Hungarian empire for six hundred years, so nothing to do with Italy) was the place from where the karst wine was transported down to the ships. The Italian Prosecco denomination around originally Valdobbiadene/Conegliano was more than one hundred miles away from Prosecco, was enlarged due to some political backroom deals and encompassed Prosecco only when Croatia with its denomination "Prošek" wanted to join the EU. A rather cavalier move (but then again, this was the time of Il Cavaliere).

16 John Mortimer, Rumpole and the Blind Tasting, in: Rumpole's Last Case, Oxford 1987.

17 This is particularly so where actual consumer perception differs from the specification of a geographical indication: Never ask where the pigs for the Parma ham come from (it may be Spain), the milk from the mozzarella di latte di bufala (could be 50% Polish milk not from buffalo cows), or what a Montepulciano d'Abruzzo has to do with the Tuscan village of Montepulciano: Nothing really.

18 Italy's claim for world-wide recognition of its own geographical indications stands in marked contrast to its failure to protect foreign indications: – Italian Supreme Court, 3 April 1996, [1996] European Trade Mark Reports 169 (protection for Pilsener Urquell as an AO denied); Italian Supreme Court, 21 May 2001, 34 IIC 676 [2003] (protection for Budweiser beer (from Budweis) as an AO denied); Italian Supreme Court, 20 September 2012, 46 IIC 881 |2015] (protection for Bavaria against beer not originating from Bavaria denied). You should not have a beer on that.

19 A red wine (Touriga Nacional) from the Douro region, and a concept.

names on the bottle rather than the liquid in it. Our quest for the allegedly 99.5 point rated wine with the raspberry-laden vanilla-chocolate-cinnamon aftertaste, available in impossible quantities where every vintage is made to taste the same.

Why not more matter with less art, more respect for *terroir*, *savoir faire* and the wonderful diversity we can enjoy in wine? To appreciate the *joie de vivre*:

> Viva Bacchus, Bacchus lebe, Bacchus war ein braver Mann![20]

All said, and all set:

> Già la mensa é preparata
> Voi suonate, amici cari …[21]

Zum Wohl[22]. Cincin[23]. Osti Jarej[24].
Santé!

20 Viva Bacchus, long live Bachus, Bachus was a decent man! Mozart, Die Entführung aus dem Serail. This time, the wine came from Cyprus.

21 Don Giovanni in Mozart's Don Giovanni: "The table is already set. You, my dear friends, play the music!" (As music is the food of love, but that would be Les Préludes to another book).

22 Foreign visitors to German beer festivals may learn "Prost". For wine, "zum Wohl" is more common.

23 Of unclear origin (Cinzano?). Makes Japanese girls giggle.

24 Inscription found on an 11th century wine amphora from Škocjan in the karst region above Trieste. Linguistic origin unclear, perhaps old Slavic for "stay healthy". Now used as an inscription on the rather unusual wine amphoras sold by a Slovenian vineyard from Dutovlje.

CHAPTER 1

An Introduction to Wine Regulation in a Globalized Market

Prospects and Limits of Wine Governance

Julien Chaisse, Fernando Dias Simões, and Danny Friedmann

1 Introduction

This book is about the law and policy of wine in national jurisdictions but also in the wider context of international economic law. Such analysis is challenging since wine is widely considered one of the most regulated – if not over-regulated – sectors in modern societies. It was said that Bacchus, the god of wine, could drive mortals to insanity.[1] This might apply not only to inebriated wine drinkers but also to vintners exposed to excessive bureaucracy. This book posits that wine laws and regulations have caused an enormous imbalance between different jurisdictions, which has either resulted in over-regulation, thus stifling innovation; or under-regulation, which leaves many a wine consumer clueless about what they are drinking. While economists and political scientists have been conducting research on the diverse aspects of wine, there is a dearth in wine law scholarship. This book brings together chapters on intellectual property rights, international trade and investment law, and health law and policy which are all relevant for the future of the wine industry.

With its richly variegated topics, this book provides a comprehensive view of the laws and policies related to wine around the idea that wine law and policy has gradually evolved from *terroirs* (and purely domestic, if not local, regulations) to a more complex and global regulatory scenario. In doing so, this collective research borrows the conceptual framework designed by Philipp Jessup

1 In the acclaimed *Classical Mythology*, the authors explain that "Dionysus is a god of vegetation in general and in particular of the vine, the grape, and the making and drinking of wine, with the exhilaration and release it can bring. He is the coursing of the blood through the veins and the throbbing intoxication of nature and of sex. He represents the emotional and the irrational in human beings, which drives them relentlessly to mob fury, fanaticism, and violence, but also to the highest ecstasy of mysticism and religious experience. Within Dionysus lies both the bestial and the sublime." Mark P.O. Morford, Robert J. Lenardon and Michael Sham, 'Chapter 13: Dionysus, Pan, Echo, and Narcissus', in *Classical Mythology* (Ninth Edition, London: Oxford University Press).

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who defined the term transnational law as including all laws, from both public and private international law, which regulate actions or events that transcend national frontiers.[2] In this book, we pay attention to all the wine actors – whether States, local governments, companies, international organizations, etc – that play a role in the shaping of the rules and policies and deal with the challenges of their implementation.[3] In fact, Philipp Jessup stated that transnational situations involve individuals, corporations, states, organizations of states and other groups.[4] Moreover, as regards the application of transnational law, Jessup opined that we should not think in terms of any particular forum, since transnational tribunals might not use any particular national law or the corpus of international law. This is why this book discusses the role of tribunals such as the WTO's Dispute Settlement Body, the EU courts and domestic courts, etc.[5]

The law and policy of wine are not fully global yet as many differences remain between States and regions with respect to essential notions such as GI s or trademarks.[6] However, the regulatory framework increasingly blends legal concepts and traditions with the effect of globalising the law and policy of wine – a dynamic which is likely to remain a driving force of wine regulation.

It would be impossible to give an exhaustive coverage of all topics involved in the regulation of wine; hence this book collects a selection of some of the most salient issues that provide a deeper insight into the legal and policy world of wine. The book is structured around three themes that help to understand the regulatory drivers that have led wine law and policy to gradually evolve from *terroirs* to a more global regulatory scenario. The first Part provides a critical review of the wine market's past, present and future in a global economy. The Second Part offers a number of important chapters addressing the role of

2 Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) 1–3. See also Peer Zumbansen: 'Chapter 73: Transnational law, evolving', in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law, Second Edition* (Edward Elgar: London 2012) 898–925 and Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24 Penn St Int'l L Rev 745.

3 Jean D'Aspremont, *International Law as a Belief System* (CUP 2017).

4 See Craig Scott, ' "Transnational Law" as Proto-Concept: Three Conceptions', (2009) 10(6–7) German Law Journal 859–876.

5 Ernst Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law* (London: Hart, 2017) 416. See also Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (London: Oxford University Press, 2009) 414; also Marise Cremona et al. (eds.), *Reflections on the Constitutionalisation of International Economic Law – Liber Amicorum for Ernst-Ulrich Petersmann* (Boston: Brill 2013) 700.

6 See e.g. Winickoff, D. et al., 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law', (2005) 30 Yale J Int'l L 107.

intellectual property law in the wine market. The Third Part brings together contributions discussing the health policy, ethical and social issues related to wine that have the power to further influence the globalization of wine law and policy.

2 The Wine Market: Past, Present and Future in a Global Economy

Part 1 contains contributions that analyse the global wine economy, domestic markets and the regulation of wine. Since the earliest of times, wines have been designated by the name of their place of provenance.[7] This was already the case in Pharaohs' Egypt, where tablets have been found in a sarcophagus with wines known by their designation of origin.[8] This is also how Pliny the Elder defined wines in his *Natural History of the Wines*[9] some of which emerged due to a particular prestige, generally due to the recognition of well-established qualities, distinct from those presented by wines of other origins. And it is in the same way that champagne has been perceived since the 18th century as a wine that can only come from Champagne.[10]

Over many centuries wine production and consumption have steadily increased. However, owing to public health measures introduced over the last

7 See Pierre Galet, *Dictionnaire encyclopédique des cépages et de leurs synonymes* (Beaune: éditions Libre & Solidaire, 2014) 1120.

8 See Patrick E. McGovern, Armen Mirzoian, and Gretchen R. Hall, 'Ancient Egyptian herbal wines', (2009) 106(18) Proceedings of the National Academy of Sciences of the United States of America 7361–7366. See also Isabel and Imogen Greenberg, 'Top 10 things you might find in a Pharaoh's tomb', *The Guardian* (1 May 1 2016).

9 Pliny the Elder even provides his ranking starting with the wine of Pucinum, then the wine of the Falernian territory, and the various wines of Alba. Pliny the Elder further states that "[t]*hese illustrations, if I am not greatly mistaken, will go far to prove that it is the land and the soil that is of primary importance, and not the grape, and that it is quite superfluous to attempt to enumerate all the varieties of every kind, seeing that the same vine, transplanted to several places, is productive of features and characteristics of quite opposite natures. The vineyards of Laletanum54 in Spain are remarkable for the abundance of wine they produce, while those of Tarraco and of Lauron are esteemed for the choice qualities of their wines: those, too, of the Balearic Isles are often put in comparison with the very choicest growths of Italy*." See Pliny the Elder, *The Natural History of Pliny* (HardPress Publishing 2013) chapter 8:6, at 590. See also Pierre Galet, *Grape Varieties* (Hachette Wine Library, London: Cassell Illustrated, 2002) 160.

10 See Roger Dion, *Histoire de la vigne et du vin en France. Des origines au XIXè siècle* (Paris: Flammarion, 1977) 768. See also Etienne Chancrin, *Viticulture moderne* (Paris: Hachette, 1955) 398.

decades, the world wine consumption seems to have stabilized.[11] Despite a downward trend in consumption, France remains the second biggest wine consuming country, accounting for 11.3% of world consumption, only behind the US. In fact, the US remains the world's leading consumer country: in 2018, consumption rose to 33 million hectoliters, with consumption of spirits increasing by 1.9% and that of wine by 0.4% (in particular, rosé wines).[12] Importantly, in 2018, for the first time, a downward trend was observed in the United Kingdom and China. The future of the wine market depends on many factors that Part 1 reviews in great detail. However, two factors should be highlighted: the regulation of indications of geographical origin, and the ever-present threat of climate change.

Nowadays, *savoir faire* is not sufficient to ensure the exclusivity and uniqueness of a wine and to prevent it from being imitated by other producers. This is why the concept of indications of geographical origin (IGOs), which encompasses appellations of origin, GIs, and indications of source, is increasingly the object of heated discussions between different stakeholders. In fact, the concept of IGOs may well be the only legal tool that can recognize and protect wine specificity and quality so that wine remains worthy of an officially consecrated appellation. This is also why there is a growing need to improve and refine legislation in this sector, defining specific conditions of provenance and production for each wine.[13] The acceptance of the (new) rules might give the wine an exclusive designation of origin thus protecting it against unfair competition, deception, confusion, dilution, usurpation and sometimes even evocation. In practice, the designation of origin results from the establishment of a regulation aimed at determining what is authorized (and prohibited) with respect to the production of wine (and grapes). Fundamentally, the purpose of the designation of origin is to ensure precedence of quality over quantity.[14] It

11 See International Organisation of Vine and Wine Intergovernmental Organisation, '2019 Statistical Report on World Vitiviniculture' (December 2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf>.

12 See International Organisation of Vine and Wine Intergovernmental Organisation, '2019 Statistical Report on World Vitiviniculture' (December 2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf>.

13 See Giulia Meloni et al., 'Wine Regulations', (2019) 41(4) Applied Economic Perspectives and Policy 620–649.

14 See Giulia Meloni and Johan Swinnen, 'Trade and terroir. The political economy of the world's first geographical indications', in *Food Policy* (2018); Quittanson (Ch.) Et R. Vanhoutte, *La Protection des appellations d'origine et le commerce des vins et eaux-de-vie* (Montpellier, 1963); Pierre Galet, *Grape Varieties* (Hachette Wine Library, London: Cassell Illustrated, 2002) 160.

is in this spirit that France has painstakingly and slowly developed over time a wine-making legislation for the protection of appellations of origin, that is one of the most complete in the world. The EU and US have a diametrically opposite philosophy on the protection of IGOs. While the EU is protecting its Protected Designations of Origin (PDOs) and Protected Geographical Indications (PDIs) via *sui generis* registers in a way that shields them against ever becoming generic; the US is predominantly protecting GIs via certification and collective trademarks, which cannot be registered if they are generic or will be cancelled after registration if they become generic. The EU is applying a higher standard of protection for its PDOs and PGIs. The US system provides more freedom to the users of GIs, generating innovation and competition. In contrast, the EU's regulations on PDOs and PGIs stifle innovation and competition because of their strictness and bureaucracy. The *raison d'être* of the enhanced protection of PDOs and PGIs is the *terroir*, the link between product and place, to stimulate rural development and safeguard cultural heritage and diversity.[15] It would suit the EU if the PDOs and PGIs generate a premium for EU vintners, especially since they are closing the subsidy valve of the Common Market Organization for wine. Unfortunately, there is no conclusive evidence for this. What both jurisdictions have in common is that they include their respective doctrinally colored IGO protection systems in bilateral treaties and FTAs.

A second important variable for the future of the wine market (and its regulation) is the challenge of climate change. Viti-cultural regions are restricted in relatively narrow geographical and climatic ranges in the Northern and Southern hemisphere, where the temperature ranges between 12°C and 22°C. Within these isotherms, there are niches for which only certain wine grape cultivars are suitable for cultivation.[16] The baseline climate defines the wine style and the climate variability determines the vintage quality differences. The variability is caused by a complex interplay between multi-annual and multidecadal phenomena: *El Niño* – Southern Oscillation (alternating between a warming *El Niño* and cooling *La Niña* phase), Pacific Decadal Oscillation, North Atlantic Oscillation, Indian Ocean Dipole, Arctic Oscillation, Antarctic Oscillation, which influences the sea surface temperature, precipitation, wind, pest and disease pressure. Any continued warming would push a region outside the ability to

15 See Shi Jingxia (2012) Factoring Cultural Element into Deciding the 'Likeness' of Cultural Products: A Perspective From the New Haven School, Asia Pacific Law Review, 20:2, 167–187.

16 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 123.

produce quality wine with existing cultivars.[17] Jones argues that not only the impact of climate change on the average climate of wine regions worldwide is evident, but also that it will lead to increased climate variability with greater risks associated with climate extremes.[18] Model projections through 2050 show a continued increase in the coefficient of variability of growing season temperatures in 20 of 27 wine regions globally.[19] It is not the first time that climate change is having an impact on the geography of viti-cultural regions. In the medieval period between 900 and 1300 CE, there were vineyards in the coastal zones of the Baltic Sea and Southern England, when temperatures were up to 1°C warmer.[20] After that the "Little Ice Age" between 1300 and 1850 resulted in the vanishing of these northern vineyards.[21] They might make a comeback thanks to climate change. Lough *et al.* correctly predicted in 1983 that growing seasons in Europe would lengthen and that wine quality in Champagne and Bordeaux would increase.[22] However, since the warming trend continues, traditional wine regions of our times are either being pushed out of the optimal ripening climates or even out of existence for certain wine cultivars.[23] Bordeaux's growing season climate of the last 50 years averaged 16.5°C. The projected warming in Bordeaux is 2.3°C by 2049. This means that an 18.8°C average growing season would place Bordeaux at the upper end of the optimum ripening climates for many of the red cultivars grown there today and outside the ideal climates for the main white cultivars grown in the region.[24] The Napa

17 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 123.

18 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 122.

19 Gregory Jones et al., 'Climate change and global wine quality', (2005) 73(3) Climatic Change 319–343.

20 John Gladstones, *Viticulture and environment* (Adelaide Australia: Winetitles 1992).

21 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 123.

22 J.M. Lough, T.M.L. Wigley, and J.P. Palutikof, 'Climate and climate impact scenarios for Europe in a warmer world', (1983) 22 Journal of Climate and Applied Meteorology 1673–1684.

23 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 126, 127.

24 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 127.

Valley, with an historical average of 17.5°C, is projected to warm by 2.2°C to 19.7°C by 2049. This would place Napa at the upper end of optimal ripening climates for nearly all of the most common cultivars.[25] The greatest warming is expected in Portugal (2.9°C in 50 years). As for the Burgundy, Rhine Valley, Barolo, and Bordeaux regions, decadal trends are modelled at 0.3–0.5°C while the overall trends are predicted to be 1.5–2.4°C. Hall and Jones expect that 8 of the 61 recognized wine regions in Australia would be warmer than the known growing season temperature threshold for suitability by 2030, 12 by 2050, and 21 by 2070 without further adaptive measures.[26] The 12°C and 22°C isotherms will shift 150–300 km poleward in both hemispheres, depending on the emission scenario by 2050, and an additional shift of 125–250 km poleward will take place by 2100.[27] Vintners and governments need to anticipate the serious climatic changes in their regions and make adaptations to the grapevine phenology, soil water availability,[28] late spur-pruning, increasing vine trunk height, trimming shoots or removing leaves to reduce the leaf area to fruit weight ratio,[29] soil tillage techniques, cover cropping species, passive protection against frost risk (*e.g.*, site selection, pruning techniques) and active protection against frost risk (*e.g.*, wind machines, heaters, over-vine sprinklers),[30] adjustments in harvest management practices and process grape composition,[31] rootstocks

25 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 127.

26 Andrew Hall and Gregory Jones, 'Effect of potential atmospheric warming on temperature-based indices describing Australian winegrape growing conditions', (2008) 15(2) Australian Journal of Grape and Wine Research 97–119.

27 Gregory Jones et al., 'Climate, Grapes, and Wine: 7 Structure and Suitability in a Variable and Changing Climate', in Percy Dougherty (ed.), *THE GEOGRAPHY OF WINE* (Dordrecht: Springer Netherlands, 2012) 126.

28 Etienne Neethling et al., 'Adapting Viticulture to Climate Change Guidance Manual to Support Winegrowers' Decision-Making', *ADVICLIM* (2016) 19–20, <https://www.adviclim.eu/wp-content/uploads/2015/06/B1-deliverable.pdf>.

29 Etienne Neethling et al., 'Adapting Viticulture to Climate Change Guidance Manual to Support Winegrowers' Decision-Making', *ADVICLIM* (2016) 22, <https://www.adviclim.eu/wp-content/uploads/2015/06/B1-deliverable.pdf>.

30 Etienne Neethling et al., 'Adapting Viticulture to Climate Change Guidance Manual to Support Winegrowers' Decision-Making', *ADVICLIM* (2016) 24, <https://www.adviclim.eu/wp-content/uploads/2015/06/B1-deliverable.pdf>.

31 Etienne Neethling et al., 'Adapting Viticulture to Climate Change Guidance Manual to Support Winegrowers' Decision-Making', *ADVICLIM* (2016) 21, <https://www.adviclim.eu/wp-content/uploads/2015/06/B1-deliverable.pdf>.

and clones,[32] or to develop new cultivars via plant breeding or genetics; and concomitant regulation of these necessary adaptations. This demonstrates the importance of plant variety protection. The question is whether this technology can provide solutions fast enough and how regulation can accommodate these adaptations optimally.

This book's first Part, dealing with the wine market in a global economy, discusses the past, present and future of wine laws and policies.

In Chapter 2, Giulia Meloni and Johan Swinnen focus on Algeria and explain the rise and fall of what was once the world's largest wine exporter. It seems hard to imagine now, but until 50 years ago Algeria was the largest exporter of wine in the world – and by a wide margin. Between 1880 and 1930 Algerian wine production grew dramatically. Equally spectacular is the decline of Algerian wine production: today, Algeria produces and exports little wine. This chapter analyses the causes of the rise and fall of the Algerian wine industry. Giulia Meloni and Johan Swinnen demonstrate that there was an important bi-directional impact between developments of the Algerian wine sector and French regulations. French regulations had a major impact on the Algerian wine industry. Vice versa, the growth of the Algerian wine industry triggered the introduction of important wine regulations in France at the beginning of the 20th century and during the 1930s. Giulia Meloni and Johan Swinnen's work is important for our book because they show that important elements of these regulations are still present in the EU Wine Policy today.

In Chapter 3, Fabrice Giordano offers a critical and thorough review of the French INAO. The history of the vine, the wine and the appellations of origins is so old that it could be almost confused with the history of humanity. Both vineyard cultivation and vineyard management originate from Near East Asia, India and Egypt. Egypt gives the image of an organized viticulture where wine orchards were cultivated in the Nile Valley, dug by the erosion of the river, more than six thousand years ago. The wine, whose winemakers gave it a name to differentiate it, came from the region of Peluse, Letopolis, Lake Maréotis and the Nile Delta. Therefore, the identification of the bottle often corresponding to a place of production, the *terroir*, became one of the conditions of its legal protection at local, national and international level. It is in this context that two public regulatory bodies from the wine sector in France were created: FranceAgriMer and the INAO. To understand the missions and challenges of this latter national body, it is necessary to return to the origin of its creation,

32 Etienne Neethling et al., 'Adapting Viticulture to Climate Change Guidance Manual to Support Winegrowers' Decision-Making', *ADVICLIM* (2016) 25, <https://www.adviclim.eu/wp-content/uploads/2015/06/B1-deliverable.pdf>.

more than 80 years ago. Placed under the supervision of the Ministry of Agriculture, INAO is a public institution with an administrative character and legal personality. The National Committee of Appellations of Origin (CNAO), the predecessor to the current INAO, was created by a law decree of July 30, 1935. Providing an answer to the failures of the previous laws of August 1, 1905 and May 6, 1919 relating to the protection of the quality of agricultural products, its creation is simultaneous with that of appellations of controlled origin for wines and *eaux-de-vie*. In the history of the INAO, three periods are to be remembered, that of its creation in a context of crisis and fraud, that during the second world war where the situation paralyzed the economy of the wine sector, and that from 1945 when the organization rebuilt and reinvented itself. Over time and following a last reform of the institution in 2007, INAO has established itself as a historical pillar of viticulture and the defense of products of origin, in France and internationally.

In Chapter 4, Antonio ROSSI and Duilio CORTASSA explore Wine law in Italy. Since ancient Roman times the Italian territory was known for its wines, normally kept in amphorae, bearing very few indications such as the consular year or a geographical name to claim their origin. Their quality was poor and the product not easily storable. In short, it was very different from the wines we are used to nowadays. Italy has a long and ancient regulatory tradition which was over time able to identify some characteristics of the product aiming, above all, at linking wines to their geographical origin. Antonio ROSSI and Duilio CORTASSA clarify in particular how the Italian laws governing the wine sector are collected in an organic body of rules, known as the Consolidated Wine Act, and explain how the Consolidated Act unified all the provisions governing designation of origin and geographical indication wines.

In Chapter 5, Iris EISENBERGER and Rostam NEUWIRTH look at the Austrian wine regulation which was deeply influenced by an international wine scandal in 1985. The wine scandal prompted the adoption of the 1985 Austrian Wine Act, which at the time was considered one of the strictest wine laws in the world and eventually helped to improve the quality of Austrian wines. As another important milestone, Austria became a member of the EU in 1995, thus incorporating the comprehensive European body of wine regulation. At present, the Austrian wine law can be regarded as an adequate but complex regulatory framework made of international, supranational and national norms, both at state and federal level. The question, however, is whether the present state of regulation can successfully tackle future challenges, which – paradoxically – may require novel regulatory tools to safeguard the tradition of viticulture while enabling innovative oenological practices.

In Chapter 6, Joanna PAWLIKOWSKA, Aleksander STĘPKOWSKI, and Leszek WIWAŁA focus their attention on the classification challenges of Polish 'Fruit Wine'-based Products. Grape wines are regulated precisely in EU law; however, among these regulations there are no appropriate normative solutions for fermented products obtained from fruits other than grapes. At the same time, national regulations, in particular definitions of beverages obtained from fruit fermentation, have been developed by analogy with the EU grape regulatory pattern. This chapter describes characteristic features of Polish legal solutions concerning those flavoured beverages and its considerable peculiarity against the background of the EU law regulating those other fermented beverages in general. A particular attention is given to the classification of the specific category of other fermented beverages and the varying practice of including it into either the flavoured fruit-wine or spirit drink. The chapter also provides with *de lege ferenda* solutions. In order to avoid the existing interpretative doubts and disputes arising from them, it is reasonable to undertake legislative actions at the EU level aimed at amending the Combined Nomenclature (CN) in the scope concerning fermented beverages by specifying the content of CN heading 2206. The new content should include a precise definition of the nature of a fermented beverage, the evaluation of which will be based on objective principles and not subjective organoleptic judgment. Classification decisions in the field of fruit drinks made in Poland do not remain without an impact on the EU trade in goods in the field of alcoholic products. Only a full harmonization will enable a proper functioning of the Internal Market. To ensure an equal level of consumer protection and an adequate level of information, a full harmonization of the definition, description and presentation of fruit wine and other fermented products is desirable. Putting standards and basic quality requirements in order will not only contribute to the EU's concern for supporting the production of the highest quality food products but also protect producers against the overzealousness of tax administration officials.

In Chapter 7, Lisa TOOHEY considers wine law in Australia, focusing on the regulation of the industry for the past 20 years. It begins with a brief overview of the industry and of the changing demand for Australian wine. The chapter then examines the regulatory challenges faced as a result of changing attitudes to wine consumption, as well as to alcohol more broadly. The chapter provides vignettes of contemporary challenges faced by the industry within Australia, including for the development of niche domestic and export markets by wine producers. The current dispute brought to the WTO by Australia against Canada is one such example. Another is the impact of expansion on existing GIs. A final example is the expansion of wine products such as low alcohol wine.

In Chapter 8, Flavia MARISI looks at EU and Chinese policies in support of wine production. In earlier times, wine was consumed where it was traditionally produced: mainly in France and Italy. Over time, two different trends have developed. Firstly, in Europe, the evolution of new production techniques has led to a substantial increase in wine production, which overloaded the market: consequently, the producers chose to focus on exports. Conversely, since the 1980s, China's thriving economy rendered it a consumers' market, importing noteworthy volumes of wine. The second trend developed in a complementary fashion. China issued legislation which made it one of the "new producing countries" in the wine sector, reaching the position of sixth wine producer in a world-wide scale, and supported the production of domestic wines which achieved global recognition. At the same time, the EU has shaped policies aimed to discourage low-quality wine making, foster the production of premium wines, and promote EU wines outside the EU. This chapter analyses the production, consumption and export data of the EU and China, and compares the most important aspects of the policies issued by the two giants in support of wine production. Finally, it discusses how the different approaches of state intervention in the economy can encourage and support companies in securing a greater share of international markets.

In Chapter 9, Daniel HOHNSTEIN looks at the wine and liquor laws in Canada. The sale of wine and other alcoholic beverage products (referred to generally as "liquor" in Canadian law) is governed by a patchwork of federal legislation and provincial liquor control regimes that have long restricted both inter-provincial trade within the Canadian domestic market and international trade into Canada. Government authorities in each province, often operating as government-owned enterprises, wield powerful monopolies over the importation and distribution of liquor products within their jurisdictions. These provincial liquor control regimes are deeply entrenched and sustained by a complex web of economic factors, policy objectives, and political interests. However, they are currently being challenged both domestically, by Canadian producers and consumers, and internationally, through a combination of bilateral trade negotiations and dispute settlement proceedings between Canada and some of its closest trading partners. These internal and external pressures have started to generate change in the form of incremental liberalization of the Canadian regulatory landscape for trade in wine and other liquor products. This chapter begins with an overview of the Canadian regulatory landscape and its trade-restrictive characteristics, examining their foundations in Canada's Constitution and a ninety-year-old, post-prohibition federal statute. The chapter then explores the domestic disputes, bilateral trade agreement negotiations, and WTO dispute settlement proceedings that

are challenging trade-restrictive measures within this landscape and promoting change in both Canada's federal legislation and the provincial liquor control regimes.

In Chapter 10, Laurence PONTY, Baptiste RIGAUDEAU, and Jean-Robin COSTARGENT extend the analysis to the field of Investment law. In 2019, wine trade was estimated to account for almost 130 million hectolitres amounting to around USD 35 billion in value. For many countries, it is a key economic sector, driving growth, cash flows and foreign investments, and involving various types of stakeholders (producers, dealers, consumers, etc.). For both political and economic reasons, wine trade has been increasingly regulated by local and international rules and regulation, though, *inter alia*, international investment and FTAs. International wine operators must thus be cognizant of the regulatory constraints they will encounter when trading globally, and of dispute resolution mechanisms available to them. This chapter focuses on international instruments regulating wine-related trade and investment, and aims at, first, clarifying the landscape of the relevant international legal instruments to be taken into account by wine sector actors trading internationally, and, second, identifying relevant tools to secure international investment in the wine sector before the investment is made and should an investment-related dispute arise.

3 The Role of Intellectual Property Law in the Wine Industry

Part 2 addresses the intellectual property layer of norms that regulate wine. The production of grape-based wine is an activity that dates back to the last archaeological discoveries over 7,000 years ago.[33] Twenty-eight centuries later, this industry spread around the world. After a record year in 2018, the largest increase in production recorded since 2004, world wine production in 2019 returned to an average level.[34] It is estimated that all countries except Portugal

33 Roger Dion, *Histoire de la vigne et du vin en France. Des origines au XIXè siècle* (Paris: Flammarion, 1977) 768.

34 International Organisation of Vine and Wine Intergovernmental Organisation, '2019 Statistical Report on World Vitiviniculture' (December 2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf>. See also Per and Britt Karlsson, 'Global Wine Production 2019 Is Returning To 'Normal', Says Pau Roca Of The OIV', *Forbes* (3 November 2019), <https://www.forbes.com/sites/karlsson/2019/11/03/global-wine-production-2019-of-263-mhl-is-a-return-to-normal-says-pau-roca-of-the-oiv/#3f182cc2745b>.

suffered a decrease in production due to bad weather conditions. World production is estimated at around 263 million hectoliters, a decrease of 10% compared to the previous year.[35] Despite a reduction in area over the last decade, the "world vineyard" seems to be stabilizing and represents 7.4 million hectares cultivated, with a concentration of 60% in the EU.

Interestingly, the decline in European vineyards is offset by the increase in cultivated areas in China and South America, among others.[36] If 1892 marked the rebirth of Chinese viticulture with the creation of the Changyu company, the Chinese interest in wine followed the economic opening-up policy established by Deng Xiaoping in 1978, leading in particular to partnerships with large companies such as Rémy Martin, Pernod Ricard and Castel.[37] Since this period, the enthusiasm of the Middle Kingdom for this fermented drink – preferably red, because this colour is synonymous with prosperity and happiness in Chinese culture – has only increased.[38] The consumption of wine is now even encouraged by the government as a substitute for excessively alcoholic drinks such as Baijiu, a brandy obtained by the distillation of fermented cereals.[39] China wishes to assert its identity and capacity to produce wines to meet a constantly increasing national demand, as is evidenced by the cultivation of the vine on a massive scale.[40] The country now accounts for the second largest

35 In fact, among the main European producers, the drop is significant: – 15% for France and Italy and up to 24% for Spain. Despite everything, Italy retains its place as the world's leading producer with 46.6 million hectoliters produced followed by France with 41.9 million hectoliters and Spain which drops below 35 million hectoliters. International Organisation of Vine and Wine Intergovernmental Organisation, '2019 Statistical Report on World Vitiviniculture' (December 2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf>.

36 6% of the world vineyard is located today in China which remains the second world vineyard. On the surface, there are 13 production areas on the Asian continent (the largest being China) with around 800 producers. See International Organisation of Vine and Wine Intergovernmental Organisation, '2019 Statistical Report on World Vitiviniculture' (December 2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf>.

37 See Per Jenster and Yiting Cheng, 'Dragon wine: developments in the Chinese wine industry', (2008) 20(2) International Journal of Wine Business Research 401–421.

38 See Darryl J Mitry, David E Smith and Per V Jenster, 'China's role in global competition in the wine industry: A new contestant and future trends', (2009) 1 International Journal of Wine Research 19–25.

39 See Xiao-We iZheng and Bei-Zhong Han, 'Baijiu (白酒), Chinese liquor: History, classification and manufacture' (2016) 3(1) Journal of Ethnic Foods 19–25.

40 See Hanqin Zhang Qiu et al., 'Wine tourism phenomena in China: an emerging market', (2013) 10(3) International Journal of Contemporary Hospitality Management 62–82.

vineyard in the world in area, behind Spain and ahead of France, and ranks sixth in the world for wine production.[41]

Since the adoption of the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works, a host of multilateral agreements, providing for both substantive and procedural rules, have sought to protect innovation and creativity by allocating exclusive intellectual property rights (IPRs).[42] Most of this body of international law was developed within the WIPO, a UN specialised organisation, and in addition to regional organisations.[43] The GATT 1947 only marginally dealt with the matter in terms of limiting excessive marking requirements in Article IX and of providing an exception to the general principles for the enforcement of intellectual property rights in Article XX(d). With the advent of the TRIPs Agreement, the trading system fundamentally changed its relationship to intellectual property rights.[44] A comprehensive agreement, building upon, and incorporating, the Paris and Berne Conventions and enacting, in addition, procedural norms, emerged after long and difficult negotiations. Besides the GATT 1994 and the GATS, the TRIPs Agreement emerged as the third pillar of the multilateral trading system later followed by a number of FTAs.[45]

As far as the EU is concerned, the intellectual property rights regime is complex and governed by both Union-wide legislation and legislation of member states.[46] Traditionally, intellectual property rights are granted and administered by the member states. Since the ratification of the Nice Treaty, confirmed by the Constitution, the EU has assumed a greater role in the external

41 See International Organisation of Vine and Wine Intergovernmental Organisation, '2019 Statistical Report on World Vitiviniculture' (December 2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf>.

42 CARLOS A. PRIMO BRAGA AND CARSTEN FINK, 'The Economic Justifications for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict', in FREDERICK ABBOTT AND DAVID J. GERBER (eds.), *Public Policy and Global Technological Integration* (Kluwer Law International, The Hague/London/ Boston, 1997) 99, 100–105, 919; Julien Chaisse and Luan Xinjie, 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) Santa Clara High Technology Law Journal 153–178.

43 THOMAS COTTIER, 'The TRIPs Agreement', in PATRICK F.J. MACRORY, ARTHUR E. APPLETON AND MICHAEL G. PLUMMER (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer Verlag AG, forthcoming 2005) 941.

44 Asif Qureshi and Andreas Ziegler, *International Economic Law* (London: Thomson Reuters, third edition 2011), 16.

45 See Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524.

46 MANN F.A., 'Industrial Property and the EEC Treaty', *ICLQ* (1975) 31.

competence on intellectual property rights protection.[47] However, the EU legal system has not (yet) created a uniform system for the protection of intellectual property rights.[48] At least, the Union has begun to develop various instruments in the field of intellectual property rights in order to harmonise or approximate national laws and create common institutions and regulatory mechanisms (often based on international conventions and agreements) which are key to understand wine law and policy in the EU and each of its member states.

In Chapter 11, Danny FRIEDMANN explores the question of whether the wine world is moving towards a universal trademark register that cancels generic IGO Terms. Territoriality is one of the important principles of trademark law; however, the principle of territoriality is problematic and leads to many conflicts in the era of globalized trade and e-commerce. The EU and Switzerland have a doctrine of maximalist protection of Indications of Geographical Origin (IGOs) via public orchestrated registers that defy the territoriality principle. The EU and Switzerland face concomitant problems to promote rural development and authentic quality products based on their *terroir*. In contrast, the US and other New World countries are harnessing their existing trademark systems to protect IGOs and further innovation. US and other New World countries are also letting products with generic geographical names compete in their home and international markets. Specificity, protecting a sign only for designated goods or services, is another important principle of trademark law that can and has been criticized. Without specificity, non-competitors would not be allowed to erode or tarnish the distinctiveness of a sign, no matter whether it is a trademark or IGO. The GI provisions of the TRIPs are the legal result of a political compromise between Old and New World countries. Where the two camps did not succeed multilaterally, they each have pursued their policy aspirations within their national jurisdiction and internationally via FTAs and specialized bilateral IGO agreements. In 2019, the PRC, one of the most important growth markets for IGOs, signed a specific IGO agreement with the EU, and in 2020 an FTA with the US which includes preferential IGO-related provisions. These recent normative developments suggest that the PRC's IGO obligations are being rearranged. Combining the best of both systems could

47 See SHEA N., 'Parallel Importers' Use of Trade Marks: The European Court of Justice Confers Rights but also Imposes Responsibilities', *EIPR* (1997) 103; SOLTYSINSKI S., 'International Exhaustion of Intellectual Property Rights under the TRIPs, the EC Law and the Europe Agreements', *GRUR Int.* (1996) 316 and OLIVER P., 'Of Split Trade Marks and Common Markets', *MLR* (1991) 587.

48 VINJE T., 'Harmonising Intellectual Property Laws in the European Union: Past, Present and Future', *EIPR* (1995) 361.

create vital hybrids that could lead the way to new IGO standards for a future multilateral IGO agreement.

In Chapter 12, Anke MOERLAND's chapter focuses on traditional terms and wine regulation in the EU. Terms used in connection with wine products in the EU can be protected through different schemes. The geographical origin of wine products is commonly protected through designations of origin and geographical indications. The specific origin of a wine product, namely an undertaking, is indicated through trademarks. A less known form of protection falling outside the scope of intellectual property protection are so-called 'traditional terms'. They often contain non-geographical words, phrases and initials, such as premier cru or château. This chapter analyses how these terms are protected within the EU and outside of it. Some third countries have concluded trade in wine agreements with the EU, agreeing on certain standards of protection. Other third countries have been adamant of the protection scheme being discriminatory: some, but not all, third countries are allowed to import wine products into the EU that carry identical terms to those protected for wines from EU Member States. In addition, the chapter looks at the most recent amendments to the EU legislative instruments, which aim at simplifying the grant of protection to traditional terms and harmonizing these procedures with those applicable to the protection to designations of origin and geographical indications within the EU.

In Chapter 13, Anisha MISTRY and Luca VALENTE share a wealth of insights on the Barolo Appellation of Origin in the global market. This chapter analyses the effects that the wine legislation has on the protection and international trade of Barolo, also known as "the wine of kings, the king of wines", one of Italy's greatest red wines. With over 50 years as a protected DOC and DOCG, Barolo is constantly ranked among the top wines, alongside Bordeaux and Burgundy, as another bold "B", and is acknowledged as a noteworthy red wine worldwide. This chapter evaluates the link between the legal protection of Barolo and its reputation worldwide. To do so, this chapter combines the study of legal literature in addition to interviews with Barolo producers and members of established organisations, in order to foster and monitor its trends of sales worldwide. The authors examine different causes for Barolo's distinctiveness. Barolo is made in the Piedmont region from the indigenous grape variety, the Nebbiolo. It is one of the few wines in the world which has varied and favourable terrain. Anisha MISTRY and Luca VALENTE also analyse the history of the laws protecting Barolo. They then focus on the point of view of the Barolo producers with regard to the three different sources of reputation (individual, collective and institutional). Finally, the chapter assesses the impact of the reputation of Barolo on the cultural and economic evolution of the

Langhe region. The authors stress the link between the worldwide reputation of Barolo, the establishment of a comprehensive legal framework, and the development of the Langhe region.

In Chapter 14, Rebeccah GAN discusses the protection of American origin wines as geographic indications. US President Dwight Eisenhower's Secretary of Agriculture Ezra Taft promoted an "agricultural-industrial complex," beseeching farmers to "get big or get out."[49] Fordism[50] in food production led to consolidation within the agricultural sector, with a handful of large farming concerns controlling the majority of the country's cropland.[51] Additionally, U.S. food regulations are decidedly more *laissez faire* than their European counterparts.[52] Accordingly, it is tempting to reduce the global discussion over protection of GI to "Good" European food culture(s) vs. "Evil" American mass-industrialized "food" technology. However, the US agricultural sector is actually multifaceted: composed of both large agro-businesses and smaller, value-added agricultural concerns. Thus, there is no monolithic position on GIs among US producers, particularly within the wine industry. This chapter examines multilateral treatment of GIs, private and public law remedies for GI protection for US producers, the development of the American Origin Products movement, and analyses possible modes to increase protection for GIs which may or may not pass constitutional muster.

In Chapter 15, Lindsey A. ZAHN reviews the challenge of enforcing stricter protection for semi-generic wines in the US. GI, a type of intellectual property rights, are distinctive signs that identify a product based on the geographical territory or region where the product originates. In practice, GIs are used as marketing tools to promote a particular region or in the consumer market to enhance credibility or grant awareness of a particular product's origin. In recent years, GIs became effective marketing tools in a global economy, especially with respect to wine products. Winemakers in the EU classify their wines

49 RR Zimdahl. *Agriculture's Ethical Horizon* (2nd ed., Waltham, MA: Elsevier, 2012).

50 Antonio Gramsci, 'Americanismo e fordismo', in V. Gerratana (ed.), *Quaderni del carcere* (vol. 3, Torino, Einaudi, 1934) 2137–2181 (discussing whether the intensification and rationalization of labor/creation of middle class laborer brought about by Detroiter Henry Ford could exist in a Europe which wanted *la botte piena e la moglie ubriaca* (a full barrel (of alcohol) and a drunken wife).

51 Macdonald J. and others, 'Three Decades of Consolidation in U.S. Agriculture', *USDA Eco. Info. Bull. No. 189* (March 2018), <https://www.ers.usda.gov/webdocs/publications/88057/eib-189.pdf>.

52 Roni C. Rabin, 'What Foods Are Banned in Europe but Not Banned in the U.S.?' *New York Times* (28 Dec. 2013), <https://www.nytimes.com/2018/12/28/well/eat/food-additives-banned-europe-united-states.html>.

using appellations of origin, a system that establishes nomenclature according to the geographical location where the grapes of each wine product originate. Accordingly, the EU advocates strong protection of GI s of wines and denounces wine products labelled with GI s that do not correspond with their geographical origin. Conversely, the US and other non-EU winemakers have stubbornly taken a less rigid posture towards global and national GI protection of wines. In September 2010, the disparity between non-EU and EU winemakers gained additional attention when Australia ratified an agreement (2008 Wine Trade Agreement Between Australia and the European Communities) that creates stricter legal protection for wines from the European Communities and prohibits Australian wine products from using semi-generic wine names originating in the European Communities, including Champagne. Presently, the US does not have a wine trade agreement with the EU that sufficiently protects the semi-generic wine names of foreign wine products from production in the US. This chapter concludes by arguing that the US should adopt a heightened system of GI protection for semi-generic wine products to halt the continued dilution of semi-generic wine product names in the international consumer wine market.

In Chapter 16, Nicolas CHAREST focuses on the federal jurisdictions of Canada, US and Germany from a transsystemic perspective to integrate the local and international protection of GI. While the theoretical foundation of GI may remain esoteric to some, the most recent international FTA, including the new NAFTA 2.0, continue to highlight that the protection of each country's products issued from their respective *terroir* is an inestimable commercial consideration, both culturally and economically. From that premise, this chapter proposes to move a step beyond the mere recognition of GI and seeks to examine the various regimes and instruments of implementation and enforcement of international GI within each country's local administration. To do so, the author proposes to examine the particular issues that federalism raises when it comes to the implementation of GI-related obligations stipulated in international agreements and the role played by local agencies involved in GI protection. More specifically, the author discusses whether the constitutionally established distribution of competencies affect the level of protection that is actually afforded to GI to be protected. This allows to explore further the synergies within given federal states, and how federalism affects the administrative structures that actualize the protection of GI within a given state. The chapter focuses on the federal states of Canada, the US, and Germany. It adopts a trans-systemic approach, that is, a methodology that goes beyond mere comparison of the responses offered by different legal regimes on a given legal issue. The goal is to distil from each of them the

principles that allow us to identify a "common federal law of geographical indications."

In Chapter 17, Philippe DE JONG analyses the protection of vines, grapes and wine under plant variety rights law, with a particular focus on the EU. The author discusses the intellectual property protection attributed to vines, grapes and wine under the International Union for the Protection of New Varieties of Plants (UPOV) plant variety rights system. Whereas Article 14(1) UPOV 1991 provides absolute protection to propagating material, such as vines, Articles 14(2) and 14(3) of that treaty make the protection and enforcement of the plant variety right in relation to harvested material (grapes) and derived products (such as wine) dependent on a number of conditions. This chapter examines how these restrictions play out for the production and commercialization of grapes and wine. In particular respect of the EU, this chapter also zooms into the famous Nadorcott decision of the CJEU, which was the first of its kind in the EU to deal with the protection of harvested material.

In Chapter 18, Burak KESKIN looks at trademark and plant variety regulation and protection rules applying to wines in Turkey. The author first seeks to lay down an outline of the public policy rules in terms of trade dress, trademark and plant variety regulation in a historical way. He provides a *résumé* of how the laws evolved over time and how the changes in law were affected by public policy concerns and the latest situation of the wine regulation in Turkey. In a second main section, broken down into three sections, the author aims at explaining private rights over trade dress, trademark and plant variety of wine makers, marketers, and other sector participants. Burak KESKIN indicates the ways that protection trade dress, trademark and plant right holders owners enjoy protection over their trade dress rights, trademark and plant variety rights against third party infringers or – in case of there is a registration mechanism – third party applicants for registration, which prior earlier right owners deem an act in violation of their own rights and thus seek redress.

In Chapter 19, Luca FALCIOLA provides a very comprehensive study of patent search and analysis in the wine industry. In many countries, wine is a product that has not only a major cultural and historical value but also a substantial economic impact. Companies regularly evaluate the best approaches to position themselves in a marketplace with respect to their own and competitors' activities, resources, and objectives to decide which technical solutions, business strategies, legal frameworks, and intellectual property rights (including patents) should be preferred. The chapter provides some background and guidance about the tools and methodologies for selectively extracting and analysing data from freely available patent databases about the wine-related patenting activities, in particular by making use of codes from the main patent

classification systems: the Cooperative (CPC) and International (IPC) patent classifications. Different search strategies are used to present high-level, exemplary trends in patenting activities for protecting wine-related product and process innovation at the main patent offices and in selected countries (such as the US, China, Spain, and Australia) over the 2000–2019 period. These suggest some specificities of the wine industry in patent strategies at both the national and international level.

4 Beyond the Market: Consumer Expectations and Social Concerns

Part 3 draws the necessary links between domestic and international laws and policies and a number of critical health, ethical, and social issues related to the production and consumption of wine. Alcohol, especially wine, is one of the symbols of French tradition and gastronomy.[53] For many, it is associated with celebration and conviviality with family or friends. In fact, wine systematically accompanies key events in social life: births, marriages, moving of residence, professional or sports successes, etc. However, consumption of alcohol carries risks. A recent scientific study has shown that drinking a glass of alcohol a day increases the risk of breast cancer by 10%.[54] A World Cancer Research Fund study suggests that an increased risk of mortality appears with the absorption of alcohol, equivalent to 1 to 1.5 glasses per day.[55] In the Netherlands, the KWF Kankerbestrijding (Combating Cancer) advises to drink 0% alcohol to avoid this increased risk of getting cancer.[56] The logical next step

53 Although the consumption of wine in France by French is not homogeneous. In fact, "[t]he fragmentation of French society has consequently led to a fragmentation of the drinker, and of the act of drinking itself. Different types of consumption characterise our modern societies and the anthropology of modernity requires the ethnography of this plurality of places where the consumer drinks: when eating out, during family occasions, wine tasting clubs, visits to the producer, local festivals and wine fairs." See Marion Demossier, 'The Quest for Identities: Consumption of Wine in France', (2001) 20(1) Anthropology of Food 35–56.

54 See S. J. Lowry et al., 'Alcohol Use and Breast Cancer Survival among Participants in the Women's Health Initiative', (2016) 25(8) Cancer Epidemiology Biomarkers & Prevention; See also Laurie McGinley, 'Just one alcoholic drink a day increases risk of breast cancer, study says', *Washington Post* (10 April 2016).

55 See Philippa Roxby, ' "Half a glass of wine every day" increases breast cancer risk', *BBC News* (23 May 2017).

56 Alcohol verhoogt de kans op kanker, KWF Kankerbestrijding, 'Alcohol is increasing the chance of getting cancer', <https://www.kwf.nl/kanker-voorkomen/gewicht-voeding-bewegen-en-alcohol/alcohol-en-kanker>.

in the public discouragement policy of drinking alcohol might be warnings on the labels. If one extrapolates this trend, it might eventually lead to plain packaging.[57]

Like other alcoholic products, wine is not an ordinary commodity.[58] In addition to a variety of social issues,[59] excessive alcohol consumption is directly associated with several health problems.[60] The WHO estimates that 3 million people died in 2016 as a result of the harmful use of alcohol.[61] Individual choices about what (and how much) to drink are, as with many other aspects of modern life, deeply moulded by advertising. The alcohol industry has colossal amounts of money available to spend with the purpose of shaping consumers' decisions and expanding their share in the global market.[62] Since market forces tend to promote over-consumption and unhealthy habits, governmental intervention is thought to be necessary. The law is now firmly established as a mighty tool of Public Health.[63] Measures regulating alcohol consumption are a common feature of legal and regulatory systems throughout the world and range from awareness-raising activities, drink-driving prevention campaigns, measures to restrict the physical access to alcohol, restrictions on drinking in public, marketing and advertising restrictions, taxation and pricing measures, and labelling requirements.[64]

57 See, e.g., Bryan Mercurio, 'Public Health Case Study, Plain Packaging of Tobacco Product', in Siân M. Griffiths, Jin Ling Tang, Eng Kiong Yeoh (eds.), *Routledge Handbook of Global Public Health in Asia* (New York: Routledge 2014) 512.

58 See Thomas Babor et al., *Alcohol: No Ordinary Commodity. Research and Public Policy* (2nd ed., Oxford University Press, 2010) 11.

59 See, generally, Larry Harrison (ed.), *Alcohol Problems in the Community* (Routledge, 1996), Harald Klingemann and Gerhard Gmel (eds.), *Mapping the Social Consequences of Alcohol Consumption* (Springer, 2001); Peter Boyle et al. (eds.), *Alcohol: Science, Policy and Public Health* (Oxford University Press, 2013), in particular part IV and V.

60 See, e.g., Ronald Watson et al. (eds.), *Alcohol, Nutrition, and Health Consequences* (Springer, 2013), Peter Boyle et al. (eds.), *Alcohol: Science, Policy and Public Health* (Oxford University Press, 2013), in particular part VI and VII.

61 WHO, 'Global Status Report on Alcohol and Health 2018' (2018) 63, <https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en>.

62 See David Jernigan, *Thirsting for Markets: The Global Impact of Corporate Alcohol* (The Marin Institute for the Prevention of Alcohol and Other Drug Problems, 1997).

63 See Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press, 2000).

64 See Thomas Babor et al., *Alcohol: No Ordinary Commodity. Research and Public Policy* (2nd ed., Oxford University Press, 2010), especially chapters 7 to 13. For an overview of the application of these regulatory tools around the world, see WHO, 'Global Status Report on Alcohol and Health 2018' (2018) 88 and ff, <https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en>.

Not all measures are equally effective or easy to implement. Education and information are the cornerstones of many public health initiatives, generally supported by media communication and other social marketing tools. The right to information is often referred to as the key to all consumer rights, as it is the necessary condition for consumers to exercise all of the other rights. Only an informed consumer can make informed and reasonable choices. Well-informed and educated individuals will probably decide to take the necessary changes for a healthy lifestyle without the need to resort to more 'coercive' measures. However, the consumption of wine, like that of a few other products lawfully available in the market, can cloud the consumer's ability to make informed, responsible choices.[65]

Taxation and pricing policies are an effective tool to reduce alcohol consumption.[66] These measures are designed to change the relative prices of alcohol products, providing consumers with economic incentives to adopt healthier consumption habits. 'Sin taxes' can lower consumption of unhealthy products and have the added benefit of generating revenue for government. However, they can also have a disproportionate economic impact on poorer people and especially on people who are pathologically dependent. In addition, with stretched governmental budgets and political opposition to taxes, using tax law to influence public health puts policymakers on difficult terrain.[67]

Governments have been looking for less 'intrusive' and controversial tools to reduce alcohol consumption. One of the most promising contributions in this regard is offered by the so-called "nudge theory". Its creators, Thaler and Sunstein,[68] draw on the teachings of Behavioral Science to argue that public authorities should perform the role of 'choice architects', organizing the context, process, and environment in which citizens make decisions. A choice architect is someone who has the responsibility for organizing the context in which people decide.[69] Policymakers can steer citizens towards positive decisions through the use of 'nudges', small features designed in the environment that help individuals to overcome behavioral failures and make better choices.

65 Paul Starr, 'Ethical Consumption, Sustainable Production and Wine' in Tania Lewis and Emily Potter (eds.), *Ethical Consumption: A Critical Introduction* (Routledge, 2010) 139, fn 1.

66 See Anurag Sharma, Kompal Sinha and Brian Vandenberg, 'Pricing as a Means of Controlling Alcohol Consumption' (2017) 123(1) British Medical Bulletin 149.

67 Scott Burris et al., *The New Public Health Law: A Transdisciplinary Approach to Practice and Advocacy* (Oxford University Press 2018) 80.

68 Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008).

69 Richard Thaler, Cass Sunstein and John Balz, 'Choice architecture' in Eldar Shafir (ed), *The Behavioral Foundations of Public Policy* (Princeton University Press, 2013) 428.

A nudge is 'any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives'.[70] These devices are essentially low-cost, choice-preserving, behaviorally informed approaches to regulatory problems, including disclosure requirements, default rules, simplification, the use of salience, and social norms. They offer a cheap, smart alternative to traditional regulatory measures in multiple areas including consumer protection, public health, financial regulation, and environmental protection.[71] They can also be used to nudge consumers into drinking responsibly.[72]

While the regulation of alcohol consumption has been a central concern at the national level for centuries, things are quite different in the international arena.[73] The globalization of the tobacco industry and of the 'smoking epidemic'[74] led to the adoption, in 2003, of the Framework Convention on Tobacco Control (FCTC)[75], the first international treaty negotiated under the auspices of the WHO. However, there is no equivalent instrument for alcohol. The WHO states: 'alcohol remains the only psychoactive and dependence-producing substance with significant global impact on population health that is not controlled at the international level by legally-binding regulatory frameworks'.[76] There is growing support for a Framework Convention on Alcohol Control, as it could help to demonstrate that alcohol is not an 'ordinary commodity' and contribute to address some of the issues resulting from excessive consumption.[77]

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70 Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008) 6.

71 Cass Sunstein, 'Empirically Informed Regulation' (2011) 78 University of Chicago Law Review 1349, 1365.

72 See James Reynolds et al., 'Public Acceptability of Nudging and Taxing to Reduce Consumption of Alcohol, Tobacco, and Food: a Population-based Survey Experiment' (2019) 236 Social Science and Medicine 112395; Luc Bovens, 'Nudging the Pub: a Change in Choice Architecture can help pub-goers Drink Less' (LSE Business Review, 2015), <https://blogs.lse.ac.uk/businessreview/2015/09/17/nudging-the-pub-a-change-in-choice-architecture-can-help-pub-goers-drink-less>.

73 WHO, 'Global Status Report on Alcohol and Health 2018' (2018) 24, <https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en>.

74 Robert Proctor, 'The Global Smoking Epidemic: A History and Status Report' (2004) 5(6) Clinical Lung Cancer 371.

75 See WHO, 'WHO Framework Convention on Tobacco Control', <https://www.who.int/fctc/cop/about/en/>.

76 WHO, 'Global Status Report on Alcohol and Health 2018' (2018) 24, <https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en>.

77 Ben Baumberg, 'World Trade Law and a Framework Convention on Alcohol Control' (2010) 64 Journal of Epidemiology and Community Health 473. See also American Public

One of the difficulties surrounding the adoption of a Convention on alcohol control is its interaction with trade rules. Trade and investment liberalisation facilitates the global propagation of 'unhealthy commodities'.[78] Despite the absence of conclusive empirical evidence, there seems to be a relationship between the reduction or elimination of tariffs, price reductions, and an increase in alcohol consumption.[79] During trade negotiations, alcohol is treated just like any other product.[80] The WHO acknowledges that international trade rules 'have focused on maximizing the freedom of international trade and investment and thereby minimizing "technical barriers to trade and other alcohol control measures" that national or local governments may impose'.[81] This may reduce the policy space of governments to address the societal and health risks associated with excessive alcohol consumption.[82] 'Public health' exceptions in trade agreements are interpreted narrowly.[83] At the WTO dispute settlement mechanism, governmental measures in this domain have been based of a stringent interpretation of 'necessity' requirements,[84] and focus exclusively on whether health regulations breach trade rules.[85] The WHO seems to be the only international organization with a clear agenda in this

Health Association, 'A Call for a Framework Convention on Alcohol Control' (2006) <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/07/11/50/a-call-for-a-framework-convention-on-alcohol-control>; Shiu Lun Au Yeung and Tai Hing Lam, 'Unite for a Framework Convention for Alcohol Control' (2019) 393 The Lancet 1778.

78 Deborah Gleeson and Ronald Labonté, *Trade Agreements and Public Health* (Palgrave 2020) 67 ff.

79 Deborah Gleeson and Ronald Labonté, *Trade Agreements and Public Health* (Palgrave 2020) 69.

80 Ronald Labonté, Katia Mohindra and Raphael Lencucha, 'Framing International Trade and Chronic Disease' (2011) 7 Globalization and Health 9; Thomas Babor and others, *Alcohol: No Ordinary Commodity. Research and Public Policy* (2nd ed., Oxford University Press, 2010) 87.

81 WHO, 'Global Status Report on Alcohol and Health 2018' (2018) 24, <https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en>.

82 Deborah Gleeson and Ronald Labonté, *Trade Agreements and Public Health* (Palgrave 2020) 67 ff; Thomas Babor and others, *Alcohol: No Ordinary Commodity. Research and Public Policy* (2nd ed., Oxford University Press, 2010) 87.

83 WHO, 'Global Status Report on Alcohol and Health 2018' (2018) 24, <https://www.who.int/substance_abuse/publications/global_alcohol_report/gsr_2018/en>.

84 Ronald Labonté, Katia Mohindra and Raphael Lencucha, 'Framing International Trade and Chronic Disease' (2011) 7 Globalization and Health 2.

85 Deborah Gleeson and Ronald Labonté, *Trade Agreements and Public Health* 19–20 (Palgrave 2020).

regard, raising the need for greater coordination with other institutions in the international arena.[86]

The evolution of the wine market – and the alcohol industry, more broadly – is also subject to other considerations. There are, for instance, increasing concerns about environmental sustainability. Like other products traded globally, wine is increasingly the subject of debates about carbon footprints,[87] choice of materials,[88] and production practices[89]. There may be tension between contradicting goals. A case in point is the use of screwcaps instead of cork due to the failure rate of the former, which could contaminate the wine.[90] Wine consumers are also increasingly concerned with wine that is produced with respect for fair labor standards.[91]

Wine consumers increasingly ponder on the ethical consequences of their choices. Ethical consumer behaviour can be broadly defined as the 'decision-making, purchases and other consumption experiences that are affected by the consumer's ethical concerns'.[92] This notion has arisen around the turn of the twenty-first century and refers to consumers that have political, religious, spiritual, environmental, social or other motives for choosing one product or service over another. It can be seen as an evolution of green consumerism that incorporates concerns with aspects other than just the price or quality of products and services. Ethical consumers are concerned with the effects that a

86 Thomas Babor et al., *Alcohol: No Ordinary Commodity. Research and Public Policy* (2nd ed., Oxford University Press, 2010) 100.

87 See, for instance, Vicki Waye, 'Carbon Footprints, Food Miles and the Australian Wine Industry' (2008) 9 Melbourn Journal of International Law 271; Claudio Pattara, Andrea Raggi and Angelo Cichelli, 'Life Cycle Assessment and Carbon Footprint in the Wine Supply-Chain' (2012) 49 Environmental Management 1247.

88 See Samuel Squire, 'Wine Packaging: The Future of Wine Packaging in an Enviro-conscious World' (2019) 671 Australian and New Zealand Grapegrower and Winemaker 79.

89 See Gergely Szolnoki, 'A Cross-national Comparison of Sustainability in the Wine Industry' (2013) 53(15) Journal of Cleaner Production 243; Christina Galitsky and others, 'BEST Winery Guidebook: Benchmarking and Energy and Water Savings Tool for the Wine Industry' (Lawrence Berkeley National Laboratory, 2015) <https://escholarship.org/uc/item/7qb4h9g0>.

90 Paul Starr, 'Ethical Consumption, Sustainable Production and Wine' in Tania Lewis and Emily Potter (eds), *Ethical Consumption: A Critical Introduction* (Routledge, 2010) 131.

91 See William Moseley, 'Fair Trade Wine: South Africa's Post-Apartheid Vineyards and the Global Economy' (2008) 5(2) Globalizations 291; Juan Ignacio Staricco, 'Towards a Fair Global Economic Regime?: A critical assessment of Fair Trade through the examination of the Argentinean wine industry' (PhD Thesis, 2015) <https://www.econstor.eu/handle/10419/208954>.

92 E. Cooper-Martin and M. Holbrook, 'Ethical consumptions experiences and ethical space' (1993) 20 Advances in Consumer Research 113.

purchasing choice has, not only on themselves, but also on the external world around them. They ponder on the external consequences of their choices instead of focusing merely on its internal impacts. Studies have demonstrated that wine consumers, especially younger ones, are fairly committed to sustainable consumption, for instance, of environmentally friendly wine.[93] Obviously, consumers will not choose some types of wine if they cost half a month's salary or taste bad. Ethical consumers are not, therefore, ignoring price and quality, but applying some additional (and sometimes prior) criteria in the decision-making process.[94]

In Chapter 20, Wayne MORRISON defines a *terroir* wine in terms of a positive sign attached, as wine made by people who aspire to provide wines of character and personality and where the character of those wines is said to be an authentic reflection of the environmental and cultural conditions of the 'place' it comes from. The chapter explains that, of course, all wine comes from somewhere at a certain level of generality, but by *non-terroir* wine Wayne MORRISON means a wine that is not developed with the idea of it reflecting a place and the attention paid to the conditions of that wine's production is consequently different. A *non-terroir* wine may be well made, it may be made with care and, to borrow a term from law, it may be made with attention paid to 'due process', in other words the winemaking process involves precise, repeatable and systematic procedures fully reported in accordance with the relevant wine related regulations, but whatever character it has does not derive from the specificity of its place of origin and the professional and ethical commitments involved in its production are also different. In the second part of the chapter Wayne MORRISON introduces New Zealand as a country in which many reflective wine makers are seeking to tie down the idea of a 'national *terroir*', that is they are looking for some emblematic factor that can be held out as specific to New Zealand in the process of making high quality wines of character.

In Chapter 21, Jacopo CIANI analyses wine packaging as a trademark. In the world of fast-moving consumer goods, whether a consumer buys one product or a rival brand involves numerous sub-conscious factors, many of which relate

93 See Gary Zucca, David Smith and Darryl Mitry, 'Sustainable Viticulture and Winery Practices in California: What is it, and do Customers Care?' (2009) 2(1) International Journal of Wine Research 189; Sharon Forbes and others, 'Consumer Attitudes Regarding Environmentally Sustainable Wine: an Exploratory Study of the New Zealand Marketplace' (2009) 17(13) Journal of Cleaner Production 1195; Eugenio Pomarici and RiccardoVecchio, 'Millennial Generation Attitudes to Sustainable Wine: an Exploratory Study on Italian Consumers' (2014) 66(1) Journal of Cleaner Production 537.

94 Rob Harrison, Terry Newholm and Deirdre Shaw, *The Ethical Consumer* (SAGE Publications, 2005) 2.

to packaging and appearance. This is particularly true for foods, drinks, wine and spirits. It has been demonstrated that appearance and packaging of wine play an important role in influencing consumer perception and subsequent acceptance. The first taste is almost always with the eye. Extrinsic packaging attributes provide consumers with social and aesthetic utility and strongly influence expectations of sensory perception. Those expectations have been shown to be very robust against later disconfirmation when consumers actually taste the product. The importance of wine packaging design pushed producers to seek to have distinctive, attractive packaging. But can it be protected to prevent competitors from adopting similar packaging? For the most part, the tools for the producers to protect packaging in the wine sector are registered trademarks and designs. For a 3D shape to be registerable as a trademark, the shape has to be capable of functioning as a trademark. Even if it is new, it may not be enough to bestow distinctiveness. If the shape does give value to the product ("substantial value criterion"), registration cannot be secured at all. Many bottles and containers shapes have secured registration. However, European and Italian case law demonstrate the high hurdle of proving distinctiveness, when the registered trademark is subject to judicial scrutiny. In the author's opinion, these cases show that the substantial value exclusion which prevent such shapes to become trademarks by showing a secondary meaning does not make sense to exist, because it has no real utility. Indeed, we must be aware that bottles and packaging, by definition, gives value to their products, since consumers consider packaging design features when making purchase decisions. Therefore, two different policy options are available. First, we may accept that all bottles and wine packaging would fall ex se under the substantial value criterion and as a consequence would be rejected as a trademark because of that. Second, we should abolish such ground for refusal and review packaging trademark only on an acquired distinctiveness base. Jacopo CIANI shows that this second option is by far the more consistent with the keystone of trademark law.

In Chapter 22, Steven GALLAGHER questions whether wine is an intellectual property or intangible cultural heritage. Wine is a consumer product and financial commodity zealously protected by manufacturers, regions and states. There have been many disputes involving wine and associated intellectual property rights including, among others: copied recipes and processes, similar names, untrue claims to geographic origins and copies of geographic indicators, similar shapes and colours of labels, and even the shape of the wine bottle. Wine is also an important part of the cultural heritage of many states, regions and peoples – both as tangible and intangible cultural heritage. As tangible cultural heritage, we have the wine itself; but it is arguably as the

latter, intangible cultural heritage that it is most important. For example, the many different methods of making wine and the recipes and skills involved in its manufacture are important examples of intangible cultural heritage. And, often for the wine producing community, an arguably even more important aspect of the intangible cultural heritage is drinking the wine, and the customs associated with drinking wine – the occasions, ceremonies, celebrations and social interaction that are observed and enjoyed when drinking wine. This chapter considers the dispute that occurred when Croatia was negotiating to join the EU and Italian producers of the highly popular wine Prosecco objected to the continued marketing of the traditional Croatian wine Prošek. Although the dispute did not precipitate a premature "Croexit", the conflict highlights the problems faced when intellectual property overlaps with intangible cultural heritage. This is a particular problem for the EU which, although primarily a political and economic union, with overriding legislative supremacy in its member states on most matters, identifies among its goals "respect [for] its rich cultural and linguistic diversity.[95] In discussing this dispute, we examine how intellectual property laws and intangible cultural heritage laws may overlap and conflict, and the likelihood of increased conflict between these areas. The chapter concludes by questioning if the legal protections for these two important interests may further conflict as the concept of intangible cultural heritage becomes more popular with governments and communities, and whether cultural appropriation or even cultural theft will upset the established intellectual property law regime.

In Chapter 23, Elliot DORFF asks whether we can trust the kosher and pareve (that is, neither meat nor dairy) status of all American wines. The problem arises in the process of clarifying, or "fining," the wine. Because of the enormous influence of the wine lobby in Washington, there are no "truth in labeling" laws requiring a winery to label its products or to divulge anything in writing or by telephone about the ingredients or process it uses. The United States Bureau of Alcohol, Tobacco, and Firearms has a list of substances permitted for use as fining agents, and one must assume that the Government's list includes precisely those substances for which wine makers have sought approval. That list includes casein, caseinates, lactose, monostearates, gelatin, isinglass (a fish glue often made from sturgeon bladders), and non-fat dry milk powder. Although there is a negligible residue of the fining agents left in the wine after they trap the particles suspended in the wine and settle down to the bottom, in Jewish law, there is no prior nullification of a forbidden substance, and so the fact that

95 EU, 'Goals and values of the EU', <https://europa.eu/european-union/about-eu/eu-in-brief_en>.

there is a residue at all raises questions. Specifically, must we not assume that without someone actually standing on the site watching the ingredients that are added to the wines, the wines are, at best, dairy and, at worst, unkosher? This Chapter is divided into four parts: the ingredients introduced into the wine as fining agents, the process used for making wine, their halakhic (Jewish legal) implications; and the production of wine on the Sabbath.

In Chapter 24, Diego SALUZZO looks at risk management in the wine supply chain. This chapter explains that the wine business has gradually evolved to provide a set of cost-effective solutions, which have rapidly been adopted on a worldwide basis to make reliable products commercially available. That global approach to the wine market, on the one hand, creates more exposure to certain unpredictable natural threats with global implications. On the other hand, it articulates more the complexities to manage certain "ordinary" risks deriving from the supply chain in the Food and Beverage sector. In this respect, Supply Chain Risk Management ("SCRM") attempts to reduce wine supply chain vulnerability via a coordinated approach, involving all the stakeholders in addressing mitigation plans to manage these risks, from carefully monitoring land and cultivation in the vineyard, to the production and proper wine ageing in the cellar, up to a proper distribution and marketing of the final product. As explained in this chapter, the ultimate goal remains to ensure supply chain reliability and profitability at all levels and to reasonably apportion related risks and associated costs along the chain itself. Current worldwide trends toward protectionism and consequent negative impact on trade and tariffs, forcing a change in many global supply chains structure, add a sort of geopolitical risk on the top of the concerns in relation to attaining supply chain risk monitoring, and wine is regretfully not an exception. In all events risk analysis must be balanced with business purposes.

In Chapter 25, Ana PENTEADO analyses biodynamic wines and trademarks. This chapter is about organic and biodynamic viticulture and its regulation for consumption. Historically, "organic" wine in ancient times was non-existent, and state regulation not necessary as the concept of natural, organic and biodynamic were assumed to be essential elements of wine. With the advent of science, chemistry and agricultural methods to control wild vines, human intervention upscaled intensively in the process of industrialising commercial wine. It is the intention of this chapter to demonstrate that natural wine is a fictitious product, as human intervention is ever-present, whether within the method of controlling the vine cultivation, alcohol content, and even the delivery of the liquid itself to the marketplace. With the advent of organic products in the commercial realm, consumers may not be aware of what standards organic and biodynamic viticulture are gatekeeping. This chapter will

elaborate how despite the complex history which has led to today's myriad of regulations, from the isolated valley to vast international bodies, the definition of biodynamic or even organic wine itself is not necessarily bound by evidence, despite its widespread commercial usage. This chapter aims to clarify the winemaking process, and to investigate organic claims in both cultivation practice and bottling-mixture additives, in order to hopefully aid consumers attempting to make an informed choice.

In Chapter 26, Jerry I-Hsuan HSIAO explores the blockchain as a solution for combating counterfeit wines in China. The combination of blockchain, which are distributed, immutable databases, and the Internet of Things (IoT), which are embedded chips with a private key that cannot be replicated, could make the supply chain of wine more transparent and improves its integrity.[96] In addition to the blockchain technology, one could think of low technology solutions and rituals. For example, a "waterproof" cork system could prevent that counterfeiters fill undetected empty bottles of famous wine with plonk. In China counterfeiters produced more "Lafite" then one can find in the Château Lafite Rothschild cellars in France. A festive ritual that could counter this is a breaking the glass ceremony after emptying such bottles.[97]

Wine law and policy has significantly evolved over the last century, progressively moving from national *terroirs* to a global market. In this process, countries and regions took different approaches to address new problems. Today, the normative conflicts and contradictions appear in many disputes that policy makers will have to prevent in order to ensure the stability and growth of the wine market (including the consumer, importer/exporter and producers). Although, economist and political science have been able to produce some research on wine, there is, in sharp contrast, a dearth in research in wine law scholarship and we hope this book will help fill a major gap while forming the basis for future legal research. We began the collective research in 2017 and the outcome is beyond our initial expectations although it would have been certainly ideal to involve a few more experts to address more topics. In any case, this book represents a significant collective effort that brings together legal scholarship about trade law, intellectual property rights, international trade

96 Danny Friedmann, 'Protecting the Integrity of Consumer Information and the Supply Chain of Wine in China', in Fernando Dias Simões (ed.), *The Legal Protection of Consumers: Developing a Market Economy in China* (Routledge, forthcoming).

97 Danny Friedmann, 'Sober Advice To Stop Counterfeit Wine As Lafite Bubble in China Attracts More Counterfeiters', *IP Dragon* (14 August 2011), <https://www.ipdragon.org/2011/08/14/sober-advice-to-stop-counterfeit-wine-as-lafite-bubble-in-china-attracts-more-counterfeiters/>.

and investment law, and health law and policy which are all relevant for the future of the wine industry.

This book has benefited immensely from contributions from many sources, both at the institutional as well as at the individual level. We are delighted at the final result and would sincerely like to express our gratitude to all who have contributed to this project in one way or the other. We also want to express sincere thanks to Christopher HEATH for writing the book foreword. We are also sincerely thankful to Brill for processing this work with efficiency for publication.

PART 1

The Wine Market

Past, Present and Future In a Global Economy

CHAPTER 2

The Rise and Fall of the World's Largest Wine Exporter – and Its Institutional Legacy

Giulia Meloni and Johan Swinnen

1 Introduction[1]

It is hard to imagine in the 21st century global wine economy, but in 1960 – 50 years ago —Algeria was the largest exporter of wine in the world, and by a wide margin: it exported twice as much wine as the other three major exporters (France, Italy and Spain) combined. Moreover, it was the fourth largest producer of wine in the world. In the 50-year period between 1880 and 1930, Algerian wine production and exports grew dramatically, turning it from non-existent into the world's largest exporter of wine.[2]

What is equally spectacular as the rise of Algerian wine production is its decline. The fortune of Algerian wine has fallen dramatically. Today, Algeria produces and exports virtually no wine. In fact, the current Algerian wine production reflects the situation at the end of the 19th century when wine production

1 Throughout the chapter, we consider Algeria as separate from France when we talk about wine production and trade. Algeria was a colony of France throughout much of that period (1830–1962). This chapter has drawn upon material from Meloni, G., & Swinnen, J. (2014). The Rise and Fall of the World's Largest Wine Exporter—And Its Institutional Legacy. *Journal of Wine Economics*, 9(1), 3–33 © American Association of Wine Economists 2014, published by Cambridge University Press, reproduced with permission.

2 The success of Algeria in wine trade also triggered vineyard investments in Tunisia and Morocco, two countries colonized by France later on. While the impact was similar (a strong growth in vineyards and wine production, mostly for exports to France), both countries never reached the importance of the Algerian wine industry, in terms of area planted, production or trade. The total vine area reached a maximum of 50,000 hectares in Tunisia in the 1930s and 78,000 hectares in Morocco in the 1960s. Algeria, by contrast, had almost 400,000 hectares in the 1930s and produced more than two billion litres of wine, or ten times the maximum produced by Tunisia and Morocco. Moreover, the share of wine in the value of Algeria's merchandise exports reached almost 50% in the early 20th century and again around 1960, but was always below 15% for Tunisia and Morocco (G. Meloni, and J. Swinnen, 'Algeria, Morocco, and Tunisia', in Anderson, K. and V. Pinilla (eds.), *Wine Globalization: A New Comparative History* (Cambridge and New York: Cambridge University Press 2018a) 441–465). Their production and exports were lower because both countries were colonized later and had less preferential access than Algeria to the French market.

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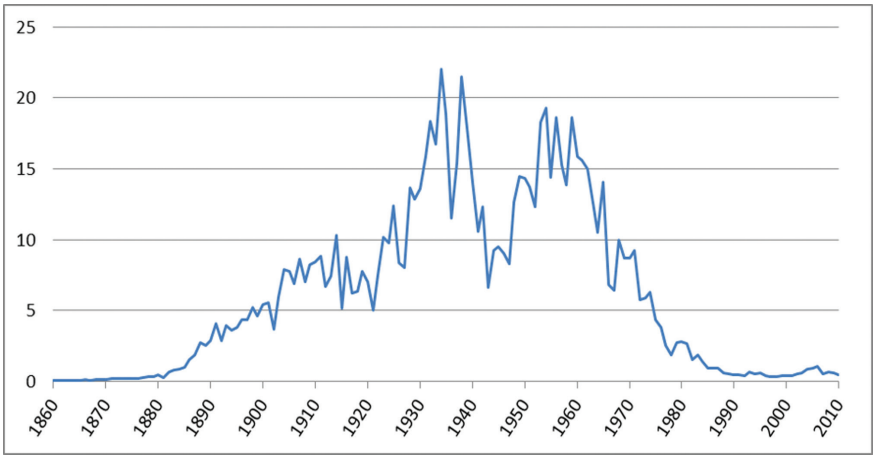

FIGURE 2.1 Wine production in Algeria, 1860–2010 (in million hectoliters)
SOURCE: INSEE (1935; 1966), BIREBENT (2007) AND FAO (2012)

was virtually inexistent. Hence, over the course of a century, Algeria went from producing almost no wine to the world's largest exporter to producing very little wine again (see Figure 2.1).

The analysis of the causes of growth and decline of such an important economic sector should be of interest to everybody interested in economic history and development. In this chapter, we document the rise and the fall of the Algerian wine industry and explain how they were caused by a combination of factors including technological advances, the spread of vine diseases, and associated migration of investors and human capital. The developments in the Algerian wine industry were heavily influenced by its impact on the French wine market and French regulations. Free trade with France stimulated the growth of Algerian exports when high import tariffs blocked imports from Spain and Italy in the late 19th century. However, from the 1930s onwards, French wine regulations halted the expansion of Algerian wine production. After Algeria's independence in 1962, French import restrictions caused a decline in Algerian exports and, in combination with state intervention and poor management in Algeria, caused the collapse of the Algerian wine industry.

However, there is an additional story – and one with major implications for today's wine markets. The growth of the Algerian wine industry had a crucial impact on French wine regulations. Even if the Algerian wine industry has effectively disappeared from the world's wine market today, the institutional legacy of the Algerian wine industry in France, and in the world, continues. The growth of the Algerian wine industry triggered the introduction of important

wine regulations in France at the beginning of the 20th century and during the 1930s. These regulations formed the basis of other regulations which today affect a large share of the global wine production. In fact, important elements of the French wine regulations triggered by the Algerian wine industry's spectacular growth are still present in the European Wine Policy today.

2 The Growth of the Wine Industry in Algeria in the Late 19th Century

When France annexed Algeria in 1830, nobody would have predicted that Algeria would become the world's largest exporter of wine and the fourth largest wine producer (see Table 2.1).[3] While wild grapevines were present in Algeria since the Phoenicians and Carthaginians[4] traded huge quantities of wine (and transplanted grapevines) across the Mediterranean sea during the first millennium BC, the cultivation of vines never took off on a substantial level. The Romans used this region as a granary for their empire. Later, under Arab rule, viticulture was not encouraged as the Koran forbade alcohol consumption.[5]

It was only after France colonized the region in 1830 that Algerian viticulture developed. The French colonialists and settlers consumed wine since it was considered to be the safest drink and a "cure" against certain epidemics such as cholera.[6] Yet it took some time for wine production to develop. The

3 The Algerian cultivable land amounts to only 3% of the country (7,5 million hectares). To compare: France has 32 million cultivable hectares, 60% of the national territory (Fillias, A., *Géographie de l'Algérie. Librairie Hachette Et Cie* (Cinquième Édition, Paris 1886); Birebent, P., *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France 2007)). In 2011, the share of cropped area under vines was 1% in Algeria, 4% in France, 6% in Spain, 8% in Italy and 13% in Portugal (FAO., 'FAOSTAT', *Food and Agriculture Organization of the United Nations* (2012), <http://faostat.fao.org>; OIV., 'Statistical Report on World Vitiviniculture', *International Organisation of Vine and Wine* (OIV) (Paris 2013), <www.oiv.int/oiv/files/2013_Report.pdf>).

4 Mago of Carthage wrote the first treaty on viticulture, later becoming the basis of Roman wine knowledge (McGovern, P.E., *Uncorking the Past: The Quest for Wine, Beer and Other Alcoholic Beverages* (University of California Press 2009) 195).

5 M.J.M. Bourget, 'L'Algérie jusqu'à la pénétration saharienne', in Comité National Métropolitain du Centenaire de l'Algérie (ed.), *Les 12 cahiers du Centenaire de l'Algérie* (1930) I Livret; S Barrows, 'Alcohol, France and Algeria: a case study in the international liquor trade', (1982) 11 Contemporary Drug Problems 525–543; P.E. McGovern, *Uncorking the Past: The Quest for Wine, Beer and Other Alcoholic Beverages* (University of California Press 2009); F. Carlà and A. Marcone., *Economia e finanza a Roma* (Il Mulino, Bologna 2011).

6 P. Birebent, *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France, 2007) 67.

first attempts to produce wine in Algeria were unsuccessful and the settlers imported wine from France.[7] It was only after the 1880s that the Algerian wine industry took off seriously (see Figure 2.1). The remarkable growth after 1890 was caused by a combination of scientific progress and the spread of a disease in France.

2.1 *Technological Progress in Wine Production*

From 1830 to 1860, French settlers tried to plant vines[8] in Algeria's warm subtropical climate but winegrowers did not have the technology to produce drinkable wines in a hot climate. The problem of fermentation in hot countries is the high temperatures reached in the tanks. If the heat exceeds 40°C, sugar cannot be converted into alcohol and fermentation stops. Refrigeration is needed to control the temperature in the tanks during the fermentation process but refrigeration technology was not available at the time.[9]

Scientific and technological innovations changed this by making wine production in hot climates possible. Pasteur's discoveries in the middle of the 19th century on the role of yeasts in alcoholic fermentation were the basis for winemaking in hot climates. With high temperatures, yeasts cannot survive and fermentation stops unintentionally, leading to wine spoilage and bad wines.[10] Pasteur's discoveries led to an innovation in wine production, called "cold fermentation", which allowed producing better wine in warm climates such as Algeria.[11] In order to control temperature during fermentation in the tanks,

7 Not only vineyards failed, also other tropical plant species, as sugarcane, cocoa, coffee and cotton, were not successful because of a poor understanding of the Algerian climate. H. Isnard, 'Vigne et colonisation en Algérie', (1949) 58(311) Annales de Géographie 212–219; P. Leroy-Beaulieu, *L'Algérie et la Tunisie* (Librairie Guillaumin et Cie, Paris 1887); H. Isnard, 'Vigne et colonisation en Algérie (1880–1947)', (1947) 2(3) Annales. Économies, Sociétés, Civilisations 288–300; H. Isnard, and J.H. Labadie, 'Vineyards and Social Structure in Algeria', (1959) 7 Diogenes 63–81, <http://dio.sagepub.com/content/7/27/63.citation>.

8 About 2,000 hectares of vines were cultivated in 1830, mainly belonging to Turkish officials and Moorish merchants (P. Birebent, *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France, 2007)).

9 G. Dervin (Abbé), *L'Afrique du Nord. L'Algérie, son agriculture, son commerce, son industrie, sa colonisation, son avenir* (Epernay, Imprimerie du 'Courrier du Nord-Est' 1902).

10 During the 1873 Vienna wine fair, Algerian wines were considered "not suited to trade sales". H. Isnard, 'Vigne et colonisation en Algérie (1880–1947)', (1947) 2(3) Annales. Économies, Sociétés, Civilisations 288–300; J. Robinson, (ed.), *The Oxford Companion to Wine* (3rd edition, Oxford University Press, 2006) 565.

11 N.D. Johnson, J. Nye, and R. Franck, 'Trade, Taxes, and Terroir', *Mercatus Center George Mason University Working Paper No. 10–35* (2010), <http://mercatus.org/sites/default/files/publication/wp1035-trade-taxes-terroir.pdf>.

TABLE 2.1 Main wine producers and exporters

Production (Average Annual)

	1865–75	1910–14	1961–65	2000–04	1865–75	1910–14	1961–65	2000–04
	Million hectoliters				Percentage of world production			
France	55.4	47.5	62.4	53.5	48.8	33.3	23.8	19.3
Italy	-	42.3	62.3	49.6	-	29.6	23.7	17.9
Spain	17.1	13.6	26.1	38.4	15.1	9.5	10	13.8
Algeria	0.2	8.1	13.1	0.6	0.2	5.7	5	0.2
World Tot	113.5	142.8	261.9	277.8	100	100	100	100

Exports (average annual)

	1909–13	1934–38	1961–65	2000–04	1909–13	1934–38	1961–65	2000–04
	Million hectoliters				Percentage of world exports			
France	1.9	0.8	3.7	15	12	4.3	14.2	22
Italy	1.5	1.3	1.7	14.5	9.4	7	6.6	21.2
Spain	3.1	0.6	1.9	10.2	18.8	3	7.1	15
Algeria	6.8	12.9	10.6	0.03	40.9	67	40.6	0.1
World Tot	16.5	19.2	26.1	68.2	100	100	100	100

SOURCES: INSEE (1951, P. 413); PINILLA AND AYUDA (2002); FAO (2012)

advanced refrigeration systems were introduced.[12] For instance, by the 1890s, the Baudelot cooler (previously used for brewing) was applied to wine. The

12 Interestingly, also the Romans were already aware of the need for "cold fermentation". Pliny the Elder, in his treatise on Natural History, described a technique used to control temperature for sweet wines: "*It is only made by using great precaution, and taking care that the must does not ferment* (…). *To attain this object, the must is taken from the vat and put into casks, which are immediately plunged into water* (…)." (Book XIV, Chap. 11).

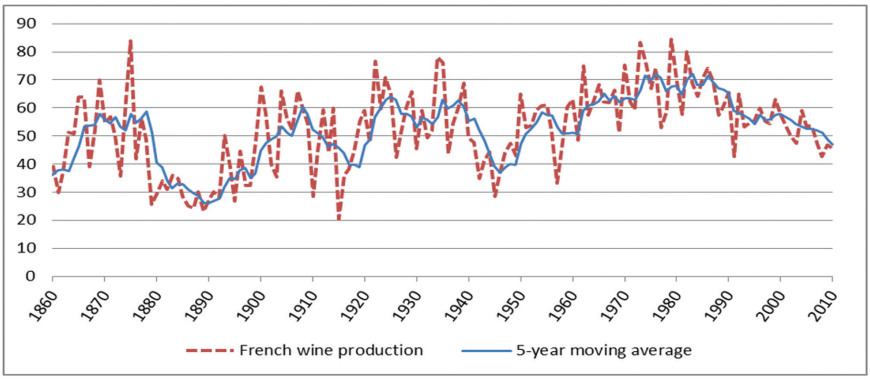

FIGURE 2.2 Wine production in France, 1860–2010 (in million hectoliters)
SOURCE: INSEE (1935; 1966), BIREBENT (2007) AND FAO (2012)

machine consisted of metal tubes through which a chilling liquid was passed.[13] While this technological breakthrough was crucial for the production of Algerian wine,[14] it was not the only reason for the take-off of the Algerian wine production.

2.2 *Devastation of French Vineyards*

Another major factor was the devastation of French vineyards caused by the *Phylloxera* infection from 1863 onwards.[15] From 1875 to 1889, one-third of the total French vine area was destroyed and the remaining (infected) vineyards were producing little wine. French wine production declined by about 70% (see Figure 2.2). This had major consequences for Algerian wine: it induced an inflow of skills in winemaking through the migration of many broke French winegrowers to Algeria, and it caused an increase in the demand for Algerian wine.

13 H. Isnard, 'Vigne et colonisation en Algérie (1880–1947)', (1947) 2(3) Annales. Économies, Sociétés, Civilisations 288–300.

14 A second (cheaper) technological breakthrough introduced during the 1890s was the addition of sulfur in the winemaking process that delayed fermentation, J. Simpson, *Creating Wine: The Emergence of a World Industry, 1840–1914* (Princeton University Press, Princeton, New Jersey, USA, 2011) 51.

15 M. Augé-Laribé, 'La Politique Agricole de la France de 1880 à 1940', in *Chapitre IV Direction et soutien de la production – b) Vins. Paris* (Presses universitaires de France, 1950); M. Lachiver, *Vins, vignes et vignerons. Histoire du vignoble français* (Fayard: Paris 1988).

Initially, and without much success, wine production was started by the soldiers and people with little knowledge of winemaking.[16] However, the wine crisis in France changed this. Ruined French winegrowers immigrated to Algeria and brought with them their technological know-how and expertise. From 1871 to 1900, 50,000 families, many of whom had been producing wine in France and were hurt by the *Phylloxera* outbreak, immigrated to Algeria and occupied 700,000 hectares of land.[17]

Between 1880 and 1890, average annual production in France fell to 30 million hectoliters, while consumption remained at about 45 million hectoliters. To fill this gap, France started to use wine "adulterations"[18] and to import wines. In ten years' time, French wine imports increased ten-fold: from 1.2 million hectoliters in 1865–69 to 10.6 million in 1875–79 (see Table 2.2 and Figure 2.3). France also decided to stimulate wine production in its Algerian colony to limit imports from Spain or Italy.[19]

The wine crisis also increased the demand for Algerian wine for blending with French wine. Not only the quantity of French wine was dramatically reduced but also the average alcohol content had fallen due to the shift to different grape varieties. Two different types of new vines had been developed to

16 During the first colonization period, Algeria witnessed an immigration, not composed of winegrowers but of soldiers. As did the veterans of the Roman legions after defeating the rebellious tribes, the soldiers of Marshal Bugeaud started cultivating land in Algeria (Leroy-Beaulieu, 1887:116). Moreover, in 1846, the French government granted free land to 13,000 unemployed workers living in Paris without any agricultural knowledge (P. Birebent, *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France, 2007) 55).

17 H. Isnard, and J.H. Labadie., 'Vineyards and Social Structure in Algeria', (1959) 7 Diogenes 63–81, <http://dio.sagepub.com/content/7/27/63.citation>.

18 Examples of wine adulteration were that producers used wine by-products at the maximum capacity (for instance by adding water and sugar to grape skins, the *piquettes*), or produced wines from dried grapes instead of fresh grapes, or added plaster or coloring additives (as sulfuric or muriatic acids) in order to correct flawed wines (M. Augé-Laribé, 'La Politique Agricole de la France de 1880 à 1940', in *Chapitre IV Direction et soutien de la production – b*) *Vins. Paris* (Presses universitaires de France, 1950); A. Stanziani, 'Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France', (2004) 18(2) European Journal of Law and Economics 149–167).

19 This idea already took shape during the first wave of vine disease in France (oidium or powdery mildew). In 7 years, from 1847 to 1854, wine production had decrease from 54 to 11 million hectoliters. However, the idea was never implemented as the discovery of sulfur, as a way to tackle the vine disease, allowed France to rapidly recover its wine production levels, with 54 million hectoliters in 1858 (Insee, *Annuaire statistique de la France. Résumé rétrospectif* (Institut National de la Statistique et des Etudes Economiques, Paris 1935)).

TABLE 2.2 French imports of bulk wines by major exporting countries (in average annual hectoliters and percentage of total imports)

	Spain		Algeria		Italy		Total
	1000 hl	%	1000 hl	%	1000 hl	%	1000 hl
1850–54	25	83.4	0	0	0.6	1.9	30
1855–59	261	85	0	0	14	4.5	308
1860–64	107	81	0	0	13	10.1	133
1865–69	171	87	0	0	6	3.1	196
1870–74	270	69.8	0	0	86	22.2	387
1875–79	860	73.4	2	0.1	237	19.9	1,171
1880–84	5,618	72	62	0.8	1,589	20.4	7,798
1885–89	6,745	63.4	875	8.2	1,325	12.5	10,635
1890–94	5,581	67.5	2,091	25.3	101	1.2	8,273
1895–99	3,802	50.5	3,507	46.6	20	0.3	7,533
1900–04	981	19.7	3,771	75.8	49	1	4,972
1905–09	49	0.8	5,876	97.7	20	0.3	6,014
1910–14	1,196	15	6,237	78.4	131	1.7	7,958
1915–19	2,030	26.4	4,489	58.3	463	6	7,697
1920–24	1,665	23.4	4,341	61.1	234	3.3	7,107
1925–29	1,852	17.5	7,796	73.7	33	0.3	10,573
1930–34	1,110	7.9	11,945	85.2	210	1.5	14,022
1935–38	59	0.5	11,813	92.1	17	0.1	12,831

SOURCE: PINILLA AND AYUDA (2002)

resist *Phylloxera*. The first solution – grafting[20] – consisted in inserting European vines on to the roots of the *Phylloxera* resistant American vine species.[21] Grafting was preferred by richer wine producers in the Bordeaux and Burgundy regions.

20 An earlier example of grafting is from 16th century Spanish Mexico, where in 1524 Hernán Cortés, Spanish *conquistador*, ordered to graft European vines on American rootstocks in Mexico (Hyams, 1965).

21 H.W. Paul, *Science, Vine and Wine in Modern France* (Cambridge University Press 1996); G.D. Gale, *Dying on the Vine. How Phylloxera Transformed Wine* (University of California Press 2011).

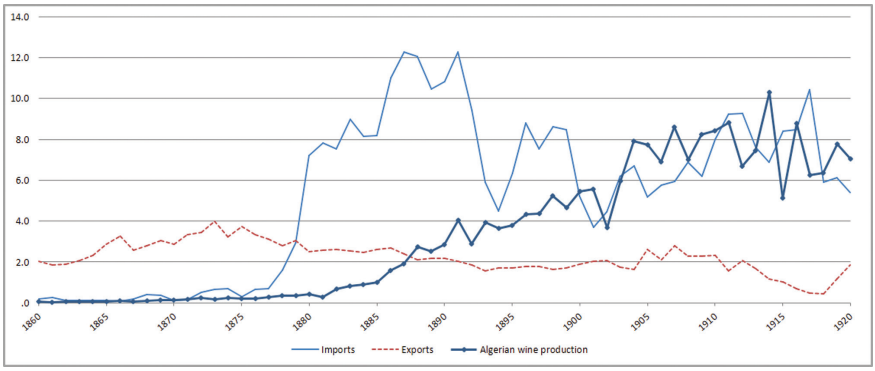

FIGURE 2.3 French imports and exports of wine and Algerian wine production, 1860–1920 (in million hectoliters)
SOURCE: INSEE (1935; 1966), BIREBENT (2007)

The second solution – hybrids – was found by crossing two or more varieties of different vine species. Hybrids were either the result of genetic crosses between American vine species (so-called "American direct-production hybrids"[22]) or between European and American vine species (so-called "French hybrids"). Hybrids was the preferred solution for producers in many other regions. However, hybrid vines produced wines with lower alcohol levels – no higher than 9 or 10%.[23] In order to increase the alcohol content of their wines (and enhance the quality), these wine producers had to either add sugar or to blend their wines with Algerian wines that had a much higher alcohol level – from 13% to 16%.[24] This increased demand for Algerian wines.

A final element was the increase in the supply of capital for investments in Algerian agriculture. Until 1880, the Bank of Algeria had refused to provide credit for long term investments in agriculture. However, in 1880 the Bank's charter was to expire[25] and the Algerian government agreed to renew this

22 These "American hybrids", as Clinton, Isabelle and Noah, were developed in the US at the beginning of the 19th century. They were directly planted into the French soil as a first solution to the vine diseases. However, by 1890–1900, due to their low resistance to *Phylloxera*, they were replaced by either grafting or Euro-American hybrids (Couderc, 2005).

23 A. Stanziani, 'Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France', (2004) 18(2) European Journal of Law and Economics 149–167.

24 M.E.F. Gautier, 'L'évolution de l'Algérie de 1830 à 1930', in Comité National Métropolitain du Centenaire de l'Algérie (ed.), *Les 12 cahiers du Centenaire de l'Algérie* (1930) Livret III.

25 The Bank of Algeria was founded in 1854 as an independent bank, with a capital of 3 million francs. The bank charter was to expire in 1871 but a law of 1868 extended the duration of the Bank to 1881, Editor of the Journal of Commerce and Commercial Bulletin, 'Banking

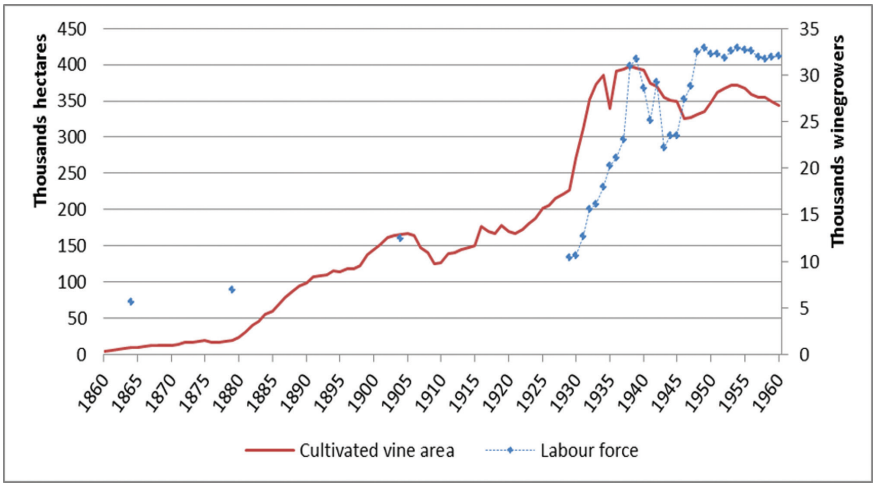

FIGURE 2.4 Algerian cultivated vine area and labor force, 1860–1960
SOURCE: BIREBENT (2007)

authorization if the Bank would increase its loans for agricultural investments. As a result, the supply of bank credits for vineyard expansion increased after 1880.[26]

2.3 *Expansion of Algerian Wine Production and Exports*

The combination of these factors had a major impact on Algerian wine production. In 1883, the Algerian *Conseil supérieur du Gouvernement*, the Supreme Council of Government,[27] perceptively asserted that:

> Now, certainly, the situation is favorable: the vineyards of France are partly devastated, Algerian producers have a safe market outlet and their

in the French Colonies', (1896) 3 The Journal of Commerce and Commercial Bulletin Chapter VII, <http://oll.libertyfund.org/title/2239/211983 on 2012-10-22>.

26 H. Isnard, 'Vigne et colonisation en Algérie', (1949) 58(311) Annales de Géographie 212–219.

27 The French governor general of Algeria was at the head of the colony and, since 1871, was a civil servant under the Ministry of Home Affairs without legislative powers. Two councils assisted the governor general: the Supreme Council of Government and the Council of Government. The Supreme Council of Government was a mixed body, composed of representatives of the population and of senior officials of the colony. The main responsibility was the discussion of the budget. The Council of Government was composed only of senior officials from Algeria and had a purely advisory role, A. Mérignhac, *Précis de législation et d'économie coloniales* (Recueil Sirey, Paris, 1912) 405–6.

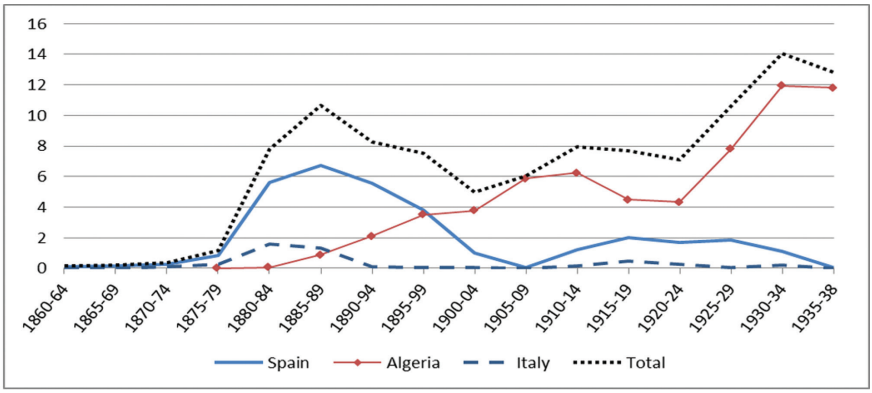

FIGURE 2.5 French imports of bulk wines by major exporting countries (in million hectoliters)
SOURCE: PINILLA AND AYUDA (2002)

products, even if of inferior quality, are sold at sufficiently remunerative prices.[28]

From 1880 onwards, vine plantations expanded massively and vines quickly replaced wheat as the principal cultivation in Algeria. Between 1880 and 1900, the area under vines increased from 20,000 to 150,000 hectares (see Figure 2.4).

Production followed soon (Figure 2.1). From about 25,000 hectoliters in 1854, Algerian production increased to 200,000 hectoliters in 1872, and to 1 million hectoliters in 1885. By 1900 Algerian production was 5 million hectoliters per year and fifteen years later (1915) it had doubled again, to 10 million hectoliters.

This dramatic increase in Algerian production had major implications for international wine markets. In contrast to other wine producing countries, most Algerian wine was exported since domestic consumption was limited. Algeria transformed from a wine importing to an exporting country. The main export market was France and exports grew fast.[29] Initially, most of

28 Authors' translation: "*Aujourd'hui, certainement, la situation est favorable: les vignobles de France étant en partie ravagés, les producteurs algériens trouvent un débouché sûr et leurs produits, même de qualité inférieure, se vendent à des prix suffisamment rémunérateurs.*", Algérie., Conseil supérieur du Gouvernement. Gouvernement général de l'Algérie, *Procès-verbaux des délibérations* (1883).

29 In 1867, the first barrels of Algerian wine were exported to Marseille. From 1886 onwards, Algerian exports would exceed its imports, A.E. Bateman, 'A Note on the Statistics of Wine Production in France', (1883) 46(1) Journal of the Statistical Society of London 113–119.

French wine imports came from Spain (see Table 2.2 and Figure 2.5): Spanish exports to France increased to almost 7 million hectoliters liters in the late 1880s, followed by Italy with exports of 1.5 million hectoliters. However, from the mid-1880s onwards, Algerian wine exports were rapidly replacing Spanish and Italian wines on the French market. By 1900, Algeria was the number one exporter to France, and by 1905, it was effectively the dominant exporter with between 4 to 6 million hectoliters per year and Italian exports almost disappeared and Spanish export fallen to below 2 million hectoliters.

The huge increase in wine exports had major implications for the economy as a whole. At the beginning of the 20th century, wine represented half of the Algerian exports and almost one third of GDP. The maximum was reached in 1933, when wine exports represented 66% of Algerian exports.[30]

3 Recovery of French Production and Government Regulations in the Early 20th Century

The wine from Algeria is the only electoral issue in the Languedoc-Roussillon wine departments.[31]

The factors that induced the rapid growth of the Algerian wine industry did not last. This was already foreseen by the Algerian Council of Government in 1883. In the same speech where he explained the great opportunity for Algerian wine, he also expressed some warning for excessive optimism:

> But an increase in plantations will lead to an increase in competition between the sellers and the current prices may drop (…). This decrease would be even more marked following the recovery of the vineyards of

30 H. Isnard, 'La viticulture algérienne: erreur économique?', in A. Jourdan (ed.), *Revue Africaine* (volume 100, Libraire-éditeur, Alger, 1956) 446–446; H. Isnard, and J.H. Labadie, 'Vineyards and Social Structure in Algeria', (1959) 7 Diogenes 63–81, <http://dio.sagepub.com/content/7/27/63.citation>.

31 Authors' translation: "*Il n'est guère que le vin d'Algérie à être un thème électoral dans les départements viticoles du Languedoc-Roussillon*." The quote refers to the first half of the 20th century. The Languedoc-Roussillon (composed by five departments, namely Aude, Gard, Hérault, Lozère and Pyrénées-Orientales) is a region of southern France (the 'Midi') that massively started producing table wines at the beginning of the 20th century, M. Lachiver, *Vins, vignes et vignerons. Histoire du vignoble français* (Fayard: Paris 1988); G. Meynier, *L'Algérie révélée: la guerre de 1914–1918 et le premier quart du XXe siècle* (Librairie Droz, Genève – Paris 1981) 13.

> southern France because our wines can be compared with the wines from this region (…) for this reason we must be very cautious.[32]

These words of caution turned out to be visionary. During the 1890s, French vineyards were recovering with new plantings using grafting and hybrid grape varieties. Production increased again and, by 1900, production was around 65 million hectoliters, the level of the pre-crisis years (see Figure 2.2). Hence, by the beginning of the 20th century, French wine production had recovered.

This recovery was also reflected in the fall of wine prices (see Figure 2.6). From the peak in 1880, average wine prices fell by more than 60% over the course of the next 25 years. Wine prices in 1905 were approximately one-third of those in 1880. The most dramatic decline took place during the 1890s, when French production increased again.

The declining prices resulted in demands by French producers to limit imports and wine "adulterations". While French consumers (and some of the French producers which used Algerian wine for blending) initially welcomed imports and wine "adulterations", French producers increasingly lobbied and put pressure on the government to stop them. As wine prices continued to fall, the protests by winegrowers grew increasingly intense. The winegrowers' revolts in various parts of France included street protests and even violence. Winegrowers resolved to press their opinions through so-called *actions directes*, which included "mutinies, pillages, burning down of city halls".[33]

3.1 *Raising Import Tariffs*

The first response of the French government was to increase tariffs on wine imports. Tariffs on Italian wine were increased from 5% to almost 50% in the

32 Authors' translation : "*Mais plus les plantations augmenteront, plus la concurrence s'établira entre les vendeurs, et les prix actuels subiront peut-être une baisse assez sensible* (…). *Cette baisse serait plus accentuée encore, si le vignoble du midi de la France se reconstituait rapidement, car c'est aux vins de cette région que nos crus peuvent être comparés.* (…) *et nous devons, pour ce motif, nous montrer très circonspects*." Algérie., Conseil supérieur du Gouvernement. Gouvernement général de l'Algérie, *Procès-verbaux des délibérations* (1883).

33 J.-P. Martin, 'Viticulture du Languedoc: une tradition syndicale en mouvement', (1998) 9(1) Pôle Sud 71–87; J.-M. Bagnol, 'Les députés héraultais et la viticulture dans l'entre-deux-guerres: organes de décision, relais de pouvoir, législation', *Ruralia* (2007), No. 21, <http://ruralia.revues.org/1857>; C. Wolikow, 'La Champagne Viticole, banc d'essai de la Délimitation (1903–1927)', *Territoires du vin – Pour une redéfinition des terroirs* (2009), <http://revuesshs.u-bourgogne.fr/territoiresduvin/document.php?id=275%20ISSN%201760-529>.

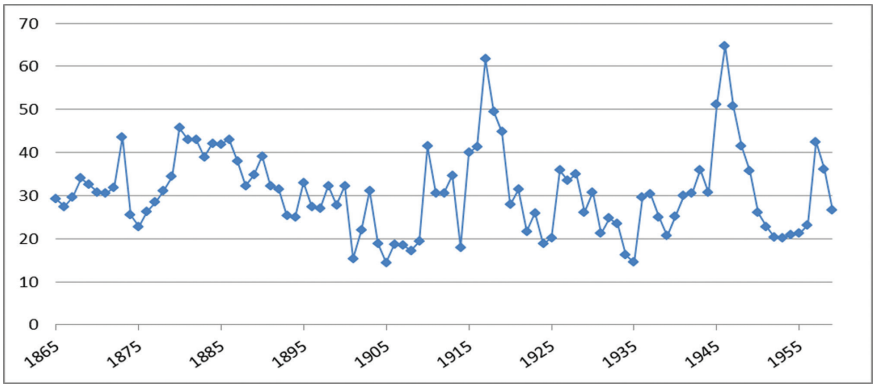

FIGURE 2.6 CPI-deflated wine prices in France, 1865–1959 (in old Francs per hectoliter) SOURCE: INSEE (1935; 1966); CONSUMER PRICE INDEX (1914 = 100) FROM MITCHELL (1998)

late 1880s when a trade war began between France and Italy.[34] A few years later, in 1892, France also increased the tax on the import of Spanish[35] wines and Greek raisins.[36] Figure 2.7 shows how import tariffs increased from 5% to more than 40% after 1892. This increase in French tariffs led to a dramatic decrease of Spanish and Italian wine exports (see Figure 2.5).[37]

34 The "trade war" (1887–1892) between Italy and France was initiated by Italy that introduced a new tariff on wheat and manufactures in 1887, G. Federico and A. Tena, 'Did trade policy foster Italian industrialization. Evidences from the effective protection rates 1870–1930', (1999) 19 Research in Economic History 111–138; S. Becuwe and B. Blancheton., 'The dispersion of customs tariffs in France between 1850 and 1913: discrimination in trade policy', *Cahiers du GREThA, n° 2012–13* (2012), <http://cahiersdugretha.u-bordeaux4.fr/2012/2012–13.pdf>.

35 In the second half of the 19th century, Spain became the world's largest table wine exporter. In 1891, Spanish exports were "32 times greater than those of 1850 or six times those of 1877", with the French market accounting for 85% of the Spanish exports between 1886–90. From 1892 onwards, Spain witnessed a decrease in table wine exports mainly driven by France's trade policy with high tariffs imposed on Spanish wine exports, V. Pinilla and R. Serrano, 'The Agricultural and Food Trade in the First Globalization: Spanish Table Wine Exports 1871 to 1935 – A Case Study', (2008) 3(2) Journal of Wine Economics 132–148.

36 J. M. Critz, Olmstead, A. L. and P. W. Rhode., '"Horn of Plenty": The Globalization of Mediterranean Horticulture and the Economic Development of Southern Europe, 1880–1930', (1999) 59(2) The Journal of Economic History 316–352; V. Pinilla and M-I. Ayuda., 'The Political Economy of the Wine Trade: Spanish Exports and the International Market, 1890–1935', (2002) 6 European Review of Economic History 51–85.

37 The importance of Algeria on French imports of table wines increased from about 8% between 1885–89 to 97.7% between 1905–09, with the importance of Spain decreasing from 80% during the second half of the 19th century to 0.8% between 1905–09 (see Table 2.2).

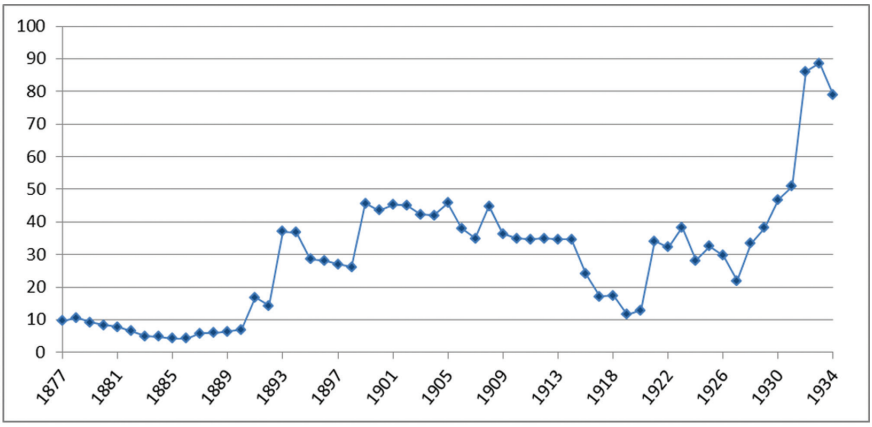

FIGURE 2.7 French import tariffs on bulk wine imports, 1877–1934 (in %)
SOURCE: PINILLA AND AYUDA (2002)

In contrast, Algerian wine imports were not taxed. Tariffs on Algerian wine imports had been removed in 1867 and the French government continued to allow tariff-free entry of Algerian wine.[38] Algeria was considered part of France[39] and, in doing so, the French government reduced imports while supporting emigrated French winegrowers ruined by *Phylloxera*. Also, France still needed extra wine to meet its demand – average French annual production was 30–40 million hectoliters in the 1890s, compared to its annual pre-*Phylloxera* average of 50 million hectoliters (see Figure 2.2).

The increase in import tariffs reduced total imports and caused a substitution of wine imports from Spain and Italy to Algeria. Figure 2.5 illustrates how imports fell from more than 10 million hectoliters in the late 1880s to 5 million hectoliters in the early 1900s, mostly as a consequence of the decline

38 Algerian external trade was entirely dependent on France. France had constructed a monopoly in trade with its colonies and a regime of preferential trade tariffs. Initially (after annexation in 1830), there were tariffs on both French and Algerian products in bilateral trade. In 1835, tariffs were removed from French products entering in Algeria, but not vice versa. Algerian products were still considered as "foreign" imports by France. In 1851, a new law admitted certain Algerian products to enter France duty free, such as fruits, vegetables, cotton, and tobacco. However, initially wine was not included. Tariffs on Algerian wine imports were removed in 1867 (P. Leroy-Beaulieu, *L'Algérie et la Tunisie* (Librairie Guillaumin et Cie, Paris 1887) 176; S. Barrows, 'Alcohol, France and Algeria: a case study in the international liquor trade', (1982) 11 Contemporary Drug Problems 525–543; H. Isnard, *La vigne en Algérie, étude géographique. Tome II.* (Ophrys: Gap 1954) 30).

39 In 1848, Algeria was divided into three French departments (or administrative units): Oran, Algiers and Constantine, P. Leroy-Beaulieu, *L'Algérie et la Tunisie* (Librairie Guillaumin et Cie, Paris 1887).

of Spanish imports. Over this period, the import of Algerian wine more than tripled, partially offsetting the reduced imports from Spain and Italy. As Figure 2.3 illustrates, French wine imports equaled Algerian production during the first two decades of the 20th century. Moreover, after 1905, further increases of Algerian imports (from 4 to 6 million hectoliters) caused total wine imports (which now consisted mostly of Algerian wine) to increase between 1905 and 1915. This caused wine prices in France to continue to decline during the first decade of the 20th century (see Figure 2.6).

Not surprisingly, with increasing imports and falling prices, French wine producers now pressured the government to intervene and stop the inflow of Algerian wine and its impact on their revenues. However, French wine producers were not a homogenous group. On the one hand, there were the producers from Bordeaux, Champagne and Burgundy, who were upset that the influx of cheap wine would spill over on their "high quality" wine market. They tried to defend their export markets and to ensure their 'brand' against possible imitators or lower quality wines. For instance, producers of the Champagne region were worried that a wine produced outside the Champagne region could be sold as "Champagne". On the other hand, there were the producers of table wines, such as the winegrowers of the Midi, located in southern France. The Midi and the Algerian winegrowers were directly competing with each other as they both produced large amounts of table wines to be sold in France.[40]

Both groups pressured the government to constrain the inflow of Algerian wine, but used different strategies – with different success. The first group tried to get government regulation protecting them from all (low quality) table wines, not just from Algerian wines. These producers and winegrowers were grouped in associations that had much influence with the authorities. For instance, in the Champagne region, three powerful lobbying groups existed: the *Fédération des Syndicats de la Champagne*; the *Syndicat du Commerce des Vins de Champagne*; and the *Association Viticole Champenoise*.[41]

40 Algeria produced three categories of wines. First, "*table wines*" (with an alcohol content between 11% and 11.5%) represented 50% of Algerian production. They were shipped and sold directly to France through the southern Marseille harbor. Second, "*wines for consumption*" (with an alcohol content between 11% and 13%) represented 30% of Algerian production and were considered as higher quality wines directly sold in Paris (via southern Marseille or northern Rouen harbors). Third, "*wines for blending*" (with an alcohol content between 11.5% and 16%) represented 20% of Algerian production and were blended in France either in Languedoc (via the harbor in Cette) or Bordeaux (via the harbor in Bordeaux). The "*wines for blending*" was the only category not in competition with Midi wines as they were used to increase their alcohol content, H. Isnard, *La vigne en Algérie, étude géographique. Tome II.* (Ophrys: Gap 1954).

41 Comité Interprofessionnel du Vin de Champagne, 'L'Appellation Champagne, les clés des vins de Champagne', *Comité Interprofessionnel du Vin de Champagne* (2003),

Wine producers from Algeria or from other French regions organized only later. Winegrowers of the Midi organized themselves in 1887 in the *Syndicat des Viticulteurs* (Union of Winegrowers)[42] and in 1907 in the *Confédération Générale des Vignerons du Midi* (CGVM – "General Confederation of Midi Winemakers"). In 1912, the French settlers which owned most Algerian vineyards organized themselves as well in order to protect their common interests, imitating the winegrowers' association of southern France. They formed an association of Algerian winegrowers, the *Confédération des Vignerons des Trois Départements Algériens* (CVA).[43]

3.2 *The Introduction of French "Quality Regulations"*

> Consommateur Français bois ce vin Français.
>
> Algerian wine advertisement[44]

The producer organizations of Bordeaux, Champagne and Burgundy were successful in lobbying the government to introduce several "quality regulations" in the early 20th century.[45] The so-called "quality regulations" were heavily

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<http://www.champagne.fr/wpFichiers/1/1/Mediatheque/11/Associes/11/Fichier/appellation.pdf>; C. Wolikow, 'La Champagne Viticole, banc d'essai de la Délimitation (1903–1927)', *Territoires du vin – Pour une redéfinition des terroirs* (2009), <http://revuesshs.u-bourgogne.fr/territoiresduvin/document.php?id=275%20ISSN%201760-529>.

42 The *Syndicat des Viticulteurs* was created to increase the tariffs on Italian wines. The French government, under pressure, did not renew the trade treaty with Italy, V. Pinilla and M-I. Ayuda, 'The Political Economy of the Wine Trade: Spanish Exports and the International Market, 1890–1935', (2002) 6 European Review of Economic History 51–85.

43 When French arrived in Algeria, lands were owned by the tribe or family collectivity and not by single individuals. During the 1870s, these Muslim "common lands" were expropriated, privatized and freely granted to European settlers, K.H. Halvorsen, 'Colonial Transformation of Agrarian Society in Algeria', (1978) 15(4) Journal of Peace Research 323–343. At the beginning of the 20th century, 10% of Algerian winegrowers (owning large vineyards of over 50 hectares) produced almost 70% of Algerian wine production (see Tables 2.5 and 2.6). The owners were French settlers – the so-called *pieds noirs*, or 'black feet', K.H. Halvorsen, 'Colonial Transformation of Agrarian Society in Algeria', (1978) 15(4) Journal of Peace Research 323–343. In 1914, Muslims Algerians only owned 3% of the vineyards. Landless Muslims Algerian were a cheap labor force to work in the vineyards, H. Isnard, 'La Viticulture Nord-Africaine', in *Annuaire de l'Afrique du Nord-1865* (Editions du CNRS, Vol. 4, Paris 1966); T. Smith, 'Muslim Impoverishment in Colonial Algeria', (1974) 17 Revue de l'Occident Musulman et de la Méditerranée 139–162; G. Meynier, *L'Algérie révélée: la guerre de 1914–1918 et le premier quart du XXe siècle* (Librairie Droz, Genève – Paris 1981).

44 Authors' translation: "French consumer drinks this French wine". Quote from an Algerian wine poster.

45 Note that there was considerable heterogeneity within these regions – and different interests. For example, in the Bordeaux wine region the large inflow of cheap wine led

supported by political representatives of these regions who held key positions in parliament.[46]

Strachan and Birebent argue that a particular event involving Algerian wine, known as the "Leakey Affair", played an important role in the political discussions.[47] Facing a surplus on French markets, Algeria was searching for new markets and attempted to promote Algerian wines in the British market. In July 1905, Charles Jonnart, the French governor general of Algeria, entered in a contract with James Leakey, a businessman based in London, to sell 50,000 hectoliters of Algerian wine on the British market. Leakey advertised Algerian wine as French wine in the newspapers since "*Algeria is now an integral part of France*". The advertisements also drew parallelisms with renowned wine regions in France as Bordeaux and Burgundy. When word spread to France, French wine producers soon protested and lobbied the French Ministry of Commerce. They accused Algerian producers of being the cause of the crisis and of producing "non-natural", artificial wines.

Only one month after the Leakey contract, the Law of 1 August 1905 on "frauds and falsifications" indicated the conditions for the production of a

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to conflicts between growers of the same area (the few large "Châteaux" owners producing "high quality" wines versus the numerous small family winegrowers producing "low quality" wines), between growers of different areas (producing inside and outside the Bordeaux area) and between merchants and growers, J. Simpson, *Creating Wine: The Emergence of a World Industry, 1840–1914* (Princeton University Press, Princeton, New Jersey, USA 2011). The main problem faced by the small "low quality" wine producers was overproduction. The merchants were blending Bordeaux wines with wines coming from outside the region (including Algerian wines that were shipped to France via the harbor of Bordeaux). Blending was initially welcomed due to the scarcity of wine but became a problem during the overproduction crisis at the beginning of the 20th century. On the other hand, the "high quality" wine owners were less worried about blending as they bottled their wines in their "Châteaux" but were more worried that Algerian wines might threaten their export market. Both groups however were united in their pressure on the government to constrain the inflow of cheap wines and to establish regional *Appellations*. Haeck et al. (2019) study how the introduction of "Appellations of Origin" (Appellations d'Origine – AO) influenced the price of specific wines (including Champagne and Bordeaux) in early twentieth century France, C. Haeck, G. Meloni and J. Swinnen, 'The Value of Terroir. A Historical Analysis of the Bordeaux and Champagne Geographical Indications', (2019) 41(4) Applied Economic Perspectives and Policy 598–619.

46 In 1919, Joseph Capus was elected deputy of the Gironde (the bordeaux wines production area) and he was also the president of the Parliamentary committee called «*des grands crus*» (great vintages).

47 J. Strachan, 'The Colonial Identity of Wine: The Leakey Affair and the Franco-Algerian Order of Things', (2007) 21(2) Social History of Alcohol and Drugs, <http://historyofalcoholanddrugs.typepad.com/SHADV21N2Strachan.pdf>; P. Birebent, *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France, 2007).

"natural" wine. Article 4[48] required that the wine sold had to clearly indicate the denomination of origin to avoid "misleading commercial practices". Article 16 of the 1905 Law explicitly stated that the law also applied to Algeria.[49]

Other laws were introduced to protect the interests of the producers of these regions by introducing an explicit link between the "quality" of the wine, its production region (the *terroir*) and the traditional way of producing wine. In this way, the regional boundaries of including Armagnac, Bordeaux, Champagne and Cognac wines were established between 1908 and 1912.[50]

These regulations of the early 20th century in response to the Algerian wine imports and the low prices turned out to have long lasting impacts. The regional boundaries, identified between 1908 and 1912, were referred to as *Appellations*. A few years later, in 1919, a new law specified that if an *Appellation* was used by unauthorized producers, legal proceedings could be initiated against its use. Later, the restrictions grew further: the 1927 Law placed restrictions on grape varieties and methods of viticulture used for the *Appellations* wine.[51] Finally, the Law of 1935 created the *Appellations d'Origine Contrôlées* (AOC) that combined several of the earlier regulations: it restricted production not only to regional specific origins (through areas' delimitation) but also to specific production criteria as grape variety, minimum alcohol content and maximum vineyards yields.[52] The 1935 Law formed the basis of the well-known *Appellations d'Origine Contrôlées* (AOC) and *Denominazione di origine controllata*

48 Loi du 1er Août 1905, article 4: "*Dans les établissements où s'exerce le commerce de détail des vins, il doit être apposé d'une manière apparente, sur les récipients, emballages, casiers ou fûts, une inscription indiquant la dénomination sous laquelle le vin est mis en vente.*" [Authors' translation: "In the establishments where the retail of wine takes place, a notice indicating the denomination under which the wine is sold must be clearly affixed on containers, packages, boxes or drums].

49 Algeria applied French laws in three different ways: French laws could be expressly declared inapplicable to Algeria, or declared applicable to Algeria but with some modifications, or could contain a final article declaring that the law applied to Algeria, A. Mérignhac, *Précis de législation et d'économie coloniales* (Recueil Sirey, Paris, 1912) 268–9.

50 G. Meloni and J. Swinnen, 'Trade and Terroir. The Political Economy of the World's First Geographical Indications', (2018b) 81 Food Policy 1–20.

51 L.A. Loubère, *The Wine Revolution in France: The Twentieth Century* (Princeton, N.J.: Princeton University Press 1990).

52 A. Stanziani, 'Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France', (2004) 18(2) European Journal of Law and Economics 149–167; Simpson, J., *Creating Wine: The Emergence of a World Industry, 1840–1914* (Princeton University Press, Princeton, New Jersey, USA 2011).

(DOC) regulations that play an important role in today's European Union (EU) wine markets.[53]

4 Further Expansion in Algeria and More Regulations in France

> This is a law of a very exceptional nature. (…) We believe it is, since the French Revolution, the legislation with the largest government intervention in the economy. This is (…) a planned economy."[54]
>
> MR LEROY, General Counsel of the Appellations of Origin, 1932

The "quality regulations" protected the French producers of the Bordeaux, Champagne and Burgundy regions against Algerian imports, but did nothing to protect the other French producers – to the contrary. The regulations targeted not only Algerian wine but also wine from other (French) regions.[55] Southern French winegrowers lobbied the government to impose import tariffs and quotas to protect them against Algerian wine. However, the French government was not willing to impose tariffs on Algerian wines, as it would have hurt the interests of French citizens overseas and because it was inconsistent with the integration of the Algerian colony as French territory.[56]

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53 The European initial system of "quality" regulations explicitly referred to (and integrated) the French 1935 AOC s system (see G. Meloni and J. Swinnen., 'The Political Economy of European Wine Regulations', (2013) 8(3) Journal of Wine Economics 244–284 for more details).

54 Authors' translation: "*Il s'agit ici d'une loi d'un caractère très exceptionnel. On peut dire, croyons-nous, qu'elle constitue, depuis la Révolution française, la mesure législative la plus importante consacrant l'intervention de l'Etat dans le domaine de la vie économique. C'est, suivant l'expression à la mode, de l'économie dirigée au premier chef.*" Société de législation comparée, *Annuaire de législation française. Publié par la Société de législation comparée, contenant le texte des principales lois votées en France en 1931* (Paris: A. Cotillon, 1932) 1882–1934, <http://gallica.bnf.fr/ark:/12148/bpt6k5446891h.image.langFR>.

55 Underlying these increasingly tight "quality" regulations in France was a major battle over the regulation of hybrids, one of the two practices used to cure vines from *Phylloxera* (see Meloni, G. and J. Swinnen., 'The Political Economy of European Wine Regulations', (2013) 8(3) Journal of Wine Economics 244–284 for more details). This battle continued through most of the 20th century. A strong division of interests existed between the *Appellation d'Origine* producers, located in Bordeaux, Champagne or Burgundy (who used grafting since it allowed to keep European *Vitis vinifera* characteristics, with the same productivity and quality) and wine producers from other regions (who used hybrids since the new vines were more productive, easier to grow and more resistant to diseases – requiring less winegrowing experience, less pesticides and less capital), H.W. Paul, *Science, Vine and Wine in Modern France* (Cambridge University Press 1996).

56 H. Isnard and J.H. Labadie, 'Vineyards and Social Structure in Algeria', (1959) 7 Diogenes 63–81, <http://dio.sagepub.com/content/7/27/63.citation>; S. Barrows, 'Alcohol, France

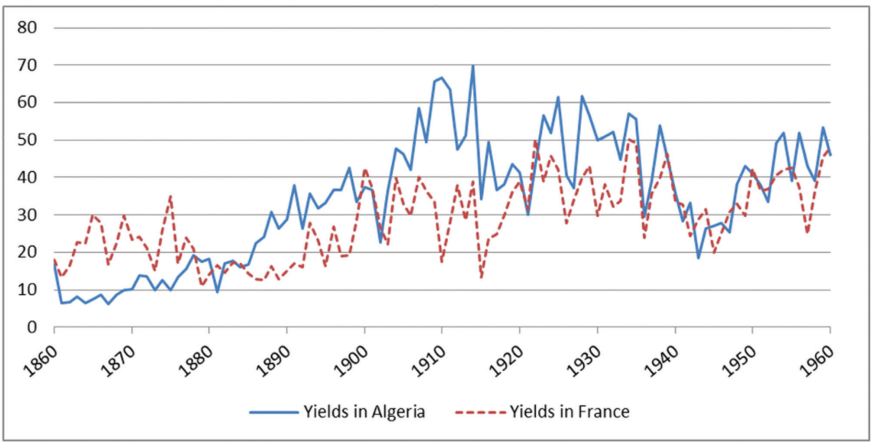

FIGURE 2.8 Yields in France and Algeria, 1860–1960 (in hectoliters of wine per hectare)
SOURCE: BIREBENT (2007) AND INSEE (1935; 1966)

The First World War (1914–18) and the spread of *Phylloxera* in Algeria brought some relief to the French-Algerian wine conflict. *Phylloxera* reached the colony at the end of the 19th century and 63% of the vineyards were still infected in 1910.[57] However, the impact on Algeria's vineyards was limited since Algerian winegrowers benefited from the French experience on how to counter the disease.[58] They opted for the grafting solution.[59]

The relief on French wine markets was brief. The 1920s and the early 1930s saw a rapid increase in Algerian wine production and exports. Production recovered from its lowest point of 5 million hectoliters in 1922 to 10 million hectoliters by 1925. Over the next decade, it doubled again: production reached 20 million hectoliters by 1935. Part of the reason for the increased production was the higher productivity of replanted post-*Phylloxera* vineyards (average productivity in Algeria was 30%-40% higher than in France over this period – see Figure 2.8). However, the most important reason was a strong growth in vineyards: the cultivated vine area in Algeria increased from 175,000 hectares

and Algeria: a case study in the international liquor trade', (1982) 11 Contemporary Drug Problems 525–543.

57 From 1905 to 1910, around 40,000 hectares of vines were destroyed by *Phylloxera* (see Figure 2.4).

58 For a detailed analysis of the battle against *Phylloxera* in Algeria see H. Isnard, *La vigne en Algérie, étude géographique. Tome II.* (Ophrys: Gap 1954).

59 H. Isnard, *La vigne en Algérie, étude géographique. Tome II.* (Ophrys: Gap 1954); G. Meynier, *L'Algérie révélée: la guerre de 1914–1918 et le premier quart du XXe siècle* (Librairie Droz, Genève – Paris 1981).

in 1925 to 400,000 hectares by 1935. The increase in plantings in the 1930s was also based on borrowing – as the first phase of massive plantations 50 years earlier. In 1925, a law allowed agriculture credit banks to provide medium – and long-term loans. Again, European settlers borrowed substantial amounts of capital.[60] Moreover, wine prices in France in the second half of the 1920s were around 40% higher than in the first half. Figure 2.6 shows that, in real terms (1914 prices), the annual prices were 23 francs per hectoliter (in 1921–1925) and 32 francs per hectoliter (in 1926–1930). The growth in plantations led to increased output and exports to France and resulted in falling prices in the 1930s. Interestingly, vineyard plantings in Algeria did not slow down in the early 1930s. As Figure 2.4 illustrates, if anything new plantings grew faster in the early 1930s. A crucial factor for this was the fear in Algeria that France would block planting of new vineyards in Algeria. This fear was stimulated by political discussions in Paris. In 1929, a suggested law – the so-called "Castel proposal" – proposed to limit vine plantations.[61] The proposal was rejected in Parliament but alerted Algerian wine producers that a prohibition of new plantings could become reality. This, in turn, induced them to plant more vineyards.

The combination of post-war recovery in French production, increasing imports and a fall in demand with the Great Depression of 1929 caused another crisis in the French wine market. Between 1927 and 1935 real wine prices declined by 50% (see Figure 2.6). Again, winegrowers of the Midi asked for import tariffs or quotas on Algerian wine. However, again the French government was not willing to impose import tariffs or quotas on wine from its colony. A 1929 law proposed to impose quota restrictions that would limit imports of Algerian wine to 8 million hectoliters was rejected.[62]

Tariffs on wine imports were increased for wine from other countries. During 1914–1925, Spanish table wines were allowed to enter France more easily due to the wine shortages induced by World War I. Figure 2.7 illustrates how import tariffs were much lower during this period. However, with the recovery of the Algerian and French wine industry and the wine overproduction crisis of the 1930s, France decided to raise again the import tariffs on Spanish wines. Figure 2.7 shows how import tariffs on wine increased from around 30% to more than 80% after 1930. As a consequence, Spanish wine imports fell from 2 million hectoliters in the 1920s to almost zero after 1935.

60 H. Isnard, 'Vigne et colonisation en Algérie', (1949) 58(311) Annales de Géographie 212–219.
61 H. Isnard, 'Vigne et colonisation en Algérie', (1949) 58(311) Annales de Géographie 212–219.
62 P. Birebent, *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France, 2007) 132.

The *Confédération Générale des Vignerons du Midi* (CGVM) then changed strategy. Instead of trying to limit Algerian imports, it lobbied the French government to halt the expansion of Algerian vineyards.[63] With almost all Algerian production exported to France, a limit on vineyard expansion was equivalent to import constraints. This tactic was more successful, possibly because it led to regulations which (ostensibly) did not discriminate between French citizens (producers) in France and those in Algeria.

Between 1931 and 1935 a series of laws (the *Statut Viticole*)[64] aiming at controlling the wine supply in France were introduced. The *Statut Viticole* included several measures: an obligation to store part of the excess production (so-called '*blocage*'),[65] obligatory distillation of surpluses,[66] the establishment of a levy on large crops and yields, a ban on planting new vines, and premiums for grubbing-up of "over-productive" vines.[67]

The regulations applied to producers in France itself and to its Algerian colony.[68] However, the policy was biased towards French wine producers and against Algerian producers. It supported smaller French winegrowers and hurt larger Algerian winegrowers. New plantings of vines were forbidden for a period of ten years for producers who owned vineyards of more than 10 hectares or who produced more than 500 hectoliters of wine. Distillation was obligatory when the combined wine production in France and Algeria exceeded 65 million hectoliters, and was imposed on winegrowers whose average yield

63 G. Meynier, *L'Algérie révélée: la guerre de 1914–1918 et le premier quart du XXe siècle* (Librairie Droz, Genève – Paris, 1981) 129.

64 Four laws were issued in 1931, 1933, 1934 and 1935, JORF., 'Loi du 4 juillet 1931 sur "La Viticulture et le Commerce des Vins" ', (1931) 5 Journal Officiel de la République Française 7282; JORF, 'Loi du 8 juillet 1933 sur "La Viticulture et le Commerce des Vins" ', (1933) 13 Journal Officiel de la République Française 7310; JORF, 'Loi du 24 décembre 1934 tendant à réaliser "L'Assainissement du Marché des Vins" ', (1934) 25 Journal Officiel de la République Française 12699; JORF, 'Décret-loi du 30 juillet 1935 "Défense du marché des vins et régime économique de l'alcool" ', (1935) 31 Journal Officiel de la République Française 8314.

65 Producers could allocate their product in the market through successive quotas.

66 Between 1934 and 1935, 24 million hectoliters were distilled, M. Lachiver, *Vins, vignes et vignerons. Histoire du vignoble français* (Fayard: Paris 1988).

67 G. Gavignaud, 'Etat et propriété: le vignoble méridional (1880–1980)', in *Économie rurale. N°184–186. Un siècle d'histoire française agricole* (1988) 92–99; L.A. Loubère, *The Wine Revolution in France: The Twentieth Century* (Princeton, N.J.: Princeton University Press 1990).

68 Article 17 of 1931 law and article 54 of the 1935 stated that the regulations were applicable to Algeria (JORF., 'Loi du 4 juillet 1931 sur "La Viticulture et le Commerce des Vins" ', (1931) 5 Journal Officiel de la République Française 7282; JORF., 'Décret-loi du 30 juillet 1935 "Défense du marché des vins et régime économique de l'alcool" ', (1935) 31 Journal Officiel de la République Française 8314).

(calculated over the three previous harvests) was greater than 500 hectoliters or producing more than 80 hectoliters of wine per hectare.[69] It also introduced taxation on high yields.[70]

These regulations hit Algerian producers much harder than French producers.[71] During the 1930–35 period, the average vineyard for French winegrowers was around 1 hectare, whereas in Algeria it was around 22 hectares. Furthermore, the average yield in France was 38 hectoliters per hectare, whereas in Algeria it was almost 50 hectoliters per hectare (see Figure 2.8 and Tables 2.3 and 2.4). Furthermore, due to the hot climate, the obligation to store part of the excess production was more damaging for Algerian wine producers.

The series of laws did not immediately contain total wine production. For two successive years, 1934 and 1935, total production of France and Algeria was almost 100 million hectoliters.[72] However, the *Statut Viticole* did immediately halt the increase of the Algerian vineyard area (see Figure 2.4). The total vineyard area never expanded beyond the level reached in the mid-1930s (400,000 hectares).

In the following years, the *Statut Viticole* did cause a reduction in vineyards and production. The dramatic decline in wine production in 1939–1947 was triggered by the *Statut Viticole* and the Second World War (1939–45). The grubbing-up of "over-productive" vines, started in 1938, eliminated 73,000 hectares of vines in Algeria – from 398,000 hectares in 1938 to 325,000 hectares in 1946 (see Figure 2.4).

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69 JORF., 'Loi du 4 juillet 1931 sur "La Viticulture et le Commerce des Vins" ', (1931) 5 Journal Officiel de la République Française 7282; M. Lachiver, *Vins, vignes et vignerons. Histoire du vignoble français* (Fayard: Paris 1988); J. Simpson, *Creating Wine: The Emergence of a World Industry, 1840–1914* (Princeton University Press, Princeton, New Jersey, USA 2011).

70 A progressive tax was imposed on yields reaching more than 100 hectoliters of wine per hectare. Starting from a fee of 5 francs per hectoliter for yields between 100 and 125 hectoliters per hectare, the taxed reached up to 100 francs per hectoliter for yields exceeding 250 hectoliters per hectare. Moreover, a second tax was hitting the large winegrowers, producing in total more than 2,000 hectoliters (JORF., 'Loi du 4 juillet 1931 sur "La Viticulture et le Commerce des Vins" ', (1931) 5 Journal Officiel de la République Française 7282, Article 1).

71 The Appellations of Origin wines were exempted from these measures, leading to the creation of a large number of Appellations of Origin, Capus, J., *L'évolution de Législation sur les Appellations d' Origine – Genèse des Appellations Contrôlées* (Institut National des Appellations d'Origine 1947), <http://www.inao.gouv.fr/public/home.php?pageFromIndex=textesPages/Les_fondements_de_l_appellation391.php~mnu=391>.

72 In 1934, France and Algeria produced respectively 78 million hectoliters and 22 million hectoliters, while total (French) consumption reached 70 million hectoliters. In 1935, France and Algeria produced respectively 76 million hectoliters and 19 million hectoliters, Insee, *Annuaire statistique de la France. Résumé rétrospectif* (Institut National de la Statistique et des Etudes Economiques, Paris 1935).

TABLE 2.3 French wine production from 1900 to 1961

	Surface (million ha)	Production (million hl)	Yields (hl/ha)	Winegrowers (million)	Surface per Winegrower
1900–1909	1.69	55.8	32.9	1.78	0.96
1910–1919	1.55	43.2	27.9	1.54	1.01
1920–1929	1.52	59.9	39.3	1.48	1.03
1930–1939	1.53	58.8	38.4	1.51	1.02
1940–1949	1.44	42.2	29.2	1.49	0.97
1950–1961	1.35	52.9	39.1	1.5	0.9

SOURCE: AUTHORS' CALCULATIONS BASED ON INSEE (1935; 1966)

TABLE 2.4 Algerian wine production from 1900 to 1961

	Surface (million ha)	Production (million hl)	Yields (hl/ha)	Winegrowers (thousand)	Surface per Winegrower
1900–1909	0.15	6.7	43.7	12.4	12.29
1910–1919	0.15	7.6	49.3	na	na
1920–1929	0.19	9.5	48.6	10.4	18.69
1930–1939	0.36	17.2	47.6	20	18.05
1940–1949	0.35	10.7	30.4	27.4	12.82
1950–1961	0.36	15.8	44.3	32.2	11.09

SOURCE: AUTHORS' CALCULATIONS BASED ON BIREBENT (2007, P. 222)

TABLE 2.5 The evolution of Algerian vineyard sizes, 1908–1948 (in hectares)

	1908	1948
Very small vineyards (<1 ha)	49%	27%
Small vineyards (1 – 5 ha)	28%	36%
Medium vineyards (5 – 20 ha)	15%	23%
Large vineyards (20 – 50 ha)	6%	8%
Very large vineyards (> 50 ha)	2%	5%

SOURCE: BIREBENT (2007, P. 223)

From 1939 onwards, Algerian wine exports were paralyzed as WWII seriously hit maritime trade. The Second World War caused destruction or abandonment of many vineyards in France and Algeria. This caused a sharp fall in wine production. The 1942 Allied invasion of Algeria led to a decrease in production, from 12 million hectoliters produced in 1942 to 7 million in 1943.[73] As a result, the *Statut Viticole* was repealed in 1942.

After WWII, both vine area and wine production recovered as vineyards were replanted with production in Algeria doubling from 9 million hectoliters in 1945 to 18 million in 1953. In France production recovered from around 40 million hectoliters during the war to around 60 million hectoliters a decade later.

This led to new pressure for political interventions, as Algerian wines were once more competing with southern French wines.[74] The *Statut* was reintroduced in 1953, under the name *Code du Vin*.[75] The *Code du Vin* again blocked the expansion of Algerian vineyards and wine production, at around 350,000 hectares and 18 million hectoliters of wine, respectively. Algerian vine area and wine production were again regulated by French wine regulations. The maximal size of the Algerian vineyards surface (almost 400,000 hectares) was attained during the 1930s, with regulatory limitations (the *Statut Viticole* and later the *Code du Vin*) halting its expansion afterwards. The situation of economic and regulatory interdependence between the Algerian and French wine sector would dramatically change with Algerian independence.

5 The Collapse of the Wine Industry in Algeria

Despite all the French-imposed regulations, Algeria was still the fourth largest producer (after Italy, France and Spain) in 1961, at the eve of its independence from France (see Table 2.1). However, immediately after Algerian political independence in 1962, wine production started falling and, in the course of two

73 Insee, *Annuaire statistique de la France. Résumé rétrospectif* (Institut National de la Statistique et des Etudes Economiques, Paris 1935).

74 Algerian wines were also more competitive as innovative transport modes (in bulk) were used for the export of Algerian wines – tankers appeared in 1935 and developed during the beginning of the 1950s, R. Caralp, 'Le transport des vins en vrac en France', (1953) 62(333) Annales de Géographie 373–374; H. Isnard and J.H. Labadie., 'Vineyards and Social Structure in Algeria', (1959) 7 Diogenes 63–81, <http://dio.sagepub.com/content/7/27/63.citation>.

75 The *Code du Vin* reestablished subsidies to uproot vines, as well as surplus storage, compulsory distillation, and penalties for high yields. It also created the viticultural land register, J. Milhau, 'L'avenir de la Viticulture Française', (1953) 4(5) Revue économique 700–738.

decades, the Algerian wine industry totally collapsed (see Figure 2.1). From 366,000 hectares in 1962, the area under vines decreased to 100,000 hectares in the mid-1980s, and falling further to 25,000 hectares in 2005, the same area as in 1880. Production dropped from 15 million hectoliters in 1962 to about 600,000 hectoliters in 2009 (the equivalent of the 1882 production), of which only 3% was exported. Algerian exports decreased from 14.8 million hectoliters in 1962 to 17,000 hectoliters in 2008.[76]

There were two main causes for the Algerian wine industry collapse. One reason was the total dependence on France for its wine sales, the other the poor management after the nationalization of the wine sector.

5.1 *Export Constraints after Independence*

There was no internal market for wine[77] and almost the entire Algerian wine production was exported to France.[78] But after independence Algeria no longer enjoyed the same trade status with France. In fact, French producers used the independence of Algeria as an argument to (again) press their case to reduce Algerian wine imports. In 1964, a five-year agreement was reached between France and Algeria in which France committed, over the next five years, to purchase 39 million hectoliters of Algerian wine – between 7 and 9 million hectoliters per year, but in decreasing quantities.[79] The agreed import was considerably lower than before independence (*e.g.* in 1961 Algeria exported 15 million hectoliters to France). However, under pressure from French winegrowers, the French government did not fulfill the agreement and forbade French traders to sell Algerian wine in France. It effectively imposed a ban of Algerian imports. While the ban was repealed after a few months, the French government continued to claim that the 1964 agreement should not be interpreted as an obligation or as automatic access to the French market, but rather that the entire quota should be imported only if needed. The last two years of the

76 Ministère de la PME et de l'Artisanat, 'Analyse de la Filière Boisson en Algérie : Rapport Principal', *Euro Développement Pme* (Alger 2005); FAO, 'FAOSTAT', *Food and Agriculture Organization of the United Nations* (2012), <http://faostat.fao.org>.

77 During the 2000s, Algerian per capita consumption was of 1.3 liters per year on average, Ministère de la PME et de l'Artisanat, 'Analyse de la Filière Boisson en Algérie : Rapport Principal', *Euro Développement Pme* (Alger 2005).

78 H. Isnard, 'Le commerce extérieur de l'Algérie en 1960', (1961) 2(2–3) Méditerranée 93–98.

79 More precisely, the amount was divided in 5 years: 8.75 million hectoliters in 1964, 8.25 million hectoliters in 1965, 7.75 million hectoliters in 1966, 7.25 million hectoliters in 1967 and 6.75 million hectoliters in 1968, Isnard, H., 'La Viticulture Nord-Africaine', in *Annuaire de l'Afrique du Nord-1865* (Editions du CNRS, Vol. 4, Paris 1966); K. Sutton, "Algeria's Vineyards. A Problem of Decolonisation", (1988) 65(65) Méditerranée 55–66.

TABLE 2.6 Algerian exports to France (% of the total Algerian exports to France)

	Wine	Food products (excluding wine)	Oil and gas
1960	46	18	27
1965	24	39	31
1970	18	4	75
1975	1	3	93
1979	1	1	94

SOURCE: BRANDELL (1981)

agreement, France imported only 6.2 million hectoliters instead of the agreed 14 million hectoliters.[80] Consequently, in a few years Algerian wine exports to France had fallen by two-thirds (see Table 2.6).

France also tried to stop wine imports from Algeria by other means. They prohibited the blending of French wines with those of third countries, and this French prohibition was integrated in the 1970 European wine regulation which extended this prohibition to the entire European Union.[81] The European law prohibited the blending of wines from member countries with those of third countries (Article 26, Council Regulation (EEC) No 816/70).

Algeria tried to find other export markets for its wine. In 1969, Algeria signed a 7-year agreement with the Soviet-Union (USSR) in which the USSR agreed to buy 5 million hectoliters of Algerian wine every year at fixed prices. The USSR then became the principal wine export market.[82] This led to

80 Isnard, H., 'La Viticulture Nord-Africaine', in *Annuaire de l'Afrique du Nord-1865* (Editions du CNRS, Vol. 4, Paris 1966); K. Sutton, "Algeria's Vineyards. A Problem of Decolonisation" (1988), 65(65) Méditerranée 55–66.

81 The EU has, since the 1960s, introduced a vast set of regulations in the wine sector, the so-called Common Market Organization (CMO) for wine. These common regulations for agricultural markets include, for instance, public interventions and production standards (see G. Meloni and J. Swinnen, 'The Political Economy of European Wine Regulations', (2013) 8(3) Journal of Wine Economics 244–284 for more details).

82 K. Sutton, "Algeria's Vineyards. A Problem of Decolonisation", (1988) 65(65) Méditerranée 55–66.

a brief surge in exports. In 1969 and 1970, total wine exports increased to around 12 million hectoliters. However, the recovery did not last. Exports to France continued to decline while also the new exports to the USSR were not successful. The prices set by USSR were lower than world market prices for wine and it was not profitable for Algeria to produce wine at those prices.[83]

5.2 *Nationalization and Poor Management*

The second reason for the collapse of the Algerian wine industry was the decision by the new Algerian government to nationalize the wine sector. Already in October 1962, the ruling political party (National Liberation Front) nationalized agricultural land including vineyards. The vineyards were to be run by state organizations, governed by local politicians without much agricultural knowledge or winemaking skills.[84]

In 1968, two state institutions were created to manage the wine industry. The first institute was the "National Marketing Office for Viticulture Products" (ONCV) – renamed in 2017 "Wine Products Processing Company" (SOTRAVIT, *Société de Transformation des Produits Viticoles*).[85] This institute holds a virtual monopoly on wine production and marketing. Today it owns 42 wineries thereby controlling 95% of Algerian wine production.[86] The second institute was the *Institut de la Vigne et du Vin* (I.V.V. – "Institute of Vine and Wine"), with the official aim of controlling wine production and establishing the equivalent of the French AOC system by delimitating the best areas of production and

83 I. Brandell, *Les rapports Franco-Algériens depuis 1962: du Pétrole et des Hommes*. (l'Harmattan, Paris 1981); K. Sutton, 'Algeria's Vineyards. A Problem of Decolonisation', (1988) 65(65) Méditerranée 55–66.

84 P. Birebent, *Hommes, vignes et vins de l'Algérie Française: 1830–1962* (Editions Jacques Gandini, Nice: France 2007).

85 The *Office National de Commercialisation des Produits Vitivinicoles* (ONCV) official website stated that "*The Company intervenes in all the phases of the wine elaboration process. At the vineyard level: 25 company engineers see to technical itinerary respect and mainly to the achievement of quality grapes through a reasonable fertilizer protection. At wines processing and storage level: A network made of 13 oenologist engineers supervises the whole vinification processes and see to wine storage in conserving stores. At processing and conditioning level: Every bottling centre is managed by two oenologist engineers who carry out blending, wine processing and the storage of finished products. These stages of control are supported by 8 laboratories managed by oenologist and chemical engineers.*" (ONCV, 2011).

86 Only 3 private companies operate in the wine sector, Ministère de la PME et de l'Artisanat, 'Analyse de la Filière Boisson en Algérie: Rapport Principal', *Euro Développement Pme* (Alger 2005).

granting "quality" labels.[87] This closely resembles the role of the INAO and the French AOC regime.[88]

The combination of poor domestic management of the wine sector after the nationalization (as in many other examples of state management of farms and agri-food industry and French import constraints caused a dramatic reduction of exports.[89] The state-managed system was unable to respond effectively to the changed international market situation. It did not manage to find alternative outlets or to reposition Algerian wines for a growing global market. The state decided to uproot a large share of the vineyards in Algeria. Already between 1970 and 1973, 71,300 hectares of vine were uprooted – 20% of the total vineyards.[90] The fall of the Algerian wine industry continued through the rest of the 20th century. By the early 1990s, 30 years after independence, the Algerian wine industry was back to where it was 120 years ago, before its spectacular rise. From a global perspective, it has effectively disappeared. Production, vineyard surface, and exports have fallen back to levels which are negligible.

5.3 *The Arab Spring and the Future of Algeria's Wine Industry*

It is unlikely that the Arab Spring will lead to the privatization of vineyards and wineries or a major policy shift as the established political parties are still ruling. The state managed wine system is likely to remain in place.

87 Algerian wines were classified into three "quality" categories: the *vins de plaine* [wines from the plains] before used for the blending of southern French wines; the *vins de coteaux* [wines from the hills] the equivalent of table wines; and the *vins de montagne* [wines from the mountains] the highest quality level, M.J. Blottière, 'Les Productions Algériennes', in Comité National Métropolitain du Centenaire de l'Algérie, Livret IX (ed.), *Les 12 cahiers du Centenaire de l'Algérie* (1930) 21. Nowadays, Algeria still applies the division into table wines and quality wines: *Vins de table* (VCC) and *Vins d'Appellation d'Origine Garantie* (VAOG); H. Isnard, 'L'Algérie ou la décolonisation difficile', (1969) 10(10–3) Méditerranée 325–340; M. Boudjellal, 'La conversion-reconstitution du vignoble algérien', *CIHEAM – Options Méditerranéennes* (1972) No. 12, <http://ressources.ciheam.org/om/pdf/r12/CI010447.pdf>; Ministère de la PME et de l'Artisanat., 'Analyse de la Filière Boisson en Algérie : Rapport Principal', *Euro Développement Pme* (Alger 2005).

88 The National Institute for Origin and Quality (INAO) was created in 1935 as a government branch established to administer the AOC process for "high quality" wines, JORF, 'Décret-loi du 30 juillet 1935 "Défense du marché des vins et régime économique de l'alcool" ', *Journal Officiel de la République Française* (1935) 8314.

89 S. Rozelle and J. Swinnen, 'Success and Failure of Reform: Insights from the Transition of Agriculture', (2004) 42(2) Journal of Economic Literature 404–456.

90 K. Sutton, 'Algeria's Vineyards. A Problem of Decolonisation', (1988) 65(65) Méditerranée 55–66.

In contrast to its neighbors (Tunisia and Egypt), who witnessed massive protests and riots that overturned governments, Algeria managed to maintain political stability.[91] Through public spending programs and the redistribution of oil revenues,[92] Algeria eased public discontent due to high (youth) unemployment and food price inflation. With high oil prices, the Algerian government used its oil export revenues to create new public sector jobs, increase wages to civil servants and decrease prices of basic foods.[93]

There have been some attempts to stimulate wine production and exports in the past decade. Since the introduction of National Agricultural Development Plan (*Plan National de Développement Agricole*, PNDA) in 2000 and the 10-year National Agricultural and Rural Development Plan (*Plan National de Développement Agricole et Rurale*, PNDAR), launched in 2004, increased attention has been put on the wine industry. Public funds have been allocated for the modernization of wine production and wine cellars, for the replanting of vineyards and for the planting of new grapes (more "noble ones" as cabernet sauvignon, pinot noir and merlot). Training programs in Bordeaux have been offered to increase wine knowledge and skills.[94]

However, many problems remain despite the renovation and modernization efforts. The methods of winemaking date from the French colonization period. The scarcity of vine varieties encourages blending and the wineries and cellars are in poor conditions (certain machinery and equipment date back to the early 20th century). Another key obstacle to the development of the sector is the SOTRAVIT.

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91 During the 2012 Algerian parliamentary election, as opposed to neighboring countries, Islamist parties did not manage to win against the established political parties (National Liberation Front (FLN) and National Rally for Democracy (RND)), L. Achy, 'Algeria Avoids the Arab Spring?', *Carnegie Middle East Center*, May 31, 2012, <http://carnegie-mec.org/2012/05/31/algeria-avoids-arab-spring/boys>.

92 Public spending in Algeria doubled in the 2011–12 period, with its energy sector representing more than 1/3 of GDP, 2/3 of government revenues, and 98% of exports, L. Achy, 'Algeria Avoids the Arab Spring?', *Carnegie Middle East Center*, May 31, 2012, <http://carnegie-mec.org/2012/05/31/algeria-avoids-arab-spring/boys>.

93 L. Chikhi and V. Parent, 'Algeria steps up grain imports, eyes Tunisia "virus" ', *Reuters*, January 26, 2011, <http://www.reuters.com/article/2011/01/26/us-grains-algeria-idUSTRE70P3PY20110126>; L. Achy, 'Algeria Avoids the Arab Spring?', *Carnegie Middle East Center*, May 31, 2012, <http://carnegie-mec.org/2012/05/31/algeria-avoids-arab-spring/boys>; L. Achy, 'The Price of Stability in Algeria', *Carnegie Middle East Center*, April 25, 2013, <http://carnegieendowment.org/2013/04/25/price-of-stability-in-algeria/g1ct>.

94 W. Wallis, 'Wine returns to the menu for Algeria as production flows again', *Financial times*, October 10, 2005, <http://www.ft.com/intl/cms/s/0/8a8c5c98-392a-11da-900a-00000e2511c8.html#axzz2Wg4OEqdu>; Oxford Business Group., *The Report: Algeria 2008* (Oxford Business Group: Oxford 2008); Oxford Business Group., *The Report: Algeria 2010* (Oxford Business Group: Oxford 2010).

The monopoly exercised by the SOTRAVIT does not promote the growth of new technologies nor the search for premium wines in the global market.[95]

In summary, it appears unlikely that Algeria will retake its position as a major wine producer and exporter in the short or medium term.

6 Conclusion: the Institutional Legacy of Algerian Wine

As we documented in the previous sections, both the rise and fall of the Algerian wine production and exports were heavily influenced by developments on the French wine market and French regulations. Free trade with France stimulated the growth of Algerian exports when high import tariffs blocked imports from Spain and Italy in the late 19th century. However, from the 1930s onwards, French wine regulations (the *Statut Viticole* and later the *Code du Vin*) halted the expansion of Algerian vineyards and wine production. After Algeria's independence in 1962, French import restrictions caused a decline in Algerian exports and contributed to the collapse of the Algerian wine industry.

However, the reverse is also true. The growth of the Algerian wine industry had a crucial impact on the French wine industry. Even if the Algerian wine industry has effectively disappeared from the world's wine market today, the institutional legacy of the Algerian wine industry in France, and in the world, continues. The growth of the Algerian wine industry triggered the introduction of important wine regulations at the beginning of the 20th century and during the 1930s. These regulations formed the basis of other regulations which today affect a large share of the global wine production. Had wine production been less successful in Algeria maybe many regulations which shape today's wine industry, particularly in Europe, would not exist. Somewhat paradoxically, the fact that Algeria had free trade with France as a colony, so that France could not impose import tariffs on Algerian wine, induced a series of regulations which arguably (one does not have a clear counterfactual to compare with) have a much longer lasting impact than tariffs imposed on other countries' wine exports such as Spain and Italy.

Until the beginning of the 20th century, the French state did not regulate and intervene in the wine market in a systematic way. This would change during the beginning of the 20th century when regulations were introduced in the French (and Algerian) wine markets to protect French wine growers.

95 H. Ilbert, (ed.), *Produits du Terroir Méditerranéen: Conditions d'Emergence, d'Efficacité et Modes de Gouvernance* (*PTM : CEE et MG*), *Rapport Final* (Montpellier: CIHEAM – IAMM, FEMISE Research Programme 2004–05, 2005).

More regulations to protect French wine growers were introduced in the 1930s and 1950s.

The first regulations were introduced to protect the interests of the producers of the renowned wine regions in France as regions as Burgundy and Champagne by introducing an explicit link between the "quality" of the wine, its production region (the *terroir*) and the traditional way of producing wine. In this way, the regional boundaries of Bordeaux, Cognac, Armagnac and Champagne wines were established between 1908 and 1912 and referred to as *Appellations*. Regulations tightened with another crisis caused by Algerian wine imports in the 1930s. A law created the *Appellations d'Origine Contrôlées* (AOC) and restricted production not only to regional specific origins (through areas' delimitation) but also to specific production criteria as grape variety, minimum alcohol content and maximum vineyards yields.

Protecting winegrowers of the Midi resulted in a different type of regulations. The 1930s *Statut Viticole* and the 1953 *Code du Vin* included an obligation to store part of the excess production (so-called '*blocage*'), obligatory distillation and storage of surpluses, the establishment of a levy on large crops and yields, a ban on planting new vines, and premiums for grubbing-up of "over-productive" vines. It also created the viticultural land register.

The severity of these regulations and the dramatic change they caused in the wine markets is illustrated by the quote from the General Counsel of the Appellations of Origin at the Ministry of Agriculture commenting on the introduction of the *Statut Viticole* who referred to the French wine sector as a "planned economy".[96]

These French regulations later strongly influenced the EU Wine Policy. Economic integration required the integration of different policy regimes in one EU Wine Policy (the Common Market Organization for wine). The positions of the most important producers, Italy and France, differed. France proposed its own, heavily regulated model while Italy favoured a more liberal system. The final version of the European Common Wine Policy, agreed in 1970, was a compromise. However, the compromise did not last very long. Under pressure from French producers, the European Council of Ministers in 1976 decided to introduce more regulations, including measures to control the supply of wine. New EU regulations introduced the French system of planting rights restrictions and subsidies for grubbing-up existing vineyards. By 1979, the French

96 C. Haeck, G. Meloni and J. Swinnen, 'The Value of Terroir. A Historical Analysis of the Bordeaux and Champagne Geographical Indications', (2019) 41(4) Applied Economic Perspectives and Policy 598–619.

wine policy with its extensive regulations and heavy government interventions in markets had become the official European Wine Policy.[97]

Many elements of the French wine regulations triggered by the Algerian wine industry's spectacular growth are still present in the European Union Wine Policy today.[98] The ban on planting new vines (*i.e.* the system of "planting rights" for vineyards, now "authorizations system") is a core element of the EU policy to control the EU wine supply.[99] The French "quality regulation" of

97 A. Niederbacher, 'Wine in the European Community, Office for Official Publication of the European Communities', Periodical 2/3-1983 (Luxembourg 1983); G. Meloni and J. Swinnen, 'The Political Economy of European Wine Regulations', (2013) 8(3) Journal of Wine Economics 244–284; G. Meloni and J. Swinnen, 'The Political and Economic History of Vineyard Planting Rights in Europe: From Montesquieu to the European Union', (2016) 11(3) Journal of Wine Economics 379–413.

98 This remained almost unchanged until 2006, when the EU Commission proposed a set of reforms which included the immediate elimination of traditional market intervention measures (such as distillation, aid for private storage, export refunds and planting rights), the consolidation of previously adopted measures (such as restructuring and conversion of vineyards), the parallel introduction of new measures (such as green harvesting and promotion in third countries), and simplified labelling rules with the intention to make EU wines more competitive with New World wines. The reform was approved in 2007, but after significant modifications and because of strong opposition, some reforms were dropped (e.g. banning enrichment through the addition of sugar), diluted (e.g. grubbing-up) or their implementation delayed (e.g. crisis and potable alcohol distillation and use of concentrate grape must will be phased out by 2012). Planting rights restrictions will officially be abolished, but opposition against their removal is growing fast. G. Meloni and J. Swinnen, 'The Political Economy of European Wine Regulations', (2013) 8(3) Journal of Wine Economics 244–284.

99 In 2008, the EU ministers of agriculture adopted a proposal by the European Commission to liberalize the planting rights system by 2018 at the latest. However, interest groups mounted an effective campaign to reverse this decision, and in 2013 the liberalization was overturned. Current rules adopted in 2016 extend a system of restrictions on vineyard plantings until 2030, although both producer organizations and Members of the European Parliament want an extension until 2050. The new EU-wide planting authorization system, which started in January 2016, differs in several important respects from its predecessor. Authorizations are granted for free, but are non-transferable. While the planting rights regime aimed to keep production constant, new authorizations allow annual growth of up to 1% of the Member States' area under vines. Finally, the qualitative rule has been weakened too, as authorizations can also be used for wines without a geographical indication. In theory, this new system introduced some additional flexibility, but Member States again have considerable leeway in imposing further restrictions. G. Meloni and J. Swinnen, 2016, "The Political and Economic History of Vineyard Planting Rights in Europe: From Montesquieu to the European Union," *Journal of Wine Economics*, 11(3): 379–413. As a result, it is difficult to say whether the authorizations system is more or less restrictive than the planting rights regime it replaced. G. Meloni, K. Anderson, K. Deconinck and J. Swinnen, 2019, "Wine Regulations," *Applied Economic Perspectives and Policy,* 41(4): 620–649.

Appellations d'Origine Contrôlées (AOC) forms the basis of other EU member states' regulations such as today's *Denominazione di origine controllata* (DOC) in Italy, *Denominación de Origen Protegida* (DOP) in Spain and *Denominação de Origem Controlada* (DOC) in Portugal, which all fall under the EU's Protected Designation of Origin regulation that plays an important role in today's EU wine markets. With the integration of other wine-producing nations in the EU such as Greece in 1980, Spain and Portugal in 1986, Austria in 1995 and Hungary, Slovakia, and Slovenia in 2004, and Bulgaria and Romania in 2007, these regulations expanded to a vast wine producing region. All these countries had to adjust their national policies to access to the EU.

CHAPTER 3

Tradition, Territory, and Terroir in French Wine

Role, Function, and Purpose of the Institut National De l'origine Et de la Qualité *in the French Wine Law Model*

Fabrice Giordano

1 Introduction

World wine production was expected to reach 28 billion liters by 2018.[1] Wine is a natural product that "*results from the fermentation of the juice of a fruit, the grape*".[2] It is defined in French law by the Griffe law of 14 August 1889,[3] intended to provide a definition of what wine should be, and then by European Law,[4] according to which *"wine" is understood to be the product obtained exclusively by the alcoholic fermentation, total or partial, of fresh grapes, trampled or not, of grape must*".[5] At world level, the International Organization of Vine and Wine (O.I.V.)[6] has since 1973 adopted an almost identical definition.[7]

Through the ages France's wine expertise and technicalities became well-known and recognised. It became a real institution with a large diversity of designations which are regulated and protected in France, EU and beyond.

1 Organisation Internationale de la Vigne et du Vin (OIV), Communiqué de presse, 'éléments de conjoncture vitivinicole mondiale', 26 octobre 2018. En ligne, disponible sur <http://www.oiv.int/public/medias/6304/oiv-communique-de-presse-elements-de-conjoncture-vitivinicol.pdf> dernier accès le 20 mars 2018).

2 H. JOHNSON, *Nouvel Atlas mondial du vin* (Robert Laffont, quatrième édition, 1994) 18.

3 J.-M. BAHANS and M. MENJUCQ, *Droit de la vigne et du vin, Féret* (2010) 63.

4 La définition du vin à l'échelon communautaire, figure aujourd'hui dans une nouvelle codification élaborée lors du conseil du 17 mai 1999: le vin est « le produit obtenu exclusivement par la fermentation alcoolique, totale, ou partielle, de raisins frais, foulés ou non, ou de moûts de raisins ». Council Regulation (EC) n° 1493/1999 of 17 May 1999 on the common organization of the wine market. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999R1493&from=fr> (dernier accès le 10 octobre 2017).

5 Council regulation (EC), n°479/2008 of 29 April 2008. En ligne, disponible sur https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0479&from=fr (dernier accès le 13 avril 2020).

6 OIV, site, <http://www.oiv.int/fr/organisation-internationale-de-la-vigne-et-du-vin>.

7 OIV, meaning and definition of the word «wine». En ligne, disponible sur <http://www.oiv.int/public/medias/3961/f-code-i-31.pdf> (dernier accès le 10 octobre 2017). Annexe I.

 | DOI:10.1163/9789004438316_004

Grapevines belonging to the Vitis vinifera family, are defined as "the plant material that will reveal the terroir (local soil) on which it is planted".[8] The history of wine begins with the growth of the vine itself, dating back to prehistoric times. Wine culture began when mankind went from nomadic to sedentary. This event marked the beginning of civilization when primitive men, began to plant a few vines on lands considered fertile, which makes us believe that the culture of wine began in the Holocene era (7th millennium BC) in Georgia, where vines were growing.[9] At that time, about forty species were listed, but the notion of legal protection to regulate and protect a designation of origin (Appellation d'Origine) had not been established yet.

Since the very beginning, vine cultivation and the vineyards' organisation system spread out to Near East Asia, India and Egypt.[10] At this time Egypt had viticulture organized with wine orchards cultivated in the Nile Valley, carved out by the river's erosion six thousand years ago.[11] Pharaohs' wine as we know it (thanks to Egyptian paintings, jars, amphoras, but also from stories), comes from Pelusa, Letopolis, Lake Mareotis and the Nile Delta.[12] After its establishment in Ancient Greece, (the first country on the European continent to produce wine), the vine spread to the shores of the Mediterranean. The civilizations of ancient Greece were the first to describe the geography of wine and the quality of the soil, qualifying it even before representing it through painting[13] or in Greek stories as in Iliad[14] and in the Odyssey.[15] According to the Greek poet-philosopher Emedocles of Agrigento, to whom we owe the first great treaties on botany, the notion of "cru", which comes from the desire to give importance to the soil, began to appear around the 7th century B.C. despite the similarity of the "cépage" (variety of grape) used. The classification by the Romans was based on the origin and on the quality of the wine, as it will also be the case later in France with the delimitation of the terroir and the premises of the appellations of origin. If the most famous "cru" was Falerne,

8 S. VISSE-CAUSE, *Droit du vin, de la vigne à sa commercialisation* (Gualino, 2017) 35.

9 FranceAgriMer, 'L'histoire de la vigne et du vin'. En ligne, disponible sur <http://www.franceagrimer.fr/filiere-vin-et-cidriculture/Vin/La-filiere-en-bref/Mieux-connaitre-le-vin/L-histoire-de-la-vigne-et-du-vin> (dernier accès le 10 décembre 2017).

10 L. GEAY, *Guide des vins et de leurs à-côtés* (Editions de la courtille, 1979) 14.

11 M. Gallinato-Contino, cours Master 2 Droit de la vigne et du vin – Bordeaux, 'Histoire du droit de la vigne et du vin'.

12 E. DAGE and A. ARIBAUD, *Le vin sous les pharaons* (A. Delayance, 1932) 36.

13 S. VISSE-CAUSSE, cours Master 2 Droit du vin et des spiritueux – Reims, 'Protection des appellations d'origines'.

14 IX^{e} century B.C.

15 VIII^{e} century B.C.

Pliny the Elder tells us that there were, at his time, about eighty "cru" classified,with two thirds were in Italy.[16] In that way the notion of terroir gained in value guiding the choice of crops and soil. This latter will continue to spread in France and Europe for centuries.

In France, in the Middle Ages, for the sake of the quality of the wines produced, Philippe le Hardy, Duke of Burgundy, passed a ducal ordinance in 1395 banning the use of the Gamay[17] variety of grape within his lands.[18] Burgundy, a region stretching from the north of Lyon to the Chablis region, has three of the best vineyards in France: the Côte d'Or, the land of origin of pinot noir[19] and chardonnay,[20] including the Côte de Nuits vineyard to the north[21] and the Côte de Beaune to the south.[22] To the south of the latter is the Côte Chalonnaise vineyard.[23] The aim of this approach, guided by the nobility of the variety of grape planted and the progressive affirmation of identity, is to move, following the development of quality viticulture, towards the progressive recognition of a precisely delineated prestige wine.

At the end of the 19th century, when vine cultivation seemed to be taking root in Europe, the French vineyard experienced an unprecedented crisis. Between the appearance of parasitic diseases as early as 1850 (powdery mildew,[24] phylloxera[25] and mildew[26]) and the progressive destruction of vine plants,[27]

16 R. BILLIARD, 'La vigne dans l'antiquité', *Librairie H Lardanchet* (1913) 45–47.

17 Gamay is a red grape giving a fruity wine, with nuances of raspberry, wild strawberry and cherry. It is known worldwide thanks to the Beaujolais region.

18 S. DIART-BOUCHER, cours Master 2 Droit du vin et des spiritueux – Reims, 'Histoire vitivinicole'.

19 Pinot Noir is a red grape that produces elegant and generous wines, with fruity notes of redcurrant, wild strawberry and sometimes cherry. In France it is mainly planted in Burgundy and Champagne, but we can find it in Alsace, Italy, Hungary, South America, California and Oregon.

20 Chardonnay is a white grape variety that produces fresh and pleasant-to-drink wines, with a generous bouquet including citrus, lemon, exotic fruits, peach and melon. Mainly planted in Champagne and Burgundy, this grape is now cultivated all over the world because of its quality and international success.

21 H. JOHNSON and J. ROBINSON, *Atlas mondial du vin* (Flammarion, septième édition, 2014) 48.

22 Op. cit. 21.

23 Op. cit. 21.

24 Powdery mildew is a disease of American origin, caused by a microscopic fungus, which attacks the leaves, flowers and grains.

25 The phylloxera is a tiny aphid that stings the vine and sucks the sap until it dies.

26 Mildew is a specific parasitic fungus in the vine. It attacks the inner side of the leaves, which dry out and fall off.

27 French production fell from 45 to 1 million hectolitre.

the law came to regulate and frame fraud in the production and marketing of wine in France. The modification of the wine map led to an insufficient production of wine for consumption, the import of foreign wines (especially Spanish), the development of new vineyards in the French colonies in Algeria,[28] but also the appearance of falsification. The falsification of wine (blending with water – wetting – , blending with wine – vinage – , artificial manufacture of wines using sugar) is reinforced from 1880 following the decrease in production between 1879 and 1892, as a consequence of the reduction or even extinction of some vineyards (Auvergne, Languedoc Roussillon, Paris region).[29] The action of the public authorities in the fight against fraud aimed at maintaining an environmental balance takes place through several laws. The Law of 11 July 1891[30] punished fraud in the sale of wine. The Law of 24 July 1894[31] regulated fraud committed in the sale of wine and penalized blending, a process that consists of mixing several wines of different origins and quality to increase the olfactory and gustatory qualities of the wine. The Law of 6 April 1897,[32] for its part, regulated against the manufacture, circulation and sale of artificial wines. Finally, the Law of 1 August 1905 regulated against fraud in the sale of goods and the falsification of foodstuffs and agricultural products.[33] The aim of all these laws is to fight against deception,[34] which "penalizes unfair information given to a contracting party" and falsification,[35] which "relates to the thing intended for sale and concerns the manufacture … of foodstuffs intended for human or animal consumption".[36]

28 A. ISNARD, '*Vigne et colonisation de l'Algérie (1880–1947)*', (*Annales*, 1947), 288–300.

29 A. STANZIANI, 'La falsification du vin en France, 1880–1905, un cas de fraude agro-alimentaire', *Berlin* (2013) 154–185.

30 Law of 1 August 1905 on product and service fraud and falsification, 'Law on the suppression of fraud in the sale of goods and falsification of food and agricultural products'. En ligne, disponible sur <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006506231&cidTexte=JORFTEXT000000508748> (dernier accès le 15 juin 2018). Please also see in this sense: J.SAGNES, 'La Fraude à la charnière de deux siècles (XIXe et XXe) dans le midi viticole'. En ligne, disponible sur <http://www.urbi-beziers.fr/articles/fraude_charniere.pdf> (dernier accès le 20 mars 2019).

31 A. STANZIANI, 'La falsification du vin en France, 1880–1905, un cas de fraude agro-alimentaire', *Berlin* (2013) 154–185.

32 Op. Cit.31.

33 Law of 1 August 1905 on product and service fraud and falsification. En ligne, disponible sur <https://dae.gouv.nc/sites/default/files/atoms/files/23340284.pdf> (dernier accès le 15 juin 2018).

34 C. de la consommation, art. L. 213-1.

35 C. de la consommation, art. L.213-1, 1°.

36 J.-M. BAHANS and M. MENJUCQ, 'Droit de la vigne et du vin', *Féret* (2010) 472–489.

Through these various laws, supplemented by the Laws of 5 August 1908, 10 February 1911, 6 May 1919, 22 July 1927 and the Decree-Law of 30 July 1935, relating to the delimitation of the legislation on registered designation of origin,[37] the legislator wishes to provide a framework,[38] to protect,[39] but also to encourage the endeavor and know-how of the winegrower.[40] It is in this context of shortages and fraud that the gradual affirmation of origin took shape with the creation – the fruit of usage and history – of registered designation of origin with the setting up in 1935 of a National Committee for Registered designation of origin of Wines and Brandies (Comité National des appellations d'origine des vins et eaux-de-vie – CNAO),[41] which became the INAO, "Institut national de l'origine et de la qualité" as for National Institute of Origin and Quality in 2006.[42]

Since it was created, how has the inao been able to delimit, regulate and protect the agricultural products, their taste and their characteristics throughout the years?

The public institution of the Ministry of Agriculture and Food, in its current form has about 250 officers (252 in 2017) and more than 200 agents The year 2017 is synonymous of the renewal of the Institute's authorities.[43] Elected by ministerial decree for a five-year term (2017–2022), members are responsible

37 C. de la consommation, art L.431-1, 'Constitue une appellation d'origine la dénomination d'un pays, d'une région ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains'. According to Joseph Capus (1867–1947), an appellation of origin is the true nobility of wines.

38 C. Rural, art. L.641–5.

39 In France and abroad, the National Institute of Origin and Quality (inao) ensures that the names of products under official signs are not usurped or misappropriated. For this purpose, the inao relies in particular on professionals and inter-branch organizations, on an international network of lawyers, and on the French diplomatic network. INAO follows European and international procedures relating to the protection of AOC/AOP and IGP names. <https://www.inao.gouv.fr/>.

40 S. VISSE-CAUSE, 'L'appellation d'origine : valorisation du terroir', *Adef* (2007).

41 History of the INAO, https://www.inao.gouv.fr/Nos-actualites/De-1935-a-2016-les-etapes-cles-de-l-histoire-de-l-INAO.

42 Loi d'orientation agricole n°2006–11 du 5 janvier 2006, art. 73. En ligne, disponible sur https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000264992&categorieLien=id (dernier accès le 13 avril 2020). Ordonnance n°2006-1547 du 7 décembre 2006, relative à la valorisation des produits agricoles, forestier ou alimentaires et des produits de la mer. En ligne, disponible sur https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000820026&categorieLien=id (dernier accès le 13 avril 2020).

43 Rapport INAO 2017. En ligne, disponible sur <https://www.inao.gouv.fr/Nos-actualites/Publication-du-rapport-d-activite-2017-de-l-INAO> (dernier accès le 1 février 2019).

for protecting and enhancing the value of agricultural, forestry and food products. INAO's head office is located in Montreuil in the Seine-Saint-Denis department (93), east of Paris.

2 From the Wine Crisis at the End of the 20th Century to the Creation of the CNAO in 1935

We have to go back to the beginning of the 20th century to understand the current definition of products with a designation of origin (appellation d'origine). This latter has been regulated and protected since the creation of the Comité National des appellations d'origine des vins et eaux-de-vie (cnao – National Committee for Origin Designations) (renamed inao in 2006). Since the beginning of the century), various French and foreign vineyards have emerged after many years of replanting.

2.1 *1905: the Premises of the Regulation Tending towards an Administrative Framework for Quality Products*

The Law of 1 August 1905, known as the "law on the repression of fraud in the sale of goods and the falsification of foodstuffs and agricultural products" – adopted by Decree on 3 September 1907 – is the starting point for the protection of registered designation of origin in France.[44] Through its articles 1 and 11, this law aims to punish "whoever has deceived or attempted to deceive the contracting party" with a correctional sentence of imprisonment and a fine for any fraudulent intent.[45] A true founding text in terms of appellation of origin, this law appears to be a turning point since it particularly punishes fraud involving wines and brandies after the rarefaction of these products due to the phylloxera crisis.

Despite its innovative effect, the Law of 1 August 1905 included two flaws that were widely raised at the Congress of Fine Wine Growing Regions organized by the Société des Viticulteurs de France (French Wine Growers Society), held in 1906 in Bordeaux. The first is that the law only took the origin into account and not the essential characteristics of the wine. Indeed, the text protected the

44 C. QUITTANSON, A. CIAIS and R. VANHOUTTE, 'La protection des appellations d'origine des vins et eaux-de-vie et le commerce des vins', *La journée vinicole* (1949) 38–41.

45 Law of 1 August 1905 on product and service fraud and falsification. En ligne, <https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=1829DCED4BCF7D3413585F173F2BA4A2.tplgfr33s_1?cidTexte=JORFTEXT000000508748&dateTexte=19780110> (dernier accès le 2 mars 2019).

simple provenance and not the quality of the terroir and the variety of grape, essential elements of the terroir in the wine sector. The second, and not less important, is the result of article 11, which is poorly drafted and provided for the delimitation of regional designation areas by the public administration.[46]

Following the entry into force of the Law of 29 June 1907 aimed at preventing wetting and sugar abuse[47] and the Law of 5 August 1908 supplementing article 11 of the Law of 1 August 1905, the delimitations were carried out by decree, taking into account local and constant usage, without taking into account other geographical data. Consequently, between 1908 and 1911, six regional appellations were delimited by decree, such as Champagne (1908), Cognac (1909) and Bordeaux (1911).

The Law of 1 August 1905 thus prepared subsequent legislation guided by the protection of registered designation of origin and the limitation of fraudulent production.

2.2 *1911: towards the Law of 6 May 1919*

As early as 1911, a bill introduced by Louis-Lucien Klotz, Minister of Finance, and Jules Pams, Minister of Agriculture, provided for the judicial recognition and delimitation of registered designations of origin, which gave rise to the Law of 6 May 1919, amending and extending the Law of 28 July 1824 relating to the alteration or assumption of names on manufactured products. The Law of 1919, consisting of four parts and 25 articles, amended and supplemented by the Laws of 22 July 1927, 4 August 1929, 1 January 1930 and by the Decree-Law of 30 July 1935, remains the basis and the fundamental text of the legislation on wine registered designation of origin.[48] Indeed, for the first time, a legal definition of the appellation of origin is given in its first article,[49] which we

46 Art 11 loi du 1er août 1905, 'Il sera statué par des règlements d'administration publique sur les mesures à prendre pour assurer l'exécution de la présente loi'.

47 Law of 29 June 1907 tending to prevent wetting of wines and abuse of sugaring. En ligne, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021801279&categorieLien=cid> (dernier accès le 28 février 2019). Please also see in this sense: P. MACAIRE, '1907 : le raisin et la colère', *Le plein de sens* (2006).

48 Law of 6 May 1919 on the protection of appellations of origin. En ligne, <https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=C212695C0C62AD569D302C6EE95381B9.tplgfr37s_2?cidTexte=JORFTEXT000000687602&idArticle=&dateTexte=20180821> (dernier accès le 28 février 2019).

49 Article 1 loi du 6 mai 1919, 'Toute personne qui prétendra qu'une appellation d'origine est appliquée, à son préjudice direct ou indirect et contre son droit, à un produit naturel ou fabriqué et contrairement à l'origine de ce produit, ou à des usages locaux, loyaux et constants aura une action en justice pour faire interdire l'usage de cette appellation'.

find today in article L.431-1 of the Consumer Code.[50] Nevertheless, its initial wording lacks clarity and suggests an alternative. The text refers to the origin of the product or to local, loyal and constant usage. The "or" is therefore problematic because, for the courts, the geographical fact alone matters, contrary to production practices or the quality and typicality of the product.

Article 7 is a response to the failure of the administrative delimitation of the previous Law and will henceforth allow for a judicial delimitation by the civil courts of the areas of appellation of origin according to local, loyal and constant usage. Articles 8 and 9 deal with the criminal penalties for the offence of using "inaccurate registered designation of origin".

Once again, the application of this Law was inadequate and has shortcomings. Its system is based solely on the origin of the products without taking into account their quality or typicality. The legislator has excluded the words "nature", "composition" and "substantial quality" from the legal text. Thus, by giving poor quality wine products the right to an appellation, the legislator no longer guarantees the quality and superiority of the wines consumed by consumers.

2.3 *1927: Legislative Recognition between Origin and Variety of Grape*

From 1923 onwards, disputes abounded and the limits of the Law of 6 May 1919 continued to show its imperfection.

Still at the instigation of Joseph Capus and in response to the abundant protests from professionals in the sector, a new bill dated 23 June 1925 was to be tabled in the Chamber of Deputies, taking up the principles laid down in the 1919 law. The text, widely supported by the sector (agricultural federations and unions), debated before the deputies and supported on 20 May 1927, resulted in the Law of 22 July 1927, published in the Journal Officiel on 30 September of the same year. In a concern for quality and under the control of the courts according to "local, loyal and constant" customs, the Law – restricted in its scope to wines only – forbade hybrid varieties of grape for appellation wines. The character of the wine must be derived from the terroir, including human and biological factors. In its article 3, relating to the conditions of production, the content of the appellation of origin is defined and any wine produced with a hybrid variety of grapes was not able to benefit from it. For the first time, the concept of area of production appears, thus establishing a link between the

50 C. de la consommation, art L.431-1, 'constitue une appellation d'origine la dénomination d'un pays, d'une région ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains'.

origin and the variety of grape. Moreover, the delimitation of each terroir is the result of a civil procedure, leading to certain arrangements between the parties before the judge.

Besides, the fifth article of this law – completed in 1935 – attributes to the wine produced in the Champagne region, a legal status. For the first time, are controlled its geographical production area, its making process, and the seven grape varieties used are controled.[51] With the support of the Benedictine monk Dom Pierre Pérignon,[52] – who contributed to the elaboration and improvement of the wine of Champagne – the vineyards of Champagne, located 145 kilometers north-east of Paris, will enjoy a national reputation renowned, until an international one in the XVIIIth century. Champagne, a blended wine associated with luxury, remained at the time an aristocratic product, marketed at a high price and whose production remained limited.[53] It was therefore the first region in France to benefit from an administrative delimitation since 1908,[54] then by legal means in 1911, before its current delimitation was fixed in 1927 and finalized on 29 June 1936.[55] Article 1 of the Decree of 29 June 1936 aimed at controlling the name 'Champagne', stating that "only wines produced on the territories" referred to in article 5 of the Law of 22 July 1927, repealing and replacing article 17 of the Law of 6 May 1919, and meeting all the requirements laid down by the Laws, Decrees and further regulations concerning the wine of Champagne, and especially those provided for by the Decree of 28 September 1935, are entitled to the controlled appellation 'Champagne'.[56] This sparkling wine, grown in the best years,[57] is produced in five wine-growing regions (the mountain of Reims, the Marne valley, the Côte des Blancs, the

51 Pinot meunier, pinot noir, chardonnay, pinot gris, pinot blanc, arbanne and petit meslier.

52 Dom Pierre Pérignon (1638–1715). Monk of Hautvillers Abbey and cellar master from 1668 to 1715.

53 H. JOHNSON, 'Une histoire mondiale du Vin, de l'Antiquité à nos jours', *Hachette* (1989) 216.

54 L'article 1 énonce que, 'l'appellation régionale champagne est exclusivement réservée aux vins récoltés et manipulés entièrement sur les territoires ci-après délimités'.

55 Please also see in this sense:S. DIART-BOUCHER, 'La réglementation vitivinicole champenoise; Une superposition de règles communautaires, nationales et locales', *l'Harmattan* (2007). T. GEORGOPOULOS, 'La Champagne viticole: quelles spécificités juridiques?', *Mare & Martin* (2012).

56 C. QUITTANSON, A. CIAIS and R. VANHOUTTE, 'La protection des appellations d'origine des vins et eaux-de-vie et le commerce des vins', *La journée vinicole* (1949) 271–273.

57 Decree of 17 October, 1952 concerning the indication of the vintage of wines with the "Champagne" controlled appellation. En ligne, disponible sur <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000868803&dateTexte=19521019> (dernier accès le 10 mars 2019).

Côte de Sézanne and the Côte des Bar). The decision to vintage or not a year is *determinated* by the climate forecast of the year and is the responsibility of each wine house.

In that respect, Champagne was the first wine-growing region to be regulated and then protected, thanks to the legislation drafted by Robert-Jean de Vogüe, on 12 April 1941, as the delegate general of the Comité Interprofessionnel des vins de Champagne (CIVC – Interprofessional Committee for Champagne Wines). The CIVC, based in Épernay located in south of Reims, manages the common interests of winegrowers, wine merchants and Champagne wine houses.[58]

For the rest of France, this new law of 1927, plunged into the heart of the 1929 crisis, was a failure. However, it was in this context that Joseph Capus nurtured the idea, as early as 1924, of an organization entirely dedicated to the protection of registered designations of origin.

3 The Creation of the CNAO

Joseph Capus, former Minister of Agriculture and president-founder of CNAO – National Committee for Origin Designations – has dedicated all his skills to the vine industry, to the wine quality, and to their registered designation of origin. As a visionary man, he created the AOC in 1935 and presided over the organization dedicated to the wine protection.

3.1 *1935, a Pivotal Year in the Creation of an Organization Dedicated to the Protection of Registered Designations of Origin*

3.1.1 The Initiative for the Creation of the CNAO

The year 1935 marked a double turning point for the wine sector while setting its current status. Still at the instigation of Joseph Capus – at the time a senator from the Gironde department, supported by the winegrowing unions and joined in his efforts by Baron Le Roy, a lawyer and wine producer in Châteauneuf-du-Pape – a new bill was inserted into the Decree-law of 30 July 1935 signed by the representatives of the fine wine regions and tabled in the Senate on 22 March 1935. This legislative evolution, relating to the defence of "the wine market and the economic regime of alcohol", the current basis of the Law on

58 J.-L. BARBIER, 'Origine et naissance du CIVC' (2011). En ligne, disponible sur <http://www.cndp.fr/crdp-reims/memoire/pdf/CIVC_naissance.pdf> (dernier accès le 10 mars 2019). Site CIVC, <https://www.champagne.fr/>.

vines and wine, will reinforce the notion of appellation of origin[59] by creating a category of appellation of origin known as "controlled"[60] (AOC), the delimitation of which is entrusted – after the opinion of the interested unions – to the "Comité National des Appellations d'Origine des vins et des eaux-de-vie" (CNAO).[61] In fact, legitimated since 1929 and supported by local and national elected representatives but also by the entire wine industry, the Decree-law of 1935 is in line with the previous laws, while providing technical details (production area, authorized varieties of grapes, yields per hectare and minimum alcohol content of the wine). Thus, the National Committee, guided by the typicity and quality of products from the terroir, had an advisory mission before the government concerning the defence of the interests of winegrowers and had the right to take legal action to defend the registered designations of origin in France and abroad.[62]

3.1.2 The Initial Mission of the CNAO

The National Committee, whose members are appointed by the State, nevertheless remains linked to the registered designations of origin unions. Under the authorization of the State, the CNAO's main task will be to approve or refuse recognition of an appellation subject to a request made by a trade union for the defence of the product. Then, always out of concern for loyalty and transparency, it will have to ensure regular controls on the production areas and the progress of the conditions of production. It must also organize the defence of the appellations and the fight against fraud in France and abroad.[63]

Until 1942 the Decree-law of 30 July 1935, generates problems in terms of its application, in particular in terms of "controlled" registered designations of origin. Indeed, although article 21 indicates the creation of this new category, no indication is given as to the substitution or cohabitation with those already existing, known as "simple appellation". The double designation, for example "Nuit-Saint-Georges", will be definitively removed on decision of the Minister of Agriculture by the Law of January 13, 1938. This double denomination caused confusion for both the producer and the consumer.

59 Chapitre III, art 19–25.
60 Chapitre III, art 21.
61 Chapitre III, art 20.
62 Chapitre III, art 23. Cour de Nîmes, 20 décembre 1947, affaire P. E., relatif aux vins de Saint-Péray.
63 Joseph Capus, 'L'évolution de la législation sur les appellations d'origine', introduction Théodore Georgopoulos, *Mare et Martin*, (2019) 61.

3.2 *Towards the Current form of the INAO*

After the period of occupation under the Vichy regime, the growth of the black market during the Second World War in Europe, and a reorganization of wine-growing, the "Comité National des Appellations d'Origine des Vins et des Eaux-de-Vie" became the Institut National des Appellations d'Origine (INAO) by Decree n°47–1331 of 16 July 1947, published in the Journal Officiel on 19 July 1947. The same year, its founder and president Joseph Capus passed away, leaving the presidency to Baron Le Roy.

In the aftermath of the war, the wine estate aroused the economic, political and social interest of other sectors. In 1948, the first "Congress of Origin" was organized by the Pays de l'Auge, in Deauville. From 25 to 27 June 1948, under the presidency of Baron Le Roy, the Bresse cheese of origin unions and poultry producers,[64] undertook to recognize registered designation of origin beyond the wine sector. This date marks the first step in the rapprochement of food and wine products towards a claim for protection and recognition under a common sign: the appellation of origin.[65] However, this junction was not definitively achieved until 1990.

Baron Le Roy, President of the INAO and of the OIV for fourteen years (1949–1963), was particularly known for his international vision of the registered designations of origin protection, which have rhythmed all of his career. He died on June 16th 1967,[66] a while after his contribution to the signing of the Lisbon Agreement in 1958.[67] The 20th anniversary of Joseph Capus' death marked a turning point for the Institute, which overhauled its structure to get closer to its current form since 1990. Indeed, it was from 1990 onwards that inao has gradually taken over the protection of the majority of signs of quality and origin.

64 Subsequently creating the National Committee of Designations of Origin for Cheese (C.N.A.O.F) on 28 November 1955. The latter is competent to recognize appellations of origin for cheeses.

65 J.-L. MULTON, H. TEMPLE and J.-L. VIRUEGA, 'Traité pratique de droit alimentaire', *Lavoisier; collection sciences & techniques agroalimentaires* (2013) 590. Please also see in this sense: C. DELFOSSE, 'L'intégration à l'INAO d'un autre secteur AOC développé : les produits laitiers', *Une histoire des vins et des produits d'AOC ; l'INAO, de 1935 à nos jours* (Editions Universitaires De Dijon, 2015) 161–180. C. DELFOSSE, *La France fromagère* (*1850–1990*) (Paris la boutique de l'histoire, 2007).

66 Baron Pierre Le Roy de Boiseaumarie (1890–1967), 'Le premier vigneron du monde aurait cent ans' (1990). En ligne, disponible sur <https://www.syndicat-cotesdurhone.com/static/upload/4/pdfarticle_51223e4da3f0d.pdf> (dernier accès le 10 mars 2019).

67 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958. En ligne, disponible sur <https://www.wipo.int/export/sites/www/lisbon/en/legal_texts/lisbon_agreement.pdf> (dernier accès le 10 avril 2020).

4 The Current Organization of INAO

The Law n°90–558 of July 2nd 1990[68] will once again extend the mission of the INAO. The economic success of wine AOCs beyond the French borders since 1935 prompted the legislator to extend the INAO's remit to food and dairy products,[69] whether raw or processed.[70] To do this, two new National Committees were created:[71] one for dairy products and one for food products.[72] Since then, guided by a European vision of product promotion, INAO's approach to delimitation has been strengthened in order to re-establish a link between the terroir, the products made from it and human factors for any recognition of registered designations of origin. The orientation Agricultural law Act No. 99–574 of July 9th 1999 extended INAO's mission to protect protection of geographical indications,[73] and to forest products in 2001[74] leading to the fourth committee, the PGI Committee (Protected Geographical Indications). On 1 January 2007, was created the National Institute of Origin and Quality as we know it nowadays.

4.1 *INAO Organization*

The director of the INAO, is appointed by order of the Minister for Agriculture.[75] As Director, her main mission is to give the opinions requested from the Institute for the Protection of Delimited Production Areas[76] and to respond to all the responsibilities listed in article L.642–5 of the Rural Code while

68 JO 6 Juillet 1990.

69 S. WOLIKOW and F. HUMBERT, *Une histoire des vins et des produits d'AOC ; l'INAO, de 1935 à nos jours* (Editions Universitaires De Dijon, 2015) 161–180.

70 Article 7-4 Loi n°90–558 du 2 juille1990.

71 Décret n°91–368 du 15 avril 1991 portant organisation et fonctionnement de l'Institut National des Appellations d'Origine, JO 17 avril 1991, p.5051–5053.

72 S. WOLIKOW and F. HUMBERT, *Une histoire des vins et des produits d'AOC ; l'INAO, de 1935 à nos jours* (Editions Universitaires De Dijon, 2015) 195.

73 Council Regulation (EEC), n°2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural product and food stuffs. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992R2081&from=FR> (dernier accès le 28 décembre 2018). Regulation 2081/92 of July 14, 1992 establishes a homogeneous system for the protection of appellations of origin but also for the protection of simple geographical indications.

74 **Loi n° 2001–602 du 9 juillet 2001 d'orientation sur la forêt.** En ligne, disponible sur <https://core.ac.uk/download/pdf/15487992.pdf> (dernier accès le 28 décembre 2018).

75 Arrêté du 16 mars 2017 portant nomination de la directrice de l'Institut national de l'origine et de la qualité. En ligne, disponible sur <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034379812> (dernier accès le 18 janvier 2019). JORF n°0083 du 7 avril 2017, texte n° 99.

76 C. Rural L. 642–5.

ensuring its permanent operation. Within the latter Institute, there are various bodies: the Permanent Council, the National Committees, the Council for Approvals and Controls, and Regional Committees.

4.1.1 The Permanent Council (Conseil Permanent)

The Standing Council is composed of the Chairs of the National Committees, the Standing Council, and other representatives of the Institute's staff.[77] All members are appointed by joint orders of the Ministries of Agriculture, Consumer Affairs and the Budget. The Permanent Council defines the strategic guidelines and general policy of the Institute and deliberates on all matters relating to the promotion and defence of the identification signs of origin and quality, while drawing up the budget.[78]

Appointed by order of the Minister for Agriculture[79] dated 27 January 2017,[80] the new Chairman of the Permanent Council is elected for a five-year term. Jean-Louis Piton – a winegrower[81] from Apt in the Vaucluse[82] – has been the current chairman of the INAO Permanent Council since 1 February 2017 and succeeded Jean-Charles Arnaud in his duties.[83]

4.1.2 The National Committees (Les Comités Nationaux)

There are five national committees, divided by product type and quality identification mark.[84] These are the National Committee for Registered designation of origin for wines and alcoholic beverages and spirit drinks;[85] the National

77 C. Rural, art. L-642–8 et R 642–3.

78 C. Rural, art. L. 642–8.

79 C. Rural, art. L642-7.

80 JORF n°0027 du 1 février 2017 texte n° 79. Arrêté du 27 janvier 2017 portant nomination du président du conseil permanent de l'Institut national de l'origine et de la qualité. En ligne, disponible sur <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033963852> (dernier accès le 2 décembre 2018).

81 Jean-Louis Piton produit des vins sous appellation Lubéron et Ventoux, et un autre sous IGP Méditerranée.

82 J.-P. STAHL, 'Jean-Louis Piton, un vigneron à la tête du conseil permanent de l'INAO', 28 février 2017. En ligne, disponible sur <https://france3-regions.blog.francetvinfo.fr/cote-chateaux/2017/02/28/jean-louis-piton-un-vigneron-a-la-tete-du-conseil-permanent-de-linao.html> (dernier accès le 19 novembre 2018).

83 Jean-Louis PITON, nouveau Président du Conseil permanent de l'INAO. En ligne, disponible sur <https://www.inao.gouv.fr/Nos-actualites/Jean-Louis-PITON-nouveau-President-du-Conseil-permanent-de-l-INAO> (dernier accès le 19 novembre 2018).

84 C. Rural, art. L642-6 et R642-6.

85 JORF n°0045 22 February 2017. Order of February 21, 2017 appointing the national committee of designations of origin relating to wines and alcoholic beverages, and brandies of the National Institute of Origin and Quality. En ligne, disponible sur

Committee for Dairy, Agri-food and Forest PDOs;[86] the National Committee for Protected Geographical Indications, Red Labels and Traditional Specialities Guaranteed;[87] the National Committee for Protected Geographical Indications for wines and ciders; and the National Committee for Organic Agriculture.[88]

Composed of representatives of professionals in the sector, representatives of administrations and qualified persons,[89] they are in charge of representing the consumer and proposing the recognition of a product under the sign of quality and origin. To do this, they must take into account the content of the specifications, conformity to the definition of the sign and the definition of the points to be checked, while improving the quality and characteristics of the products. The national committees may also give opinions on the provisions relating to labelling, product presentation, or any question relating to the origin and quality identification signs.[90]

The committees members' nomination is the same as for the permanent council, and also elected for five years. Each national committee has a chairperson and each committee includes one member from each of the other national committees. Thus, the director of the national committee for Registered designation of origin relating to wines and alcoholic beverages and spirit drinks appointed by ministerial order dated 21 February 2017.[91]

4.1.3 The Approval and Control Board (Le Conseil des Agréments et des Contrôles)

The Approval and Monitoring Board[92] is composed of representatives of members of the national committees, inspection bodies, the administration, and

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034071074&categorieLien=id> (dernier accès le 2 décembre 2018).

86 JORF n°0042 du 18 février 2017. Arrêté du 16 février 2017 portant nomination au Comité national des appellations laitières, agroalimentaires et forestières de l'Institut national de l'origine et de la qualité. En ligne, disponible sur <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034061562&categorieLien=id> (dernier accès le 2 décembre 2018).

87 N93 JORF n°0042 du 18 février 2017.

88 N93 JORF n°0042 du 18 février 2017.

89 C. Rural, art. L642-9.

90 Les instances de l'INAO. En ligne, disponible sur <https://www.inao.gouv.fr/Institut-national-de-l-origine-et-de-la-qualite/Les-instances-de-l-INAO> (dernier accès le 15 octobre 2018).

91 Arrêté du 21 février 2017 portant nomination du président du comité national des appellations d'origine relatives aux vins et aux boissons alcoolisées, et des eaux de vie de l'Institut national de l'origine et de la qualité. JORF n°0045 du 22 février 2017 texte n°50.

92 Arrêté du 21 février 2017 portant nomination du président du comité national des appellations d'origine relatives aux vins et aux boissons alcoolisées, et des eaux de vie de l'Institut national de l'origine et de la qualité. JORF n°0045 du 22 février 2017 texte n°50.

qualified persons, including consumer representatives.[93] This transversal body is entirely dedicated to controls.

The missions of the Approval and Inspection Board are to define the general principles of control and to approve control or inspection plans, but also more broadly to give opinions on the approval of control bodies and the approval of control and inspection plans.[94]

4.1.4 The Regional Committees (Les Comités Régionaux)

Throughout France, the Institute has many organizations: these are the regional committees. Their mission is to study all issues of interest to their region and to INAO's activities.[95] In accordance with article R642-16 of the Rural and Maritime Fishing Code, their expertise and opinions are brought to the attention of the national committee concerned.

4.2 *Financing of INAO*

The Institute's resources are diverse. Indeed, INAO receives a State budget allocation[96] in application of article L.642-12 of the Rural Code and a fee per hectolitre of wine claimed as an appellation of origin.[97] In addition to this the

93 C. Rural, art. R642-14.

94 C. Rural, art. R642-13.

95 C. Rural, art. R642-16.

96 C. Rural, art. L642-12.

97 C. Rural, art. L642-13.

Les taux des droits sont fixés sur proposition du conseil permanent de l'institut et après avis du comité national compétent, par arrêté des ministres chargés du budget et de l'agriculture, dans les limites suivantes:

0,15 € par hectolitre pour les vins d'appellation d'origine;

0,12 € par hectolitre ou 1,2 € par hectolitre d'alcool pur pour les boissons alcoolisées d'appellation d'origine autres que les vins;

0,03 € par hectolitre pour les produits vitivinicoles bénéficiant d'une indication géographique protégée;

0,075 € par hectolitre ou 0,75 € par hectolitre d'alcool pur pour les boissons alcoolisées bénéficiant d'une indication géographique autres que les produits vitivinicoles bénéficiant d'une indication géographique protégée.

10 € par tonne pour les produits agroalimentaires ou forestiers d'appellation d'origine autres que les vins et les boissons alcoolisées;

7,5 € par tonne pour les produits bénéficiant d'une indication géographique protégée, autres que les produits vitivinicoles et boissons alcoolisées.

0,075 € par hectolitre ou 0,75 € par hectolitre d'alcool pur pour les boissons alcoolisées bénéficiant d'un label rouge autres que les produits vitivinicoles bénéficiant d'une indication géographique;

7,5 € par tonne pour les produits bénéficiant d'un label rouge autres que les produits vitivinicoles et boissons alcoolisées.

institute has its own resources such as fees, inspection costs and costs for the attestation of classification in a protected designation of origin area. In 2015, the INAO's budget was 23 million euros, 72% of which was allocated by the State and 23% from fees collected on production.[98]

The Institute is subject to economic and financial control by the State and to the public financial and accounting regime.

4.3 *INAO's Missions and Competences*

Defined by the ordinance of 7 December 2006[99] and modified by the ordinance of 7 October 2015, INAO's missions are transversal and defined by article L.642–5 of the Rural Code. The institute:

1 Proposes the recognition of products likely to benefit from quality and origin identification signs and the revision of their specifications;
2 Pronounces the recognition of the organizations which ensure the defense and the management of the products profiting from a sign of identification of the quality and the origin;
3 Defines the general principles of control;
4 Approves the inspection bodies and assesses them;
5 Ensures the control of the respect of the specifications and, if necessary, takes the measures to sanction their ignorance;
6 Gives its opinion on the provisions relating to the labelling and presentation of each of the products within its jurisdiction;
7 May be consulted on any question relating to quality and origin identification signs and may propose any measure contributing to the proper functioning, development or enhancement of a sign in a sector;
8 Contributes to the defence and promotion of signs identifying quality and origin both in France and abroad;
9 May be consulted by defence and management bodies on the environmental or animal welfare requirements mentioned in Article L. 642-22;
10 Determines the inspection provisions common to several specifications or several inspection bodies;
11 Approves the control or inspection plans.

98 Le financement de l'institut national de l'origine et de la qualité. En ligne, disponible sur <https://www.inao.gouv.fr/Institut-national-de-l-origine-et-de-la-qualite/Le-financement-de-l-institut-national-de-l-origine-et-de-la-qualite-INAO> (dernier accès le 15 juin 2018).

99 Ordonnance n° 2015-1246 du 7 octobre 2015 relative aux signes d'identification de l'origine et de la qualité.

FIGURE 3.1
The PDO/PDO (AOP/AOC)
SOURCE: INAO OFFICIAL WEBSITE (PUBLIC DOMAIN) WWW.INAO.GOUV.FR

4.4 *The Official Quality Signs Framed by INAO*

The National Institute of Origin and Quality takes its current form from Order No. 2006-1547 of 7 December 2006, which follows from the Agricultural Guidance Act No. 2006–11 of 5 January 2006, ratified by Act No. 2007-1821 of 24 December 2007, implemented by Decree No. 2007–30 of 5 January 2007. Henceforth INAO has jurisdiction under article L.642–5 of the Rural Code for the recognition, management, control and protection of all the Signs of Identification of Quality and Origin (SIQO) which should be studied briefly.

Regulation n°1151/2012 of the European Parliament and of the Council of 21 November 2012[100] (relating to quality systems applicable to agricultural products and foodstuffs with regard to designations of origin and geographical indications) excludes in its article 2, 2° "spirit drinks, aromatised wines and vine products".[101] Consequently, the provisions on designations of origin and geographical indications relating to the wine sector are found in Regulation (EU) n°1308 /2013 of the European Parliament and of the Council of 17 December 2013.[102] Moreover, since 1 January 2012 only wines registered at the European Union level are allowed to bear the French appellation of origin (AOC). In

100 Regulation (EU) n° 1151/2012 of the European parliament and the council of 21 November 2012. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=FR> (dernier accès le 20 janvier 2019).

101 Le présent règlement ne s'applique pas aux boissons spiritueuses, aux vins aromatisés ou aux produits de la vigne définis à l'annexe XI *ter* du règlement (CE) no 1234/2007, à l'exception des vinaigres de vin.

102 Regulation (EU) n° 1308/2013 of the European parliament and the council of 17 December 2013. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1308&from=FR> (dernier accès le 23 janvier 2019).

FIGURE 3.2
The PGI (IGP)
SOURCE: INAO OFFICIAL WEBSITE (PUBLIC DOMAIN) WWW.INAO.GOUV.FR

France, a controlled origin product must respond to the article L.431-1 of the Consumer Code[103] definition's and must present quality or character.[104]

The INAO defines the protected designation of origin (PDO) as "a product for which all the stages of production are carried out according to recognized know-how in the same geographical area, which gives the product its characteristics".[105]

In 2017, France had 363 PDOs for wine, 50 PDOs for food products and 50 PDOs for dairy products for a turnover of 23.4 billion euros.[106]

Linked to a know-how and set up by European regulations in 1992 and extended to wines in 2009, the Protected Geographical Indications (PGI) applies to the wine sector[107] and also to the food and food-processing sector.[108]

103 «Constitue une appellation d'origine la dénomination d'un pays, d'une région ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains».

104 Please also see in this sense: 'L'appellation d'origine', thèse de S. VISSE-CASSE, sous la direction de J. RAYNARD, soutenue en (2005).

105 AOP/ AOC, INAO.fr. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protegee-Appellation-d-origine-controlee> (dernier accès le 23 janvier 2019).

106 Les produits sous signe d'identification de la qualité et de l'origine; chiffres-clés 2017. En ligne, disponible sur <https://www.inao.gouv.fr/content/download/2821/26564/version/2/file/19-02-08-Brochure%20chiffres-cl%C3%A9s%20INAO%202017.pdf> (dernier accès le 2 mars 2019).

107 Regulation (EU) No 1308/2013 on the common organization of the market in agricultural products (wine products).

108 Regulation (EU) No 1151/2012 on quality systems for agricultural products and foodstuffs.

Since 1 August 2009, in the interests of harmonization at the European Union level and following the agreement signed on 15 April 1994 in Marrakech creating the Common Market Organization (CMO)[109] for the wine sector, the European Union is going to make a change by transforming Vins de Pays[110] into PGI wines. Historically, Vins de pays date back to a law of 1 January 1930 with a distinction made by the decree of 13 September 1968 between Vins de département and Vins de pays de zone. There were about 150 Vins de Pays and the decree of 1 September 2000[111] laid down the conditions of production until their repeal in 2011.[112] Finally, the law of May 12, 2009 removed them from the category of "mentions valorisantes" and integrated them into the PGI category.[113] The aim of this evolution is to bring wines closer to the PDO/PGI food-processing framework.[114]

The INAO defines a wine with a Protected Geographical Indication as "an agricultural product, raw or processed, whose quality, reputation or other characteristics are linked to its geographical origin".[115]

In 2017, France had 140 PGI registered for the agri-food sector, including 74 PGI for the wine sector and 2 PGI for cider, with a turnover of 3.8 billion euros.[116]

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109 Déclaration de Marrakech, 14 avril 1994. En ligne, disponible sur <https://www.wto.org/french/docs_f/legal_f/marrakesh_decl_f.pdf> (dernier accès le 10 janvier 2019); Accord instituant l'Organisation Mondiale du commerce, conclu à Marrakech le 15 avril 1994. En ligne, disponible sur <https://www.admin.ch/opc/fr/classified-compilation/19940094/200411110000/0.632.20.pdf> (dernier accès le 12 janvier 2019). See Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) Santa Clara High Technology Law Journal 153–178. See also Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p.

110 J.-M. BAHANS and M. MENJUCQ, *Droit de la vigne et du vin* (Féret, 2010) 82–84; S. VISSECAUSE, *Droit du vin, de la vigne à sa commercialisation* (Gualino, 2017) 57–58.

111 Décret n°2000–848, 1 septembre 2000.

112 Décret n° 2011-1629 du 23 novembre 2011 portant abrogation des décrets relatifs aux vins de pays. JORF n°0272 du 24 novembre 201, texte n° 78.

113 L. n°2009–526, 12 mai 2009. C. Rural, art. L.641-11.

114 Council Regulation (EC) n°1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and specific provisions for certain agricultural products (Single CMO Regulation). En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R1234&from=FR> (dernier accès le 12 janvier 2019).

115 Indication Géographique Protégée, INAO.fr. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Indication-geographique-protegee> (dernier accès le 12 janvier 2019).

116 AOP/ AOC, INAO.fr. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protegee-Appellation-d-origine-controlee> (dernier accès le 23 janvier 2019) Les produits sous signe

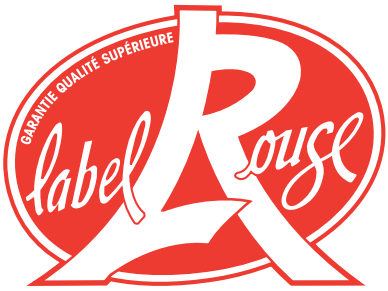

FIGURE 3.3
The red label
SOURCE: INAO OFFICIAL WEBSITE (PUBLIC DOMAIN) WWW.INAO.GOUV.FR

Created on 5 August 1960 by the agricultural orientation law under the impetus of the Minister of Agriculture Henri Rochereau, the decree of 13 January 1965 sets the framework for the approval of this label, which is open to all foodstuffs and non-food and unprocessed agricultural products. This decree set its conditions based on quality of the product, and was officially applied as a label from June 17th1983.[117]

The INAO defines the red label as "a national sign which designates products which, by their production or manufacturing conditions, have a higher level of quality than other similar products usually marketed".[118]

In France, in 2017, 427 specifications were approved, including 215 for the poultry sector, 56 for the meat sector and 43 for the charcuterie sector, for a turnover of 1.2 billion euros.[119]

Developed after the first war in Europe in the 1920s, organic farming, which is committed to "respecting natural balances and biodiversity",[120] made its legal appearance in France in the second half of the 20th century.

The INAO defines organic farming as "a method of production that combines optimal environmental practices, respect for biodiversity, preservation of natural resources and the assurance of a high level of animal

d'identification de la qualité et de l'origine; chiffres-clés 2017. En ligne, disponible sur <https://www.inao.gouv.fr/content/download/2821/26564/version/2/file/19-02-08-Brochure%20chiffres-cl%C3%A9s%20INAO%202017.pdf> (dernier accès le 2 mars 2019).

117 D.CHAILLOUET, 'Le label rouge, une longue histoire'. En ligne, disponible sur <https://www.labelrouge.fr/une-histoire> (dernier accès le 12 janvier 2019). C. Rural, art. **R.641-1 à R.641-10.**

118 Label Rouge. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Label-Rouge> (dernier accès le 12 janvier 2019).

119 AOP/ AOC, INAO.fr. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protegee-Appellation-d-origine-controlee> (dernier accès le 23 janvier 2019).

120 Agriculture Biologique. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Agriculture-Biologique> (dernier accès le 13 janvier 2019).

FIGURE 3.4
Organic farming
SOURCE: INAO OFFICIAL WEBSITE (PUBLIC DOMAIN) WWW.INAO.GOUV.FR

welfare".[121] This practice aims to reduce inputs, exclude the use of synthetic chemicals and genetically modified organisms (GMOs).[122]

The 1980 agricultural orientation law marked the beginning of the appearance of organic farming at the European Union level where this production method was mentioned for the first time in 1991 in the EEC Regulation 2092/91 of June 24th 1991.[123] Until 2012 at the European Union level, there was no official acknowledgement of organic wine but only a wine "from organic farming".[124] To benefit from the "organic farming" label,[125] the latter had to comply with Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and its implementing regulation (EC) No 889/2008 of the Commission of 5 September 2008.[126]

121 C. Rural, art. L.640–2 et L641-13.

122 *Qu'est-ce que l'agriculture biologique*, 8 septembre 2017. <https://agriculture.gouv.fr/lagriculture-biologique-1> (dernier accès le 13 janvier 2019).

123 Règlement CEE 2092/91 du 24 juin 1991 concernant le mode de production biologique de produits agricoles et sa présentation sur les produits agricoles et les denrées alimentaires. En ligne, disponible sur <https://www.bioconsomacteurs.org/sites/default/files/pdf/reglement-bio-europeen-1991-avec-ensemble-des-modifications.pdf> (dernier accès le 10 mars 2019).

124 Commission Implementing regulation (EU) n° 203/2012 of March 2012, amending Regulation (EC) n° 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) n° 834/2007, as regards detailed rules on organic wine. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0203&from=FR> (dernier accès le 10 mars 2019).

125 C. Rural, art. L. 641-13.

126 **Council Regulation (ec) n° 834/2007, of 28 June 2007on organic production and labelling of organic products and repealing Regulation (eec) n° 2092/91.** En ligne, disponible sur <

The implementing regulation (EU) n°203/2012 of 8 March 2012 recognized the legal existence of organic wines[127] before being repealed on 30 May 2018 by the new Regulation (EU) n°2018/848 of the European Parliament and of the Council on organic production and labelling of organic products.[128] Initiated in 2014 by the European Commission and in force from 1 January 2021, the aim of this new regulation is firstly to clarify and strengthen the confidence of consumers, who are increasingly demanding about the origin and traceability of the product consumed, and secondly to ensure fair competition for players in the organic sector.[129]

In France, in 2017, 1,745 million hectares of farmland will be under organic production, with 54,044 certified operators and a turnover of 8.3 billion euros.[130]

Created in 1992, this European quality mark[131] applies to products or foodstuffs intended for human consumption without necessarily being linked to its geographical origin.[132]

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https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0834&from=FR > (dernier accès le 10 mars 2019).

127 Regulation eec 2092/91 of June 24, 1991 concerning the organic production method of agricultural products and its presentation on agricultural products and foodstuffs. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31991R2092&from=EN > (dernier accès le 10 mars 2019). Commission implementing regulation (EU) No 203/2012of 8 March 2012amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007, as regards detailed rules on organic wine. En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0203&from=FR (dernier accès le 10 mars 2019).

128 Regulation (EU) 2018/848 of the European parliament and of the council of 30 May 2018on organic production and labeling of organic products and repealing Council Regulation (EC) No 834/2007 En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0848&from=EN > (dernier accès le 6 janvier 2019).

129 INAO, *Le nouveau règlement européen de l'agriculture biologique a été publié*, 15 juin 2018. En ligne, disponible sur <https://www.inao.gouv.fr/Nos-actualites/Le-nouveau-reglement-europeen-de-l-agriculture biologique-a-ete-publie> (dernier accès le 15 février 2019). Please also see in this sense: Jus Vini 2, L. TOUZEAU-MOUFLARD, *Un nouveau règlement pour l'agriculture biologique: quel intérêt pour le secteur vitivinicole*, p.225–237; Droit(s) du Bio, actes du colloque de Toulouse, 23 mars 2018, Éditions l'Épitoge (2019); T. GEORGOPOULOS, *Le vin biologique : réflexions autour d'un paradoxe*, p.125 et s.

130 AOP/ AOC, INAO.fr. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protegee-Appellation-d-origine-controlee> (dernier accès le 23 janvier 2019).

131 **Regulation (Eu) n° 1151/2012 of the European Parliament and the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.** En ligne, disponible sur < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=FR> (dernier accès le 15 février 2019).

132 C. Rural, art. **R.641-1 à R.641-10.**

FIGURE 3.5 Traditional specialities guaranteed (TSG)
SOURCE: INAO OFFICIAL WEBSITE (PUBLIC DOMAIN) WWW.INAO.GOUV.FR

The INAO defines traditional specialities guaranteed as "a product whose specific qualities are linked to a composition, manufacturing or processing methods based on a tradition".[133] While Italy is one of the largest users of this sign, in France, to date, only one product (Bouchot mussels) benefits from this denomination.[134]

5 The Protection of PDO/AOC s in France Focused on Innovation and the Renewal of Production Methods

As this is a PDO or AOC, which has been an identifying sign of quality in France since 1905 and internationally since 1958 with the Lisbon Agreement,[135] any application for recognition presupposes the existence of links between the terroir and the characteristics of the product. The registration of this appellation of origin has the consequence, after study of the file by the Institute, of ensuring its protection against any usurpation. Also, the INAO, guided by the evolution of vine and vineyard management, is

133 Spécialité traditionnelle garantie. En ligne, disponible sur <https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Specialite-traditionnelle-garantie> (dernier accès le 15 février 2019).

134 M.-G. PLASSERAUD and Y. PLASSERAUD, *Typicité ; Valorisation du patrimoine* (Tir, 2018) 280–286.

135 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958. En ligne, disponible sur <https://www.wipo.int/export/sites/www/lisbon/en/legal_texts/lisbon_agreement.pdf> (dernier accès le 10 avril 2020).

constantly implementing strategic actions to fight against the vagaries of the climate.

5.1 *INAO Control over Registered Designation of Origin*

INAO is the only organization able to propose to the government the recognition of AOCs, and to ensures their protection. Indeed, products benefiting from a distinctive sign must be protected against any prejudice. To this end, the Institute, under the supervision of the Council of State, has civil and criminal actions at its disposal.

With regard to civil actions, in accordance with the definition of the appellation of origin given by article L.431-1 of the Consumer Code,[136] any use likely to divert and weaken its reputation[137] leads to an action for infringement.[138]

Criminal proceedings are initiated by the DGDDI or the DGCCRF, with the INAO filing a civil suit, in the event of false indication of origin, misleading commercial practices and advertising, and the offence of deception.[139]

With regard to the control exercised by the Conseil d'État over INAO decisions, we can illustrate its action through the series of rulings relating to the AOC Quarts de Chaume and Coteaux du Layon Chaume located in the Loire Valley.

The INAO, under the supervision of the Conseil d'Etat, continues to protect the AOCs. However, in certain cases, the latter may replace the Institute's missions. In order to fully grasp the subtlety of these ten years of procedures, it is necessary to return in the 1950s to the formation of the "Quarts de Chaume" AOC, recognized by decree on 10 August 1954 and the "Coteaux du Layon" AOC, recognized by decree on 18 February 1950. Subsequently, the latter, although earlier, did not meet with unanimous approval and the AOC "Quarts de Chaume",[140] which continued to gain in notoriety. From then on, the Coteaux du Layon winegrowers wished to obtain a modification of the name of the appellation to protect the name Chaume. Encouraged in their approach by the INAO, a decree dated 1957 proved them right, and the appellation became

136 C. de la consommation, art L115-1: «Constitue une appellation d'origine la dénomination d'un pays, d'une région ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains».

137 C. Rural, art. L643-1.

138 Code de propriété intellectuelle, art L. 722.

139 C. de la consommation, art L.121-1.

140 Quarts-de-Chaume is a sweet wine made exclusively from Chenin Blanc, made with botrytised grapes (attacked by noble rot) and harvested when overripe. Before fermentation, musts must have a sugar concentration at least equal to 298 g/l.

"Coteaux du Layon-Chaume" then "Chaume – the first vintage of Coteaux du Layon", by decree on 19 September 2003. In response to these requests, and on the basis of Article L.643-1 of the Rural Code, the producers of "Quarts de Chaume" appealed to the Conseil d'Etat, which annulled it.

As the back label of a bottle of wine from the AOC "Quarts de Chaume" indicates, "the prestigious appellation of "Quarts de Chaume" takes its name from the small village of Chaume and from a medieval custom according to which the Lords of the Guerche, received for rent the best Quarts of the harvest". In order to avoid any risk of confusion and weakening of the reputation of the "Quarts de Chaume" appellation, the Conseil d'Etat (Council of State) therefore annulled the decree of 19 September 2003 in a ruling on 27 July 2005.[141] Not satisfied with this decision, the winegrowers of the appellation "Coteaux du Layon-Chaume" obtained a new modification of the name of the appellation by decree on 21 February 2007. The appellation became "Chaume" and the Conseil d'Etat had to – once again – intervene by cancelling the decree on 30 March 2009.[142] In a final ruling dated 26 February 2014, the Conseil d'État put an end to this legal dispute by validating the specifications of two different AOC s, "Quarts-de-Chaume grand cru" with a maximum authorized yield of 20 hectolitres/ha, and "Coteaux du Layon first vintage Chaume" with a maximum authorized yield of 25 hectolitres/ha.[143]

This series of rulings clearly illustrates the framework of INAO decisions by the Conseil d'Etat (Supreme Court in the French administrative court system) regarding the prohibition of the misappropriation of the reputation of an appellation of origin.

5.2 *Actions Implemented by INAO in 2018*

In more recent times, the year 2018 seems to mark a turning point for French winegrowing, the recognition of registered designation of origin – elements of national heritage – and the future of the wine industry. Moreover obtaining the protected designation of origin for Cotentin cider on July 4th 2018 and the recognition of the Terres du Midi protected geographical indication on 5 July

141 CE, 27 juillet 2005, SCEA domaine des Baumard, Syndicat de défense de l'AOC « Quarts de Chaume », contre INAO, n°261989, Revue Rural, n°337, novembre 2005.

142 CE, 30 mars 2009, aff. n°304990. T. GEORGEOPOULOUS ; « Les AOC entre notoriété et confusion, le contentieux autour des vins « (Quarts de) Chaume » », Revue Rural, n°381, mars 2010, étude 5, 19–25.

143 P. TOUCHAIS, 'La hiérarchie des crus de l'Anjou validée', Vitisphère 4 mars 2014. En ligne, disponible sur <https://www.vitisphere.com/actualite-78681-La-hierarchisation-des-crus-de-lAnjou-validee.htm> (dernier accès le 1 mars 2019).

2018 for still white, red and rosé wines, the INAO draws up an assessment and tables the opportunities and strategy to adopt for the profession.

On the eve of the 24th Conference of the Parties to the United Nations Framework Convention on Climate Change, which took place from 3 to 14 December 2018 in Katowice, Poland, the INAO was considering these issues concerning climate change and its short, medium and long-term consequences for viticulture. To this end, a progression of the grape varieties and an additional individual volume seems likely to be authorized.

5.2.1 The Evolution of Vine Varieties, a Freedom Given to Winegrowers to Fight against Climatic Hazards

In south of France vineyards are suffering of the global warming and the climatic conditions. Early harvests and a rising alcoholic degree are the first signs. Therefore, guided by an ecological transition, experiments are being carried out on certain plots and heat and drought resistant variety of grape are being planted. The aim is to develop – always with a concern for quality – the taste of the origin.

To do this, the INAO approved, after prior authorization requested[144] and in accordance with the planting right stemming from Regulation (EU) n°1308/2013 of the European Parliament of 17 December 2013, which came into force on 1 January 2016, a temporary amendment to the specifications allowing winegrowers located within the French appellations to plant new varieties of grape. This evolution, controlled and supervised, will eventually allow the research and development of varieties necessary to adapt to climate change. Thus, new categories of variety of grape will be able to evolve on the same terroir of the appellation, which was not, to date, authorized.

For information, historically, two categories of variety of grape were authorized by the specifications of an appellation, namely the main variety of grape and the secondary variety of grape. From now on, a third category can be included: "variety of grape for climatic and environmental adaptation".

However, in order to respect the quality, particularity and reputation of French wines – well-known around the world – this last category of variety of grape must not exceed 5% of the appellation's variety of grape and may not exceed 10% of the final composition of a bottle. Moreover, at the national level, the number of varieties of grape will be limited to "ten variety of grape per colour and twenty variety of grape of any colour".

Also, the introduction of this new category of cépage is framed in time, i.e. ten years. At the end of this period, after studies and exchanges as to the

144 C. Rural, art. D.665-2.

benefits of the latter between the INAO, the ODG[145] and the winegrowers, they will be able to join either the category of accessory cépage or the category of main cépage. In case of lesser interest, they can neither be included in the specifications, nor be vinified, nor even benefit from the reputation of the appellation.

The ODG will therefore have to motivate the collective nature of the approach and its research experimentation.

5.2.2 Individual Supplementary Volume, Better Management of the Wine-Growing Holding

The individual supplementary volume (VCI), implemented from 2013 and made possible for red wines benefiting from an appellation d'origine contrôlée by decree on 25 August 2015 and published in the Journal Officiel on 27 August 2015, will be reinforced for the entire French wine sector in 2018. A real response to climatic hazards – frost, hail, mildew – the VCI aims to build up an individual annual reserve, by designing an additional volume built up beyond the fixed and authorized yield.

From the 2018 harvest onwards, winegrowers can use the surplus grapes to build up a reserve that can be used to compensate for poor harvests and climatic contingencies. A limit is nevertheless set at "20% of the yield of the appellation and a cumulative 50% over three years".

The INAO's decision of 20 June 2018 was a success, and the first applications have been examined since January 2019.

On 26 February 2019, the new Objectives and Performance Contract (COP) was signed by the Minister of Agriculture and Food, Didier Guillaume, and two INAO members, Marie Guittard, Director of the Institute and Jean-Louis Piton, Chairman of the Permanent Council.[146] This document, drawn up for a period of five years (2019–2023), will define the main lines of development of the official signs in order to strengthen their attractiveness by continuing the modernization of the Institute's internal organization in order to improve the efficiency and quality of public action.[147]

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145 Organisme de défense et de gestion. En ligne, disponible sur <https://www.inao.gouv.fr/Espace-professionnel-et-outils/Les-organismes-de-defense-et-de-gestion-ODG> (dernier accès le 8 mars 2019).

146 Signature du nouveau Contrat d'objectifs et de performance de l'INAO, 26 février 2019. En ligne, disponible sur <https://www.inao.gouv.fr/A-la-Une/Signature-du-nouveau-Contrat-d-objectifs-et-de-performance-de-l-INAO>, (dernier accès le 8 mars 2019).

147 Contrat d'objectifs et de performance 2019–2023, INAO. En ligne, disponible sur <https://www.inao.gouv.fr/content/download/2869/26832/version/1/file/COP-COPINAO20192023-Bassed%C3%A9f.pdf> (dernier accès le 8 mars 2019).

6 Conclusion

Wine, a product of the terroir cultivated by men since ancient times, has been subject to regulations guided by quality, characteristics and taste of origin. The Gironde parliamentarian, Joseph Capus, made France a pioneer country in terms of recognition and protection of registered designations of origin. After him, Baron Le Roy's contribution encouraged the rest of the European Union to do the same. The delimitation of production areas, the authorization of cépage – indigenous or traditional – as well as the methods of production and cultivation were defined and regulated at the beginning of the 20th century.

The concept of the designation of origin stems from man's desire to individualize the things he produces. At national level, the appellations of controlled origin and at European level, the registered designations of origin have constantly highlighted the value of the terroir and the excellence of French products beyond the national borders. Therefore, since their inception, and throughout their historical, scientific and legal construction, the aocs and the National Institute of Origin and Quality have been inseparable.

The current missions of the Institute are to recognize, control and protect the products and inform about the French heritage, which is incomparable richness. Consequently, producers, public authorities, agricultural groups and economic policies must act together to safeguard, develop and enhance the value of products of origin while ensuring their recognition and protection.

CHAPTER 4

Exploring Italy's Wine Law Reforms

Experiences, Challenges, and Prospects

Antonio Rossi and Duilio Cortassa

1 Introduction

Italy is the world's leading wine producer and the second largest exporter by volume. While in Italy, the heterogeneity of production reflects the diversity of regional contexts. Italian unity has a century and a half and Italy has not benefited from a centralizing tradition as in most other countries. The structure of the Italian wine world is the consequence of certain much larger historical and economic realities. Talking about the wine-growing regulation of a country and of those who are its actors implies to remain modest, as the complexity is great. In the case of Italy this is particularly true. Viticultural Italy is characterized by a multiplicity of indigenous grape varieties. For some this diversity translates the richness and the authentic character of Italian viticulture. For others, it appears to be an obstacle to the emergence of a vineyard of uniform quality. In any case, regulating wine in Italy is a complex and unique effort.

A few economic facts suffice to explain Italy's importance on the global market of wine. According to the International Organisation of Vine and Wine (OIV),[1] 7.4 mha is the global area under vines in 2018, while five countries represent 50% of the world vineyard. More precisely, Spain represents 13%, China 12%, France 11%, Italy 9%, Turkey 6%. In terms of grapes production (grapes intended for all uses), 77.8 mt is the world production of grapes in 2018, of which 57% of wine grape, 36% of table grape and 7% of dried grape. While 292 mhl is the global wine production in 2018, in terms of the total wine production per country Italy is in first place (54.8 mhl), followed by France (48.6 mhl) and Spain (44.4 mhl).

As can be gleaned above, these data confirm a fairly stable trend which, since 2014, was, respectively, 44.2/46.5/39.5; in 2015 50.0/47.0/37.7; in 2016 50.9/45.3/39.7; and in 2017 42.5/36.3/32.5. To find comparable figures we must

1 *2019 Statistical Report on World Vitiviniculture*, OIV, 2018.

 | DOI:10.1163/9789004438316_005

go back 18 years, to 2000, when 54.1 mhl were produced. With a small difference: in 2000 the Italian viticulture worked on 692,000 hectares, while today, according to ISTAT,[2] the hectares in production are 629,000, therefore around 9% less. Therefore, 2018 certainly was the most prolific vintage of the millennium, in absolute and also relative terms. In terms of major wine consumers, the situation is different, since the USA are in the first place with 33.0 mhl, followed by France (26.8) and Italy only ranking third (22.4), followed by Germany[3] (20.0).

In 2018 Italy was the second largest wine exporter (19.7 mhl) after Spain (21.1) and well ahead of France (14.1). Beyond these numbers, however, Italy is by far the country with the largest and most diverse wine production in the world. The climatic conditions, the numerous vines, the geological characteristics and the conformation of the territory make the peninsula the ideal place for the production of quality wines, sometimes of great value, from very diversified characteristics. Regulations regarding wine production have a profound effect on the character of the wine produced. Such regulations can be found on the local, national, and international levels, but each level must be considered with the others in mind.

This chapter explores the evolution of wine regulations in Italy. The chapter shows that wine law in Italy has constantly and considerably changed over the last decades. From a local approach and regulation, Italy has gradually embraced a more European and more international regulation which better services the interests of its producers and consumers. The regulatory framework has requested many social and economic changes, but it now provides Italy with a robust architecture which might help the country to retain a prime role in the wine global economy. The chapter first reviews the history of wine law in Italy (Section 2). It then provides a comprehensive analysis of the current Italian law on wines and vineyards (Section 3). In this respect, the chapter also explains the DOCG and DOC regime which are both quality classifications (Section 4). Under Italian wine law DOCG is the highest designation of quality among Italian wines. Moreover, the chapter discusses the Italian framework for the protection for geographical indications and designations of origin (Section 5) before it draws some regulatory and policy conclusions (section 6).

2 The *Istituto nazionale di statistica* (Italian National Institute of Statistics) is a public research organisation and the main producer of official statistics in Italy.

3 "*They* [*the Germanic tribes*] *on no account permit wine to be imported to them, because they consider that men degenerate in their powers of enduring fatigue, and are rendered effeminate by that commodity*", Julius Caesar, *De Bello Gallico*, Book IV, Chap. 2; things change, obviously.

2 A Brief History of Wine Law in Italy

Wine regulations have existed for much of the history of the wine and are currently in place at all levels of national and international governance. In order to fully understand any single regulation, it is necessary to consider the regulation within the context of those around it. "*The growing globalization of trade has made clear the need to adopt rules which, while being limited for many products to a certain standardization, take on completely peculiar aspects in the case of food. On the other hand, foods are goods different from others, since they satisfy an inescapable need and have the peculiarity of entering into ourselves to support us. Furthermore, these are often products characterized by traditional recipes; so that a radical standardization, as carried out for mechanical products, would not be possible, otherwise the loss of traditional peculiarities which the consumer does not want to renounce. Hence the emergence of rules that essentially aim to ensure food security and food safety on the one hand, and on the other to guarantee the consumer that the recipe behind the product is respected*".[4]

In line with the entire agri-food sector, regulation is the best solution frequently adopted in the wine sector, implemented through the enactment of strict laws on the health of drinks and on oenological practices allowed, as well as through the creation of designations of origin and labelling rules.[5] The EU wine sector is undoubtedly the most regulated worldwide, where the lawmaker essentially establishes everything: the grape varieties permitted in each designation or geographical indication, the oenological practices as well as the labelling rules. "*Almost half the world's vineyards are in the European Union* (*EU*), *and the EU produces and consumes around 60% of the world's wine. The EU is not only the largest global wine-producing region and the main importer and exporter of wine but also a highly regulated market*."[6]

4 L. Costato, F. Albisinni, *European and global food law*, CEDAM. 2016.

5 An history of Italian wine law in M. Da Passano, A. Mattone, *La vite e il vino. Storia e diritto*, Carocci, Rome, 2000; the law on wine in communal age in P. Cammarosano, *Le campagne nell'età comunale* (*metà sec. XI-metà sec. XIV*), Loescher, Turin, 1974, foot note in http://fermi.univr.it/rm/didattica/fonti/cammarosano/nota.htm; *see* E. Orlando, *Coltura vitivinicola, consumo e commercio del vino: il contributo degli statuti comunali veneti*, and U. Santarelli, *La vite e il vino negli statuti della toscana marittima*, both in M. Da Passano et al. *La vite e il vino. Storia e diritto, cit*.

6 G. Meloni and J. Swinnen, *The Political Economy of European Wine Regulations*, in *Journal of Wine Economics*, 8, 3, 2013, Pages 244–284.

2.1 *The Influence of the EU on Italian Wine Legislation*

On 1 January 1958, with the coming into force of the Treaty of Rome, ratified with the Act of 4 October 1957, no. 1203, Italy became a founding member of the European Economic Community (EEC).[7] Not long after, in 1962, the first common market organisation (CMO) was established, although an effective organization of the wine market did not come until 1970 with the passage of the Common Wine Policy (CWP) in Regulations 816/70[8] and 817/70.[9] The underlying motivations of the CWP were protectionist in nature and similar to those found in other statutes: to reduce wide annual fluctuations, to restricting quantity in order to protect the livelihood of wine producers and to raise the quality of wine. Most importantly, the EC was becoming a single market, within which no restraint was put for the commerce of wine. Indeed, it was only between 1976 and 1978, with the ban on planting and the obligation to distil the surplus, that the market organisation adopted the interventionist approach that nowadays characterizes it.[10]

Financial incentives for giving up vineyards were reinforced towards the end of the 1980's, with the objective of reducing production. Needless to say, a milestone in the process of European integration was the signing, on 7 February 1992, of the Maastricht Treaty (officially, the "Treaty on European Union"), whereby the European Economic Community was renamed the European Community (EC) to underscore the bridging of economic boundaries and the start of a process designed to integrate the member countries into a single political entity. Later on, the EC took the definitive name of "European Union", with the coming into force, on 1 December 2009, of the Treaty of Lisbon (Treaty on the Functioning of the European Union), which strengthened the institutional

7 Since 1962, in the framework of the common agricultural policy (CAP), it was gradually established a common organization of the market in wine. Such CMO, based on a political balance between producer States, was availing itself of different tools to ensure market equilibrium. Such mechanisms were designed to regulate supply by restricting replanting rights and withdrawal at a minimum price guaranteed of surplus production and transformation of the same into alcohol for human consumption, granting premiums for the grubbing-up of vines; to apply a price and intervention regime to table wines (with the exception of "quality wines produced in specific regions ", V.Q.P.R.D.) through the use of distillation, or the consumption or in fuel. As we all know, the conditions of the EU wine market have since changed and accrued globalization has made competition more heated.

8 Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine.

9 Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions.

10 *L'organizzazione comune del mercato del vino*, in A. Germanò, E. Rook Basile, N. Lucifero, *Manuale di legislazione vitivinicola*, Giappichelli, Turin, 2017.

architecture of the Union, also from the legislative and financial viewpoints. Among other things, the Treaty of Lisbon defined in detail the co-decision procedure to be adopted by the EU Council and the EU Parliament.

2.2 *The Progressive Transformation of Italian Wine Law*

While the main economic issues which were bringing together these countries in 1957 were steel and coal, quite a major conflict had to be resolved in respect of the integration of the French and Italian wine industries. The two largest wine producing countries were organized in a fairly different manner. France had a detailed register of vineyards, while Italy's ordinary land register was out of date; while France was prohibiting planting new vines, planting new vines was subsidised in Italy; while France had a classification system based on quality and strict rules for vineyards, no comparable standards or rules were applied in Italy; while France had AOC, VDQS, and *vins de consommation courante*, only a general prohibition on inaccurate names existed in Italy, with no specific regulations on names or quality; while France had a set total amount of wine to be released to market and spread it over time, no such restrictions were contemplated in Italy. Even sugar and surpluses were ruled differently, with France allowing to add sugar to wine and Italy having severe penalties for this and France intervening to support prices by way of storage or distillation, while Italy not doing it. Thus, French *vignérons* was scared that Italian wine would flood their market while prices of French wines would deteriorate, at the same time with the value of French vineyards.

In 1959 the procedures for the progressive abolition of customs duties started, together with the process of unifying the European wine industry; the Common Custom Tariff was aimed directly at reducing outside competition by placing customs duties on imported wines based on the type of wine, alcohol content, and sugar content. In 1962, the Council adopted the first regulations on the CAP aiming to institute a single market for agricultural products and of financial fitness through the European Agricultural Guidance and Guarantee Fund (EAGGF): Regulation 24/62 laid the foundation for the common market in wine. The preamble noted the "*appreciable divergences in the wine-growing policies pursued by different Member States at a national level*" and then set out four main provisions, pursuant which each country was expected to establish 1) a vineyard register, 2) a central authority to keep track of annual production levels, 3) strict rules regarding quality wines produced in specified regions, and 4) to compile annually future estimates of resources and requirements. In response to Regulation 24/62, Italy instituted its own system of granting quality wines *Denominazione di Origine Controllata* (DOC) status based on the region

of origin.[11] While many protectionist measures previously in place began to be lifted, Italy and France elected to retain their quotas for table wine, but not for quality wine, since cheap table wine was considered more of an economic threat than quality wines that had production limitations. By 1970, although discriminatory taxation remained an issue until long after, quotas had essentially disappeared.

In this context, Italy began to pass a more organic set of laws regulating the wine sector in parallel with the formulation of the directives that would be adopted by the European Community. Thus, the Royal Decree of 1 July 1926, no. 1361, was completely redesigned by Presidential Decree of 12 February 1965, no. 162, which established stricter and more specific regulations on the production, distribution and marketing of wine products in preparation for the forthcoming directives that were going to apply to all EEC member countries, including Italy. At the same time, the first comprehensive set of rules on wines with designation of origin was approved, on 17 July 1963, with Presidential Decree no. 930, which, to this day, serves as the basis of Italy's legislative provisions on protected designation of origin (PDO) and protected geographical indication (PGI) wines, as we shall see in greater detail later on.[12]

2.3 *A New Framework: the Act of 12 December 2016*

The European Union's rules for the wine sector require each Member State to complete the regulatory framework with additional provisions which are in fact perhaps the most important part in regulating the specific operational aspects which allow to fully implement the EU policy to achieve the desired objectives. In late 2016 the long Italian wine-making tradition was finally regulated with the coming into force of the Act of 12 December, no. 238 (*Organic set of rules on the cultivation of grapes and wine production and trade*), which, having been approved after several years of debate, aimed to be an organic collection of the aforementioned earlier regulations, to be brought together in a Consolidated Wine Act.[13] Albeit in continuity with the earlier provisions, the

11 A comprehensive survey in L. Costato, P. Borghi, S. Rizzioli, *Compendio di diritto alimentare*, CEDAM, 2019.

12 For a general overview of trademarks and geographical names in Italian law, see L. Costato, A. Germanò, E. Rook Basile, *Trattato di Diritto Agrario*, vol. III, chapter 13, UTET Giuridica, 2011.

13 Act no. 238 of 12 December 2016, Article 2: "*This law sets out the national regulations on the production and marketing, the designation of origin, the geographical indications, the traditional mentions, the labelling and presentation, the management, the controls and the sanctioning system for wine products as per Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013, and Regulation (EU) No 1306/2013 of the*

production of a unified compilation made it possible to rationalise and simplify the complex set of rules governing grape growing and wine production.[14] Many aspects were reviewed and updated and, to facilitate future revisions, the lawmaker provided for the issuing of a series of implementing decrees making for a speedier amending procedure, since it was going to be up to the Ministry of Agricultural, Food and Forestry Policies, not the legislative body, to intervene, in a more direct and simplified manner, on the implementing provisions.

3 The New Italian Law on Wines and Vineyards

The Act no. 238 sets out a complex set of regulations, consisting of 91 articles grouped into eight titles, each of them comprised of chapters addressing specific issues. Article 1 of Title I stated: *"The wine obtained from grapes, the grapevine and the wine-making territories, as the fruit of labour, skills, know-how, practices and traditions, constitute a national cultural heritage to be safeguarded and enhanced from the standpoints of social, economic, productive, environmental and cultural sustainability".* Article 5 in Chapter III, Title I, established the *national register of grapevine varieties, where the different wine grapes varieties are classified as a function of the relative administrative areas as either varieties suitable for cultivation or varieties under observation.* Article 6 defines the *«autochthonous Italian grapevine» or «Italic vine» as the grapevine belonging to Vitis vinifera, a species of proven exclusively Italian origin, whose presence is observed in delimited geographic areas of the national territory.* The use of the wording *«autochthonous Italian grapevine»* and its synonyms is reserved for the labels and presentations of specific PDO (both "DOGC", protected and Guaranteed Designation of Origin and "DOC", Protected Designation of Origin) and IGP (PGI) wines, within the framework of the relative wine-making standards, while appropriate vine identification procedures, conditions and characteristics were going to be defined by ad hoc decrees. The regulations on the protection of the vineyards defined as «*heroic or historic vineyards*» are set out in Article 7 and the government promotes interventions for the restoration, recovery, maintenance and protection of vineyards in the *areas subject to hydro-geological instability risks or having special landscape, historic and environmental characteristics.* Such vineyards are situated in areas ideally suited for

European Parliament and the Council of 17 December 2013, as well as the Commission's Delegated Regulation (EU) No 2016/1149 of 15 April 2016, and the Commission's Implementing Regulation (EU) No. 2016/1150 of 15 April 2016".

14 P. Caviglia, *Manuale di diritto vitivinicolo*, Milan, UIV, 2017.

grape growing, in that special environmental and climatic conditions endow the product with unique characteristics, strictly associated with the specific features of the area of origin.

3.1 *The Establishment of a Grapevine Register*

The establishment of a grapevine register containing up-to-date information on the wine production potential of a vine, pursuant to regulation no. 1308/13, is provided for in Article 8. Each vine unit suitable for the production of wine grapes must be recorded in the grapevine register, whose management is entrusted to the Regions,[15] according to modalities agreed upon, to be defined, within the framework of the services offered by the *National Agricultural Information System*, based on information obtained from the dossiers of the individual wine producers. The vineyards entered in the grapevine register are considered suitable for the production of grapes for use in the making of DOCG, DOC and IGP wines, based on the technical characteristics of the vine units. For purposes of a tighter control on the production systems, each winery is required to submit a plan view showing the location of the various wine vats with a capacity of more than 10 hectolitres as provided for in Article 9. The period of time during the year when it is possible to collect the grapes and perform the fermentation and refermentation processes is established in Article 10 as going from 1 August to 31 December. Moreover, the regions are entrusted with the power to authorise on a yearly basis the increase in the natural alcoholic strength by volume of fresh grapes, grape must, partially fermented must, new wine still in fermentation, and wine, intended for the production of wines, whether or not IGP and DO quality, as well as of batches for the preparation of sparkling wines, quality sparkling wines, aromatic type quality sparkling wines, whether or not PGI and PDO.

Article 13 sets out the required storage and disposal modalities for the pomace and lees used for distillation and other purposes. The processes provided for include the preparation of alcohol-muted fresh grape must, liqueur wines, flavoured wine products and sparkling wines (obtained through the addition of sucrose) as well as the preparation of spirit drinks in wineries engaging in the extraction of musts and wines that cannot be prepared by adding sucrose, the preparation of schnapps, alcohol and all the products permitted according to regulation no. 251/14, as long as their production processes are notified beforehand, no later than by the fifth day preceding their preparation, to the local

15 Italy is subdivided into nineteen regions (one of those, Aosta Valley, bilingual, French and Italian) and two autonomous provinces, i.e., the formerly Austrian territories of Trento and Bolzano (the latter bilingual, German and Italian).

office of the Central Inspectorate for Fraud Repression and Quality Protection of Agri-Food Products and Foodstuffs (*i.e.*, the ICQRF, Article 14).[16]

The prohibition to keep in the winery cellars substances that can be used for sophistication purposes is provided for in Article 16. Some derogations are permitted when the areas of the cellar or the winery include the dwellings of the winery owner, collaborators and/or employees, as well as accommodation facilities reserved for food service and food product preparation activities. There being no specific EU regulations on the production of semi-sparkling wines, whether or not DO or GI, and aerated semi-sparkling wines, the relative requirements are detailed in Article 19.

3.2 *The Storage of Oenological and Chemical Products*

Articles 21 and 22 lay down the rules on the storage of oenological and chemical products, prohibiting the sale, the storage for sale and the storage thereof in the wineries, and in facilities connected with the latter also through courtyards, irrespective of the use they are intended for, and well as the use in wine making of substances not permitted by the applicable EU and national regulations. However, wineries are allowed to keep, in duly traced and bare minimum amounts, prohibited products that are necessary to the functioning or the regeneration of the machinery and equipment used in authorised wine-making practices or depuration processes. Chapter V of Title II of the Act 238 of 2016 addresses marketing and distribution issues and, in particular, Article 23 defines the storage modalities for wine products in the cellar during the various production stages, whilst Article 24 details the components, possibly present in the products, that should neither be sold nor served.

3.3 *The Designation of Origin and Geographical Indication*

Title III of the Act addresses the designation of origin and geographical indication aspects that we are going to examine later on, in paragraph 1.2.1 et seq. The labelling and use of geographical indications, traditional mentions and other designations reserved for DO and GI wines are addressed in Articles 43, 44, 45, 46 and 47. For details, see the relative implementing decree, approved on 13 August 2012, which is currently being revised. In a perspective of ever stricter rules being imposed to ensure product traceability, we should point out the use of a government issued label as a guarantee and control tool, as provided for in Article 48: its use is mandatory for DOCG wines, whereas in the case of

16 For an overview of official control systems see F. Albisinni, *Strumentario di diritto alimentare europeo*, Utet Giuridica, 2017.

DOC wines the consortium concerned can select an alternative modality, such as the simple presence of a batch number.[17]

3.4 *The Control Instruments*

The control instruments available are described in Title VI of the Act. In particular, Articles 58 to 68 detail the provisions on the transport documents and the registers, which must necessarily be held in electronic form (as required in Italy and in none of the other EU member countries[18]). Special provisions are established on control modalities, annual inspections, and the chemical and organoleptic analyses of DO and GI wines. The articles in Title VII of the Act specify the sanctions applied for violations concerning wine making potential, wine growing and making processes, distillation of prohibited products, keeping non-reported products in store, as well as violations of the designation and presentation requirements and of the rules on the production and marketing of vinegars. Besides the existing requirements and sanctions, an instrument of considerable importance for the wine sector was introduced with the "*active repentance remedy*", derived from tax regulations, which provides for the possibility of being subjected to an appreciably reduced fine in the case of a limited number of violations reported by a wine producer prior to the beginning of a tax assessment process by the authority.

3.5 *The Impact of the EU Wine Legislation*

The EU wine legislation has had a further impact on Italian wine law. The adoption of the Common Agricultural Policy (CAP)[19] and the measures implemented with the European support plan.

For agricultural products, on account of the physical constraints farming is subject to and, above all, in view of the impossibility of developing competition

17 Title V of the Act is entirely devoted to the provisions governing the production, storage and marketing of vinegars; needless to say this subject matter is outside the scope of the chapter.

18 The Decree of the Ministry for Agricultural, Food and Forestry Policies of 20 March 2015, no. 293 lays down the rules for keeping registers in the wine sector in electronic form, in accordance with EU regulations, In particular, are transposed the provisions of Article 1-bis, paragraph 5 of Legislative Decree No. 91 of 2014 which provides for the implementation of the provisions referred to in Article 38, paragraph 1, letter a) of Regulation (EC) No. 436/2009 of 26 May 2009, according to which the registers of wine products are dematerialized and organized within the framework of the "*Sistema informativo agricolo nazionale*" (SIAN).

19 See generally, Julien Chaisse, 'Adapting the European Community Legal Structure to the. International Trade' 17(6) European Business Law Review 1615.

conditions similar to those characterising the industrial sector, ad hoc "rules of the game" had to be established, not so much to level the starting points as to incorporate the different realities developed in different natural conditions, by steering production and the markets towards the primary objective of ensuring producer profitability.[20] "*With the 1999 CAP reform, the wine sector had a specific financial endowment at its disposal. The aim of the reform was to convert and restructure vineyards to encourage the validation of grape varieties and growing techniques with support from structural policies*".[21] The formulation of the Mansholt Plan[22] for agriculture prompted the idea of developing a more advanced and coordinated set of rules for the wine sector, on account of its peculiar nature: the new provisions would be put into effect in a gradual manner with the aim of integrating the sector into a single market organisation and thereby achieve higher quality and productivity levels, support the income of producers, maintain a proper balance between supply and demand. 1959 saw the establishment of a common customs tariff to be applied gradually, and, shortly afterwards, the definition of the quotas to be complied with by Italian, French and German producers for wines meeting quality standards higher than those associated with wines for current consumption. Thus, the wine market dichotomy between two major categories began to take shape, with table wines on the one side and quality wines possessing characteristics that set them apart from all current consumption wines having no quality requirements to comply with on the other. The Common Agricultural Policy (CAP) was implemented through common organisations of the markets (CMOs) for

20 In the late 1960s, when the common organisations of the markets (COM s) were gradually being put in place, the Commission was determined to limit expenditure on the common agricultural policy (CAP). The uncontrolled increase in cereals and dairy surpluses resulted in expenditure on intervention (guaranteed prices) and market support that took up more and more of the Community budget. At the same time, between 1950 and 1958, the total number of working farmers fell from 18 million to 14.5 million.

21 A. Urso, G. Timpanaro, F. Caracciolo, L. Cembalo, *Efficiency analysis of Italian wine producers*, in *Wine Economics and Policy*, 7, 1, June 2018, Pages 3–12.

22 On 21 December 1968, Sicco Mansholt, the European Commissioner for Agriculture, sent a memorandum to the Council of Ministers concerning agricultural reform in the European Community. This long-term plan, also known as the '1980 Agricultural Programme' or the 'Report of the Gaichel Group', named after the village in Luxembourg where it had been quietly prepared, laid the foundations for a new social and structural policy for European agriculture. In the Mansholt Plan, the Commission proposed a radical overhaul of Community agriculture, causing much concern and discontent among European farmers, as evidenced by a spectacular demonstration of nearly 100,000 farmers on the streets of Brussels on 23 March 1971. The results were serious: much material damage was caused, 140 people were injured and one person died.

each of the products that were thought to require specific actions in order to ensure a stable income for the farmers and a permanent supply for consumers.[23] The CMOs should therefore be seen as the basic regulatory tools for the proper operation of the common agricultural market, in that they remove the barriers to intra-Community trade of the products in question.

The latest EU policies have translated into a series of regulations and, as the governing bodies of the EU adopted specific regulatory provisions, EU member countries were gradually deprived of the power to adopt national regulations on the issues in question, unless they were delegated to issue provisions implementing the Community regulations. Accordingly, a number of national decrees were issued to put into effect the support measures provided for in the EU regulations and several provisions on plant authorisations. A list of such decrees is given in the footnote below.[24]

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23 F. Albisinni, *La OCM vino: denominazioni di origine, etichettatura e tracciabilità nel nuovo disegno disciplinare europeo*, in Agriregionieuropa, 4, 12, March 2008; A. Germanò, E. Rook, N. Lucifero, *Manuale di legislazione vitivinicola*, *cit.*

24 DECREES IMPLEMENTING THE SUPPORT MEASURES AND THE WINE COMMON ORGANISATIONS OF THE WINE MARKETS (in chronological order):

Decree of 27 November 2008 – Implementing provisions for Regulations No 479/08 (now Reg. 1308/13) and No 555/08 (now Regulations 1146/16 and 1150/16) as concerns the implementation of the regulations governing the distillation of wine-making by-products.

Decree of 23 December 2009 – National provisions on the common organisation of the wine growing and wine making market with reference to the «Green Harvesting» provision.

Decree of 8 March 2010 – Criteria for the determination of the support measures as per Council Regulation No 1234/07 of 22 October 2007, art. 103r (now Reg. 1308/13, art. 47) – «Green Harvesting» provision.

Decree of 2 August 2010 – National implementing provisions for Council Regulations No 1234/07 (now Reg. 1308/13) and Commission Regulation No 555/08 (now Regs. 1146/16 and 1150/16) regarding the «harvet insurance» provision.

Decree of 2 July 2013 – National provisions implementing Regulations No 1234/07 (now Reg. 1308/13) and Regulation No 436/09 ((now Reg. 273/18) regarding the documents to accompany certain types of wine product transport.

Decree of 17 June 2014 – Provisions on the use of certified electronic mail for purposes of the validation and transmission of the documents that must accompany certain types of wine product transport pursuant to articles 8(4)(14) of the ministerial decree of 2 July 2013.

Decree of 15 December 2015 – National provisions implementing Regulation No 1308/13 of the European Parliament and the Council regarding the common organisation of the markets of agricultural products. Authorisation system for vineyards.

Decree of 14 February 2017 – National provisions implementing Regulation No 1308/13 of the European Parliament and the Council, Delegated Regulation No 2016/1149 and

4 Understanding Italian Wines: the DOC and DOCG Wines

Geographical names identifying wines have their roots in the oldest history, although they may have little in common with the European schemes of geographical indications and traditional specialties, known as protected designation of origin (PDO) and protected geographical indication (PGI), aiming at promoting and protecting names of quality wines. Since March 1900, when the first provisions were adopted for the protection of typical wines, the road of the legislation has been long and uneven. We wish to describe here the developments in the history of those names, until they reached the current scheme known to all wine-lovers in the world. While in the 30' there were no clear-cut definitions of the concepts of "quality" and "typicality", detailed regulation on the protection of the designations of origin of musts and wines were finally approved in Summer 1963. It was only in response to Regulation 24/62 that Italy instituted its own system of granting quality wines the status *Denominazione di Origine Controllata* (DOC) and geographical indications the status *Indicazione Geografica Tipica* (IGT) based on the region of origin.

4.1 *The Tradition of Geographical Origin*

Since ancient Roman times the Italian territory was known for its wines, normally kept in amphorae, bearing very few indications such as the consular year or a geographical name to claim its origin. Their quality was poor, the product not easily storable: in a nutshell, very far from wines we are used to now.

Italy has however a long and ancient regulatory tradition which was over time able to identify some characteristics of the product aiming, above all, at linking wines to their geographical origin. It is no secret that one of Italy's most well-known and recognizable wines, *Chianti*, can boast a history dating back to at least the 13th century with the earliest incarnations of *Chianti* as a white wine. In the Middle Ages, the villages of Gaiole, Castellina and Radda located near Florence formed as a *Lega del Chianti* (League of Chianti) creating an area that would become the spiritual and historical *"heart"* of the Chianti region.[25]

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the Commission's Implementing Regulation No 2016/1150 concerning the implementation of the investment provision.

Decree of 3 March 2017 – National provisions implementing Regulation No 1308/13 of the European Parliament and the Council, Delegated Regulation No 2016/1149 and the Commission's Implementing Regulation No 2016/1150 concerning the implementation of the provisions on vineyard conversions and restructuring.

25 In 1716 Cosimo III de' Medici, Grand Duke of Tuscany, issued an edict delineating the boundaries that would eventually become the heart of the Chianti Classico region. The same area today is located within the Chianti Classico Denominazione di Origine

When in 1861 Italy became one nation, the rules relating to the wine world were far from being uniform. It was not before 1861, thus, that we may talk of "*Italian wine*", although the concept of a bond with a single region, and particularly with its territory of origin, was still lacking. Governments that followed one another in the newly formed state (starting as early as 1885) were solely concerned with issues related to ensuring the authenticity of wine, omitting, however, measures and solutions designed to protect the quality and origin of those productions.

While the Calandra Act of 25 March 1900 may be seen as the first regulatory measure to be adopted in Italy, the first act containing "*disposizioni per la difesa dei vini tipici*" (*provisions for the protection of typical wines*) was the Royal Legislative Decree no. 497 passed on 7 March 1924 and converted into the Act of 18 March 1926, no. 562, which was followed by its implementing rules. Then came the Royal Legislative Decree of 11 January 1930, no. 62, providing for "provisions for the defence of typical wines", converted with amendments into the Act of 10 July 1930, No. 1164 and the relative implementing rules, published in 1933. At the time, there were no clear-cut definitions of the concepts of "*quality*" and "*typicality*", but the legislator's intention to ensure some form of protection to wines having specific characteristics arising from soil, climate and human factors was unmistakable.[26]

It was not until the EEC stated its intention to integrate the European markets that Italy created its DOC system to separate quality wine from table wine (*vino da tavola*). For each new designation, product specifications were set out regarding specified grape varieties, maximum yields, conversion ratios of grapes to wine, alcohol content, and ageing requirements. While tasting panels were not required initially, they have since become mandatory. It was the summer of 1963 when, a few days before the end of the legislature, Senator Paolo Desana was able to push through a law that provided a future for Italian wine: the law on DOC labels, which the French had passed about thirty years earlier, with the *Décret du 31 janvier 1930 pris pour l'application de la loi du 1er*

Controllata e Garantita (DOCG). Ampelographers find clues about which grape varieties were popular at the time in the writings of Cosimo Villifranchi who noted that Canaiolo was a widely planted variety in the area along with Sangiovese, Mammolo and Marzemino. It wasn't however till the work of the statesman Baron Bettino Ricasoli (Count of Cavour's successor as Prime Minister in 1861) that the modern "Chianti recipe" would take shape.

26 The hallmark of the Wine Statute was the law of July 30, 1935 that formally created the system of *Appellations d'Origine Contrôlées* (AOC), that distinguished quality wine from ordinary table wine. This system specifically set out the areas of production, choice of grape varieties, minimum alcohol levels, growing methods, and winemaking techniques required for regions and their wines to carry the AOC designation.

août 1905[27] *en ce qui concerne le commerce des vins de liqueur, des vermouths et des apéritifs à base de vin*. On 12 July 1963,[28] Presidential Decree no. 930, *"norme per la tutela delle denominazioni di origine dei mosti e dei vini"* (*Regulation on the protection of the designations of origin of musts and wines*), was finally approved: a recognition that resulted in a quality leap for Italian wines.

4.2 *The First Protection Consortiums*

The Act No. 1164 of 1930 paved the way for the birth of the first Protection Consortiums. The Consortium for the protection of *Asti* wine was founded on 17 December 1932, but the *Barolo* and *Barbaresco* wine making areas, among the most renowned in Italy, had felt the need to join forces to protect their products as way back as in the early 20th century, and in 1908 had applied for the creation of a "certificate of origin" to be issued by an association working under the control of the provincial administration and the winemakers' union of Piedmont. As we have seen, it was only in 1924 that the Italian Parliament promulgated the Royal Legislative Decree no. 497 on typical wines and established that their characteristics should be constant and should be specified in the bylaws of the consortiums. Thus, preparatory works got underway for the creation of the Consortium for the Defence of Typical High Quality Wines *Barolo* and *Barbaresco*, which was officially founded in 1934 with the task of defining the production context (the zone of origin, the grapes and the characteristics of the wine), keep watch for frauds, adulteration and unfair competition, enhancing the appreciation of wines, as well as defend the reputation and qualities of wine through all the appropriate channels.[29]

The Act of 10 June 1937, no. 1266, which regulated "*la produzione ed il commercio di vini pregiati di determinata origine*" (the production and trade of high quality wines of a specific origin), clearly reflects the intention to protect the wines whose characteristics depend on their geographic areas of origin. The term designation of origin refers to the geographic name or the geographic qualification of the corresponding area of production – possibly accompanied by the name of a grape variety or some other indication – used to designate the

27 It was the «*loi du 1er août 1905 sur la répression des fraudes dans la vente des marchandises et des falsifications des denrées alimentaires et des produits agricoles*».

28 Prime Minister Amintore Fanfani resigned four days later and the subsequent elections resulted in the formation of the first government headed by Giovanni Leone.

29 For a survey on consortia and controls on wine production, see D. Cortassa, *La sicurezza alimentare nel settore vitivinicolo: i controlli sulla produzione*, in *Impresa agricola e sicurezza alimentare – esperienze e regole*, ESI, Naples, 2009; R. Ricci Curbastro, *Il ruolo di garanzia dei consorzi di tutela*, in *Riv. dir.alim.*, n. 1-2012; L. Paoloni, *I Consorzi di tutela ed i contratti per le politiche dell'offerta dopo il d. lgs. 61/2010*, in *Riv. dir.alim.*, n.3-2012.

wines that are produced in a specific area and whose characteristics essentially depend on the grapevines and the conditions of the natural environment. This is what we read in the first article of the decree, which was clearly inspired by the French law of 6 May 1919 "*relative à la protection des appellations d'origin*",[30] which stated that "*Constitue une appellation d'origine la dénomination d'un pays, d'une région ou d'une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains*". From the 1963 decree, we also learn that the designations of origin of the wines are distinguished into: a) designations of "simple" origin; b) designations of "controlled" origin; c) designations of "controlled and guaranteed" origin. Thus, Italy chose to adopt a sub-specification of the designations of origin, which, to this day, is peculiar to it, and calls to mind a pyramid with the designation of controlled and guaranteed origin at the top.[31]

4.3 *The Birth of "Quality Wines Produced in Designated Areas"*

In the meantime, Community lawmakers began to realise that the notion of quality associated with the designated geographic area was a valuable instrument for the enhancement of wine products.[32] Accordingly, Regulation (EEC) no. 24 of 4 April 1962 ratified the birth of "quality wines produced in designated areas" (in Italian: *Vini di Qualità Prodotti in Regioni Determinate* – *VQPRD*). The law formulated by senator Desana served as the basis on which the legislator defined the structure of the Act of 10 February 1992, no. 164, referred to precisely as the new regulation on the designation of origin of wines. The threefold division provided for in the 1963 Decree was now translated into the concept of "*denominazione di origine dei vini*" (designation of origin of the wines), meaning the geographic name of a specific wine growing area used to designate a well-known quality product, whose characteristics arose from the natural environment and human factors, and the concept of "*indicazione geografica tipica dei vini*" (typical geographical indication of the wines), which simply means "the geographic name of a zone used to designate the product arising from it".

30 F. Humbert, *Approche historique du processus de délimitation des AOC vinicoles françaises. Contribution à la compréhension des principes et de l'application d'une expertise*, in Sciences Humaines Combinées, 5, 2010.

31 A. Sabellico, G. Martelli, *Note pratiche di legislazione vinicola*, Assoenologi, 2011.

32 See G. Allaire, F. Casabianca and E. Thévenod-Mottet, *Geographical origin: A complex feature of agro-food products, in Labels of origin for food: local development, global recognition*, cared by E. Barham e B. Sylvander, Wallingford, CABI, 2011.

The geographic name constituting the designation of origin or the typical geographical indication, and the other mentions reserved for specific wines are defined more clearly and the lawmaker specifies that they cannot be used to designate products that are similar, or alternative, to wines, nor can they be used so as to engender, in the consumer, confusion in the identification of wine products. Accordingly, the Act of 1992 classifies the designations of origin and the typical geographical indications into: a) controlled and guaranteed designations of origin (DOCG); b) controlled designations of origin (DOC); c) typical geographical indication (IGT).[33] This marked the beginning of the main subdivision between table wines (*vin de table*, *Tafelwein*) and typical geographical indication wines (*vin de pays, Landwein*) on the one side and, on the other side, wines with designation of origin (*vin à appellation d'origine*, *Wein mit Ursprungsbezeichnung*), which, in Italy only, were and continue to this day to be further subdivided into wines with protected designation of origin and wines with protected and guaranteed designation of origin.[34]

A turning point in the evolution in stages of Italian wine regulations was the Legislative Decree 61 of 2010,[35] the outcome of lengthy discussions among specialists. Legislative Decree 61 was, so to speak, the "*translation*" into the national context of the new, wide-ranging Community regulations reforming the common organisations of the markets for wine, comprised of Council Regulation (EC) No 1234/2007 of 22 October 2007 (also referred to as the "Single CMO

33 A useful survey on PDO and PGI and their product specifications in A. Rossi, *Codice delle Denominazioni di Origine dei Vini*, UIV, 2018, while a comprehensive collection of the legislation on wine is to be found in A. Rossi, *Codice della Vite e del Vino*, UIV, 2018; regarding the product specifications, see A. Germanò, E. Rook Basile, N. Lucifero, *Manuale di legislazione vitivinicola*, *cit*.

34 With regard to the nature of this sign, it is worth mentioning that GIs are detailed in Part II of the TRIPS Agreement and is recognised to them the quality of an intellectual property right (similar to other rights, such as copyrights, patents, trademarks and the like): an idea which is now accepted, even if in legal-writing it was not, and still is not, devoid of criticism. One of the central arguments in favour of such an approach is the fact that the good to be analysed is immaterial. For a survey on GI's as rights of intellectual property, see V. Mantrov, *EU Law on Indications of Geographical Origin. Theory and Practice*, Cham, Springer International Publishing, 2014, F. Albisinni, *Quality and Origin between GIs and TMs: a Difficult Relationship*, in *Les marques vitivinicoles et appellations d'origine: Conflits, mimétismes et nouveaux paradigmes*, a cura di T. Georgopoulos, Paris, Mare et Martin, 2019; G. Morgese, *L'accordo sugli aspetti dei diritti di proprietà intellettuale attinenti al commercio* (*TRIPS*), Bari, Cacucci, 2009.

35 Legislative Decree of 8 April 2010, no. 61 "*Tutela delle denominazioni di origine e delle indicazioni geografiche dei vini, in attuazione dell'articolo 15 della legge 7 luglio 2009, n. 88*" ("Protection of the designations of origin and the geographical indications of wine, implementing Article 15 of the Act no. 88 of 7 July 2009").

Regulation"), Regulation (EC) No 479/2008 of 29 April 2008[36] and, above all, Council Regulation (EC) No 491/2009 of 25 May 2009, amending Regulation (EC) No 1234/2007, with which, in particular, Regulation (EC) No 479/2008 was included in the aforementioned Regulation (EC) No 1234/2007, effective 1 August 2009; the Legislative Decree also took into due account the provisions laid down in Regulation (EC) No 607 of 14 July 2009.[37]

Regulation No 479/2008 on the common organisation of the market in the wine sector, whose key aspects were defined with the political agreement reached within the Council of Ministers on 19 December 2007, was part of an overall reform path proceeding along the lines also confirmed by the "Single CMO Regulation" of 2007 and the new regulation on fruit and vegetable products, also issued in 2007.[38] In its initial 2006 projects, the European Commissions had pointed out the need for a radical reform of the CMO for the wine sector; this need was reasserted in the 5th recital of the regulation approved by the Council, based on an evaluation of the inefficiency of Regulation No 1493/1999 «*in steering the sector towards a competitive and sustainable development*», and in view of a plurality of objectives, ranging from economic goals (improving the competitiveness of Community wine producers and enhancing the visibility of high quality Community wines in the world markets) to social objectives (strengthening the social issues of rural areas), as well as historical (safeguarding wine-growing and wine-making traditions) and environmental considerations (producing wine in an environmentally compatible way).[39] In actual fact, there was no general consent as to the need for a radical reform and the inefficacy of the previous set of rules, whose validity was advocated precisely by some of the producers' organisations that – according to the Commission – should have found them wanting. Moreover, the congruity of the new provisions with the stated objectives was not uncontested,[40] even where

36 Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in the wine sector, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999.

37 Commission Regulation (EC) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products.

38 P. Borghi, *Sovrapposizioni fra ordinamenti e "fantasia" del legislatore in tema di segni di qualità dei prodotti alimentari: entropia e storytelling*, in *Riv.dir.alim.,* n. 4-2015.

39 V. Mantrov, *EU Law on Indications of Geographical Origin. Theory and Practice*, *cit.*

40 A. Germanò, *La disciplina dei vini dalla produzione al mercato, in Riv.dir.alim.* (2007); E. Pomarici-E. Sardone, *L'attuazione dell'OCM vino: un primo bilancio di metà percorso*, in *Agriregionieuropa,* 6, 21, June 2010.

the budgetary and financial compatibilities of the 27 members EU seemed to play a much bigger role than officially declared.

In a brief assertive note in the 24th recital, the new regulation states that «*in order to permit the establishment of a transparent and more comprehensive framework substantiating the indication of quality*» for wines «*it is appropriate to put in place a system that would make it possible to examine designation of origin and geographical indication applications in keeping with the approach adopted within the framework of the cross-cutting quality rules applied by the Community to food products other than wine and spirit drinks with Regulation* (EC) *No 510/2006*».[41] In actual fact, the text of the regulation goes well beyond the assertion made in the recital, as, besides reforming procedures and responsibilities, it also drastically changes the definitions and the contents of the rules. As for designation recording modalities, Article 27 introduces significant new requirements, asking that the recognition take place at Community level, as opposed to national level as it had been the case for years and had been reasserted only a few years before in Regulation No 1493/1999.

Innovating the law in its substantial aspects meant discarding the well-tested formulas used for purposes of symbolic communication with the consumer (VQPRD and IGT) in favour of the adoption, in the wine sector too, of the PDO and PGI labelling schemes, until then reserved for products other than wines and alcoholic beverages. Such a unification of distinctive marks was not called for by international agreements. On the contrary, by providing diversified protections for geographical indications of wines and alcoholic beverages (art. 23) and other food products (art. 22), and by underscoring the "*additional protection*" granted to wines ad alcoholic beverages the TRIPS agreement clearly justified a diversification of the distinctive marks. However, the most significant innovations were introduced in terms of the legal framework. According to the model outlined by Regulation No 1493/1999, quality wines consisted of the VQPRD wines (i.e., "*quality wines produced in specific areas*") governed by requirements (as per Title VI of the Regulation) clearly distinct from those specified for table wines, even if the latter were permitted to make use of a geographical indication pursuant to art. 51 of the 1999 Regulation and art. 28 of Commission Regulation No 753/2002 (5).

With the new CMO (arts. 27 et seq.), PDO and PGI wines, albeit with some differences from one another, were grouped under a single regulatory category, so that, as a result, the perimeter of quality wines was extended to include

41 The reference to Regulation No 510/2006 seems to address solely procedural matters, i.e., examination and approval modalities. Nothing is said about the substantial aspects of the law.

PGI wines, i.e., wines that, like the old IGT wines, could be made with 85% – instead of 100% – grapes coming from a specific zone (and at the same time the power granted to the member countries by Regulation No 1493/99 to adopt more stringent requirements for TGI wines was also ruled out). Thus, as a result of the reform, the regulatory and identity elements that in the past had clearly marked the boundary lines between IGT and VQPRD wines – which were assigned to two distinctly separate product classes – have been appreciably attenuated where PGI and PDO wines are concerned in view of their belonging to a single regulatory framework.

5 Designations of Origin and Geographical Indications in Italian Law

The breakdown of production by quality category in 2019 in Italy sees DOC products at 40% of total production (among the highest levels ever recorded), while production of IGT has fallen to historic lows, in relative terms, at 22% of production. The 13.5 million hectolitres IGT are in fact 2% lower than the historical average. With 17.8 million hectolitres, table wines (including, however, table wines with indication of grape variety) return to represent one third of production, after having fallen in recent years, with more limited production.[42] Since each vineyard, region, or country produces wine that is distinguishable from another, we assume that, for the most part, this distinction is due to the unique characteristics imparted on wine by the geographic conditions, the growing methods, and the winemaking process. An intricate web of regulations exists, however, behind these natural and man-made factors, which fundamentally influences the character of the final product.[43]

5.1 *The Consolidated Wine Act: Scope and Significance*

The Italian laws governing the wine sector are collected in an organic body of rules, known as the Consolidated Wine Act,[44] which has been discussed above, under 2.3. The Consolidated Wine Act represents a codification of Italian laws on wine production and trade that is fully in line with the 2013 wine

42 Federdoc (Confederazione Nazionale dei Consorzi Volontari per la Tutela delle Denominazioni dei Vini Italiani), *I vini italiani a Denominazione di Origine 2018*, https://www.federdoc.com/new/wp-content/uploads/2018/04/brochure-2018.pdf.

43 S. A. Conca Messina, S. Le Bras, P. Tedeschi, M. Vaquero Piñeiro, *A History of Wine in Europe, 19th to 20th Centuries*, Volume II, *Markets, Trade and Regulation of Quality*, Cham Springer International Publishing, 2019.

44 "*TU Vino*", i.e., the Act of 12 December 2016, no. 238, *cit*.

CMO reform. Though it is commonly referred to as the "Consolidated Wine Act" (*Testo Unico Vino*), in fact it is no such thing. In fact, it should be referred to with its proper title, *i.e.*: "*Organic set of rules on the cultivation of grapes and wine production and trade*".

The set of rules governing such matters is subdivided along different levels, that is, on the one side along the European level, consisting of the major regulations brought together in the Single CMO and set out in the international agreements entered into at EU level (which prevail over the Single CMO) as well as of the various implementing provisions issued by the European Commission;[45] on the other hand, the national level consisting of the applicable laws, one of which is the "Consolidated Wine Act"; the Community and national laws implementing provisions issued by the ministry, the implementing circulars. Essentially, grape cultivation laws and wine production and marketing laws are grouped into a set of rules having a pyramid-like hierarchical structure at whose apex we find the Single CMO.

This was an innovation of absolute significance, whereby wine, the vine, the terroirs, the labour and the know-how of the wine sector constitute a national cultural heritage. In Article 1 the law describes wine precisely as a national cultural heritage: "*Il vino, prodotto della vite, la vite e i territori viticoli, quali frutto del lavoro, dell'insieme delle competenze, delle conoscenze, delle pratiche e delle tradizioni, costituiscono un patrimonio culturale nazionale da tutelare e valorizzare negli aspetti di sostenibilità sociale, economica, produttiva, ambientale e culturale*". (*The wine obtained from grapes, the grapevine and the wine-making territories, as the fruit of labour, skills, know-how, practices and traditions, constitute a national cultural heritage to be safeguarded and enhanced from the standpoints of social, economic, productive, environmental and cultural sustainability*).

However, the real innovation having a most profound effect on the Italian regulatory system for the wine sector lies in the fact that the national lawmaker had traditionally identified the definitions of designation of origin and geographical indication in the provisions of national law. Article 1 of the Act of 10 February 1992, no. 164, which, as mentioned above, replaced Presidential Decree 164 of 1992, which, in its turn, replaced Presidential Decrees of 12 July 1963, no. 930 and of 24 May 1967, no. 506, provides for two specific definitions for musts and wines. Article 3(1)(2) of Legislative Decree 61 of 2010, in fact, specifies that two different versions of the protected designation of origin (PDO)

45 V. Rubino, *La protezione delle denominazioni geografiche dei prodotti alimentari nell'Unione europea dopo il regolamento 1151/2012 UE*, in *Riv.dir.alim.*, n. 4-2013, 4.

should be used for wine, *i.e.*, controlled and guaranteed designation of origin (DOCG) and controlled designation of origin (DOC). The lawmaker specified that DOCG and DOC are the traditional mentions used in Italy to designate PDO wine products, in accordance with EU regulations. This approach was drastically modified with the approval of the Consolidated Act in 2016, in that now the definitions of PDO and PGI are no longer included in the national standard and are only described through a reference to the European regulation.

5.2 *The Consolidated Wine Act: Some Key Innovations*

The Consolidated Act unified all the provisions governing designation of origin and geographical indication wines. It was compiled by reorganising in a more coherent manner the provisions introduced by the Decree 61 of 2010, thereby making them easier to understand and comply with. The relative implementing decrees were also revised accordingly, where necessary. The most significant innovations with respect to the previous provisions concerned the issues of "Community Protection – Recognition Procedure – Fundamental Requirements and Management of PDO and PGI Attributes"; a newly introduced clause provided for the possibility for PDO and PGI wines to be labelled provisionally pursuant to the applicable European regulations as of the date of submission to the European Commission of the relative protection or conversion application, provided that the application had been authorised beforehand by the Ministry of of Agricultural, Food and Forestry Policies acting in coordination with the Region.

The same provision was included in Article 5 of the Title on "Production Specifications" which details the specification amendment procedures. The Title on the "Management of Production and Market Policies" contains a proposal for the simplification of the execution modalities of organoleptic analyses of CDO wines, by requiring that sample checks be performed solely on designations with an average production volume coming short of a predetermined value.

Pursuant to Article 26, the definitions of designation of origin and geographical indication for wine sector products are those established in Article \93 of Regulation (EU) No 1308/2013.[46] Now, the acronyms «PDO» and «PGI»

46 Pursuant to Article 93 of Regulation (EU) No 1308/2013, "*designation of origin*" is the name of a region, a specific place or, in exceptional and duly justifiable cases, a country used to describe a product referred to in Article 92(1) fulfilling the following requirements: (i) the quality and characteristics of the product are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; (ii) the grapes from which the product is produced come exclusively from that geographical area; (iii) the production takes place in that geographical area; and (iv) the product is obtained from vine varieties belonging to Vitis vinifera; on the contrary, a "*geographical indication*"

stand for «protected designation of origin» and «protected geographical indication», respectively, also in the plural form, as provided for by Regulation (EU) No 1308/2013 for wine sector products. The acronyms «DOCG» and «DOC» stand for the traditional «controlled designation of origin» mentions used in Italy for PDO wine sector products. «DO» is used with the same meaning in the «DOCG» and «DOC» acronyms. «IGT» stands for the traditional mention «typical geographical indication», which is the formula, used in Italy for PGI wine sector products. «IG» stands for the «geographical indication» expression contained in the IGT and PGI acronyms.

The wine market CMO, as addressed in Article 34, which then became Article 118b of the Single CMO Regulation and was eventually included in Article 93 of Regulation (EU) 1308/2013, associates the expression DO ("designation of origin") with the name of a region, a specific place, or, in exceptional cases, a country used to designate a wine; the characteristics of a DO wine must be essentially or exclusively due to a particular geographical environment with its inherent natural and human factors. A PGI wine, instead, must possess quality, reputation or other specific characteristics attributable to its geographical origin; in either case, production must take place in the specific area, but the language used is characterised by subtle but unmistakable differences. In the case of PDO wines, it is possible to mention additional geographic units, smaller than the production zone of the designation, situated inside the production zone and appearing in a list, provided that the product is processed separately and is specified in the annual grape production report to be submitted pursuant to Article 37. These geographical units must be clearly delimited and may correspond to municipalities, districts and administrative areas, as well as clearly defined local geographical areas. These additional geographical units ("*unità geografiche aggiuntive*") and the relative boundaries must be specified in an ad hoc list in an annex to the production specifications.[47]

In Italy, at present, wines are classified according to a well-defined pyramidal order: starting from the wines without geographical indication, we find the so-called "*varietal wines*", i.e., wines that may show the name of the grapevine even

is an indication referring to a region, a specific place or, in exceptional and duly justifiable cases, a country, used to describe a product referred to in Article 92(1) as fulfilling the following requirements: (i) it possesses a specific quality, reputation or other characteristics attributable to that geographical origin; (ii) at least 85 % of the grapes used for its production come exclusively from that geographical area; (iii) its production takes place in that geographical area; and (iv) it is obtained from vine varieties belonging to Vitis vinifera or a cross between Vitis vinifera and other species of the genus Vitis.

47 Pursuant article 29(4) of Act of 12 December 2016, no. 238.

though they are not GI wines;[48] moving up we find the protected geographical indication wines, then the controlled designation of origin wines, and, at the top of the pyramid, controlled and guaranteed designation of origin wines.[49]

The so-called "*sottozona*" (sub-zone), that is, an expressly delimited area, possessing environmental or traditionally known characteristics, designated with a specific geographical, historical-geographical or administrative name, and subject to stricter regulations. A sub-zone may be recognised as an autonomous DOC zone and can be promoted to DOCG zone independently of the main DOC zone. Altogether different is the nature of the so-called "geographical unit", which also defines an area smaller than the production zone, but instead has fixed boundaries and may correspond to municipalities, districts and administrative zones, as well as clearly defined local geographical areas. However, what distinguishes the two cases is that, though it is true that, in either case, the wine product must be described separately in the annual grape production report, while the product of a sub-zone must have an expressly identified character of its own, the wine produced in a geographical unit must simply be declared as coming from that particular unit and entered separately in the grape production report.

6 Conclusion

Although modelled after France's successful AOC system, Italian DOC classification and the higher standard DOCG classification[50] needed a few years

48 It should be noted that a Decree issued on 23 December 2009 by the Ministry of Agricultural, Food and Forestry Policies (National provisions implementing Council Regulation (EC) No 1234/2007 and the Commission's Implementing Regulation (EC) No 607/2009 regarding the use of PDO and PGI attributes and traditional mentions, and the labelling and presentation of certain products of the wine sector) introduced the so-called varietal wines, that is to say, wines without designation of origin or geographical indication, whose labels bear the year of production and/or the name of one or more grape varieties with which they were produced, without any connection with the place of production being established. The certification is based on a review of the documents conducted to determine whether the optional indications that the producer wants to add to the labels are truthful. The varieties that may appear on the labels of still wines are few: Cabernet Franc, Cabernet Sauvignon, Cabernet, Chardonnay, Merlot, Sauvignon, Syrah; conversely the grapevine varieties that may be specified on the labels of sparkling wines are Moscato, Malvasia, Trebbiano, Pinot blanc*, Pinot gris*, Pinot noir* (*for non GI sparkling wines only the synonym "Pinot" may be used).

49 This typical Italian category has no counterpart in other national regulations for the wine sector.

50 With the *Indicazione Geografica Tipica* (IGT) to be equivalent to the French *vin de pays*.

before they became a true symbol of quality; there is little doubt that a comprehensive Italian regulation was implemented long after, and was partially borrowed from, the French one. However, the higher standards set by more recent regulations were able to guarantee a quality standard. In the years, this led many producers who previously preferred to work outside the denomination system, even producing wines of a similarly high quality, to join the designation in order not to build their reputation relying on their brand name alone and possibly to take advantage of higher prices and good sales figures based, also, on the DOC/DOCG reputation.

Pending the first effects of the duties, Italian wine continues to grow on foreign markets. According to ISTAT data updated to October 2019 and released on 17 January 2020, Italian wine in the first 10 months of 2019 recorded a 3.6% growth in turnover compared to the same period of 2018, reaching 5.3 billion Euro.[51] In 2019, about 40% of all Italian wine is in DOC and DOCG, about 22% is in IGT, a third is finally table wine. Veneto is the region that produces the most wine, with over 11.3 million hl of which 7.8 of DOC and DOCG. Puglia ranks second, with just over 10.5 million hl composed largely of table wines (7.3 million hl). Piedmont and Trentino-Alto Adige are the two regions where over 90% of the wine produced is DOC or DOCG, while on the other hand Molise, Puglia and Calabria do not reach 10%.[52]

Therefore, 74 DOCG wines and 334 DOC wines currently make up around 40% of Italian wine production and 118 IGP wines make up around 22% of Italian wine production.[53] The most bottled IGP are *Terre Siciliane* and *Veneto*, with minimal quantity differences, followed by *Emilia, Puglia Toscana*. *Prosecco* triumphs among the DOC wines, covering alone 23% of the production, followed by *delle Venezie*. *Chianti* is the most bottled DOCG, followed by *Asti* and *Moscato d'Asti*. These figures are not far from the 58,2% market share for French 363 AOP wines and the 33,5% market share for the 74 IGP wines.[54]

On the other hand, it is worth to be mentioned that the evolution of the Italian legislation has led to a very significant use of the resources of the web with the implementation of a register to be held in electronic form, which is still a unique example of such a tool in Europe, allowing a remote control on

51 ISTAT, https://www.istat.it/it/archivio/esportazioni; also, http://www.inumeridelvino.it/tag/dati-istat.

52 http://www.wineacts.it/19-notizie/statistiche/2156-la-produzione-2019-per-regione.html.

53 Data from *Corriere Vinicolo*, in partnership with *Osservatorio del vino*, *Annuario Statistico sul Mondo del Vino*. 10th edition. See also http://www.wineacts.it/19-notizie/statistiche/2156-la-produzione-2019-per-regione.html.

54 https://www.inao.gouv.fr; https://www.vitisphere.com; see also M. Roumegoux, *Plan Stratégique de valorisation de la filière vitivinicole Française à l'Horizon 2020*.

the stored wines and circulation between wineries of wine products. MVV supporting documents and mandatory communications and declarations can also be made directly online using certain computer programs connected to the on-line register. Thanks to these systems it is now possible to know monthly the details of the stocks of wine products in Italian wineries providing a fundamental information for the regulation of the market itself. At least in this sector, it therefore seems that Italy has been able to draw on the experience of other European countries and especially of France which, let us recognize it, has the merit of having first outlined the guidelines of wine legislation.

Annex 1

The Act of 12 December 2016 No. 238, laying down a comprehensive set of rules on the cultivation of vines and the production and trade of wine (as amended by the Legislative Decree of 30 December 2016 No. 244, converted into the Act of 27 February 2017 No. 19, the so-called "*Consolidated Law on Wine*") has provided for a number of decrees of application (*i.e.,* pieces of subsidiary legislation) aimed at completing the regulatory framework with the implementing provisions of the principles and requirements contained therein. Some of those are material in order to operationalize the will of the legislator, such as the decree on the *State Seal* (alternative systems), the decree on historic or heroic vineyards, the decree on the autochthonous Italian grape variety and the like. A certain delay in implementing all of them in fact renders the action of the Consolidated Law on Wine incomplete. Here below the decrees having been already adopted.

Implementing Decrees (*in a chronological order*)

Decree of 12 January 2017 – Decree vesting into ICQRF offices heads the power to impose the administrative sanctions provided for by the Act of 12 December 2016, no 238 Title VII.

Decree of 30 March 2017 – Definition of the scope of the provisions concerning the incompatibility criteria for the appointment and activity of the national committee on PDO and PGI wines referred to in article 40 of the Act of 12 December 2016, No 238.

Decree of 21 June 2017 – Prohibition of the use of pieces of oak wood in the wine-making and aging of Italian PDO wines as set forth by article 23 of the Act of 12 December 2016, No 238.

Decree of 22 June 2017 – Provisions for keeping a dematerialized register of loading and unloading of vinegars, as set forth by article 54 of the Act of 12 December 2016, No 238.

Decree of 7 July 2017 – Implementing rules for article 24, 5th§, of the Act of 12 December 2016, No 238 concerning the methods of traceability in wineries where products deriving from wine grapes and from grapes from vine varieties not registered as wine grapes in the register of vine varieties.

Decree of 14 July 2017 – Seventeenth revision of the list of traditional agri-food products pursuant to article 12, § 1, of the Act of 12 December 2016, No 238.

Decree of 10 August 2017 – Limits of some components contained in wines, pursuant article 25 of the Act of 12 December 2016, No 238.

Decree of 6 September 2017 (*with annexes*) – Provisions for keeping a dematerialized register of loading and unloading of sugary substances as set forth by article 60 of the Act of 12 December 2016, No 238.

Decree of 6 September 2017 – Regulations on storage in cellars and wineries of grape must having a natural alcoholic strength of less than 8 per cent by volume, without the required denaturation, pursuant article 15, § 1, g), as well as article 17, § 1, first sentence, of the Act of 12 December 2016, No 238.

Decree of 25 September 2017 – Regulations on denaturation of certain wine products, certain substances deriving from carrying on permitted oenological practices as well as ciders and other alcoholic fermenters other than wine which have undergone acetic fermentation or are in the process of acetic fermentation, pursuant the EU provisions as well as the Act of 12 December 2016, No 238.

Decree of 9 November 2017 – Rules on wine competitions, pursuant article 42, § 3, of the Act of 12 December 2016, No 238.

Decree of 16 February 2018 – Updating of the national list of traditional agri-food products pursuant to article 12, § 1, of the Act of 12 December 2016, No 238.

Decree of 8 May 2018 – Regulations on organic wine products, pursuant article 20 of the Act of 12 December 2016, No 238.

Decree of 18 July 2018 – Control and surveillance system for wines that do not have a protected designation of origin or a protected geographical indication and are designated with the vintage and the name of the vine varieties, pursuant to article 66 of the Act of 12 December 2016, No 238.

Decree of 18 July 2019 – National provisions implementing the EU Delegated Regulation 2018/273 and the EU Implementing Regulation 2018/274 of the Commission of 11 December 2017, concerning the declarations of the harvest and wine production.

Decree of 18 July 2018 – General provisions on the establishment and recognition of consortia for the protection of designations of origin and geographical indications of wines.

Decree of 25 July 2018 – National provisions implementing the EU Delegated Regulation 2018/273 and the EU Implementing Regulation 2018/274 of the

Commission of 11 December 2017, concerning the declarations of stock of wines and musts.

Decree of 2 August 2018 – System of checks and surveillance on DO and GI wines, pursuant to article 64 of the Act of 12 December 2016, No 238.

Decree of 12 March 2019 – Discipline of the analytical tests for PDO and PGI wines, of the organoleptic tests and of the activities of the tasting commissions for PDO wines and of the financing of the activities of the appeal tasting committee.

Decree of 27 February 2020 – Decree, pursuant article 48, § 9, of the Act of 12 December 2016, No 238 laying down certain characteristics, terms, methods for the manufacture, use, distribution, control and cost of the labels for wines with a controlled and guaranteed designation of origin and a controlled designation of origin, as well as certain characteristics and application methods for alternative control and traceability systems.

Decree of 10 March 2020 – Act of 12 December 2016, No 238, article 10 § 4, derogation from fermentations and re-fermentations outside the harvest period for wines with designation of origin and geographical indication and for particular wines including raisin wines and wines without geographical indication. Wine campaign 2019/2020.

Existing Decrees (*to be replaced*)

Decree of 16 December 2010 – Implementing rules for the legislative decree of 8 April 2010, No 61 (*now, the Act of 12 December 2016, No 238*), on the protection of designations of origin and geographical indications of wines, as regards the regulation of the vineyard register and the annual claim for production.

Decree of 13 August 2012 – National provisions implementing the regulation n. 1234/07 (*now regulation 1308/2013*) of the Council, of implementing regulation No 607/09 of the Commission (*now, regulation 33/2019*) as well as of the legislative decree No 61/10 (*now, the Act of 12 December 2016, No 238*), as regards PDOs, PGIs, traditional terms, labelling and presentation of certain products in the wine sector.

Decree of 7 November 2012 – National level procedure on presentation and examination of applications for the protection of PDO and PGI of wines and modification of the specifications, pursuant to regulation No 1234/07 (*now, regulation No 1308/2013*) eand legislative decree No 61/10 (*now, the Act of 12 December 2016, No 238*).

Decree of 22 July 2015 – Establishment of the single register of inspections on agricultural undertakings.

CHAPTER 5

"Innovative Tradition"

Austrian Wine Regulation between Past and Future

Iris Eisenberger and Rostam J. Neuwirth

1 Introduction

> "Jemandem reinen Wein einschenken", figürlich, ihm die Wahrheit ohne allen fremden Zusatz sagen. Die reine Wahrheit sagen.
>
> German language idiom[1]

The Republic of Austria, located in the heart of Europe, has a long history not only of wine consumption but also wine making or so-called "vinification", dating back to at least 700 BCE and possibly even further to 1000 BCE.[2] Over the past millennium, Austria has also developed a strong tradition of administration and regulation especially under the Habsburg rule.[3] This may explain the large number of laws and decrees regulating wine, which takes nearly encyclopaedic proportions. Yet, it may have been a specific regulatory act that provided an important impetus to the recent improvement in the quality and greater global recognition of Austrian wines. For instance, the Oxford Companion to Wine reported that several regional wines, like from Southern Styria "emerged from a century of obscurity to national stardom" and concluded that by "the late 1990s, Austrian wine was enjoying unprecedented export success and prestige that has continued to this day".[4]

1 " 'To serve someone pure wine', figuratively, to tell him the truth without any strange additions. To tell the pure truth"; see Johann Christoph Adelung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, 3rd vol.* (Leipzig: Breitkopf, 1798) 1057 [translation by Rostam J. Neuwirth].

2 See Willi Klinger and Karl Vocelka, *Wine in Austria The History* (Wien: Brandstätter Verlag, 2019).

3 See eg Mate Petervari, 'One Empire and Two Ways of Public Administration: The Second Level Administrative Division in Austria-Hungary' (2018) 9(2) Journal on European History of Law 133, Waltraud Heindl, *Gehorsame Rebellen: Bürokratie und Beamte in Österreich 1780 bis 1848* (vol. 1, Wien: Böhlau, 2013) and Waltraud Heindl, *Josephinische Mandarine: Bürokratie und Beamte in Österreich 1848 bis 1914* (vol. 2, Wien: Böhlau, 2013).

4 See David Schildknecht, 'Austria' in Jancis Robinson (eds.), *The Oxford Companion to Wine*. 4th ed. (Oxford: Oxford University Press, 2015) 53 at 54.

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Overall, wine made from grapes is a highly complex product, at least in chemical, sensory and socio-cultural terms.[5] This complexity is also reflected in wine law. First and foremost, the global significance of wine is reflected by virtue of the International Organisation of Vine and Wine (OIV) i.e. "an intergovernmental organisation of a scientific and technical nature of recognised competence for its works concerning vines, wine, wine-based beverages, table grapes, raisins and other vine-based products".[6] Furthermore, Austrian wine law is of multilevel regulatory character, meaning that it includes norms originating from the global, the supranational (or regional), the national (federal) and subnational (subfederal) level. Various multilateral agreements, like the agreements administered by the World Trade Organization (WTO) as well as bilateral international agreements, and supranational laws and regulations, like those adopted by the European Union (EU), directly affect the regulation of wine on Austrian soil.

The goal of this chapter is to present the main issues relating to the Austrian Wine Act (AWA), the central source of Austrian wine law. The authors hope to contribute both to the global quest for novel ways in regulating wines and vinification and the preservation of the innovative tradition of the Austrian viticulture in the future. Section 2 briefly presents the context of global wine regulation followed by a brief outline of the historical evolution of the AWA. Section 3 yields a concise but detailed presentation of the AWA 2009 (last amended in 2019), the version currently in force. Finally, Section 4 calls for the successful reconciliation between manifold apparent contradictions that govern the uniquely complex phenomenon of wine in contemporary Austria and beyond.

2 The Context of Austrian Wine Regulation: from the Global to the National – from Adulteration to Acclaim

> **Quantitative Limitation** [Mengenbeschränkung]
> *§ 29.* (*Constitutional provision*) (*1*) *Wine growers* (*managers of vineyards*) *may per harvest not market more than the maximum hectare*

5 See also John H. Thorngate, 'The Physiology of Human Sensory Response to Wine: A Review' (1997) 48(3) American Journal of Enology and Viticulture 271 at 271 and W.V. Parr et al., 'Representation of Complexity in Wine: Influence of Expertise' (2011) 22(7) Food Quality and Preference 647 at 647.

6 See the Official Website of the International Organisation of Vine and Wine (French: *Office International de la Vigne et du Vin*), <http://www.oiv.int//>.

> *of predicate-, quality – or land wines or grapes intended for their production* (*subsection 2*).
>
> Austrian Wine Act (1999)[7]

Most legal problems at the national level also require consideration of relevant global and supranational norms. In line with the long history and growing global consumption of wine as a product,[8] it is no surprise that regulatory trends also follow suit. Therefore, from a legal perspective, wine regulation is detailed and comprehensive. This also reflects and matches the highly complex nature of wine in chemical, sensory and socio-cultural terms as mentioned before.[9]

Translated into regulation, this means, for instance, that although vines are grown locally, the regulation of wine has reached global spheres in line with an increasingly globalized wine market.[10] In the international trade context too, wine is referred to as a complex issue but one of increasing relevance as in the past two decades the volume of international wine trade has experienced considerable growth.[11] As a result, global trade in wines is subject to numerous international agreements and subject to the tariff regulations and dispute settlement system of the World Trade Organization (WTO).[12] It is also regularly subject to international trade tensions or disputes.[13] For instance, most recently a WTO panel was

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7 Austrian Wine Act 1999 – Bundesgesetz über den Verkehr mit Wein und Obstwein (Weingesetz 1999), BGBl. I Nr. 141/1999 (23 July 1999).

8 See e.g. Mu-Chou Poo, *Wine and Wine Offering in the Religion of Ancient Egypt* (Oxon: Routledge 2009).

9 See also Thorngate (n 5) 271 and Parr et al. (n 5) 647.

10 See also Kym Anderson, *The World's Wine Markets: Globalization at Work* (Cheltenham: Edward Elgar, 2004) and Gwyn Campbell and Nathalie Guibert (eds.), *Wine, Society, and Globalization: Multidisciplinary Perspectives on the Wine Industry* (New York: Palgrave Macmillan, Year: 2007).

11 See Angela Mariani, Eugenio Pomarici and Vasco Boatto, 'The International Wine Trade: Recent Trends and Critical Issues' (2012) 1 Wine Economics and Policy 24 at 24–25 and Angela Mariani and Eugenio Pomarici, 'Barriers to Wine Trade' in Adeline Alonso Ugaglia, Jean-Marie Cardebat, and Alessandro Corsi (eds.), *The Palgrave Handbook of Wine Industry Economics* (Cham: Palgrave Macmillan, 2019) 291.

12 See also Andrea Dal Bianco et al., 'Tariffs and Non-Tariff Frictions in the World Wine Trade' (2016) 43(1) European Review of Agricultural Economics 31.

13 See e.g. WTO, *India – Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities* (*Lapse of Authority for Establishment of the Panel: Note by the Secretariat*), WT/DS352/7 (17 July 2008); WTO, *Canada – Tax Exemptions and Reductions for Wine and Beer* (*Notification of Mutually Agreed Solution*), WT/DS354/2 (23 December 2008); WTO, *India – Additional and Extra-Additional Duties on Imports from the United States* (*Report of the Appellate Body*), WT/DS360/AB/R (30 October 2008); WTO, *India – Certain Taxes and Other Measures on Imported Wines and Spirits* (*Request for Consultations*

established at the request of Australia (not Austria) challenging a range of Canadian "distribution, licensing and sales measures such as product mark-ups, market access and listing policies, as well as duties and taxes on wine applied at the federal and provincial level", which are allegedly implemented in a discriminatory way.[14] Wine is also one of the few products with its own international organization: the International Organisation of Vine and Wine (OIV), established in 2001.[15]

The EU concluded several international agreements regarding wine with third countries, including important wine producers, like Australia, Chile, South Africa and the United States.[16] Generally, these agreements serve to establish closer links in the wine sector and develop trade in wine, as well as to provide a harmonious environment for addressing wine trade issues.[17]

Within the EU, the wine industry is also strongly regulated at the supranational level, as can be seen from a comprehensive body of laws and regulations adopted by the European Union (EU).[18] The importance and severity of EU

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by the European Communities), WT/DS380/1 (25 September 2008); WTO, *Canada – Measures Governing the Sale of Wine in Grocery Stores* (*Request for Consultations by the United States*), WT/DS520/1 (23 January 2017); and WTO, *Canada – Measures Governing the Sale of Wine in Grocery Stores* (*Second Complaint*) (Request for the Establishment of a Panel by the United States), WT/DS531/7 (29 May 2018).

14 See WTO, *Canada – Measures Governing the Sale of Wine* (*Request for the Establishment of a Panel by Australia,* WT/DS537/8 (16 August 2018) and WTO, *Canada – Measures Governing the Sale of Wine* (*Request for the Establishment of a Panel by Australia* (*Communication from the Panel*), WT/DS537/14 (26 August 2019).

15 See the Official Website of the International Organisation of Vine and Wine (French: Office International de la Vigne et du Vin); available at: http://www.oiv.int//. But see the World Processing Tomato Council (WPTC), https://www.wptc.to/ and the Organization of the Petroleum Exporting Countries (OPEC); available at: https://www.opec.org/opec_web/en/. See generally Raúl Compés López, 'International Wine Organizations and Plurilateral Agreements: Harmonization Versus Mutual Recognition of Standards' in Adeline Alonso Ugaglia, Jean-Marie Cardebat, and Alessandro Corsi (eds.), *The Palgrave Handbook of Wine Industry Economics* (Cham: Palgrave Macmillan, 2019) 253 and Hervé Hannin, Jean-Marie Codron and Sophie Thoyer, 'The International Office of Vine and wine (OIV) and the World Trade Organization (WTO): Standardization Issues in the Wine Sector' in Jim Bingen and Lawrence Busch (eds.), *Agricultural Standards: The Shape of the Global Food and Fiber System* (Dordrecht: Springer, 2006) 73–92.

16 For a full list of international wine agreements concluded by the EU with third countries, see European Commission, 'Wine: Bilateral Agreements with Third Countries', <https://ec.europa.eu/agriculture/wine/third-countries_en>.

17 See e.g. the Preamble of the Agreement between the European Community and the United States of America on trade in wine, OJ L 87/2 (24 March 2006).

18 See generally Paola Corsinovi and Davide Gaeta, 'The European Wine Policies: Regulations and Strategies' in in Adeline Alonso Ugaglia, Jean-Marie Cardebat, and Alessandro Corsi (eds.), *The Palgrave Handbook of Wine Industry Economics* (Cham: Palgrave Macmillan, 2019) 265.

wine regulation is no surprise either given that the EU is reported to account for almost half of the world's vineyards and produce and consume around 60% of the world's wine.[19] The most important EU law is Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products.[20] It is, however, complemented by several other legal acts, on *inter alia* vine plantings and the vineyard register,[21] the categories of grapevine products and oenological practices,[22] the common organization of the market in wine,[23] detailed rules on organic wine,[24] rules on labelling and geographical indications or aromatized wines and spirit drinks.[25] In addition, there are

19 See Giulia Meloni and Johan Swinnen, 'The Political Economy of European Wine Regulations' (2013) 8(3) Journal of Wine Economics 244 at 244.

20 Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347/671 (20 December 2013).

21 Commission Delegated Regulation (EU) 2018/273 of 11 December 2017 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards the scheme of authorisations for vine plantings, the vineyard register, accompanying documents and certification, the inward and outward register, compulsory declarations, notifications and publication of notified information, and supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council as regards the relevant checks and penalties, amending Commission Regulations (EC) No 555/2008, (EC) No 606/2009 and (EC) No 607/2009 and repealing Commission Regulation (EC) No 436/2009 and Commission Delegated Regulation (EU) 2015/560, OJ L 58/1 (28 February 2018).

22 Commission Regulation (EC) No 606/2009 of 10 July 2009 laying down certain detailed rules for implementing Council Regulation (EC) No 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions, OJ L 193/1 (24 July 2009) and Commission Implementing Regulation (EU) No 1251/2013 of 3 December 2013 amending Regulation (EC) No 606/2009 as regards certain oenological practices and Regulation (EC) No 436/2009 as regards the registering of these practices in the wine sector registers, OJ L 323/28 (4 December 2013).

23 Commission Regulation (EC) No 555/2008 of 27 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector, OJ L 1701/ (30 June 2008).

24 Commission Implementing Regulation (EU) No 203/2012 of 8 March 2012 amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007, as regards detailed rules on organic wine, OJ L 71/42 (9 March 2012).

25 Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, OJ L 84/14 (20 March 2014) and Regulation (EC) No 110/2008 of the

numerous cases involving aspects of intellectual property, free movement of goods, fiscal barriers to trade, EU legal order, fundamental rights, public health and external relations.[26]

The relevant EU laws co-exist and co-regulate the wine industry and its many diverse products with the national Austrian legal systems. The most pertinent wine regulation, the so-called "*Weingesetz*" (AWA) once even featured a provision in the rank of constitutional law. Furthermore, and in line with the federal character of the Republic of Austria, regulations and laws related to wine can also be found in the laws of federal states (*Bundesländer*).

From a historical perspective, the Austrian regulation of wine has often been divided into different time periods.[27] These different stages reflect some of the most important wine acts and related regulations, including the following:

Edict Circular (1784) by Joseph II: The edict allows everyone to sell one's self-produced food, wine and fruit-wine;[28]

Artificial Wine Act (1880): The act establishes certain quality and labelling regulations (ban of starch sugar and prohibition to sell wine-like beverages under wine-labels), regards the production of wine-like beverages as a taxable trade and establishes administrative sanctions;[29]

European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89, OJ L 39/16 (13 February 2008) (and see Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008, OJ L 130/1 (17 May 2019).

26 See Alina Mihaela Conea, 'Case Law of the Court of Justice of European Union: A Visit to the Wine Cellar' (2018) 25(2) Lex ET Scientia International Journal 139.

27 See e.g. Andréas Heinrich-Lenz, *Das Weinrecht in Osterreich von 1880 bis 2003* (September 2003) [Doctoral Thesis University of Life Sciences (Vienna)].

28 See the Zirkularverordnung 17 August 1784 (by Joseph II) discussed in Stefan Rothschedl, *Kulturgut Wein: Die Inwertsetzung österreichischer Weinkultur auf Basis des Kulturerbeverständnisses der UNESCO* (Hamburg: Disserta Verlag, 2013) 92–93.

29 Gesetz, betreffend die Erzeugung und den Verkauf weinähnlicher Getränke [Law concerning the production and sale of wine-like beverages], Reichsgesetzblatt für die im Reichsrath vertretenen Königreiche und Länder Nr. 120/1880 (21 June 1880).

Food Act (1896): Regulation of competent authorities and control measures for food and beverages which also applies to wine, fruit wine and wine mash;[30]

Wine Act (1907): First Austrian wine act which defines wine and establishes permissible wine treatment measures such as the use of long acknowledged procedures, coupage of wines or the de-acidification of wines, labelling regulations and the ban of artificial wine;[31]

Wine Act (1925): Sugaring is permitted in more instances;[32]

Act Reinstating the Wine Act 1929 (1945): Geographical indications are regulated;[33]

Wine Act (1961): Minimum requirements for quality wine and protection of designation of origin;[34]

Wine Act (1985): New production rules, maximum yields, disclosure of yields, export of quality wines only in bottles,[35] introduction of banderoles[36]

Wine Act (2009): see below;[37]

Wine Act Amendment (2019): see below.[38]

In view of the multilevel regulation and the long historical process, it is hardly surprising that a recent comprehensive publication commenting on the Austrian Wine Act and related EU laws counts more than 800 pages.[39] Nevertheless, from

30 Gesetz, betreffend den Verkehr mit Lebensmitteln und einigen Gebrauchsgegenständen, Reichsgesetzblatt für die im Reichsrath vertretenen Königreiche und Länder Nr. 89/1897 (16 January 1896).

31 Gesetz, betreffend den Verkehr mit Wein, Weinmost und Weinmaische, Reichsgesetzblatt für die im Reichsrath vertretenen Königreiche und Länder Nr. 210/1907 (12 April 1907).

32 Bundesgesetz vom 17. Juni 1925 über den Verkehr mit Wein und Obstwein (Weingesetz), Bundesgesetzblatt für die Republik Österreich Nr. 217/1925 (16 July 1925).

33 Wiedereinführung des österreichischen Weingesetzes 1929, StGBl 157/1945 (18 September 1945).

34 Bundesgesetz vom 6. Juli 1961 über den Verkehr mit Wein und Obstwein (Weingesetz 1961), BGBl. Nr. 187/1961 (24 July 1961).

35 This regulation was unsuccessfully brought before the Austrian Constitutional Court, VfSlg. 13.576/1993.

36 Bundesgesetz über den Verkehr mit Wein und Obstwein (Weingesetz 1985), über Änderungen des Lebensmittelgesetzes 1975, BGBl. Nr. 86, und des Bundesfinanzgesetzes 1985, BGBl. Nr. 444/1985 (24. Oktober 1985).

37 Bundesgesetz über den Verkehr mit Wein und Obstwein (Weingesetz 2009), BGBl. I Nr. 111/2009 (17 November 2009).

38 Änderung des Weingesetzes 2009, BGBl. I Nr. 48/2019 (12 June 2019).

39 See Hannes Mraz and Hans Valentin Schroll, *Weingesetz: WeinG 2009, Verordnungen und EU-Recht mit umfassendem Kommentar und höchstgerichtlicher Judikatur* (5th ed., Wien: MANZ Verlag, 2018).

a legal perspective, understanding the regulation of vines and wines is not only a challenge in terms of its quantity. It is also a qualitative challenge in terms of its classification along the existing categories of legal fields. In other words, wine poses multiple and multidisciplinary regulatory challenges.[40] For instance, in a comprehensive presentation of Austrian wine published in 1840, the author not only discusses the variety of Austrian wine regions and their products, but also its medical, educational, scientific, economic, folkloristic, literary and musical aspects.[41]

For this reason it is also important to mention that there exists a large number of specific but closely related Austrian regulations, such as those on vine varieties,[42] banderoles,[43] the cellar book,[44] wine labelling,[45] different regulations regarding the designation of origin of quality wines[46] or generally on enforcing the Wine Act.[47] However, central to Austrian wine regulation is the Austrian Wine Act (2009, as last amended in 2019) which will be reviewed and summarized in the following section.

3 The Austrian Wine Act 2009: from the Past to the Future

> *§ 2. (1) lit. 2 AWA: "Austrian wine": wine produced in Austria from Austrian grapes.*

The Austrian Wine Act 2009 (AWA) is first of all characterized by a strong collaborative parallelism between its own laws and regulation and those of the

40 See generally Tim Unwin, *Wine and the Vine: An Historical Geography of Viticulture and the Wine Trade* (London: Routledge, 1991) and Steve Charters, *Wine and Society: The Social and Cultural Context of a Drink* (Amsterdam: Elsevier, 2006) 10–45.

41 See Hans Traxler, *Das österreichische Weinbuch* (Wien: Austria Press, 1840).

42 Verordnung der Bundesministerin für Nachhaltigkeit und Tourismus über Rebsorten für Qualitätswein, Landwein und Wein ohne geschützte Ursprungsbezeichnung oder geografische Angabe mit Rebsorten- oder Jahrgangsbezeichnung (Rebsortenverordnung 2018), BGBl. II Nr. 184/2018.

43 Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft über Banderolen (Banderolenverordnung 2008), BGBl. II Nr. 167/2008.

44 Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft über Ein- und Ausgangsbücher im Weinsektor (Kellerbuchverordnung), BGBl. II Nr. 149/2005.

45 Verordnung des Bundesministers für Land- und Forstwirtschaft Umwelt und Wasserwirtschaft über die Bezeichnung von Weinen (Weinbezeichnungsverordung – WeinBVO), BGBl. II Nr. 111/2011.

46 See e.g. DAC Verordnung "Vulkanland Steiermark", BGBl. II Nr. 299/2018 [DAC=Districtus Austriae Controllatus].

47 See Verordnung des Bundesministers für Land- und Forstwirtschaft zur Durchführung des Weingesetzes 1985 (Weinverordnung), BGBl. Nr. 630/1992.

EU in the field of vinification. It also addresses very different legal disciplines, ranging from constitutional law to economic and administrative law, and even criminal law and administrative penal law (i.e. branch of administrative law used to penalize regulatory offences and enforced by administrative authorities and administrative courts). It also includes aspects of intellectual property law, such as provisions on geographical indications. Even though in a limited manner, the law also provides some guidance as to the proper use of subsidies. It also pursues a plethora of regulatory goals, ranging from the control and improvement of marketed wines, food safety, consumer protection, to procedural guidelines for the management and administration of the wine industry. The Austrian Wine Act 2009 in its current version is still largely based on the AWA 1985, which was hailed as a regulatory success as it helped to transform the Austrian wine industry after the infamous international wine scandal and to evidently improve the quality of Austrian wines altogether. Additionally, having joined the EU in January 1995, Austrian wine laws were also complemented by a comprehensive body of existing and quickly evolving EU laws targeting the wine industry in particular and related industries and regulatory objectives in general.

The AWA has been amended seven times since its enactment, most recently in June 2019.[48] In its current consolidated version, the AWA is structured in six parts (1. Wine; 2. Fruit Wine; 3. Control Measures; 4. Criminal Provisions; 5. Subsidies; 6. Final Provisions) and counts a total of 74 sections (§§).

At the outset, § 1, by establishing the regulatory scope of the law, already reflects the aforementioned regulatory complexity. In concrete terms, Section 1 AWA stipulates as follows:

> § 1. This federal law regulates the marketing of
> 1. wine and other products that fall within the Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 of OJ L 347 of 20.12.2013, p. 671, except grape juice and wine vinegar,
> 2. products that fall within the Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of

48 Austrian Wine Act (AWA) 2009 – *Bundesgesetz über den Verkehr mit Wein und Obstwein* (Weingesetz 2009), BGBl. I Nr. 111/2009 (17 November 2009) [last amended by BGBl. I Nr. 48/2019 (12 June 2019)].

geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, OJ L 084, 20.3.2014, p.14,
3. fruit wine products,
4. wine-based drinks, de-alcoholised wine and low-alcohol wine, as well as
5. wine treatment products.[49]

This means that in a combined reading of the Austrian and EU law, the law's regulatory scope includes in addition to wine, fruit wine, wine-based drinks and wine treatment products also aromatised wine products[50] and wine of fresh grapes, including fortified wines as well as piquete, wine lees and grape marc.[51]

Part 1 (*Wine*): This part is devoted to wine in general, including notably provisions on the production and marketing of wine as well as additional provisions.[52] Section 2 concretizes the meaning of various key concepts, such as "products", "marketing", and "wine-based beverages". So-called "wine-based beverages" include the following categories of wine:

> Beverages that contain parts of wine, land wine [*Landwein*], quality wine, [*Qualitätswein*], dealcoholised wine, low alcohol wine, Liqueur wine [*Likörwein*], sparkling wine [*Schaumwein*], aerated sparkling wine, semi-sparkling wine [*Perlwein*] or semi-sparkling wine aerated by at least 50%.[53]

The same section notably defines "Austrian wine" as "wine produced in Austria from Austrian grapes".[54] It also states that the marketing of all the wine products covered is only authorized when they fully comply with Austrian law and all relevant EU laws.

The following sections (§§ 3–5) govern the oenological practices and treatments, as well as the practices of increasing alcoholic strength (enrichment) and sweetening, both of which can be considered crucial given the dangers

49 Austrian Wine Act (AWA) 2009 – *Bundesgesetz über den Verkehr mit Wein und Obstwein* (Weingesetz 2009), BGBl. I Nr. 111/2009 (17 November 2009) [last amended by BGBl. I Nr. 48/2019 (12 June 2019)].

50 Article 3 Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, OJ L 084/14 (20 March 2014).

51 See Part XII Regulation (EU) No 1308/2013 (n 18).

52 Part I, §§ 2–34 Austrian Wine Act (AWA) 2009 (n 49).

53 § 2(1) lit. 4 Austrian Wine Act (AWA) 2009 (n 49).

54 § 2(1) lit. 2 Austrian Wine Act (AWA) 2009 (n 49).

of wine adulteration (*Weinpanschen*). According to the act, the enrichment of the natural alcoholic content is permitted but within certain limits in terms of grams per litre as well as up to a certain percentage of total alcoholic strength for land and quality wines of both red and white colour.[55] However, the enrichment of alcoholic strength is never permitted for cabinet and predicate (or "classed quality") wines.

Sweetening is also not permitted for cabinet and predicate wines and for land and quality wines within the limit of up to 15 grams of unfermented sugar per litre as laid down in the act and relevant EU regulations.[56]

The act also covers the treatment of so-called "flawed wines". The latter are not wines based on ingredients that were artificially falsified but instead those whose usability is reduced or barred due to disease, defects, or other circumstances, such as bad odours or tastes.[57]

The next section (§ 7) deals with grape must (*Traubenmost* or *Sturm*), which "means the liquid product obtained naturally or by physical processes from fresh grapes" not exceeding an actual alcoholic strength of 1 % volume.[58] This beverage may, when made from Austrian grapes in Austria, be marketed between 1 August and 31 December of each vintage year.

Furthermore, the act (§ 8) outlines very detailed standards and rigid criteria for wine without protected designation of origin or geographical origin with a designation of vine variety or vintage. Even more detailed are the criteria for the different wine categories of land wine, quality wine and predicate wine, which are partly outlined in the act (§§ 9–11) as well as in relevant EU regulation.

The following section (§ 12) contains equally detailed and highly rigid vintage regulations to be enforced by organs of the wine supervisory authority, namely the Federal Viticultural Authority (*Bundeskellereiinspektion*).[59] Subsequent norms of the act (§§ 13–14) also regulate specific quality criteria for sparkling wine, dealcoholised wine, and low alcohol wine.

Especially from the perspective of innovation in vinification, an interesting and most relevant norm (§ 15) is the one on so-called "experimental wine"

55 § 4 Austrian Wine Act (AWA) 2009 (n 49).

56 § 5 Austrian Wine Act (AWA) 2009 (n 49), and Annex I D of the Commission Regulation (EC) No 606/2009 of 10 July 2009 laying down certain detailed rules for implementing Council Regulation (EC) No 479/2008 as regards the categories of grapevine products, oenological practices and the applicable restrictions, OJ L 193/1 (24 July 2009).

57 § 6 Austrian Wine Act (AWA) 2009 (n 49).

58 § 7(1) Austrian Wine Act (AWA) 2009 (n 49); ANNEX VII Part II 10 of Regulation (EU) No 1308/2013 (n 18).

59 See also the Bundeskellereiinspektion Website, <https://www.bundeskellereiinspektion.at/?entscheid=0>. In the context of "Kellereiinspektionen", see also VfSlg. 11.403/1987.

(*Versuchswein*). This provision relates to the use of new oenological practices or processes for experimental purposes, which requires wine produced from such experiments to be marketed to receive an approval by the competent authority, i.e. the Federal Viticultural Authority. The same section also contains detailed criteria regarding when and under what scientific conditions such authorization is to be granted. For instance, it states that the "approval is to be granted if it is at least made credible that the new treatment method can be expected to advance the wine-cellars industry".[60]

Furthermore, the wine act also regulates (§ 18) harmful hazardous and fake products, beverages similar to wine or artificial wines, which are – subject to detailed regulations and some exceptions – barred from being marketed.

The act also lays down general and specific labelling provisions in order to better inform and avoid misleading the consumer (§§ 19–20, 22). One of them (§ 21/1) also concerns the geographical indications of domestic wines, which clarifies how Austrian wine can be marketed, namely by calling it "Austrian wine", "wine from Austria" or simply "Austria". It is also possible to market the wine in smaller geographical units, such as wine-growing regions or municipalities. The same section (§ 21/2) also clarifies how the nine individual federal states (*Bundesländer*) are called in terms of wine-growing regions, which are denominated as follows:

1. *"Weinland"* (wine land): Burgenland, Lower Austria and Vienna;
2. *"Bergland"* (mountain land): Carinthia, Upper Austria, Salzburg, Tyrol and Vorarlberg;
3. *"Steirerland"* (Styrialand): Styria.

The same section also explains how the territories of each of these respective federal states and even their single municipalities (*Gemeinden*) can be further subdivided in terms of their wine-growing regions.

Another crucial provision of the act is Section 23, which lays down the so-called "Quantitative Limitations" – a norm aiming to put quality before quantity – which was first introduced with the Austrian Wine Act 1985 at the rank of a constitutional provision.[61] This provision stipulates as follows:

> *§ 23.* (1) Wine growers (managers of vineyards) may market per harvest of a vintage not more than the maximum hectare of wine in accordance

60 § 15 (6) Austrian Wine Act (AWA) 2009 (n 49).

61 See § 27a Austrian Wine Act (AWA) 1985 – Bundesgesetz vom 24. Oktober 1985 über den Verkehr mit Wein und Obstwein (Weingesetz 1985), über Änderungen des Lebensmittelgesetzes 1975, BGBl. Nr. 86, und des Bundesfinanzgesetzes 1985, BGBl. Nr. 444/1985 (31 October 1985).

with *§* 8, of predicate-, quality – or land wines or grapes intended for their production.

The section (§ 23/2) mentions maximum yields: 9,000 kg of grapes or 6,750 l per hectare of vineyard area registered and planted in the vineyard register. Until the planned changes regarding a vineyard register (*Rebflächenverzeichnisses* or *Weinbaukatasters*) in accordance with § 24 have been made, the act (§ 23/2) also allows for the maximum amount to be increased or reduced by a maximum of 20% by ordinance at the request of the National Wine Committee, if climatic or winemaking conditions for that year so require.

The act also regulates a state test number, which is a mark intended to identify Austrian quality and predicate wines. This national test number can be obtained by submitting a sample of the wine.[62] The National Wine Committee can also restrict the territory to be used for wine with a protected denomination of origin.[63]

Given that important personal data is being processed by several competent federal and subfederal authorities, the wine act also authorizes them to collect pertinent information as they are considered "joint controllers" in the sense of the EU General Data Protection Regulation.[64] Additional provisions (§§ 27–29) govern various formal requirements of the related aspects of administrative procedures, such as forms, accompanying documents, or harvest, production or storage reports. As an additional mark used for consumer protection, the act also requires for domestic quality wines to feature a banderole, which has to be affixed to the bottle cap in a way that excludes the possibility of refilling a bottle by reusing the banderole.[65]

Wine producers are also obliged to fulfil several reporting duties, such as to note all inputs and outputs of products in a registry, the so-called "cellar-book" (*Kellerbuch*).[66] At the same time, winemakers are also not allowed to store several substances not related to wine but that can be used to create artificial or

62 § 25(1) Austrian Wine Act (AWA) 2009 (n 45) in combination with Annex 2 to section 2 Austrian Ministry Act (Bundesministeriengesetz 1986-BMG), BGBl. Nr. 76/1986 (WV) (20 February 1986) [zuletzt geändert durch BGBl. I Nr. 8/2020 (28 January 2020)].

63 § 26(1) Austrian Wine Act (AWA) 2009 (n 45).

64 § 26a Austrian Wine Act (AWA) 2009 (n 45); and Articles 4(7) and 26 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119/1 (4 May 2016).

65 § 30 Austrian Wine Act (AWA) 2009 (n 49).

66 § 31 Austrian Wine Act (AWA) 2009 (n 49).

fake wines and in case such substances are found, the competent organ of the Federal Viticultural Authority is authorized to take samples.[67] Finally, a provision regarding the production of wine-based beverages (§ 33) and a second one (§ 34) empowering the competent federal minister to enact ordinances to establish producer and industry organisations as well as to implement EU directives complete the first part of the Austrian Wine Act.

Part 2 (*Fruit Wine*): The second part features several quality and control measures related to the production and marketing of fruit wine (*Obstwein*), which is broadly speaking wine made from different fruits (and not grapes).[68]

Part 3 (*Control Measures*)*:* Part 3 is entirely devoted to various control measures and the competent authorities.[69] These provisions (§ 46/1) first outline the mandate and powers of inspection conferred to the Federal Viticultural Authority called "*Bundeskellereiinspektion*", which inter alia supervises the marketing of products and oenological practices, reviews records of wine analyses and persons involved in the production, storage and transport of related businesses and consults with business owners. It has further vast control powers like carrying out inspections, sampling, as well as even seizure and confiscation of products where there is suspicion of a violation of the present act and related EU regulations.[70]

Part 4 (*Criminal Provisions*)*:* In the fourth part and as a further crucial element in the safeguarding of quality control of wine products, the act first contains several provisions which establish both criminal and administrative penal provisions as well as related instruments. Among the criminal offences, the act lists the following offences: the marketing of non-marketable products and of fruit wine as defined by the act; the illegal removal of a state testing number; the use of confirmations prescribed by the act for the purpose of deceiving, or the unauthorized use of the banderole or similar marks; the use of oenological practices and treatments not authorized by the present act and EU Regulation 1308/2013 as well as other EU laws, or the addition of water to products covered by the act in violation of EU Regulation 1308/2013.[71] Generally, the maximum punishment is a prison sentence of up to six months or of not more than 360 times the daily fine rate as set by the court. Products which were subject to a crime in accordance with the wine act will be confiscated and can be exploited for instance as vinegar or disposed of by the court.[72]

67 § 32 Austrian Wine Act (AWA) 2009 (n 49).
68 Part II, §§ 35–45 Austrian Wine Act (AWA) 2009 (n 49).
69 Part III, §§ 46–56 Austrian Wine Act (AWA) 2009 (n 49).
70 §§ 47–50 Austrian Wine Act (AWA) 2009 (n 4849).
71 § 57(1) Austrian Wine Act (AWA) 2009 (n49).
72 §§ 58–59 Austrian Wine Act (AWA) 2009 (n 49).

The list of administrative offences is even longer and more detailed. The different offences will be punished in accordance with their severity with fines of up to €7,270.[73] Additional provisions regulate the possible forfeiture of products subject to those administrative proceedings, different ways of their exploitation (*e.g.* destruction) and costs caused by control and sampling.

Part 5 (*Subsidies*)*:* The fifth part governs subsidies provided for the wine industry. It notably states for what kind of purposes federal funds can be used to support the wine industry. These are limited to the following three kinds of support measures, namely 1) for the sales of the product, 2) for production quality, and 3) for measures aimed to remove the damage caused by winter frost.[74] The remaining articles regulate how these subsidies are administered.

Part 6 (*Final Provisions*)*:* The sixth and final part contains final provisions that address the different issues of the processing of personal data and the relation of the act to other acts merely stating that the present act does not affect the federal law against unfair competition (UWG).[75] The following section (§ 71/1 and 3) lists a large number of European laws and regulations to which the wine act refers and which are to be enforced by it as long as they fall within its scope. Given their number and the fact that other laws or EU regulations in particular are frequently amended, the act (§ 71/2) also clarifies that any reference to another legal source requires that these are to be read in their latest version. In addition, the act designates the Federal Minister for Agriculture, Regions and Tourism as the principal ministry competent for the enforcement of the act.[76] Finally, the very last section (§ 74) of the act addresses the entry into force of the law and which other laws or provisions cease to be in force.

Given the rapid changes in the world today, which appear to assume a faster pace every day, it is still not guaranteed that the present regulatory framework of Austrian and European laws as well as international agreements is capable of solving all present and future regulatory challenges. Or, more concretely, it is necessary to closely observe the current trends in vinification, consumer preferences, scientific, technological and social progress including both the opportunities and dangers that may come with it. To effectively prepare for these opportunities and challenges, it is therefore deemed helpful to provide a brief outlook on how innovation and tradition are not necessarily incompatible but

73 § 61 Austrian Wine Act (AWA) 2009 (n 449).
74 § 65(1) Austrian Wine Act (AWA) 2009 (n49).
75 §§ 69 and 70 Austrian Wine Act (AWA) 2009 (n 49).
76 § 73 Austrian Wine Act (AWA) 2009 (n49).

rather capable of mutually complementing each other to the benefit of future consumers of wines in their greatest possible variety and quality.

4 Reconciliation of Opposites: Innovation from Tradition

> *'In vino veritas' – there is truth in vine. The influence of wine is to develop the true character of the individual.*[77]

The Austrian history of wine regulation dates back to a distant past, which comprises diverse regulatory efforts to tackle the multidimensional nature of wines. In this respect, the present overview of the evolution of the Austrian Wine Act only provides a limited account of the underlying complexity of winemaking and wine regulation. To give but one example, wine is at the same time an agricultural product deeply rooted in tradition and an industry driven by innovation and fierce international competition. Furthermore, "smart farming" or "agriculture 4.0" – using technologies such as sensors, apps, satellite navigation, telemetry systems, or drones – provide opportunities as much as they pose serious challenges to the future of winemaking and its regulation.[78]

Regulation also appears to be confronted with many paradoxes, or apparent opposites that are calling for their reconciliation and solution. Among the many challenges for future wine production, distribution and consumption, are climate change,[79] various health risks caused inter alia by pesticides,[80] as well as economic crises or changing consumer preferences affecting wine sales. The latter also give rise to some paradoxes as economic crises may on the one hand reduce the global sale of wine because less money is

77 William Benjamin Carpenter, *On the Use and Abuse of Alcoholic Liquors, in Health and Diseases* (Philadelphia: Blanchard and Lea, 1860) 31 (Fn 1).

78 See e.g. Bundesministerium für Nachhaltigkeit und Tourismus (ed.), *Digitalisierung in der Landwirtschaft: Entwicklung, Herausforderungen und Nutzen der neuen Technologien für die Landwirtschaft* (Wien: Bundesministerium für Nachhaltigkeit und Tourismus, 2018) 12–17, Iris Eisenberger, 'Drohnen in den Life Sciences: Das Luftfahrtgesetz zwischen Gefahrenabwehr und Chancenverwirklichung' (2016) 43 Österreichische Zeitschrift für Wirtschaftsrecht (ÖZW) 66 and Iris Eisenberger et al., '"Smart Farming" – Rechtliche Perspektiven' in Roland Norer and Gottfried Holzer (eds.), *Agrarrecht. Jahrbuch 2017* (Vienna: NWV Verlag GmbH, 2017) 207–224.

79 See e.g. Robert Pincus, 'Wine, Place, and Identity in a Changing Climate' (2003) 3(2) Gastronomica 87.

80 See e.g. Philippe Schenkel, *Pestizide im Schweizer Weinbau: Eine Untersuchung von Greenpeace Schweiz* (September 2016), <https://www.srf.ch/sendungen/kassensturz-espresso/pestizid-in-vielen-schweizer-weinen-ausser-in-bio-wein-2>.

available to be spent on alcoholic beverages but increase harmful drinking on the other.[81]

As a related paradox, wine in Austria has historically been seen as a social drink which can help to be "cheerful and in good spirits".[82] At the same time it was also called a "people's drug" (*Volksdroge*) as Austria internationally ranks high in terms of alcohol consumption per capita,[83] which led to early regulatory measures against alcohol addiction.[84] As yet another paradox, wine consumption may not only be a health hazard but vines themselves may be suffering from diseases.[85]

The potential health risk also gave rise to a regulatory paradox, which lies in the fact that the recent success of the Austrian wine industry was likely born out of a painful experience in the form of the so-called "wine scandal" (*Weinskandal*) also known as "anti-freeze scandal" or "glycol scandal", which rocked the Austrian wine industry in 1985. In the year following the scandal, the exports of Austrian wines dropped to a 10% level of previous years and stayed low for some time.[86] It could also be called a case of oxymoronic "bad luck", as it was because of the scandal that the Austrian wine law was renewed, which – given its scope and detailed norms of quality control – was described then as one of the strictest wine acts in the world.[87] This regulatory reform was said to have laid the foundations for the later success of the Austrian wine industry as follows:

> The scandal destroyed the market for Austrian wine, but in the long term has been a force for good, compelling Austria to tackle low standards of bulk wine production, and reposition itself as a producer of quality wines that stand comparison with the best in the world.[88]

81 See e.g. Moniek C.M. de Goeij et al., 'How Economic Crises Affect Alcohol Consumption and Alcohol-Related Health Problems: A Realist Systematic Review' (2015) 131 Social Science & Medicine 131.

82 See Johann Rasch, *Weinbuch: Von Baw, Pfleg vnd Brauch des Weins* (München: Berg, 1582) 5.

83 See 'Wie Alkohol zur Volksdroge wurde', *science.orf.at* (*online*) (25 May 2019), <https://science.orf.at/stories/2983307/>.

84 See e.g. Irmgard Eisenbach-Stangl, 'The Beginnings of Galician and Austrian Alcohol Policy: A Common Discourse on Dependence' (1993) 20(4) Contemporary Drug Problems 705.

85 See e.g. C. Bertsch et al., 'Grapevine Trunk Diseases: Complex and Still Poorly Understood' (2013) 62 Plant Pathology 243.

86 See Charters (n 40) 237–238.

87 See Martin Paar, 'Zur Geschichte des österreichischen Weinrechts von 1907 bis 1985 (On the History of Austrian Wine Law from 1907 to 1985)' (2019) 10(1) Journal on European History of Law 15 at 17 and Charters (n 40) 238.

88 Agnes F. Vandome and John McBrewster, *Austrian Wine* (Alphascript Publishing, 2009).

Yet, it was also argued that the development of the Austrian wine industry still had to be seen in the context of a larger temporal horizon given that the regulatory basis for the contemporary success of Austrian wines goes back to a time much earlier than the wine scandal.[89] Such larger time focus also needs to include the fact that Austria had joined the EU in 1995. Austria's EU accession meant that it had to adopt the comprehensive and sophisticated body of EU wine regulations. At the same time it had to expose its wine industry to stronger competition within the European common market.

To cut a long story short, wine regulation fits well with a wider trend of our time, namely a general rise in contradictions, usually expressed in rhetorical figures known as oxymora and paradoxes. Translated into the legal realm, this trend earned the present era the qualification of a "Time of Oxymora"[90] and even an "Age of Paradox".[91] Their rise tells us that it is often an accelerated pace of change plus increasing levels of complexity that prompt a problem to be framed as an oxymoron or paradox.[92]

This finding may help to explain the high levels of regulatory complexity deriving from the multidisciplinary character of wine, epitomized by its historical, political, economic, environmental, medical, educational, scientific folkloristic, literary, musical or, generally, cultural significance. In other words, the production, distribution and consumption of wine (and other alcohol) relates to many different aspects of a society. This multidisciplinarity poses a regulatory challenge notably in terms of policy coherence and legal consistency so as to make sure that a regulatory approach in one area is not neutralized by or even in conflict with those of other areas.

This principal problem has been framed by way of the so-called "complexity paradox", which reflects the seemingly contradictory trend of humanity's scientific progress leaving us with more questions than answers.[93] Last but not least, there may be one important insight gained by this chapter, namely

89 See Philippe Crapouse, *Katharsis oder Katalysator? Wie der österreichische Weinbau aus der Krise kam und welche Rolle der Weinskandal 1985 dabei spielte* (Vienna: University of Vienna, 2010) [Diploma Thesis]; <http://othes.univie.ac.at/10156/1/2010-05-27_8752346.pdf>.

90 See Rostam J. Neuwirth, *Law in Times of Oxymora: A Synaesthesia of Language, Logic and Law* (New York: Routledge, 2018) and Rostam J. Neuwirth, 'Essentially Oxymoronic Concepts', (2013) 2(2) Global Journal of Comparative Law 147.

91 Charles Handy, *The Age of Paradox* (Boston: Harvard Business School Press, 1995).

92 Rostam J. Neuwirth, *Law in Times of Oxymora: A Synaesthesia of Language, Logic and Law* (New York: Routledge, 2018) 229.

93 See Kenneth L. Mossman, *The Complexity Paradox: The More Answers We Find, the More Questions We Have* (Oxford: Oxford University Press, 2014) xii and 3.

two lessons to be learned from the past, for both wine and law, or to be more specific, for the art of vinification and of regulation: Opposites only appear contradictory but are rather complementary, which is why winemaking needs to combine tradition and innovation, past with future practices and to balance the expected opportunities with possible risks. In this respect, it is helpful to recall a common truth for both wine and law, which is that it is important to make use of both *wisely* and *with moderation*.

CHAPTER 6

Between Wines and Spirits

Classification Challenges of Polish 'Fruit Wine'-based Products in EU Perspective

Joanna Pawlikowska, Aleksander Stępkowski, Leszek Wiwała

1 Introduction

Wine production is associated with the Mediterranean countries enjoying long and warm summers.[1] It may be surprising then that the Polish tradition of alcoholic fermentation of grapes and honey dates back likely to the 10th century.[2] Written testimonies of early viticulture in Poland can be found as early as the 12th century. Unfortunately, after the World War II, the Communist regime destroyed all vineyards in Poland. Wine production based on domestic crops was not reestablished until 2008, but since then, there has been dynamic growth. There were 21 vineyards in 2009 and 295 vineyards in 2019. Despite such a spectacular increase, wine production is still relatively insignificant. Global warming and new varieties of grapes which are resistant to low temperatures may support future development of vineyards in the Vistula and Oder valleys but they will never be so important in Poland as the fruit orchards are.[3]

In Poland, beverages called "wine" include also products derived from the fermentation of fruits other than grapes. Production of those beverages in Poland dates back as early as the 13th century. Today, because of the great variety of available fruits, Polish viniculture is undergoing considerable development. It is worth noting that the fermentation process, apart from alcohol and carbon dioxide, also produces some by-products that considerably affect the organoleptic characteristics of fermented beverages. Such chemical compounds include: glycerol, organic cash, aldehydes, higher alcohols, esters.

1 Tomasz Tarko et al., 'Physicochemical and Antioxidant Properties of Selected Polish Grape and Fruit Wines' (2008) 7(3) Acta Sci. Pol., Technol. Aliment. 37.

2 Alina Kunicka-Styczyńska et al., 'The Trends and Prospects of Winemaking in Poland', in Antonio Morata and Iris Loira (eds.), *Grape and Wine Biotechnology* (IntechOpen 2016) 401.

3 There are around 284,6 thousands agricutlure farm with fruit orchards with the total area 374,2 thousands ha according to the Polish Main Agriculture Statistic Office (pl: Powszechny Spis Rolny) (2010).

These compounds are extremely important for the properties of wine and other fermented products, while they are removed during the production of spirit drinks. From the perspective of its chemical composition, which affects the taste, aroma and appearance of beverages, fermented products can be distinguished from spirits. The most popular fruit used for the production of alcoholic beverages are apples. Cherries, strawberries and raspberries are also used for that purpose. This is typical of Northern European countries. In effect, those fruit-fermented beverages are the most important products of the Polish fermented beverage industry.

The aim of this chapter is to describe characteristic features of Polish law concerning those flavored beverages against the background of the European Union (EU) law that regulates those "other fermented beverages". Particular attention is given to the classification of the specific fermented beverages either as flavored fruit-wine or spirit drink category. In other words, this analysis is an attempt to capture the essence of the nature of alcoholic beverages obtained from fruits other than grapes, especially those products whose taste and smell differ from those of the fruits that have been used for fermentation. An additional element that is necessary to be taken into account due to EU case-law is the extent to which some technological processes (e.g. different types of filtration or sweetening of the setting), as well as the addition of distilled alcohol, affect the classification of products that are used in fermented beverages. When considering the legal delimitation of the categories of fermented beverages and spirit drinks, systemic legal consistency is necessary so that the classifications which are carried out for tax and customs purposes comply with the requirements established by industry regulations. In this regard, it seems that both the provisions of the Combined Nomenclature (CN)[4] and the industry regulations need modifications in order to achieve legal coherence.

2 Particular Aspects of the Polish Wine Market

In the Polish language, "grape wines" are distinguished from "fruit wines", whereas in most European languages, the word "wine" refers only to the product of the fermentation of grapes. Similarly, according to the legal definition

4 The Combined Nomenclature (CN) is a tool for classifying goods, set up to meet the requirements both of the Common Customs Tariff and of the EU's external trade statistics. Cf. Kathrin Limbach, *Uniformity of Customs Administration in the European Union* (Hart Publishing 2015) 265 ff.

of wine in Regulation (EU) No 1308/2013,[5] "wine" means the product obtained exclusively from the alcoholic fermentation of fresh grapes, whether crushed, or of grape must. However, EU law also allows the word "wine" to be used for describing other products as a compound term in which the name of another raw material is added to the word "wine" in such a way that the consumer is not misled (e.g. apple wine, raspberry wine). It is worth adding that using the expression "fruit wines"[6] is optional in the EU and is left to the discretion of individual Member States. Southern countries with large wine-growing areas generally reserve the word 'wine' only for grape fermented beverages. However, Polish regulations, along with the German or British ones, allow the use of the name "fruit wine" or "made wine" to describe non-grape fermented products.

This is partly due to the fact that Poland is the largest producer of apples in Europe and the third in the world (after China and the United States of America).[7] Apples have been used as raw material for the production of alcoholic beverages for centuries. Fruit wine and flavored drinks based on these beverages were very popular in Poland 20–30 years ago. Their sale in volume was even larger than the vodka market. Annual sales of fruit wine products amounted to around 400 million liters.[8] However, a 30% reduction in excise duty on spirits on October 1, 2002 has had a significant impact on the development of the fruit wine sector.[9] Since then, the consumption of legal spirit drinks has grown at the expense of the fruit wine market. At the same time, EU membership has opened the Polish alcoholic beverages market for grape wines, which also saw increased consumption in the country. Poland is still seen as an emerging wine market because the consumption of grape wine is among the lowest in the EU. Despite many expert forecasts that predicted an increase in wine consumption due to an increase in living standards, the market for other fermented products remains stable.

5 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671–854). Cf. André Bouquet et al., (eds), *Commentary on the EU: Treaties and the Charter of Fundamental Rights* (Oxford 2019) 569.

6 Cf. Maria Kosseva, V.K. Joshi and P.S. Panesar (eds.), *Science and Technology of Fruit Wine Production* (Academic Press 2017).

7 Top Apple Producing Countries in the World – https://www.worldatlas.com/articles/top-apple-producing-countries-in-the-world.html, accessed 8 April 2020.

8 Iwona Szczepaniak, *Produkcja i rynek win w Polsce w 1999 r.,* Przemysł Fermentacyjny i Owocowo Warzywny, No. 8, 2000, p.8.

9 Wiktor Szczepaniak, *Rynek tanich win owocowych wysycha,* Puls Biznesu, 6.12.2011 r. https://www.pb.pl/rynek-tanich-win-owocowych-wysycha-643039, accessed 8 April 2020.

According to the Central Statistical Office, the wine market in Poland in 2018 was around 240 million liters.[10] The grape-based product had over 150 million liters.[11] Classic grape wine was 110 million liters,[12] whereas 30 million liters were flavored and/or fortified (including vermouths). However, production from domestic vineyards is small. In 2018, it reached 1.2 million liters but only half of it was officially sold. According to the National Agriculture Support Center, there were only 634 thousand liters of wine from Polish vineyards commercially sold in 2018/2019.[13] That was less than 0.3% of the whole fermented product market (including all types of wine). The rest of the fermented beverages market, nearly 90 million liters, consisted of fruit wine and other fruit-based fermented products. This means that the fruit wine market in 2018 was only one-sixth of what it was 20 years ago. Even a high-quality product has not been able to survive the competition with cheaper spirits and increasingly cheaper grape wines, whose sales have been growing for several years especially in the discount stores.

However, it should be noted that since 2013, considerable quantities of cider[14] (i.e. low-alcohol apple wine) have also appeared on the Polish market. Many experts have predicted that the cider market would grow rapidly for many years. In fact, sales grew dynamically until 2017, when it encountered formal and legal barriers. The main competitor of cider has turned out to be flavored beers, which have many more legal privileges than products from the wine sector. As a consequence, breweries are in a much better competitive position.[15]

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10 Rynek wewnętrzny w 2018 r., GUS – https://stat.gov.pl/obszary-tematyczne/ceny-handel/handel/rynek-wewnetrzny-w-2018-roku,7,25.html, accessed 8 April 2020.

11 Rynek wewnętrzny w 2018 r., GUS.

12 According to Global Statistics from the Wine Institute, https://www.wineinstitute.org/files/World_Consumption_by_Country_2017_Update.pdf, accessed 8 April 2020.

13 The National Agricultural Support Center http://www.kowr.gov.pl/interwencja/wino, accessed 8 April 2020.

14 Cf. Andrew G. H. Lea et al., 'Cidermaking' in Andrew G.H. Lea, John Piggot (eds.), *Fermented Beverage Production* (Springer 2003) 59–87.

15 All beers, including flavored beers, can be advertised; they are exempt from the obligation to be marked with excise strip stamps having low general excise duty rate (regardless considerable differences of alcoholic strength of specific beers); and their sale is based on a single retail license (up to 18% alcohol). In contrast, cider is not allowed to be advertised, and it is covered by the obligation to have excise strip stamps. An excise duty rate comparable to that of beer applies only to ciders with less than 5% alcoholic content. In addition, it is worth mentioning that a producer of two types of cider, 4% and 6% alcohol content, is obliged to purchase two retail licenses (up to 4.5% alcohol and above) and his products are subject to two different rates (the rate for beer is similar to rate for cider with maximum 5% alcohol content). In the same time, sellers of 4% alcohol and 10% alcohol beer need only one retail license, and they benefit from a low excise rate. In addition,

Legal barriers and low yields of apples with adequate acidity meant that in 2017 cider production fell by nearly 10% to 6.73 million liters (though still more than 10 times the sale of wine from domestically planted crops).[16] It should be noted that the sale of cider-like products, classified as flavored beer with the addition of apple juice, is several times higher in Poland than the cider market. The European Cider and Fruit Wine Association has reported that the Polish cider market was 48.92 million liters.[17] In fact, less than 7 million liters was real cider. Most of this type of product is presented as an apple beer drink, which is characteristic for the most popular international cider brands.[18]

A similar situation occurred in popular flavored tinctures on fruit wines (wine tinctures), which for many years were classified as wine drinks. For several years, tax authorities have been forcing the reclassification of these fruit-based products from Combined Nomenclature (CN) code 2206 to CN 2208 spirit drinks. All producers of these tinctures have voluntarily changed their interpretation of tax regulations or have changed the production formula due to the risk of litigation with tax authorities. On this occasion, it is important to emphasize the significant difference between beer-based drinks and fruit-based drinks. The latter, including wine tinctures, are defined in a detailed way in Polish regulations. In contrast, there are neither Polish nor EU regulations for flavored beers and beer-based beverages.

There is a global trend among younger generations of consumers who prefer modern products, especially flavored (aromatised within the wording of EU regulations) ones, over traditional beverages. The quantity of wine used for the production of wine-based beverages and aromatised wine has grown significantly in recent years. Indeed, it has almost doubled from 2.7 million hectoliter (mhl) in 2001 to 4.9 mhl in 2016.[19] Flavored products play an increasingly important role in the EU economy. The significance of flavored (aromatised)

breweries with less than 20 million liters of annual production pay only 50% of the standard excise rate on beer. At the end of 2017 there was a public declaration of the Prime Minister promising introduction of a zero excise duty rate for cider and abolishment of the excise strip stamps duty. However, since that time nothing has changed.

16 Instytutu Ekonomiki Rolnictwa i Gospodarki Żywnościowej, Rynek wyrobów alkoholowych, 2017/11 and 2018/11.

17 Based on Global Data analytical company data – http://zpprw.pl/wp-content/uploads/2019/12/AICV_Cider_Trends_2019.pdf, accessed 8 April 2020.

18 The European Cider Trends 2018, AICV report. Cf. in wider perspective F. Matei, 'Technical Guide for Fruit Wine Production', in Maria Kosseva, V.K. Joshi and P.S. Panesar (eds.), *Science and Technology of Fruit Wine Production*, p. 696–697.

19 <http://www.oiv.int/public/medias/6957/focus-oiv-2019-industrial-use-of-wine.pdf>, p. 13–14, accessed 21 January 2020.

products obtained from grapes is reflected in applicable legal regulations. Regulation (EU) No 251/2014[20] declares in the 4th recital of Preamble to this regulation, that:

> Aromatised wine products are important for consumers, producers and the agricultural sector in the Union. The measures applicable to aromatised wine products should contribute to the attainment of a high level of consumer protection, the prevention of deceptive practices and the attainment of market transparency and fair competition. By doing so, the measures will safeguard the reputation that the Union's aromatised wine products have achieved in the internal market and on the world market by continuing to take into account the traditional practices used in the production of aromatised wine products as well as increased demand for consumer protection and information. Technological innovation should also be taken into account in respect of the products for which such innovation serves to improve quality, without affecting the traditional character of the aromatised wine products concerned.

The *ratio legis* cited above may be as well applied to the flavored fruit wine sector, though there is no such legislation in EU law yet. The favorable legal treatment that is given to wine because of the long tradition represented in the southern countries should not, on the other hand, lead to undermining other traditions represented by the Northern European fruit winemakers.

The increasing trend for aromatized products is also evident in the Polish alcoholic beverages market. Spirit producers have developed some new categories of spirit drinks, including those with traditional vodka brands, that are flavored but with decreased alcohol content. Legally, they are no longer a part of the vodka category, but consumers still perceive them as a kind of flavored vodkas. Those products now represent nearly 30% of the value of the vodka market. A similar process can be observed in the beer and (grape) wine markets. Flavored beers represent more than 10% of the value of the beer market in the summertime, while vermouths and other flavored grape wines represent around 20% of the grape wine market.

Within the alcoholic beverages market, a particular position was taken by "fruit-wines" that were flavored and other fruit wine-based products with some

20 Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labeling and protection of geographical indications of aromatised wine products, repealing Council Regulation (EEC) No 1601/91 [.OJ L 84, 20.3.2014, p. 14–34].

amount of ethyl alcohol added. For a long period of time, they were a part of the fermented beverages market but due to EU case-law (*Siebrand*), more and more of those products were transferred into the spirits sector. The tax authorities are not always consistent in this approach. As it will be described later, due to some mysterious reasons, tax authorities allow some products, causing considerable doubts as to their character, to be still considered as a part of fermented beverages sector. They continue to do so despite their market appearance (e.g. a specific shape of the bottles) is typical for spirits and consequently they are placed in shops at vodka shelves, being also promoted accordingly, not mentioning their names, being also very misleading for consumers. On the other hand, there are also other products, which used to be classified as fruit wine-based and subsequently have been reclassified into the "spirits" category (e.g. *Nalewka Babuni*).

3 The Development of Polish Regulations of Fruit Wines in the Context of EU Economic and Legal Policies

Grape wines, including flavored varieties, are specifically regulated in EU law, so Polish provisions are subject to the EU legal framework. Within that framework, there is no appropriate categorization for fermented products obtained from fruits other than grapes. Fermented wine drinks are covered by EU rules on the wine market only so far as the use of the composite name for these products contain the word "wine".[21] Fermented products obtained from raw materials other than grapes are not covered by specific industry regulations at the EU level, leading to many terminological disputes (e.g. *Barmańska, Nalewki Dobrońskie, Nalewka Babuni*). There should be no doubt that, in order to protect the interests of consumers, this group of beverages should also be covered in a way that is consistent with the current rules. This would give consumers a greater opportunity to distinguish among differently fermented fruits beverages, as well as to distinguish these products from wine products made specifically from grapes or grape must.

At the same time, Polish national law, in its specific definitions of beverages obtained from fruit fermentation, has developed by analogy with the EU grape regulatory pattern. The basic legal act concerning wine and other fermented

21 According to Annex VII, paragraph 2 of point C, Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine [OJ L 179, 14.7.1999, p. 1–84], the use of a composite name including the word "wine" may be allowed by Member States.

products market is the Wine Act of May 12, 2011. That act deals with the production and bottling of fermented drinks the trading in these products, and the organization of the wine market (the Wine Act 2011).[22] The Act introduced a threefold division of wine products: fermented wine drinks, flavored (aromatised) wine products (as defined in Regulation 251/2014), and wine products (as defined in Regulation 1308/2013 in Annex VII, Part II, points 1–9, 11, 15 and 16). Polish provisions on fruit wine and other fermented products are very detailed, contain precise definitions, specify minimum fruit shares (actually quite high compared to other countries[23]), physicochemical parameters of products, analytical methods, etc. The Wine Act 2011 precisely defines types of fermented beverages made from other fruits than grapes. These are fermented products belonging to one of the following categories: fruit wine, brand fruit wine, fortified fruit wine, flavored fruit wine, fruit wine tincture, flavored fruit wine tincture, fruit (or honey) wine drink, flavored fruit wine drink or honey, low-alcohol fruit wine, flavored low-alcohol fruit wine, cider and perry.

Fruit wines and branded fruit wines are the basis for the production of flavored and/or fortified fermented beverages. They are recognized in the tax regulations as fermented products whose excise rate is the same as the rate for wine. The definition of fruit wine[24] is similar to that of branded fruit wine subject to some specificity concerning alcoholic strength, aging period and the amount of the fresh fruits in the set.[25]

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22 *Polish Official Journal* 2011, No 120 item 690 subject to several changes. It covers production and marketing of fermented wine beverage, business activities in that field of producing and bottling of wine products, organization of the wine market, including rules and procedure for registering designations of origin as well as the geographical indications of wine products obtained from grape vineyards located in Poland.

23 Very good example in this respect is that of cider. In Poland it is required to use at least 60% of apple juice, whereas in UK it is 35% (https://www.theguardian.com/lifeandstyle/wordofmouth/2011/aug/09/consider-cider) and only 15% in Sweden (https://www.livsmedelsverket.se/matvanor-halsa--miljo/maltider-i-vard-skola-och-omsorg/aldreomsorg), accessed 8 April 2020.

24 According to Article 3.1.d. of the Wine Act 2011, the fruit wine is a drink with an alcohol content of 8.5% to 16% by volume, obtained as a result of alcoholic fermentation, without the addition of alcohol, and with the possibility of sweetening or coloring. In the case of the most popular apple, pear, or strawberry wines, the amount of fresh fruit used to make the setting must not be less than 2 kilogram per liter of water in the setting, and the product that must share in the set for such beverages may not be less than 60% by volume.

25 According to Article 3.1.c of the Wine Act 2011, the branded fruit wine has maximum 15% alcohol content by volume, and the possibility of sweetening is limited only to sucrose or fruit must and have an aging period of not less than six months. In the case of branded apple, pear or strawberry wines, the quantity of fresh fruit used to make the setting must not be less than 2.5 kilograms per liter of water in the setting.

It is worth noting that since 2011, national regulations have significantly reduced the possibility of using fruit juices other than those used in the setting, so that in the case of fermented wine drinks that are not subjected to flavoring, there is no possibility of changing the nature of the product. This has limited the previous practice of adding chokeberry juice to a non-flavored fermented wine drink obtained from an apple setting in order to obtain the taste and color characteristic of chokeberry in the finished product. This can be described as one of the first effects of changes in regulations that was caused by the decision of the CJEU in the *Siebrand BV* case,[26] which will be discussed below.

The Wine Act 2011 explicitly defines products that may contain added ethyl alcohol. Looking from a tax perspective, most of these products, until recently, have been classified as intermediate products, but now their legal and tax status is being questioned. These products are primarily flavored fruit wines and fruit tinctures.

Flavored fruit wine contains at least 75% of fruit wine supplemented with a variety of other products and flavored with substances other than those obtained from grapes.[27] The wine tinctures, on their part, are specific products regulated in Polish law. The very name "tincture" refers to traditional, homemade alcohol products obtained through the maceration of herbs and fruits in the distilled alcohol. Since entering the EU, commercial sales of wine and spirits tinctures in Poland have grown dynamically, despite the fact that neither the Spirit Drinks Act 2006[28] nor any other legislation contains definition for the term "tincture". Thus, tinctures made as spirit drinks obtained out of maceration of fruit or herbs in distilled alcohol and tinctures based on fruit wine were present in the market. The term "tincture" was introduced by the Wine Act 2011, as a part of the expression "fruit tincture".[29] Distinguished from

26 Judgment of the Court (Third Chamber) of 7 May 2009, *Siebrand BV v Staatssecretaris van Financiën,* C-150/08 [ECLI:EU:C:2009:294].

27 Flavored fruit wine is a drink with an alcohol content between 8.5% and 18% by volume, flavored with substances other than those obtained from grapes. Flavored fruit wine must contain at least 75% fruit wine, with the possibility of adding rectified alcohol, honey or fruit distillate, as well as with sweetening or dyeing. Fortified fruit wine is a drink with an alcohol content between 16% and 22% by volume, obtained out of alcoholic fermentation of the fruit wine setting, with the addition of rectified alcohol, honey or fruit distillate, with the possibility of sweetening or coloring.

28 Act of 18 October 2006 on the production of spirit drinks and on the registration and protection of geographical indications of spirit drinks Polish Official Journal, 2006 No 208, item 1539 with changes.

29 According to Article 3.1.j. Wine Act 2011 on the production and bottling of wine products, trading in these products, and the organization of the wine market, the said "fruit tincture" means a drink with an alcoholic strength between 17% and 22% by volume,

"flavored tincture based on fruit wine" which has a very similar content, with the requirement that it should be flavored with substances other than those obtained from grapes. Application of those definitions of tincture in the Wine Act 2011 provoked much controversy. Small producers of artisan spirits tinctures expressed the most reservations in this respect.[30] Although they lost the battle in Polish parliament years ago, they won over wine competitors with the support of the tax authorities. *d*In effect, all the fruit wine tinctures were classified as being part of the spirit sector.

In addition, there are special statutory requirements for cider being low-alcohol wine that is based on apples or pears.[31] Due to the definition, Polish tax authorities have no problems with the classification of ciders or perries. However, doubts may arise regarding such products when imported from other EU countries. The reduced content of apples used for the production of cider outside Poland would not be sufficient to undermine the classification of this product by the Polish authorities of the National Tax Administration. For flavored ciders, however, the position of tax authorities is no longer so clear.

Before presenting the excise issues, it should be noted that two ordinances have been issued on the basis of the Wine Act 2011, which contain detailed

containing at least 60% fruit wine or fortified fruit wine and at least 10% macerate, with the optional addition of either rectified alcohol or a distillate of honey or fruit, sweetener or dye.

30 The artisan spirits tinctures (e.g. Karol Majewski from Nalewki Staropolskie) criticized the definition at the consultation meetings with economic operators in the Ministry of Agriculture in 2010–2012, in which one of the authors participated.

31 Cider is a drink with an alcohol content of between 1.2% and 8.5% by volume, obtained after alcoholic fermentation of the cider set, without the addition of alcohol, with the possibility of sweetening or adding apple juice or concentrated apple juice. According to the legal definition of "cider set" is a mixture made with whole or fragmented apples, apple must, apple juice or concentrated apple juice, with the option of adding water, sugar, yeast or food acids. The share of apple juice or concentrated apple juice, calculated on apple must in such a cider set, may not be less than 60% by volume (which is one of the highest minimum quality thresholds in EU countries). The Act allows the addition of the whole or ground pears, pear juice or concentrated pear juice, if they do not dominate the final taste, color or smell of apples in the product. According to Polish law, the only alcohol in cider must derive from apple fermentation, and the final product must also not contain other flavor additives than natural apple aromas. This is a fundamental difference when comparing Polish requirements with those for similar products imported from abroad, which can have very different flavors. The Polish structure of the statutory definition of perry is analogous to the definition of cider, with the difference that it refers to the setting obtained from pears. Cf T Vicklund, E.R. Skottheim, S.F. Remberg, Various Factors Affect Product Properties in Apple Cider Production, International Journal of Food Studies, January 2020, Vol. 9, 84 ff.

technical regulations. The first is the Regulation of the Minister of Agriculture on the detailed method of producing fermented wine drinks etc.[32] The second is the Regulation of the Minister of Agriculture on the types of fermented wine drinks etc.[33] It is important, however, that they result from the national tradition of fermented beverages production and apply to fermented beverages entrepreneurs operating in Poland. Therefore, these technical regulations should also be taken into account in tax classifications, especially since quality standards and tax classifications refer to the requirements of taste, smell or appearance. There is a need for coherence of the legal system in this respect. Meeting the organoleptic requirements of fermented beverages contained in industry regulations should be tantamount to recognition of the fermented nature by customs or tax authorities.

4 Specific Regulations for Fruit Wine and Other Fermented Products as Enacted in Poland and Differences with Regard to Provisions on Grape Wines

Industry regulations may not interest average consumers or sellers, but for producers, they are of fundamental importance. In practice, the tax regulations are more important for producers. Though Polish producers of fermented beverages classify their products on the basis of the Wine Act 2011, tax authorities hardly care about it. Instead, they use for tax purposes only provisions of the Excise Duty Act 2008.[34]

Fruit wines and other fermented fruit drinks are, like all alcoholic beverages, excise harmonized products in the EU. Classification based on the Combined Nomenclature (CN)[35] plays a key role in determining the appropriate excise duty rate in all Member States. It is part of the international classification of goods as applied for customs purposes around the world, in

32 Regulation of the Minister of Agriculture and Rural Development of May 21, 2013 on the detailed method of producing fermented wine drinks and methods of analyzing these drinks for official control in the field of commercial quality (Polish Official Journal 2013, item 624).

33 Regulation of the Minister of Agriculture and Rural Development of 22 May 2013 on the types of fermented wine drinks and detailed organoleptic, physical and chemical requirements that these drinks should meet (*Polish Official Journal* of 2013, item 633).

34 Excise Duty Act 2008, December 6, 2008; *Polish Official Journal*, 2009 No 3, item 11 with changes.

35 Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (*Official Journal, EC,* L 256, 07.09.1987.).

accordance with the International Convention on the Harmonised Commodity Description and Coding System of 14 June 1983.[36] Wine-growing countries had decisive influence on the shape of the Combined Nomenclature when it was adopted. This is one of the crucial circumstances explaining why CN heading 2204 (grape wines) is clearly constructed and well developed. It contains over one hundred subcategories that accurately describe different types of grape drinks. Thanks to this accurate and comprehensive classification, there are essentially no disputes regarding these items. However, if the grape wines are flavored, they fall under CN heading 2205 (vermouths and other flavored grape wines). In contrast, CN 2206 (other fermented beverages) looks very different.

It is useful to describe characteristic deficiencies of the CN 2206 group, taking cider as an example. It is described there as an alcoholic drink obtained by fermenting apple juice. The precision of the description is by far insufficient, for it does not determine the allowable minimum proportion of apples, what other additives may contain cider, or whether flavored cider is truly cider or not. Similar doubts apply to perry, a low-alcohol drink fermented from pears. In addition, CN heading 2206 covers various groups of fermented beverages other than beer and grape wine, including mixtures of various types of fermented drinks with non-alcoholic drinks or various types of fermented drinks. The comments and subsequent Explanatory Notes, which repeat phrases from the CJEU rulings, also do not specify this position sufficiently. They indicate e.g. that all these drinks can be both naturally sparkling and artificially saturated with carbon dioxide. They are classified in this heading if they are fortified by the addition of alcohol or if the alcohol content has increased as a result of further fermentation, provided that they retain the nature of the products of this heading. This heading also includes mixtures of non-alcoholic beverages and fermented beverages as well as mixtures of fermented beverages under the previous heading in Chapter 22, e.g. mixtures of lemonade and beer or wine, mixtures of beer and wine, with an alcoholic strength by volume exceeding 0.5% vol. Some of these drinks may also contain added vitamins or iron compounds. These products sometimes called "dietary supplements" are intended for consumption in order to maintain good health or well-being. Therefore,

36 *Polish Official Journal,* 1997, No 11 item 62. Cf. Autar Krishen Koul, *Guide to the WTO and GATT: Economics, Law and Politics* (Springer 2018) 199; Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178; Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge 2018) 429 ff.

it should be said that the CN 2206 heading is far from providing an accurate description of fermented beverages.

Pursuant to the first general interpretation rule of the Combined Nomenclature, the meaning of the CN and its comments on sections or chapters should be applied to individual CN headings. Thus, referring to the meaning of a given concept in the whole legal order is crucial for tariff classification. For example, in the explanatory note made available through the Integrated Customs Tariff Information System (ISZTAR4), CN heading 2206 indicates that this heading covers all fermented beverages other than those covered by headings 2203 to 2205. In addition, if we consider 10 examples of categories that fall under CN heading 2206,[37] it will be difficult to find common features for those products, not even mentioning searching for some essence of the fermented character. However, CN 2206 category seems to be an obvious place for flavored fermented beverages.

In accordance with Article 3 of the Excise Duty Act of 2008, for the purposes of collecting excise duty and marking goods with excise strip stamps, as well as for Binding Excise Information (WIA), the classification shall be applied in a system corresponding to the Combined Nomenclature. At the same time, changes in the Combined Nomenclature do not cause changes in excise duty taxation of excise goods, if not specified in the Excise Duty Act 2008. For the purposes of collecting excise duty under alcoholic beverages, there are categories of beer, wine, fermented beverages, intermediate products and ethyl alcohol (liquid with at least 80% alcohol content or spirit drinks). The main contentious area in the field of flavored fruit wines and other fermented products is the scope of the "intermediate products" category. In accordance with Article 97 of the Excise Duty Act 2008, it consists of all products falling within CN headings 2204,[38] 2205,[39] and

37 These are 1) cider, an alcoholic drink obtained by fermenting apple juice, 2) perry, a fermented cider-like drink obtained from pear juice, 3) mead, a drink obtained by fermentation of an aqueous solution honey. (This item also includes hydromel vineux – honey containing the addition of white wine, aromas and other substances), 4) raisin wine, 5) wines obtained by fermentation of fruit juices, other than fresh grape juice (wine from figs, dates or berries) or from vegetable juices, with an alcoholic strength by volume of more than 0.5% by volume, 6) "Malton", a fermented drink prepared from malt extract and wine sludge, 7) spruce, a drink obtained from the leaves or small branches of spruce fir or spruce essence, 8) saké or rice wine, 9) palm wine, prepared from the juice of some palm trees, and 10) ginger beer and herbal beer, prepared from sugar and water as well as ginger or herbs, fermented with yeast.

38 Wine of fresh grapes, including fortified wines; grape must, other than that of heading 2009.

39 Vermouth and other wine of fresh grapes flavored with plants or aromatic substances.

2206,[40] except for beer, wine and fermented products (i.e. products specified in Articles 94–96 of the Act).

The legal structure presented above requires some reference to other categories. From the excise perspective, the definition of beer is considered to be relatively simple, as it includes products classified under CN heading 2203 00 (malt beer) and mixtures of beer with non-alcoholic beverages classified under heading CN 2206 00 if their actual alcoholic strength by volume exceeds 0.5%. For wine, the situation is more complex. This category includes still wines and sparkling wines. Still wine shall be all products falling within CN headings 2204 and 2205 (except sparkling wine) with an alcoholic strength by volume exceeding 1.2% but not exceeding 15% provided they satisfy conditions as to the strength and the origin of the ethyl alcohol contained.[41] Sparkling wine, on the other hand, shall be all products with CN codes 2204 10, 2204 21, 2204 29 10 and falling within heading 2205, which collectively meet certain specified conditions.[42] To put it simply, it can be stated that, for tax purposes, wine is classified in products falling within CN headings 2204 and 2205 that do not contain added alcohol.

Fermented beverages have an even more complex structure. This group includes sparkling fermented beverages and non-sparkling fermented beverages.[43] They are all products falling within CN heading 2206 00 and products within CN codes 2204 10, 2204 21, 2204 29 10 and falling within heading 2205, not listed in Article 95 (wine), meeting several technical requirements and characteristics[44] – provided that all the ethyl alcohol contained in the final

40 Other fermented beverages – for example cider, perry and mead, saké; mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included.

41 All the ethyl alcohol contained in the still wine must exclusive provenance from the fermentation process, or with an actual alcoholic strength by volume exceeding 15% but not more than 18%, and 2) that they do not contain any enrichment additives and that all the ethyl alcohol contained in the finished product comes exclusively from the fermentation process.

42 (a) they are in bottles fitted with mushroom-shaped cork, fixed with knots or clips, or characterized by pressure of at least 3 bar due to the presence of carbon dioxide in the solution, b) have an actual alcoholic strength by volume exceeding 1.2% by volume but not exceeding 15% by volume, c) all of the ethyl alcohol contained in the finished product comes exclusively from the fermentation process.

43 Cf. Alexandru Grumezescu and Alina Butu (eds.) *Fermented Beverages: Volume 5. The Science of Beverages* (Woodhead Publishing 2019).

44 The products are distributed in bottles fitted with a mushroom-shaped cork, fixed with knots or clips, or have a pressure of at least 3 bar due to the presence of carbon dioxide in the solution, and: a) have actual alcoholic strength by volume exceeding 1.2% by volume but not exceeding 13% by volume, or (b) have an actual alcoholic strength by volume exceeding 13% by volume but not exceeding 15% by volume.

product comes exclusively from the fermentation process. Non-effervescent fermented beverages are products falling within CN headings 2204 and 2205, with several exceptions,[45] provided that all the ethyl alcohol contained in the finished product comes exclusively from the fermentation process. In simple terms, it can be considered that for excise purposes, fermented beverages are products classified under CN heading 2206 and products marked with CN codes 2204 10, 2204 21 10, 2204 29 10 and falling within heading 2205, which are neither grape wine nor beer.

For a complete picture, the excise definition of the category 'ethyl alcohol' should be also considered, in which there is an attempt to categorize some of the disputed types of beverages produced from the processing of fruit wines.[46] Finally, there is room for interpretation as to when distilled alcohol added to other alcoholic drinks turns it into ethyl alcohol, and when it will be considered as an intermediate product. Until recently, the proportion of alcoholic strength was decisive in this respect under Polish law. If in the final product more alcohol came from fermentation than from distillation, then such a drink was considered an intermediate product. In light of the case law of the CJEU, such interpretation can be considered obsolete.

To sum up, the intermediate products category includes mixtures of beer, wine or fermented products to which distilled alcohol has been added, but this mixture has not lost its fermented character and has not been classified as spirit drinks. Moreover, beverages to which no alcohol has been added, but contain more than 15% of fermented alcohol (excluding grape wines with an upper limit of 18%) are also included in this category. It should be emphasized that the general interpretative rules of the Combined Nomenclature do not preclude the tax authorities from referring to the Wine Act 2011 and implementing regulations as adopted on the basis of the tariff classification of fermented

45 The exclusion concerns products referred to in Article 95 (wine) and products falling within CN heading 2206 00, with the exception of all products referred to in Article 94 (beer), of an actual alcoholic strength by volume exceeding 1.2% by volume but not exceeding 10% by volume, or of an actual alcoholic strength by volume exceeding 10% by volume but not exceeding 15% by volume.

46 Within the meaning of the Excise Duty Act, three types of products are included in the product named „ethyl alcohol": 1) products with an actual alcoholic strength by volume exceeding 1.2% in volume, falling within CN headings 2207 (spirit) and 2208 (spirit drinks), even if they are products part of a product belonging to another chapter of the combined nomenclature; 2) products of CN headings 2204, 2205 and 2206 00 with an actual alcoholic strength by volume exceeding 22% by volume; 3) beverages containing diluted or undiluted ethyl alcohol. The quoted definition does not arouse disputes in point 2, because exceeding the power of 22% is an objective criterion, easy to check.

beverages. However, from the perspective of the coherence of the legal system, such a reference would be desirable.

5 Classification of Products Based on Non-grape Fruits Fermentation and the EU Law

The market for fermented beverages from fruits other than grapes in Europe has been growing for several years, mainly due to cider (especially the flavored one), but the market is regulated differently in different EU countries. The lack of consistent and clear regulations in this regard led to a situation where some entrepreneurs have creatively used the intermediate products category to understate their excise duties. In practice, this meant that the products allegedly derived from cider (or other fermented products) were in fact diluted spirit with a slight admixture of cider. In principle this should not affect the free movement of goods, as a product lawfully marketed in one Member State can be traded in any other EU country (Rule Cassis de Dijon, C-120/78.[47]) The application of this rule does not prevent custom and tax authorities from verifying the original classification as provided by the producer. Moreover, significant differences in terminology and quality standards may mislead consumers, which is contrary to EU law (Article 8 of Regulation 178/2002).[48] Currently, only the general provisions of the Combined Nomenclature (CN codes) are common to EU countries for other fermented beverages. However, they are too general and are interpreted differently in individual EU countries.

In this context, reference to the case law of the Court of Justice of the EU is justified, especially in order to draw the line between "intermediate product" and "spirit drink". The first is the decision of 7 May 2009 in the case of *Siebrand*

47 Cf. Maria Inmaculada Ihle-Masip, *The relationship of the Free Movement of Capital to the other Fundamental Freedoms* (Diplomica Verlag 2005) 24–25; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Bloomsbury 2013) 273; Tinne Heremans, *Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation* (*Modern Studies in European Law*) (Hart Publishing 2012) 320–321; Karolina Żurek, *European Food Regulation after Enlargement: Facing the Challenges of Diversity* (Brill 2011) 95; Edoardo Traversa and Matthieu Possoz in Michael Land et al. (eds), *CJEU – Recent Developments in Direct Taxation 2017* (2018) 32.

48 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [OJ L 31, 1.2.2002, p. 1–24].

BV v Staatssecretaris van Financiën (C-150/08).[49] The CJEU ruled that beverages based on alcohol from the fermentation process, initially corresponding to CN heading 2206, to which a certain amount of distilled alcohol, water, sugar syrup, flavors and colors were added, and as a result of which these beverages lost the taste, smell or appearance of the drink produced from certain fruit or natural products, do not fall within heading 2206, but rather in heading 2208 of the Combined Nomenclature. It is important, however, to pay attention to the details of the case. The issue in the case was the tax classification of alcoholic beverages named 'Pina Colada', 'Whiskey Cream' and 'Apfel Cocktail'.[50] They were to be made on the basis of cider. The volume of alcohol in all three drinks was 14.5%, of which 12% was provided for distilled alcohol and 2.5% from the fermentation of apple concentrate.[51] The very statement of the proportions of the origin of alcohol should be decisive in this matter. The Tribunal raised this fact in paragraphs 28–33 of the ruling, but in its thesis it went much further than the facts. Admittedly, paragraph 40 of that judgment mentions the addition of a certain amount of alcohol, but the proportions have not been taken into account at all in the argument of the judgment. On the other hand, the Court emphasized the fact that the drinks under consideration lost the taste, aroma and appearance of a drink made from fruit or a specific natural product and should therefore not be classified as fermented products (CN 2206) but as spirits (CN 2208).

The second important ruling of the CJEU in this respect was issued on July 14, 2011 in the case of *Paderborner Brauerei Haus Cramer KG v Hauptzollamt Bielefeld*.[52] The case did not directly concern intermediate products, but the demarcation between beer and spirits. Nevertheless, the conclusion of this judgment also applies to flavored fruit wines. The Court in this case held that the law should be interpreted to mean that a liquid called "malt beer base", with an alcohol content of 14% by volume, obtained from brewed beer, which subsequently underwent clarification process followed then by ultrafiltration leading to the dilution of bitter substances or proteins, is to be classified as a spirit drink (CN heading 2208). This judgment is

49 Cf. Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2013) 204; Krzysztof Lasiński-Sulecki and Wojciech Morawski, 'Konsekwencje wyroków Trybunału Sprawiedliwości w sprawach Siebrand i Paderborner Brauerei Haus Cramer', *Monit. Prawa Celnego Podat.* (2016) R. 21 nr 1, p. 20–25.

50 *Siebrand*, C150/08, EU:C:2009:294, paragraph 18. 8.

51 *Siebrand*, C150/08, EU:C:2009:294, paragraph 18.8.

52 Judgment of the Court (Eighth Chamber) of 14 July 2011.Paderborner Brauerei Haus Cramer KG v Hauptzollamt Bielefeld [ECLI:EU:C:2011:487]. Cf. Szymon Parulski, Akcyza. Komentarz, wyd. III, LEX/el.

important because clarification and filtration are processes commonly used in the production of fermented beverages. The question is: to what extent do these processes affect the change of the characteristics of a given product category?

The third major classification judgment is the CJEU decision of 12 May 2016 in the case of *Toorank Productions BV v. Staatssecretaris van Financiën.*[53] The Court decided about the effect of adding of substances like ethyl alcohol, sugar or flavors, for classification of an alcoholic product. It appeared that even if the percentage of an added alcohol does not exceed 49% of the whole alcohol quantity in the drink, while the remaining 51% is obtained in the direct fermentation process, a specific drink might be still reclassified from 2206 to 2208.[54] However, the ruling also concerned other drinks that contained solely alcohol from fermentation and was also reclassified to CN 2208 due to the loss of fermented character resulting not from adding distilled alcohol but from intensive flavoring. Moreover, it appeared that beverages with the addition of alcohol or sugar could be still classified under CN 2206, provided that their fermented nature is preserved. Therefore, the decisive character for classification under the CN 2206 heading has the complex of specific organoleptic properties resulting from fermentation that could be named as "fermented character" of a product.[55] It was disappointing for producers, however, that the tribunal did not provide the precise limits or other objective criteria to be met by a fermented drink or any closer description of the "fermented character". According to the Court, the addition of substances (be it either alcohol, sugar, flavorings or others) to a drink based on the fruit fermentation, which is changing its taste and aroma to the extent that it loses its fermented character, should result in reclassification into the group of spirit drinks.

Some producers of fermented beverages argue that, in the broadest interpretation of the CJEU rulings, classification problems are present for any flavored product.[56] However, this position seems to be too far-reaching. With

53 Judgement of the Court (First Chamber) in joint Cases C-532/14 and C-533/14 Toorank Productions BV v. Staatssecretaris van Financiën [ECLI:EU:C:2016:337].Cf. Krzysztof Lasiński-Sulecki, Klasyfikacja wyrobów alkoholowych: wyrok Trybunału Sprawiedliwości z 12.05.2016 r. w sprawach połączonych Toorank Productions BV przeciwko Staatssecretaris van Financiën (C-532/14 i C-533/14), Prz. Podat. (2016) nr 8 (304), p. 44–45; Jacek Matarewicz, Ustawa o podatku akcyzowym. Komentarz, LEX/el.

54 *Toorank Productions*, C532/14 and C533/14, EU:C:2016:337, paragraph 60.

55 *Toorank Productions*, C532/14 and C533/14, EU:C:2016:337, paragraph 38.

56 https://biznes.interia.pl/podatki/news-producenci-win-owocowych-skarza-sie-na-wytyczne-fiskusa,nId,4034945, accessed 8 April 2020.

the narrowest understanding of the judgments in the above cases, it can be assumed that, regardless the fact that each addition of flavors is intended to change the taste and aroma of the product, not always it deprive the product from its fermented character. A particular beverage loses its fermented character only in case of such an interference with organoleptic characteristics that the fermented raw material is completely unnoticeable. This position seems to be more correct. It should be borne in mind that the limit indicated by the Court is not precise. It is unclear whether this reference should apply to the average consumer or a properly trained expert, since their ability to feel the taste or smell residue of fermented fruit certainly can vary. In this situation, there is a high risk of classification controversies. There is also a third, indirect possibility of understanding the judgment in this respect. It concerns the dominant taste that determines the nature of the product. Following this approach, even if the raw material used is detectable, but the amount of additives make it irrelevant, it can be already considered that the nature of the fermented product has been lost and such a product should be reclassified from CN heading 2206 to CN 2208. If the rules were to be applied consistently, flavored cider, in which neither taste nor smell of the apple are perceptible, should also be classified as spirit drinks (CN 2008).

The three judgments mentioned above seem to indicate that the spirit drinks category is an open and very absorptive group. It includes all alcoholic beverages that have lost their original character as a result of ultrafiltration or by the addition of aromas, sugar and flavors. It should be noted here that there is no ruling that would extend the application of this rule to flavored products based on grape wines. In practice, it is difficult to make precise qualifications because they are largely based on organoleptic studies, in particular on taste and smell. In such a situation, the case law of the CJEU and the explanatory notes to the Combined Nomenclature may not be sufficient to ensure consistency and the uniform application of EU law in this respect. It would be advisable, therefore, to combine the fermented character with more objective physico-chemical parameters.

5.1 *Inconsistencies of the Combined Nomenclature*

At the same time, it is worth showing the major inconsistencies arising from the current design of the Combined Nomenclature. Flavored fermented grape products have their own CN heading 2205, which covers various drinks (generally used as aperitifs or tonics) obtained from wine produced from fresh grapes (as defined in heading 2204) and flavored with vegetable extracts (leaves, roots, fruit, etc.) or aromatic substances. This group of flavored grape products includes mainly vermouths, Sangria, "Marsala all'uovo", "Marsala alla mandorla"

and "Crema di Marsala all'uovo",[57] or Ginseng tonic.[58] The case law of the CJEU and the European Commission explanatory notes concern only CN heading 2206. Therefore, there is doubt as to the way flavored grape products in which the taste and aroma of the grape would be imperceptible should be classified. If they are classified under CN heading 2205, this would raise reasonable doubts as to the coherence of the legal system and the proportionality of those principles in this area.

In addition, it is worth mentioning that the EU classification rules sometimes *expressis verbis* mention the consequences of strengthening a drink with distilled ethyl alcohol. Additional Note 5 (b) to Chapter 22 of the Common Customs Tariff provides that CN subheadings 2204 21 11 11 to 2204 21 99 and 2204 29 12 to 2204 29 99 include wine fortified with distilled alcohol. This applies to products having an alcoholic strength between 18% and 24% obtained solely by adding wine distillate of maximum strength of 86%. In addition, these products may have a maximum volatile acidity of 1.5g per liter, expressed as acetic acid. At the same time, it should be noted that although fortified wines according to the Common Customs Tariff may exceed 22% in alcohol content (CN 2204 21 99), from a tax perspective they will be subject to the rate applicable to ethyl alcohol, pursuant to Article 93 item 1 point 2 of the Excise Duty Act.

There are no such special regulations for fermented fruit drinks, which means that in practice there are doubts as to how much alcohol or aroma can be added so as not to deprive the product of its fermented nature. Nevertheless, it should be noted that most alcoholic fruit drinks are not fortified with a distillate of these fruits, which is a fundamental difference with brandy fortified wines. The above remark indicates, however, that the taste and smell of the raw materials used for fermentation is important. It follows that the level of distillation should not exceed 86% in order to preserve the basis of the grape derived elements.

The classification problem concerning fermented fruit drinks has already been recognized at the EU level. It was not only the subject of CJEU jurisprudence but also taken into account by the European Commission while it was working on the Evaluation of Council Directive 92/83/EEC.[59] The authors of

57 Drinks based on Marsala wine and seasoned with egg yolks, almonds and other aromatic substances.

58 Liquid with a strength of 11.5% alcohol, with highly concentrated ginseng extract, bitter orange syrup, sorbitol and wine made from fresh grapes.

59 Evaluation of Council Directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages – Final Report 2016-10-10, DOI 10.2778/506650, https://op.europa.eu/en/publication-detail/-/publication/fa0a9de1-f4e0-11e6-8a35-01aa75ed71a1 (27.03.2020), hereinafter: Evaluation Report.

the evaluation report argued that the consultation of stakeholders revealed systemic weaknesses relating to classification, in particular with respect to the completeness of the available product categories, legal certainty and clarity of classification in the context of technological and market developments. It was also acknowledged, that the problems primarily concern the category of "other fermented beverages" as it is very disputable, which products are intended to fall within this category[60] n. 18 Member States and 23% of economic operators reported difficulties with assigning products to the categories specified in the Directive, while 43% of the respondents to the open public consultation (citizens as well as companies) reported that they had seen or purchased lower-priced alcoholic products that looked like corresponding higher-strength spirits.[61] Moreover, in the mentioned public consultation, a quarter of respondents of all types noted that they could give examples of drinks being for them of unobvious character and surprising price in comparison to other products that seemed to be similar.[62]

One of the most problematic categories mentioned in the evaluation report were fermented beverages pushed to a level of 15–21% which look like its equivalent, higher rate spirits.[63] The main uncertainty is knowing whether these products should be classified as "other fermented beverages", "intermediate products", or "ethyl alcohol". Without attempting to analyze the "correct" legal interpretation of the customs classification under code CN2206 (which is the subject of past and present case law), it is clear from the current analysis that the great majority of difficulties with classifying alcoholic beverages for excise purposes are due to the linkage between the customs classification and the definitions of the excise categories.

The above-mentioned Commission evaluation report refrained from answering the question of what the correct classification in dubious cases should be. It has confirmed however, that significant classification problems arise from the lack of a sufficiently precise definition of the "other fermented beverages" category covered by the heading 2206 CN. As part of the evaluation of existing regulations, the Commission also pointed out the need to clarify provisions of Directive 92/83 regarding the definition of "other fermented beverages".[64]

60 Evaluation Report – point. 2.1, p. 26–27.

61 Evaluation Report – point. 2.4, p. 34.

62 Evaluation Report – point 2.3.1, p. 33.

63 For instance, wine to which flavors containing alcohol have been added; beer to which alcohol of distilled origin is added; sparkling wine; cooking wine which contains additional ingredients other than alcohol.

64 Evaluation Report – point 2.7, p. 42.

Such a conclusion cannot be disagreed with, even from the perspective of Polish classification disputes. Despite many arguments in favor of amendments to the Directive, this process has been stopped.

At the EU level, rules resulting from the CJEU case law discussed above are consistently implemented. Subsequent products, until recently classified as "intermediate products", are classified in the "spirit drinks" category. The latest Explanatory Notes to CN 2206 codes issued by the European Commission on July 1st, 2019 did not solve any doubts.[65] The new text is in fact a simple repetition of previous judgments. There is no clarification of what is the nature of fermented beverages or fermented character. This approach is also demonstrated in the recent Commission Implementing Regulation (EU) No 2019/923 of 3 June 2019 concerning classification of certain goods in the Combined Nomenclature.[66]

This might be well illustrated by an example of a product made up of a mixture of apple wine and ethyl alcohol, which is subject to the Regulation 2019/923.[67] This product has an alcoholic strength by volume of 4% to 6%. The product is presented for use in the manufacture of cocktails. It has an alcoholic, sweet and sour smell and taste. The product is intended for human consumption and is put up for retail sale in containers of two liters or less. On the basis of General Rules 1 and 6 for the Combined Nomenclature interpretation and the wording of CN codes 2208, 2208 90 and 2208 90 69, the European Commission considered that the product presented above was an alcoholic beverage which did not retain the character of the product of heading 2206,[68] as the added substances resulted in the loss of properties and characteristics of fermented apple juice. There is no majority rule that determines the nature

65 Explanatory Notes to the Combined Nomenclature of the European Union (2019/C 119/04) [OJ C 119/4, 1.07.2019].

66 It was produced by mixing fermented apple juice with distilled ethyl alcohol, sparkling water, sugar, citric acid, flavors, preservative (E 202), caffeine and dyes (E 102, E 124). The addition of distilled ethyl alcohol to fermented apple juice increases its alcohol strength: 62.05 liters of fermented apple juice with a capacity of 18% vol. (11.17 liters of alcohol) is mixed with 37.95 liters of distilled ethyl alcohol with a strength of 28.28 vol. (10.73 liters of alcohol). The alcohol content of fermentation in the product is 51%, and distilled alcohol constitutes 49% of the total alcohol content. The mixture thus obtained is diluted to a strength of drink from 4% to 6% by volume by adding sparkling water. Sugar, citric acid, preservative (E 202), caffeine, dyes (E 102, E 124) and flavors (e.g. mango, rum, passionflower or porto) are also added.

67 Commission Implementing Regulation (EU) 2019/923 of 3 June 2019 concerning the classification of certain goods in the Combined Nomenclature [OJ L 148, 6.6.2019, p. 7–9].

68 See also the Explanatory Notes to the Harmonized System to heading 2206, third paragraph.

of the products classified in CN 2206 so the fact that distilled alcohol does not exceed 49% of the alcohol contained in the product by volume and the remaining 51% is the result of a fermentation process is not a classification criterion. Consequently, the classification under heading 2206 is excluded because the product has objective characteristics similar to those of a spirit drink, and no longer those of a drink obtained by fermenting certain fruits or plants. The product is therefore to be classified under CN code 2208 90 69 as other spirit drinks in containers holding two liters or less.[69]

Another example of a product to which Regulation No. 2019/923 applies is a drink with a strength of 15% alcohol, produced as a result of fermentation of sugar beet extract,[70] with the yeast removed by means of sedimentation and microfiltration. The product has no specific smell or taste other than alcoholic. The product is sold in bulk being intended as a base for the preparation of alcoholic beverages. Also in this case, the European Commission had no doubt that it should be classified under heading 2208 of the CN. This was primarily due to the fact that the sugar beet extract is neutral raw sugar, and therefore the product may not have the taste, smell or appearance of a drink made from specific fruit or natural products. It therefore did not obtain the characteristics of the product of heading 2206, but acquired the characteristics of ethyl alcohol of heading 2208. A product which is obtained by processing fermented sugar beet extract and which is intended to be used as a basis for the preparation of alcoholic beverages, being neutral in color, smell and taste as a result of purification (including microfiltration) is therefore covered by heading 2208 and has been classified under CN code 2208 90 99 as "other undenatured ethyl alcohol in containers holding more than two liters".

Regulation No. 2019/923 implements principles that were previously defined in the jurisprudence of the CJEU (*Siebrand* and *Toorank*). In the case of a product obtained from sugar beets, it should be emphasized that it was not the filtration process itself that was decisive for changing the classification, but instead it was the large amount of sugar in the product (and even the absence of a raw material other than sugar beet). In this regard, the question should also be asked of how much added sugar is acceptable so that the product can

69 Annex to the Commission Implementing Regulation (EU) 2019/923 of 3 June 2019 concerning the classification of certain goods in the Combined Nomenclature [OJ L 148, 6.6.2019, p. 7–9].

70 In this case, the raw material contained 93.4% sucrose (96.7% sucrose in dry matter), protein, trace elements, fiber and water. The fermentation process was obtained by the addition of water and yeast and was continued until an alcohol content of 15% was reached.

retain its taste, smell or appearance when using a different raw material and, consequently, be classified in heading 2206.

To sum up classification decisions at the level of EU law, it is important to emphasize the importance of organoleptic features. In practice, taste and aroma often have a decisive impact on the classification of products into the category of either "fermented beverages", "intermediate products" or "spirit drinks". There is no doubt that, according to settled case law, taste can be a feature and an objective property of a product. However, in many contentious cases, settling based on taste alone is not easy and can be subjective. In the interest of legal system consistency, legal certainty and easier control, the decisive criterion for the tax classification of goods should in principle be sought in more objective characteristics and properties, such as those specified in CN headings and sections or chapter notes. Such conclusions stem from the settled case law of the CJEU. In this regard, it is advisable to clarify the objective criteria to be met by the fermented product and not to assign organoleptic properties to a decisive extent in most cases.

5.2 *Polish Application*

Polish tax authorities have been using a clear "rule of origin" for the dominant share of alcohol in the case of flavored fermented beverages with addition of distilled alcohol. If the majority of alcohol came from fermentation, then alcoholic beverages were recognized as fermented beverages described under CN code 2206 and the excise duty rate applicable to intermediate products was charged (Article 97 of the Excise Tax Act 2008). One of the last such classifications was the Binding Tax Interpretation of December 18, 2012 issued by the Director of the Customs Chamber in Warsaw. By that decision, a drink was classified as "fortified apple wine", in which the proportion of alcohol from fermentation to that from distillation was 51% to 49%.[71]

The policy of the Polish Ministry of Finance and subordinate tax authorities aims to limit the scope of various types of fermented beverages (from CN heading 2206) and to reclassify them to the group of spirit drinks (CN 2208). As a consequence, these products are burdened with a much higher rate of excise duty.[72] The tax authorities changed their approach, arguing that it was necessary to adapt the interpretation to the EC Communication on Explanatory Notes to heading 2206 of the CN, which appeared on 26 January 2013.[73]

71 BTI information PLPL-WIT-2012-01413 of 18 December 2012.

72 In 2019 it was a changed of 3.18 PLN per liter by volume to 57.04 PLN per liter of 100% alcohol.

73 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0028:0028:EN:PDF, accessed 8 April 2020.

In 2015 the institution of Binding Excise Information (WIA, Wiążąca Informacja Akcyzowa) was introduced to the Polish legal system.[74] It is a specific administrative decision as to the excise classification, which is issued by the Director of the Customs Chamber in Wrocław, which binds public administration bodies until it is repealed or annulled. The *ratio legis* of this mechanism was to secure the interests of taxpayers and the legal stability of trading. Since the introduction of this instrument, 72 decisions have been published in which the issue of CN 2206 appeared, but most concern spirit classifications.[75]

Basically, producers of fermented products submitted applications for the issue of WIA, indicating the correct position for their products under CN 2206. In 2015, a request on behalf of some of the largest producers was submitted for the WIA relating to classification of three products based on fruit wines, which were attributed to CN heading 2208 covering spirit drinks. The request concerned hypothetical future products. However, the hypothetical future products were described in the same way, as were described existing products of the main market competitor of the requesting company. Director of the Customs Chamber in Wrocław agreed with the entrepreneurs' classification, even if the applications were likely to be submitted in bad faith, just in order to force competitor to pay much higher excise duty. As a result, explanatory proceedings were initiated regarding calculation of excise duty collection. One of them concerned then the most popular wine tincture in Poland. Due to the large scale of turnover, and consequently the high tax risk, the manufacturer of this popular product has changed the receipt and tax classification.[76] This led to the complete disappearance of products described as tinctures from fruit wines, which were replaced with the category of spirit liqueurs of reduced alcohol content.

The interpretation as provided by the National Tax Administration agents aims towards an increasingly rigorous understanding of rules resulting from the *Siebrand* case.[77] Classification under CN 2208 heading is based not exactly on the loss of detestable taste and smell of raw materials used for fermentation, but it is sufficient, if the taste and smell is no longer dominant. Changes in the

74 The Act [what is the full name of the Act] of November 7, 2014 on facilitating business operations, entered into force.

75 Positive decisions issued by the Voivod Custom Houses are publicly accessible at <http://www.icwroclaw.pl/BIP/WIA/result.php> accessed 21 January 2020.

76 https://www.money.pl/gospodarka/wiadomosci/artykul/skarbowka-bierze-sie-za-pseudowodki-koniec-z,107,0,1906795.html the passage concerning reclassification of "*Barmańska*" and "*Nalewka Babuni*" products, accessed 8 April 2020.

77 Judgment of the Court (Third Chamber) of 7 May 2009, Siebrand BV v Staatssecretaris van Financiën, Case C-150/08 [ECLI:EU:C:2009:294].

approach of Polish authorities have been reinforced by the above-mentioned judgment of the CJEU in *Toorank* cases.[78] It should be emphasized, however, that the Court asserted in its judgment that, considering the final product, it is not the relation between the amount of alcohol resulting from fermentation and from distillation that has the overriding and exclusively decisive character.

Polish tax authorities take no account of the criteria from Wine Act 2011 for classification purposes. Some of the traditional fruit wine based products are classified in the spirits category and some others, which look like spirits, are still classified as a fermented category (so called intermediate product). There are also many products that are similar to wine based products, especially cider,[79] which were classified as beer avoiding the excise strips stamps regime as well as huge restrictions in advertising. The national market regulatory measures are in practice interpreted in a very diverse way putting emphasis either on CN classification or the principles established in the *Siebrand* and *Toorank* judgments.[80]

One of the most important examples (both from an economic and legal perspective) are the products described in the decision of the Director of the Custom Chamber in Poznań, 9 March 2015 on the individual interpretation of ILPP3/443-127/14-4/TK.[81] According to that decision, a flavored alcoholic drink with an alcohol content of up to 21% was considered an intermediate product, although its name, bottle shape, presentation and promotion on the internet indicate that it is a product that, in the view of consumers, may be considered a spirit drink. The said drink is produced in a multiple stage process[82] in accordance with the Wine Act 2011. The manufacturer described this drink as having organoleptic properties (taste, smell, appearance) characteristic for fermented

78 Judgment of the Court (First Chamber) of 12 May 2016, Toorank Productions BV v Staatssecretaris van Financiën, Joined Cases C-532/14 and C-533/14 [ECLI:EU:C:2016:337].

79 Cf. Judgment of the Polish Supreme Administrative Court, 12.09.207, I GSK 1420/16.

80 Judgment of the Court (Third Chamber) of 7 May 2009, Siebrand BV v Staatssecretaris van Financiën, Case C-150/08, Judgment of the Court (First Chamber) of 12 May 2016, Toorank Productions BV v Staatssecretaris van Financiën, Joined Cases C-532/14 and C-533/14.

81 https://interpretacje-podatkowe.org/akcyza/ilpp3-443-127-14-4-tk, accessed 8 April 2020.

82 The first stage in the production of this drink is the production of fruit wine (in accordance with Article 3 point 1d of the Wine Act 2011). The second stage is the production of flavored fruit wine of an alcohol content of up to 18% (in accordance with Article 3 point 1f of the Wine Act 2011). The third stage is production of fortified fruit wine, which has an alcohol content of up to 22% (in accordance with Article 3 point 1e of the Wine Act 2011). The fourth stage is the blending of two fermented beverages into a drink with an alcohol content of up to 21%. The finished product assembled in this way is subjected to other treatments necessary to maintain stability before being sent to the bottling process (pasteurization, filtration, etc.).

drink, since it is a mixture of two fermented drinks. Sugar, flavors and other additives used for production were considered as not changing the overall nature of the product.

The decision to categorize that product to CN 2206 was utmost controversial because the adding of ethyl alcohol, sugar, flavorings and other additives make apples (the raw material used for fermentation in this case) practically undetectable for consumers. In fact, a general fermented taste was still dominant in the product, by no means however resembling taste of apple, which were used for fermentation. According to the *Siebrand* rule, especially bearing in mind the shape of a bottle, the name, methods of marketing and consumer perception, it should be classified to CN 2208. The tax authority started therefore a reclassification procedure in 2015.[83] At this stage, the producer made a public statement announcing that due to the possible reclassification, the alcohol base used for the production would be changed from apples to grapes. This operation was considered to solve classification problems. In the meantime, the producer also applied to the Director of the Custom Chamber in Wrocław for another Binding Excise Interpretation (WIA) and was lucky again receiving confirmation that the product in question belongs to CN 2206 and the reclassification procedure was closed. This product is still offered via the internet shop as flavored vodka.[84] Apart from considerable doubts as to the regularity of the tariff classification, the case might be also considered as an example of an apparent breach of law prohibiting selling alcohol *via* the internet. It is also to be noted that the minimal alcohol content for vodka is 37,5%, so it is by no means authorized to present under the vodka name a product with a content of 21% alcohol.

6 Conclusion

Fermented beverages are produced in Poland conforming to the Wine Act 2011 and its subordinate legislation. In order to offer products in the domestic market or shipping them outside the country, an entrepreneur is required to classify its products into appropriate position within the Combined Nomenclature. The tax or customs authorities should also take into account industry regulations when checking the correctness of classification for tax purposes.

83 S. Ogórek, Skarbówka bierze się za pseudowódki. Koniec z nalewką z jabłek, avaliable at https://www.money.pl/gospodarka/wiadomosci/artykul/skarbowka-bierze-sie-za-pseudowodki-koniec-z,107,0,1906795.html, accessed 8 April 2020.

84 https://darwina.pl/wodka/24414-barmanska-mango-500ml.html, accessed 8 April 2020.

The lack of coherence of the legal system, as well as the fact that tax authorities has been disregarding Wine Act 2011 regulations aimed at securing quality of the products available in the market, cause legal uncertainty in this respect. Consequently, existing practice of classifying products as fruit wines does not guarantee the safety of legal transactions and raises doubts both in legal and economic terms.

Most of the doubts concern flavored beverages based on fruit wines. In Poland, many of these beverages are produced in complex multi-stage processes beginning with the fermentation of fruit/juices or its concentrates. The fermentation is often continued after the sugar addition. Flavorings, additives and other substances including the addition of ethyl alcohol of agricultural origin or distillate are introduced into some of the products, providing appropriate organoleptic properties. There is neither objective specification of the "fermented character" of those products nor a precise definition of what a "fermented beverage" is. Classification decisions are issued mainly on the basis of organoleptic assessment carried out by customs laboratories. The results of research in various cases of this type raise doubts. Although 10 years have already passed since the ruling in the *Siebrand* case, no uniform interpretation has been developed in Poland to date. This leads to a situation in which there is a state of legal uncertainty and questionable classification of beverages based on fruit wines under heading CN 2208, which refers to spirit drinks. This results in a significant increase in taxation. Some of the more interesting cases include fruit flavored wine, especially those based on apple wine, which was produced in an analogous way to flavored grape wines and falls into CN 2208, while vermouth remains in CN 2205. At the same time, some imported drinks have changed classification and intermediate products have become wine products due to a change of production process resulting in a very similar final product which, however, might be classified in a different way allowing considerable decrease of their excise tax rate.

There are also many products in the Polish market, especially flavored fruit wines, which are still classified under CN 2206. Most of them are apple wines with peach, strawberry or cherry flavors. They do not have the flavor of apples but still retain some general taste and flavor of fermented character. Consumers perceive those products as fruit wine, and it is not always important what was the main fruit used for fermentation. In most cases, tax authorities do not reclassify these products into the spirit category. Given the precedence of the EU law to national law, there is uncertainty as to where the limit for implementing the principles arising from the *Siebrand* should be. It seems that it is worth considering the common-sense approach of Polish tax authorities and recognize the general fermented nature, even if additives make the main raw

material used for fermentation no longer palpable. It seems advisable to consider establishing at the EU level the minimum content of selected compounds that should characterize fermented beverages even if the taste or smell of the raw material used for fermentation would be difficult to capture. This would also protect fermented products against over-purification. On the other hand, the indication of objective parameters would give a chance for more precise classification decisions, which would also reduce the number of surrounding controversies. The following *de lege ferenda* remarks can improve the situation on the fermented beverages market:

i. To ensure an equal level of consumer protection and an adequate level of information, a full harmonization of the definition, description and presentation of fruit wine and other fermented beverages is utmost desirable. It would contribute considerably to the EU's concern for supporting production of the highest quality food products and also protect producers against overzealous tax administration officials. Those technical fruit wine regulations should be also binding for tax authorities, especially when CN codes are not precise enough. It is most desirable to reconcile provisions of the industrial regulations with the excise categories so that a fermented beverage produced according to industrial regulations is classified in the same way for excise purposes.

ii. In order to avoid existing interpretative doubts and controversies arising therefrom, legislative action aimed at amending CN 2206 is most desirable. The new content should include a detailed definition of fermented beverages, the evaluation of which should be based on objective criteria and not on some subjective organoleptic appreciations. Moreover, some concrete new categories of products should be distinguished within the category, similarly to CN 2204 and CN 2205. Those new subcategories should be based on distinctions existing in industrial regulations as well as local traditions existing in the EU Member States producing fermented beverages from non-grape fruits.

iii. Given the numerous doubts regarding the implementation of the principles established in the case law of the CJEU, it is advisable to carry out additional scientific studies on the nature of fermented beverages. It is important to determine at the EU level the minimum content of selected compounds that should characterize these drinks. Indication of objective classification criteria should reduce the level of disputes, increase the protection of consumer interests, and ensure the proper functioning of the Single Market.

CHAPTER 7

Wine Law in Australia

Challenges of Local Identity in a Global Marketplace

Lisa Toohey

1 Introduction

Australia is a well-known producer of wine as well as a country of avid wine consumers. The wine industry is increasingly important for the economy, with strong growth predicted over the coming decade.[1] Revenue reached $6.9 billion in 2019 and it is expected to grow to a total value of $8.2 billion within five years.[2] Wine export and wine tourism contribute significantly to the Australian economy and it is perhaps surprising to some that Australia is the world's fourth-largest exporter of wines by value (following France, Italy and Spain), the largest non-European exporter of wine, and one of the fastest-growing exporters globally.[3]

Although researchers are only just beginning to systematically explore the history of fermentation practices by Australia's indigenous population,[4] the history of wine in the country is generally considered to have commenced when the grape vine was introduced as an imported species by British colonists. Since then, much has changed, in particular, the identity of an "Australian wine" has evolved, the notion of terroir has become a great deal more sophisticated, and the industry itself has experienced significant changes. Nonetheless, there is a remarkable amount of thematic continuity between

1 Wine Australia, 'Australian Wine: Production, sales and inventory 2017–18' (2018) <https://www.wineaustralia.com/getmedia/735b7324-ba8d-4fbd-967a-197d490be5e8/MI_PSI_Report_2017-18_F#:~:targetText=Total%20Australian%20wine%20production%20in,cases)%20less%20than%20in%2020174>.

2 Matthew Reeves, 'IBISWorld Australia Industry (ANZSIC) Report C1214: Wine Production in Australia' (2019) <https://my.ibisworld.com/au/en/industry/c1214/about>.

3 OEC, 'Wine Trade Exporters' <https://oec.world/en/profile/hs92/2204/>.

4 Maggie Brady, 'Alcohol Fermentation by Australian Aboriginals', in Helaine Selin (ed), *Encyclopaedia of the History of Science, Technology, and Medicine in Non-Western Cultures* (2014). See also Maggie Brady and Vic McGrath, 'Making Tuba in the Torres Strait Islands: the cultural diffusion and geographic mobility of an alcoholic drink', (2010) 45(3) The Journal of Pacific History 315–330.

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the earliest regulatory interventions in the colony and the modern-day contours of Australian wine law. The development of an identity for Australian wine, and the development of wine law and regulation, has been intertwined with other political contexts quite unique to Australia.

A constant theme in the story of wine in Australia is one of globalisation – grapes are an introduced species in the Australian landscape, and the development of a wine industry is tied closely to the opportunities and challenges of globalisation itself. It is generally accepted that vine specimens from what is now South Africa were part of the cargo brought with British colonising forces, and McIntyre explains that from the earliest days of the colony onwards, there were concerted efforts made by Governor Philip and others to facilitate the prospering of develop prosperous vineyards from that point forward.[5] One of the drivers of this initiative was the aspiration to create the "vineyard of Great Britain."[6] The role of tariffs and foreign trade also looms large in both the historical and contemporary context of the wine industry. Wine, according to Regan-Lefebvre, lacked many of the protections traditionally afforded to colonial products imported into the United Kingdom, with the fledgling industry being hampered by "the lack of tariff protection for the infant industry and the fierce competition from European wines."[7]

More recently, international treaties and relations have shaped the evolution of the Australian wine industry and, in the process, helped to forge a unique identity for Australian vintages – and that identity has become a powerful marketing force in key markets such as China. The Australian wine industry has also looked past domestic law to the sphere of public international law in order to assert its rights. This is an important strategy given the industry's fairly heavy dependence on export, which of course requires access to key foreign markets. This strategy can be seen in the recent success that the Australian wine industry had in lobbying the Australian government to bring a trade dispute against Canada.

The other constant theme of the story of wine regulation in Australia is one of public health and order – specifically the impact that attempts to curb excessive consumption of beer and spirits have had on the wine industry. Contemporary Australia faces quite specific, but not unique, regulatory challenges as a result

5 Julie McIntyre, *First Vintage: Wine in Colonial New South Wales* (UNSW Press, 2013).

6 Julie McIntyre, *First Vintage: Wine in Colonial New South Wales* (UNSW Press, 2013) at 5.

7 Jennifer Regan-Lefebvre, 'John Bull's Other Vineyard: Selling Australian Wine in Nineteenth-Century Britain' (2017) 45(2) The Journal of Imperial and Commonwealth History 259–283, <10.1080/03086534.2017.1294243>.

of changing attitudes towards wine consumption, as well as changing attitudes to the consumption of alcohol in general.

The development of viticulture in Australia was also driven by social and economic considerations – specifically the idea that wine would serve as a positive social intervention in the Colony of New South Wales. McIntyre explains that there were strong ideas surrounding the growing of grapes and drinking of wine as a sign of 'civilisation', as well as hopes that wine could be a lower-alcohol substitute that could remedy the colony of its reputation for 'notorious inebriety'. As McIntyre explains, it was believed that "proximity of vineyards and resulting consumption of wine in preference to stronger liquors could promote civility. This faith in the transformative qualities of locally-grown, light-alcohol wine depended on centuries-old stereotypes of European drinking habits".[8] Here, regulation was crucial, with legislation to support and encourage this change of drinking habits first introduced into the Colony of New South Wales in 1843. These laws promoted local wine production and tried to encourage temperance in alcohol consumption by increasing the price of spirits, prohibiting the addition of spirit to wines, and allowing officers in the military the opportunity to purchase duty free imported wine to influence their drinking preferences.[9]

In contemporary Australia, excessive alcohol consumption is still considered a substantial social issue. According to the World Health Organization (WHO), Australia ranks as one of the largest consumers of alcohol, particularly in problematic consumption referred to as "heavy episodic drinking" – across the population generally, but especially in relation to young people aged 15–19 years old.[10] As in the past, recent regulatory attempts to ameliorate these health risks have impacted the wine industry despite it not typically being the cause of problematic consumption.

This chapter provides a primer on wine law in Australia, focussing on the regulation of the industry for the past 20 years. It will begin with a brief overview of the industry and the changing markets for Australian wine, as well as the primary pieces of Commonwealth legislation. The chapter will then illustrate how the themes of globalisation and consumer safety translate into current regulatory challenges for wine law, providing case studies of three aspects of Australian wine law – the integration of Geographical Indications via treaty,

8 Julie McIntyre, 'Adam Smith and Faith in the Transformative Qualities of Wine in Colonial New South Wales' (2011) 42(2)Australian Historical Studies 194–211, at 198.

9 McIntyre (n 5) Chapter 3.

10 World Health Organization, 'Global Status Report on Alcohol and Health' (2018) 51 <https://www.who.int/substance_abuse/publications/alcohol/en/>.

the use of public international law to challenge restrictions on foreign market access, and the challenges of public health regulation on the introduction of new wine products such as low alcohol wine.

2 The Contemporary Australian Wine Industry

As indicated in the introduction, Australia has a large and expanding wine industry, rich in diversity and catering to a range of market segments. The profile of the industry has changed substantially over time, with Anderson chronicling five primary phases of boom and bust in its economic history.[11] These were driven by a range of factors – the advent and spread of imported diseases such as Phylloxera, major social changes caused by the Gold Rushes, the World Wars, and the Great Depression, regulatory changes from competition laws, and economic factors such as changing cycles of subsidies, tariffs, and currency fluctuation.[12]

The industry now employs 172,736 employees nationwide and contributes over $40 billion to the national economy.[13] Australia is both a substantial exporter and importer of wine, although it exports vastly more than it imports. Australians are relatively domestically-focussed in their wine drinking, with imported wine accounting for only 16% of the wine consumed in Australia – far less than the 25% foreign wine consumed in the USA, or the 22% consumed in France.[14]

In Australia, Shiraz now occupies the largest cultivation area, accounting for almost one-third of Australia's 135,133 hectares of viticulture. The next is Cabernet Sauvignon (18%), Chardonnay (16%), Merlot (6%), and Sauvignon Blanc (5%).[15] While there are 65 wine regions and nearly 2500 vineyards throughout the country, almost three-quarters of all grapes crushed are produced in either

11 Kym Anderson, *Growth and Cycles in Australia's Wine Industry: A Statistical Compendium, 1843 to 2013* (University of Adelaide Press 2015).

12 Kym Anderson, *Growth and Cycles in Australia's Wine Industry: A Statistical Compendium, 1843 to 2013* (University of Adelaide Press 2015).

13 Wine Australia, 'Australian Wine Sector 2018 At a Glance' (2018) <https://www.wineaustralia.com/getmedia/00b01bfb-69c2-440d-84ec-ceba6a993600/MI_SectorReport_Mar2019_F.pdf>.

14 Wine Australia, 'Production, Sales and Inventory Report 2017–2018' (2018) <https://www.wineaustralia.com/getmedia/735b7324-ba8d-4fbd-967a-197d490be5e8/MI_PSI_Report_2017-18_F>.

15 Wine Australia, 'Australian Wine Sector 2018 at a Glance' (2019) <https://www.wineaustralia.com/market-insights/australian-wine-sector-at-a-glance>.

South Australia or the Murray-Darling Swan River area, which is located on the border of New South Wales and Victoria.[16] While production is relatively concentrated in these areas, there are many famous wine regions with strong market recognition internationally that attract both domestic and international tourists to cellar doors. These include the Hunter Valley, the Yarra Valley, and the Margaret River, all of which are known particularly for their white wines. Wine tourism is an increasingly important sector, with the industry reporting over a million visits per year by tourists to wineries in 2018–2019, with increasing interest from Chinese tourists.[17]

As an exporter, Australia holds about 6% of the global market, exporting primarily to China, the United States, and the United Kingdom, with other notable markets including Hong Kong, Singapore, Canada, and Japan.[18] Red wines dominate Australian exports, constituting 61% of all wine exported with white wines occupying 38%, and sparkling wines just 1%.[19]

2.1 *Defining and Regulating Wine in Australia*

In Australia the definition of a 'wine' depends on the purpose for which it is being defined – a complication that is not unusual but which can be confusing to non-lawyers or those who are new to the industry or the country's laws. The most simple definition of 'wine' is found in Standard 1.1.2 of the Australia New Zealand Food Standards Code as: "a food that is the product of the complete or partial fermentation of fresh grapes, or a mixture of that product and products derived solely from grapes" but also includes products that have also had grape juice, sugar, or sprit added during production, and also added water that was required in order to incorporate permitted food additives or processing aids. The Food Standards Code also contains a definition of "wine product", which is defined as a product containing a minimum of 70% wine, but "has been formulated, processed, modified or mixed with other foods such that it is not wine."[20] One of the primary consequences of a product being a "wine product"

16 Wine Australia, 'Australian Wine Sector 2018 at a Glance' (2019) <https://www.wineaustralia.com/market-insights/australian-wine-sector-at-a-glance>.

17 Wine Australia, 'New results provide a better picture of tourism to Australian wine regions' *Market Bulletin* Issue 184 (2018) <https://www.wineaustralia.com/news/market-bulletin/issue-184>.

18 Wine Australia, 'Australian Wine Sector 2018 At a Glance' (2018) <https://www.wineaustralia.com/getmedia/00b01bfb-69c2-440d-84ec-ceba6a993600/MI_SectorReport_Mar2019_F.pdf>.

19 Wine Australia, 'Australian Wine Sector 2018 At a Glance' (2018) <https://www.wineaustralia.com/getmedia/00b01bfb-69c2-440d-84ec-ceba6a993600/MI_SectorReport_Mar2019_F.pdf>.

20 *Australia New Zealand Food Standards Code Standard 2.7.4 – Wine and wine product* 1984.

is that they are not permitted to make reference to Geographical Indications or vintage, although they can make representations as to the grape varieties.[21] Additional definitions are contained in Standard 1.1.2 for "fruit wine", "vegetable wine," and a range of other terms, meaning (at its most simple) that only grape-based wine can be labelled "wine" without a qualifier.[22]

A substantially identical definition is used in the Wine Australia Act 2013, the main piece of legislation of relevance to the wine industry. The Act empowers the industry authority (Wine Australia), prescribes the Label Integrity Program, and regulates the use of Geographical Indications. It also introduces the concept of a "grape product", which is designed to be broader than merely a wine, thus capturing a product such as brandy, grape-spirit, or 'strawberry-infused Shiraz'.[23]

Yet another definition of "wine" is provided primarily for revenue purposes such as excise and customs duties, and is contained in a piece of legislation entitled A New Tax System (Wine Equalisation Tax) Act 1999 ("the WET Act"). This Act provides a general definition of 'wine' as including fruit or vegetable wines, cider, perry, mead, and sake.[24] Most relevantly however, section 31.2 of the WET Act defines the meaning of a "grape wine" as one that "is the product of the complete or partial fermentation of fresh grapes or products derived solely from fresh grapes" and which complies with the Regulations of the WET Act. Section 31.3 then contains a definition of a "grape wine product", which is one has only particular additives of alcohol (grape spirit or incidental alcohol contained in extracts such as herbs or spices) and which contains at least 70% grape wine. The Wine Equalisation Tax rate is currently set at 29%, and is not calibrated to the alcoholic content of the wine, provided it is under 22% but over 15% alcohol as stipulated in the Regulation.[25] The implications of this alcohol stipulation are explained later in this chapter in the context of the "Alcopops" regulation.

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21 *Australia New Zealand Food Standards Code Standard 2.7.4 – Wine and wine product* 1984.

22 See *Australia New Zealand Food Standards Code Standard 2.7.4—3 Requirement for food sold as wine*, which simply states, "A food that is sold as wine must be wine." This can be understood by being read in conjunction with *Standard 2.7.3 – Fruit wine, vegetable wine and mead.*

23 *Wine Australia Regulations 2018* (Cth), s5 – "or the purposes of paragraph (d) of the definition of grape product in subsection 4(1) of the Act, a product is a grape product for the purposes of the Act if: (a) it includes wine; and (b) it is derived in whole or in part from prescribed goods; and (c) a standard, within the meaning of the Food Standards Australia New Zealand Act 1991, applies to it.".

24 *A New Tax System* (*Wine Equalisation Tax*) *Act 1999* (Cth) s31.8.

25 *A New Tax System* (*Wine Equalisation Tax*) *Regulations* 2019 (Cth).

Wine Australia has been the main industry regulator since 2017. Such a body was first introduced in the form of an export marketing board in 1929, known as the Wine Overseas Marketing Board. This was replaced in 1937 by the Australian Wine Board, in 1981 by the Australian Wine and Brandy Corporation, and then through a series of successors – the Wine Australia Corporation, the Australian Wine and Grape Authority, and now Wine Australia.[26] While the individual powers and functions of these statutory bodies have varied over the years, their chief functions have included export marketing, reputation control, and various licencing and enforcement functions.

In 2018 the formal powers of Wine Australia were expanded pursuant to the Wine Australia Regulations 2018. The most significant of the changes to their powers was in relation to upholding the integrity of Australia's wine exports, including the power to cancel, revoke or reject an export licence if the applicant exporter is not a "fit and proper person", and to refuse export if the wine cannot legally be sold in its intended destination. Section 10 of the Regulations sets out a range of factors that can be included in the 'fit and proper person test', including whether the Wine Export Charge has been paid, or if the applicant has been responsible for any offences under the Act, such as:

- The sale, export or import of wine with a false description and presentation;
- A failure to keep proper records to substantiate labelling claims;
- Importing, exporting, or selling wine under a false description, which includes incorrect use of a Geographical Indication or registered traditional expression; or
- Unauthorised export of grape products.

Other roles of Wine Australia are non-regulatory in focus, such as the development of export markets, building awareness of Australian wine, supporting Research and Development, and helping to develop the business and exporting know-how of the industry.

3 Contemporary Regulatory Challenges

Australia is often described in pejorative terms as a "nanny state," particularly in regards to consumer protection and product labelling.[27] There is certainly a range of legislative requirements that impact wine labelling, and these go

26 Wine Australia Act 2013 (Cth).

27 Mike Daube, Julia Stafford and Laura Bond, 'No need for nanny' (2008) 17(6) Tobacco Control 426–427; Hoek, Janet, and Andrea Insch, 'Special section on marketing and public policy: Going beyond a nanny state', (2011) 19(3) Australasian Marketing Journal.

beyond the wine-specific requirements of the Food Standards Code mentioned above to include the more generic requirements of weights and measures legislation and the Australian Consumer Law.[28]

Wine labelling is highly regulated, with legislative instruments mandating the display of information including designation/type of product,[29] country of origin,[30] volume statement,[31] alcohol statement,[32] standard drink statement,[33] allergens statement,[34] lot number,[35] name and address,[36] and 'best before' date.[37] It is optional to include information that indicates vintage,[38] variety and geographical indication,[39] but if they are displayed on the label, they are subject to strict requirements.[40] These requirements set out that at least 85% of the wine is to be made of grapes that match the vintage, variety and geographical indication displayed on the label.[41]

Wine varies quite substantially in alcohol content, generally around 13%, although mandatory labelling standards in Australia allow a tolerance of 1.5%, meaning that a wine labelled at 13% could, in reality, have an alcohol content ranging from 11.5% to 14.5%. This is a loophole that can be used to the benefit of wine exporters, as many countries have a higher tariff applicable to wines that exceed 14% alcohol.

Finally, it is recommended, but not required, that wine labels contain a pregnancy warning.[42] While this labelling information is not currently mandatory, this is likely to change soon. On 11 October 2018, the Australian and New Zealand Ministerial Forum on Food Regulation agreed to make pregnancy warnings mandatory, and changes are expected to occur in April 2020.[43]

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28 *Competition and Consumer Act (Cth) 2010, Schedule 2.*
29 *Australia New Zealand Food Standards Code*, Standard 1.2.2.
30 *Australia New Zealand Food Standards Code*, Standard 1.2.11.
31 *National Trade Measurement Regulations 2009* (Cth), reg 4.9.
32 *Australia New Zealand Food Standards Code*, Standard 2.7.1.
33 *Australia New Zealand Food Standards Code*, Standard 2.7.1.
34 *Australia New Zealand Food Standards Code*, Standard 1.2.3.
35 *Australia New Zealand Food Standards Code*, Standard 1.2.2.
36 *Australia New Zealand Food Standards Code,* Standard 1.2.2.
37 *Australia New Zealand Food Standards Code,* Standard 1.2.5.
38 *Wine Australia Regulations 2018* (Cth), reg 27.
39 *Wine Australia Act 2013* (Cth), Part VIB.
40 *Wine Australia Act 2013* (Cth), Part VIB regs 20, 21 and 22.
41 *Wine Australia Regulations 2018* (Cth), regs 25(2), 26(3) and 27(2).
42 See Winemaker's Federation, <https://www.wfa.org.au/policy-and-issues/alcohol-and-health/pregnancy-warning-labeling/>.
43 Food Standards Australia New Zealand proposal P1050.

In other respects, wine is dealt with as a special product that is at times mysteriously exempt from generic laws. For example, South Australia and New South Wales both have deposit and refund schemes for drink containers, designed to promote recycling and minimise waste. Typically, wine bottles, along with milk bottles and certain other drink containers, have been exempt,[44] although in South Australia, the industry body has protested against an expansion of the scheme on the basis that it would add substantially to the direct and indirect costs of producers, particularly smaller producers.[45]

Tensions often arise due to the need to create legislation that acts to protect consumer health, for example in relation to excessive alcohol consumption, and the need to recognise the particular attributes of wine as a specific alcoholic beverage that has quite unique patterns of consumption. The debate around "alcopops" and low alcohol wines provides an illustrative case study.

3.1 *The Case of "Alcopops" and Low Alcohol Wines*

In Australia the burden of alcohol-related disease is substantial. Doran et al offer the statistic that 3.3% of the total disease burden in Australia stems from alcohol, rising to 6.2% in indigenous communities. They go on to attribute the total economic cost of alcohol to be $10.8 billion.[46] As a consequence, the recommendations of the World Health Organisation are directed towards the minimisation of alcohol consumption, and Australia has followed similarly in using the tax system to try and encourage consumers to choose lower-risk products.[47]

However, as Deroover et al observe, "experts struggle to make general conclusions because there is evidence that supports both positive and negative effects of wine consumption depending on the specific health outcomes that are investigated."[48] This greatly complicates matters from a regulatory standpoint,

44 See, for example, Waste Avoidance and Resource Recovery (Container Deposit Scheme) Regulation 2017. Section 5, which contains extensive carveouts for various kinds of wine products, including wine bottles, wine sachets, and glass wine bottles of any size.

45 'Review of South Australia's Container Deposit Scheme raises real concerns for wine businesses' *Winetitles Media*, 19 February 2019, <https://winetitles.com.au/review-of-south-australias-container-deposit-scheme-raises-real-concerns-for-wine-businesses/>.

46 Doran, Christopher M. et al., 'Alcohol policy reform in Australia: what can we learn from the evidence?' (2010) 192(8) Medical Journal of Australia 468–470.

47 Doran, Christopher M. et al., 'Alcohol policy reform in Australia: what can we learn from the evidence?' (2010) 192(8) Medical Journal of Australia 468–470.

48 Kristine Deroover et al., 'A Scoping Review on Consumer Behavior related to Wine and Health' (draft paper, copy on file with author).

especially in Australia, where alcohol-related disease is substantial and on the increase.[49]

A particular controversy arose in Australia in relation to so-called "alcopops" – generally a spirit-based, pre-mixed drink. These have caused a great deal of concern as a 'gateway' alcoholic beverage for young people, particularly because the drinks tend to be sugary, disguise the taste of alcohol, often bright colours, and sold in individual portioned bottles. They are "part spirit or wine and part non-alcoholic drink, such as milk or a soft drink"[50] and were typically cheaper than alternative products of interest to at-risk drinkers.[51] In 2008 the Australian Government highlighted the perceived negative impact of alcopops on young women under the age of 29, for whom alcopops was a drink of preference, and instituted the so-called "alcopops tax".[52] Under the Excise Tariff Amendment (2009 Measures No. 1) Act 2009, the amount levied on "Ready-To-Drink" ("RTD") alcoholic beverages was increased from $39.36 per litre of alcohol to $66.67, and currently sit at $85.87 per litre of alcohol.[53]

Studies examine the influence of the alcopops tax on rates of alcohol abuse among young persons vary in their conclusions. One study, undertaken by the University of Queensland, found that there was no significant decrease in the number of young people being hospitalised due to alcohol abuse following the introduction of the new tax.[54] In contrast, a study led by the University of New South Wales concluded that the tax had resulted in a decline in hospitalisations due to alcohol abuse.[55] However, one unintended consequence is its potential impact on the development of a market for low alcohol wine.

Bucher et al document the way in which increasing awareness of the public health consequences of alcohol has led to a low but increasing consumer

49 *Bills Digest no. 101 2008–09 – Customs Tariff Amendment (2009 Measures No. 1) Bill* 2009 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/digest/cta2009mn1b2009388/cta2009mn1b2009388.html?context=1;query=%22ready%20to%20drink%22;mask_path=>.

50 Rachel Clemons, 'Alcopops Taste Test' Choice Australia.

51 Tanya N. Chikritzhs et al., 'The "alcopops" tax: heading in the right direction." (2009) 190(6) Medical Journal of Australia 294.

52 Bills Digest no. 101 2008–09 – *Customs Tariff Amendment (2009 Measures No. 1) Bill 2009*.

53 *Excise Tariff Amendment (2009 Measures No. 1) Act 2009* (Cth) and *Customs Tariff Amendment (2009 Measures No. 1) Act 2009* (Cth). See also Australian Taxation Office, 'Excise Rates for Alcohol' <https://www.ato.gov.au/Business/Excise-and-excise-equivalent-goods/Alcohol-excise/Excise-rates-for-alcohol/>.

54 Chikriths et al (n 50).

55 Marianne Gale *et al*, 'Alcopops, taxation and harm: a segmented time series analysis of emergency department presentations' (2015) 15 BMC Public Health 468, <https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/s12889-015-1769-3>.

demand for (and regulatory interest in) low alcohol wines.[56] They note that low levels of alcohol intake have recognised positive impacts on health outcomes and that "the grape and wine derived phenolic compounds contained in wine confer additional health benefits with favourable changes to other lipoproteins and endothelial function, and other studies of regular moderate consumption of wine with meals have shown health benefits in both the short and long term. For example, moderate consumption of wine with a meal mitigates oxidative stress and vascular endothelial damage induced by a high-fat meal."[57]

Lower alcohol wine is an emerging product category that is attractive to many wine drinkers for its health benefits including lower calories, the ability to drive after enjoying wine, and the health benefits of lowering alcohol consumption.[58] However, consumers are also sensitive to product pricing, and an additional tax has the potential to inhibit development of the market for low alcohol wines. Whether a particular product would fall within the category of an RTD is extremely complex, as it depends not just on the alcohol content (noting the broad permitted tolerance described above) but also on the way in which the lower alcohol has been achieved. The production techniques for lower alcohol wine vary considerably and can range from viticulture techniques involving leaf area, choice of yeast, physical removal of alcohol post-fermentation, or the addition of juice.[59] This leaves open the possibility that some types of low alcohol wines, particularly those involving the addition of juice, would attract the 'alcopops' tax.

Another public health challenge that has resulted from the current legislation has occurred due to the differential taxation on spirits ($85.87 per litre of pure alcohol) versus wine under the Wine Equalisation Tax (29 per cent of the wholesale price). This differential has led creative entrepreneurs to sell products that fit the formal definition of wine but which sit at the top end of

56 Tamara Bucher, Kristine Deroover, and Creina Stockley 'Low-alcohol wine: A narrative review on consumer perception and behaviour' (2018) 4(4) Beverages 82.

57 Tamara Bucher, Kristine Deroover, and Creina Stockley 'Low-alcohol wine: A narrative review on consumer perception and behaviour' (2018) 4(4) Beverages 83.

58 Tamara Bucher, Kristine Deroover and Creina Stockley, 'Production and Marketing of Low-Alcohol Wine' in Antonio Morata and Iris Loira (eds), *Advances in Grape and Wine Biotechnology* <https://www.intechopen.com/books/advances-in-grape-and-wine-biotechnology/production-and-marketing-of-low-alcohol-wine>.

59 Tamara Bucher, Kristine Deroover and Creina Stockley, 'Production and Marketing of Low-Alcohol Wine' in Antonio Morata and Iris Loira (eds), *Advances in Grape and Wine Biotechnology* <https://www.intechopen.com/books/advances-in-grape-and-wine-biotechnology/production -and-marketing-of-low-alcohol-wine>.

the permitted alcohol level for wine (22%), are colourless and flavourless, and which are marketed with a guise that portrays them as spirits. These products exploit the tax differential to become very price competitive and are often sold in bundles with soft drinks, leading to them being termed "deconstructed alcopops" by critics. The growth of this segment was facilitated by the ruling in a 2018 test case in Divas Beverages Holdings Ltd v Commissioner of Taxation.[60] In that case the court was asked to characterise a product called VKat, a self-described "white spirit wine liqueur".[61] The Court was required to consider some of the limits of the definition of a 'wine product' – specifically whether a proposed product made of distilled grapes with added grape could be considered a wine product. The product, which had an alcohol content of 22%, involved the blending of low sugar juice with grape concentrate to produce a product ultimately sold in the liqueur segment of the market. The Court's analysis in that case focused not on the taste, appearance or other characteristics of the product, but rather on the requirement for "grape wine" needing to be produced solely from grapes and/or grape products, as opposed to other products such as sugar cane, and therefore upheld its characterisation as wine. The proliferation of these products remains of concern for public health researchers as they are seen to imitate vodka, but at a vastly cheaper price point.[62]

Addressing these anomalies is challenging, especially without a single cohesive view from the wine industry about these products. Some players may regard them as irrelevant; others may be keen to take advantage of the market opportunities they bring. From a regulatory perspective, they are a good reminder of how easily consumer protection measures can have unintended consequences, and the challenge of designing laws that adequately protect vulnerable consumers without hampering innovation.

3.2 *Protection of Geographical Indications*

Traditionally, wine in Australia was sold by reference to descriptors that could be understood by the broadest possible audience, invariably the names of European regions and styles. A red wine drinker in the United Kingdom, for example, was more likely to select an Australian wine if it contained a descriptor that conveyed its typicality in terms that they already understood from Europe.

60 [2018] FCA 576 (27 April 2018).

61 Divas Beverages, 'VKAT' <https://divasbeverages.com.au/divas-vkat/>.

62 See, for example, Giselle Wakatama, ' "Imitation rum and vodka" soft drink deal selling for less than $10 slammed by health officials', *ABC Newcastle* (16 May 2019), <https://www.abc.net.au/news/2019-05-16/imitation-vodka-rum-soft-drink-deal-slammed/11116340>.

Battaglene states that "Australian wine was commonly sold with the brand name, the style (using the semi-generic terms Champagne, Claret, Burgundy and the like) and the major geographical descriptor was Australia".[63] However, articles from the era report anger from French wine producers at the insistence of Australian winemakers in labelling over 1.6 million bottles annually as "Australian Beaujolais".[64]

The threat of litigation and a trade war meant that Australia was one of the first countries to engage with the European interest to protect Geographical Indications, and an agreement (the "Agreement on Trade in Wine") was concluded with the European Community (as it was then known) as early as 1994,[65] prior to Geographical Indications being incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Agreement (the "TRIPS Agreement").[66] Australia implemented its obligations by amending the Australian Wine and Brandy Corporation Act, and by the time it was formally required to meet its treaty obligations, Australia had already established a system to recognise and protect Geographical Indications.[67]

The Agreement on Trade in Wine had two primary impacts on the Australian wine industry. The first was that it committed in principle to the phase out the use of European Geographical Indications ("GI") that had been commonly used by Australian winemakers – with the two highlighted in the legislation's Explanatory Memorandum being Chablis and Claret (both very popular wines of choice for Australians in the late 1980s and early 1990s).[68] The second was that it set the legislative regime to support an Australian system of Geographical Indications. In reality, there were a range of challenges in ensuring both that the EU GIs were respected, and in setting the boundaries of the new Australian GIs.

63 Tony Battaglene, 'The Australian wine industry position on Geographical Indications' *Paper presented to the Worldwide Symposium on Geographical Indications* (Parma, 2005) 2.

64 Frank J. Prial, 'Australian Beaujolais'? Non, Non' *New York Times* (27 July 1988) Section C <https://www.nytimes.com/1988/07/27/garden/australian-beaujolais-non-non.html>.

65 Agreement between Australia and the European Community on Trade in Wine, and Protocol, done at Brussels on 26 January 1994, entry into force on 1 March 1994.

66 *Agreement Establishing the World Trade Organization* entry into force on 1 March 1994. 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299.

67 *Australian Wine and Brandy Corporation Act* 1993 (Cth). The current version of this legislation is now the Wine Australia Act 2013 (Cth).

68 Commonwealth of Australia Explanatory Memoranda, 'Australian Wine and Brandy Corporation Amendment Bill 1993', <http://classic.austlii.edu.au/au/legis/cth/bill_em/awabcab1993471/memo_0.html>.

While some names such as Beaujolais and Chianti were withdrawn from use on Australian products relatively quickly,[69] a broader phase out of key EU GIs only took place a year after the entry into force of a second treaty, the Agreement between Australia and the European Community on Trade in Wine,[70] and finally became properly restricted for a range of GIs and traditional expressions in January 2011. This included restrictions on the use of previously popular and widely used terms such as Champagne, Moselle, and White Burgundy, as well as Sherry, Port and others.

However, the legacy resulting from decades of use of terms such as Champagne could not be resolved by this legislation alone. Ancillary uses of the term Champagne in relation to wine services, for example, are not restricted by GIs, requiring more creative litigation in order to 'clean up' unwanted uses. This is typically achieved through litigation under the Australian Consumer Law, or occasionally through the trademark system. One such example is a notable case litigated in the Federal Court of Australia in 2015, in which the French Comité Interprofessionnel du Vin de Champagne successfully brought a claim against Jayne Powell, a self-styled Francophile and 'global ambassador for Champagne' known on social media as 'Champagne Jayne'. Interestingly, this action was brought just a short time after the defendant had been awarded the honorary title of Dame Chevalier de L'Ordre des Coteaux de Champagne by Champagne producers themselves.

The Comité successfully argued that she had engaged in misleading and deceptive conduct by referring in her social media posts to Australian sparkling wine products as Champagne.[71] They were, however, unsuccessful on a number of other claims in relation to the label 'Champagne' ambassador. The Comité was also unsuccessful a couple of years later in an opposition to Ms Powell's registration of the trademark "Champagne Jayne".[72] This pair of cases provides an excellent insight into the way in which branding has been "cleaned up" within Australia due to the legacy of use of EU names.

The second consequence of the Agreement on Trade in Wine was that Australia established its own system of Geographical Indications. This offered a significant opportunity for the Australian wine industry. For many industry experts, the creation of Australian Geographical Indications was seen not just as

69 Vicky Waye, 'Wine Market Reform: A Tale of Two Markets and Their Legal Interaction' 29(2) University of Queensland Law Journal 211–244, at 213.

70 Done at Brussels on 1 December 2008, entry into force for Australia on 9 January 2010.

71 *Comité Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110.

72 *Comite Interprofessionnel du Vin de Champagne v Rachel Jayne Powell* [2017] ATMO 57 (4 April 2017).

a compliance requirement but as a sign of maturity of the Australian industry, a way of building the image of the sophistication of Australian wine overseas, and creating a marketable image of enhanced quality.[73] For example, in its 2025 strategy, Wine Australia explained:

> Underpinning the sector's intentions to encourage consumers to "trade up" is the recognition that Australia's success as a maker of multi-regional brands of high quality and affordable price has over-shadowed Australia's place as a producer of top-end wines: wines that reflect their individual sites, their vintages and the philosophies of their makers and growers. Until it is broadly recognised around the world that the imperatives of terroir, typicité, site and vintage are today as much a foundation of Australia's regionally distinct and fine wine dimension as they are in traditional Europe, there is no room for complacency.[74]

The use of a GI regime to develop and enforce the identity of Australia's wine regions has not been without controversy. The criteria for the designation of a Geographical Indication in Australia in Section 57 of the Wine Australia Regulations 2018 contains a non-exclusive list of seventeen different factors that can be considered, including climatic uniformity, geological uniformity, uniformity of elevation, the existence of a natural drainage basin, as well as factors such as history and building construction. It also specifies minimum numbers of vineyards of, minimum size, and minimum tonnage requirements.

Waye and Stern offer a strong critique of many aspects of the Australian regime for GIs, and particularly its dismissal of the role of regionality and typicality in the legislative regime of GIs. They explain that despite the creation of a GI for the Barossa Valley, there are at least 11 sub-parts to the Barossa Valley, each with unique soil, terrain, and localised climatic features, thus there is no single winemaking style, and no single description that adequately includes the full range of Shiraz that is the hallmark of the region and integral to its identity.[75] Similarly, Drahos explains that this ambiguity is tied in with both

73 Vicky Waye and Stephen Stern, 'The Next Steps Forward for Protecting Australia's Wine Regions' (2016) 42(2) Monash University Law Review 458–496.

74 Wine Australia, 'Directions To 2025: an Industry Strategy for Sustainable Success' (2007) 14.

75 Vicky Waye and Stephen Stern, 'The Next Steps Forward for Protecting Australia's Wine Regions' (2016) 42(2) Monash University Law Review 458–496.

the size of the protected areas and the legislative intent behind the introduction of GIs:

> With GIs that enclose areas the size of large European countries, there is little plausibility to the claim that there is a distinctive set of qualities imparted by the locality to a particular wine. The system was not designed to bring terroir into a close regulatory association with the production of wine, but rather had a market-access goal.[76]

Due to the rationale for Australia's GI regime, and the casting of the criteria for a GI, it is unsurprising that disputes have arisen as to the appropriate boundaries of that designation – particularly given that the regime has been superimposed upon long-standing vineyards. In Coonawarra for example, several vineyards were established among the rich terra rossa (red soil) local to that region prior to the 1970s.[77] During the 1980s, a period of rapid expansion saw vineyards expand into the surrounding areas, outside of the terra rossa soil that had come to give Coonawarra wine a respected name in the domestic wine industry. When Coonawarra became a protected region, the limitations of the area covered by this protection was bitterly contested, with some of the original vineyards situated in the terra rossa soil claiming exclusive right to the Coonawarra name. The most famous dispute was a 2002 appeal before the Federal Court of Australia in the case of Beringer Blass Wine Estates Ltd v Geographical Indications Committee.[78]

Ongoing disputes remain with the European Union, with the most notorious being in relation to prosecco, a term traditionally used to refer to a variety of grapes. In order to push forward with using the term prosecco as an indication to typify sparkling white wine from particular regions of North-Eastern Italy, produced by the Charmat – Martinotti method, the European Union has now registered a change in name for the variety of grapes (formerly known as prosecco grapes) and now refers to the variety as "glera" grapes.[79] Although it is not listed in the EU-Australia Wine Agreement, there

76 Peter Drahos, 'Sunshine in a Bottle? Geographical Indications, the Australian Wine Industry, and the Promise of Rural Development' in Irene Calboli and Wee Loon Ng-Loy, *Geographical Indications at the Crossroads of Trade, Development, and Culture* (Cambridge University Press, 2017) 259–280.

77 Gary Edmond, 'Disorder With Law: Determining the Geographical Indication for the Coonawarra Wine Region' (2006) 27(59) Adelaide Law Review 71.

78 (2002) 125 FCR 155.

79 Gazzetta Ufficiale della Repubblica Italiana, No 173, 28 July 2009.

have been unsuccessful attempts by the European Commission on behalf of the Italian Consorzio di Tutela della Denominazione di Origine Controllata Prosecco to register prosecco as a GI under the Australian legislation.[80] The future of expended indications of origin is a major bone of contention in the ongoing negotiations of the Australia-European Union Free Trade Agreement (FTA). The negotiations, which began in 2018 and continue to the time of writing, include negotiation for the registration of a range of new geographical indications, such as feta cheese,[81] prosecco and vittorio.[82] Prosecco represents a major bone of contention – a practical one for industry and a conceptual one for academia – with academic critiques pointing to the analytical problem of a grape varietal being 'transubstantiated'[83] or 'transmogrified'[84] into a Geographical Indication. Davison et al also argue that, were Australia to cede to EU demands, the enabling legislation required to enforce a prosecco GI might be the subject of a constitutional challenge in the High Court of Australia.[85]

3.3 *Access to Export Markets and Engaging International Law*

One of the ongoing challenges for the Australian wine industry is that it is, comparatively to other regions, very reliant on the export market. Of the 12.9 million hectolitres produced in Australia in 2018, 67%, or 8.6 million hectolitre, was exported.[86] In contrast, Italy exports 36% of production, and France only

80 *Winemakers' Federation of Australia v. European Commission* [2013] ATMOGI 1 (22 November 2013).

81 Department of Foreign Affairs and Trade, 'List of EU FTA Geographical Indications' <https://dfat.gov.au/trade/agreements/negotiations/aeufta/public-objections-gis/Pages/list-of-european-union-geographic-indications-gis.aspx>.

82 Department of Foreign Affairs and Trade, 'Public objections procedure concerning terms proposed by the European Union for protection as geographical indications in Australia' <https://dfat.gov.au/trade/agreements/negotiations/aeufta/public-objections-gis/Pages/default.aspx>.

83 Danny Friedmann, 'Geographical Indications in the EU, China and Australia: WTO Case Bottling Up Over Prosecco', in Julien Chaisse (ed.), Sixty Years of European Integration and Global Power Shifts; Perceptions, Interactions and Lessons (Oxford: Hart Publishing, 2019) 411–427, at 424. Available at SSRN: https://ssrn.com/abstract=3218810.

84 Sam Hill, 'della uve del vitigno Prosecco' – Italian Government Decrees Referring to Prosecco (May 17, 2019). Available at SSRN: https://ssrn.com/abstract=3444265.

85 Mark Davison, Caroline Henckels and Patrick Emerton, 'In Vino Veritas? The Dubious Legality of the EU's Claims to Exclusive Use of the Term "Prosecco"' (2019) 29 Australian Intellectual Property Journal 110–126. <https://ssrn.com/abstract=3304239>.

86 Statistics derived by the author from Per Karlsson, 'World wine production reaches record level in 2018, consumption is stable' *BK Wine Magazine* (2019), <https://www.bkwine.com/features/more/world-wine-production-reaches-record-level-2018-consumption-stable/>.

29%, with Chile reaching 72%.[87] Therefore, Australia is comparatively more vulnerable to the dynamics of wine law as it is played out in foreign jurisdictions and in the public international law space.

Looking again at the controversy surrounding prosecco offers a prime example of Australia's position in international wine law. Despite prosecco being the most rapidly expanding variety in Australia, with astronomical growth in just a few short years, it represents a very small share of the Australian export market.[88] Wine Australia reports that "Prosecco produced with a total value of almost $2 million shipped in 2018–19, with 80 per cent going to New Zealand."[89] However, due to the EU's expansion of GIs, and their acceptance by a number of other countries, Australian prosecco cannot be sold under that label in the European Union, and is also barred from sale in China, Vietnam, Canada, South Africa, or Chile due to bilateral free trade agreements negotiated by the EU with each of those countries.[90]

The industry has to decide, both as a whole and as individual winemakers, how to respond to the demands of the European Union. Herein lies one of the most complicated dynamics of 'wine law' in Australia – what strategy to pursue to best ensure access to global markets. One possibility is to cede to EU demands, accepting protection in Australia for prosecco as a GI, which would require a new name for Australian vintages and the resulting marketing and rebranding costs to reacquaint the Australian public with the new nomenclature. Another alternative is to continue to challenge the measure in an international or foreign forum. This includes actions already being taken by Wine Australia to challenge the registration in China, in order to bypass negotiations directly with the European Union.[91] The industry, whether as Wine Australia, or individual producers (or both) can push for a diplomatic solution, although success is unlikely – or ask the

87 Statistics derived by the author from Per Karlsson, 'World wine production reaches record level in 2018, consumption is stable' *BK Wine Magazine* (2019), <https://www.bkwine.com/features/more/world-wine-production-reaches-record-level-2018-consumption-stable/>.

88 Wine Australia, 'Prosecco – a rising white grape in Australia' *Market Bulletin* (2019) 170, <https://www.wineaustralia.com/news/market-bulletin/issue-170>.

89 Wine Australia, 'Prosecco – a rising white grape in Australia' *Market Bulletin* (2019) 170, <https://www.wineaustralia.com/news/market-bulletin/issue-170>.

90 Wine Australia, 'Prosecco – what is the deal?' (2018) <https://www.wineaustralia.com/news/articles/prosecco-what-is-the-deal>.

91 Wine Australia, 'Prosecco – what is the deal?' (2018) <https://www.wineaustralia.com/news/articles/prosecco-what-is-the-deal>.

Australian government to keep pressing the point in Free Trade Agreement Negotiations.

The final option for consideration, however, is that Australia engages the dispute resolution mechanisms of international law, in particular the Dispute Settlement System of the World Trade Organization ("WTO").[92] In the case of the prosecco dispute, it is arguable that the EU's position could constitute an unjustifiable encumbrance on the use of a trademark in breach of the European Union's obligations under the TRIPS Agreement and unjustifiable discrimination under Article 2.1 of the Agreement on Technical Barriers to Trade.[93] If the Australian government were to choose to bring a dispute to the WTO, and if they were successful in their claim, then protection for prosecco would need to be withdrawn.

However, the decision to bring a public international law dispute throws up a complex matrix of interactions between private interests (those of Australian producers of prosecco) and an array of public interests. These include the interests of the Australian public, whose tax dollars ultimately fund a WTO case, of the Australian government in deciding which cases are in the national interest, and of the wine industry as a whole, who would need to decide whether to lobby the Australian government to bring the case for what is ultimately a very small export market share. There are also other companies with related but slightly different concerns, whose interests may not align at all with those of the wine industry. This includes the ongoing dispute between the Italian producers using the Community Geographical Indication 'vittorio', and the privately owned trademarks and defensive trademarks owned by an Australian company for Vittoria coffee and Santa Vittoria water.[94]

The work of Blanchard remains the sole detailed study of the interaction between public and private interests in relation to enforcing Australia's trade rights at the WTO. Blanchard's research shows that the Australian wine industry has a particularly nuanced approach to advancing international trade

92 *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

93 *Agreement of the World Trade Organization on Technical Barriers to Trade,* 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 120. See further, Mark Davison, Caroline Henckels and Patrick Emerton, 'In Vino Veritas? The Dubious Legality of the EU's Claims to Exclusive Use of the Term "Prosecco" ' (2019) 29 Australian Intellectual Property Journal 110–126. <https://ssrn.com/abstract=3304239>.

94 See article 3.1 of the Agreement between Australia and the European Community on Trade in Wine [2010] ATS 19.

disputes, particularly when compared with other industries. He explains that the wine industry has traditionally adopted a "pragmatic" approach, on the basis that Australian companies, even the largest, lacked the immense size of foreign competitors, preferring negotiation to formalised dispute settlement processes. There was also a sense that domestic political support could be hard to obtain, given that wine is not generally seen as an issue that would be taken up by rural communities or politicians.[95] For this reason, the Australian wine industry has also looked to international alliances in order to advance its trade interests, such as World Wine Trade Group, an international consortium to lobby for the removal of trade barriers in the global wine trade.[96]

While it is very unlikely that Australia would bring a case against the European Union in relation to prosecco, Australia has very recently made use of the WTO's dispute settlement system in order to defend market access for the wine industry in the Canadian market, when extensive diplomatic overtures proved unfruitful.

In 2018 Australia requested formalised consultations with Canada in accordance with WTO law. The discussions related to a number of regulatory provisions that appear to provide Canadian domestic wine with unfair protection, including the fact that provincial wine measures provide local wine producers with direct access to stores; reduced mark ups for local wines; and the establishment of separate enclosed sections of grocery stores for the sale of imported wines.[97] These measures included differentials in Canadian Federal excise taxes, and the Nova Scotia product mark-up for local producers applied pursuant to the Emerging Wine Regions Policy, which Australia has argued alters the competitive conditions for the wine market in Nova Scotia, to the benefit of domestic producers.[98]

Australia's case is the third to be brought against Canada in respect of its wine sales, distribution and licencing regime, with two still-pending cases by the United States against various aspects of Canada's regulated processes for

95 Peter Blanchard, 'Defending WTO rights: A Comparison of the Effectiveness of Australian and American Public-Private Relationships, Phd Thesis' Faculty of Law, UNSW (2017) 96. <https://www.unsworks.unsw.edu.au/primo-explore/fulldisplay?docid=unsworks_45660&context=L&vid=UNSWORKS&lang=en_US&search_scope=unsworks_search_scope&adaptor=Local%20Search%20Engine&tab=default_tab&query=any,contains,peter%20blanchard&offset=0>.

96 World Trade Wine Group, 'Wine Trade Group Twentieth Year Anniversary Commemoration Statement', <https://www.wwtg-gmcv.org/>.

97 DS537: Canada – Measures Governing the Sale of Wine – Request for Consultations.

98 DS537: Canada – Measures Governing the Sale of Wine – Oral Statement of Australia at the Second Substantive Meeting with the Parties, Geneva, 3 December 2019.

the sale of wine in British Colombia grocery stores.[99] While Australia was able to resolve some parts of the dispute relating to the province of British Colombia (also the subject matter of the US dispute), the remainder of the dispute was heard in Geneva in July and December 2019, with a decision expected from the Panel in around mid-2020.

The bringing of this dispute to the WTO is an interesting case study about the engagement of the Australian industry with international law. Despite being very reliant on foreign markets to bring export dollars into its economy, Australia has been relatively inactive in bringing formal complaints under the WTO Dispute, with commentators believing this is due to Australian industry being less aware of their rights and resolution options, and even when aware, not particularly assertive in asserting their formal rights.[100] It seems that the very nature of the wine industry, particularly the globalised regulatory environment in which it operates, has led to it closely observing and engaging with public international law in a way that other industries have not.

4 Conclusion

While a single chapter cannot provide a comprehensive survey of the entirety of "wine law" in Australia – for that would easily be the subject of a large and frequently-changing book – this chapter does aim to focus on aspects of wine law that are more uniquely 'Australian' than others. This includes the search for appropriate and balanced alcohol regulation that properly accounts for the range of products and the differential harms that can be caused by overconsumption in various populations. As consumer tastes and preferences change and market 'disrupters' seek to offer new products, regulation does not always function as intended. For example, as low alcohol wine seeks to expand its market, then law reform may become necessary if the preferred production methods place these products into the category of 'alcopops'. Conversely, those concerned with drinking habits of young Australians will seek additional

99 DS520: Canada – Measures Governing the Sale of Wine in Grocery Stores; DS531: Canada – Measures Governing the Sale of Wine in Grocery Stores (second complaint).

100 Peter Blanchard, 'Defending WTO rights: A Comparison of the Effectiveness of Australian and American Public-Private Relationships, Phd Thesis' Faculty of Law, UNSW (2017) 96. <https://www.unsworks.unsw.edu.au/primo-explore/fulldisplay?docid=unsworks_45660&context=L&vid=UNSWORKS&lang=en_US&search_scope=unsworks_search_scope&adaptor=Local%20Search%20Engine&tab=default_tab&query=any,contains,peter%20blanchard&offset=0>.

pushback on 'deconstructed alcopops' that currently fall under the definition of wine.

The other theme explored in this chapter has been the impact on regulation of the Australian wine industry's strong export orientation. The logical consequence of this industry orientation is that external pressures for regulatory change cannot be ignored. As a result, the Australian industry is very engaged in global advocacy around market access, avoiding becoming collateral damage in trade wars, and integrating demands from strong trade competitors for regulatory change. For this reason, external regulatory pressures have had a formative impact on the operation of Australian laws, with the European reclaiming of wine designations being a very good example. The move towards Australian Geographical Indications, while not always straightforward, has also ultimately been responsible for developing the strong Australian wine identities, and increasing global recognition of a "Barossa Valley Shiraz" or a "Margaret River Cabernet Sauvignon." Finally, the Australian wine industry has shown itself to be adroit at strategically harnessing mechanisms of international law in order to defend market access, where less confrontational methods have failed.

CHAPTER 8

Libiam Ne' Lieti Calici

EU and Chinese Policies in Support of Wine Production

Flavia Marisi

1 Introduction[1]

Grape cultivation and fermentation to produce wine has existed for millennia, dating back to the first Mediterranean and Black Sea coastal regions' civilisations. Since many centuries the European countries bordering the Mediterranean Sea are the biggest producers of grapes and wine, and wine became a fundamental part of their cultures. Due to wars, famine, and economic crises, large waves of migration took place from southern European countries to North and South America and Australia. Some of the emigrants who considered wine a part of their daily diet planted vines in their new countries of residence. In some of the new locations, vines thrived. Wine was initially consumed only by the descendants of the south European migrants but spread out in the New World. Consequently, some countries where wine consumption was previously uncommon became important wine consumers and producers: among them are the United States, Chile and Australia.

At present, the group of EU Member States where the wine culture is most entrenched is still the world's leader in the wine industry, but wine trade gave countries of the New World the opportunity to participate in the exchange, becoming new competitors. For some decades, a number of New World countries have been gaining growing market shares whereas some Old World countries are reducing their shares. Among the New World countries, China, whose vineyard is one of the largest in the world, has a leading position.

This chapter seeks to outline the way in which wine grape cultivation and winemaking developed in the EU and in China, clarifying the role played by policies issued in support of wine production, consumption and trade. Therefore, different aspects of the vitivinicultural sector will be analysed. Section 2 highlights the history of grape vine and winemaking. Section 3 examines some

1 Libiam ne' lieti calici, meaning "let us drink from the joyful glasses", is the first verse of an aria in Verdi's opera La Traviata.

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elements of the wine culture in the EU and in China. Section 4 focuses on the relationship between global production, consumption and trade, whereas section 5 provides the relevant data. Sections 6 and 7 provide data on production, consumption and trade and disclose the wine regions of the EU and China, respectively. Section 8 compares EU and China's wine policies, suggesting some possible improvements to EU policies. Finally, section 9 provides an overview of the study and draws some conclusions.

2 History of Grapevine and Winemaking

The findings of archaeological studies show that during pre-historic times the wild grapevine, *Vitis vinifera* subspecies *sylvestris*, was mostly found around the Mediterranean coasts as well as in Southwest Asia.[2] The findings also show that starting from the Neolithic era, populations living in Transcaucasia and neighbouring areas slowly began changing the 'natural' distribution of the wild grapevine, in an effort to cultivate wine grape as well as to find out vines that could generate fruits with the desired qualities in specific areas.[3]

Remains of clay jars containing wine or deposits of tartaric acid found in Georgia and Greece date back to 8,000 years ago;[4] a winery dating from 6,000 years ago was discovered in a cave in Armenia;[5] and during the First Dynasty, who ruled Egypt from 3100 to 2890 B.C.,[6] both cultivation of grape and production of wine were considered essential.[7]

The significance of viticulture in ancient Greek culture was emphasized by Thucydides, a Greek historian living in the fifth century B.C., who

2 Daniel Zohary, 'The domestication of the grapevine' in P.E. McGovern, S.J. Fleming and S.H. Katz (eds), *The Origins and Ancient History of Wine* (Gordon and Beach 1995).

3 Tim Unwin, 'Terroir: At the Heart of Geography' in Percy H. Dougherty (ed), *The Geography of Wine: Regions, Terroir and Techniques* (Springer 2012).

4 David Keys, 'Now that's what you call a real vintage: Professor unearths 8,000-year-old wine' *Independent* (28 December 2003) <https://www.independent.co.uk/news/science/now-thats-what-you-call-a-real-vintage-professor-unearths-8000-year-old-wine-84179.html> accessed 30 January 2020.

5 Hand Barnard et al., 'Chemical evidence for wine production around 4000 BCE in the Late Chalcolithic Near Eastern highlands' (2011) 38(5) Journal of Archaeological Science 977.

6 Percy H. Dougherty, 'Introduction to the Geographical Study of Viticulture and Wine Production' in Percy H. Dougherty (ed), *The Geography of Wine: Regions, Terroir and Techniques* (Springer 2012).

7 Ibidem.

proclaimed: "the peoples of the Mediterranean began to emerge from barbarism when they learned to cultivate the olive and the vine".[8]

During the Roman era, vine growers were cognisant that certain areas were favourable to different kinds of vines: Columella, a Roman farmer living in the first century B.C., presented in his *De re rustica* one of finest early explanations of the association between various kinds of vines and the environmental conditions they grew in.[9]

Vitis vinifera was introduced in China from Central Asia during the Han Dynasty (206 B.C.–220 A.D.).[10] It is not difficult to find historical references to wine production and consumption in various China's dynasties.[11]

Actually, indications of an appellation system are even more ancient: in the tomb of the Egyptian pharaoh Tutankhamun, who died in 1325 B.C., the amphorae have engravings that show the name of the wine, its production year and harvest year, its source, as well as the name of the farmer who raised the grapevines.[12]

Pliny, a Roman naturalist living in the first century A.D., recorded 91 varieties of vine, and recognised some of them, namely the Nomentian and Apiana, as especially adapted to cold climates, such as those characterising northern Italy.[13] His work allows us to deduce that the Romans recognised that wines produced in distinct areas tasted different, and preferred certain wines over others.

Since the earliest time it is known that the unique taste of each wine originates from a combination of various elements: the vine variety, the whole of climate, soil, vegetation and geomorphological aspects creating a certain 'place' where grapes are cultivated, and the specific techniques used to plant, grow and harvest grapes, and to make wine.

This combination of elements has been termed *terroir* by French winemakers long ago. It is not easy to give an exact definition of the term: although it is indisputably linked to the notion of territory, it certainly refers to something going beyond simple geographical factors.

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8 Cited in Tom Standage, *A History of the World in 6 Glasses* (Walker & C. 2005) 52.

9 Lucius Junius Moderatus Columella, *On Agriculture* (H.B. Ash, E.S. Forster and E.H. Heffner trs, Heinemann 1941) III.i.5: 229.

10 Shi-Zuo Wang and Ping Huang, 'Discussion on grape wine history in China' (In Chinese) (2009) 11 Liquor-making Sci Tech 136.

11 Per Jenster and Yiting Cheng, 'Dragon wine: developments in the Chinese wine industry' (2008) 20(3) Int J Wine Business Res 244.

12 Stephen K. Estreicher, W*ine from neolithic times to the 21st century* (Algora Publishing 2006) 18.

13 Unwin (n 3).

A working group of the French National Institute for Agricultural Research (INRA) suggested the following definition, which in 2005 the UNESCO proposed as a basis for a dialog:

> A terroir is a delimited geographical space, defined from a human community which in the course of its history constructs an assemblage of distinctive cultural traits, knowledge and practices founded on a system of interaction between the natural environment and human factors. The skill set involved reveals originality, conferring a typicity and permitting recognition for the products or services originating from this space and thus for the men who live there. Terroirs are living and innovative spaces which cannot be assimilated into a single tradition.[14]

Therefore, in the course of time it has been recognised that specific traits characterising the physical environment, the vine variety, and the production techniques gave origin to a wine distinguished by particular taste and quality. As a consequence, since the earliest times regulations have been issued, aimed at guaranteeing the adoption of certain choices and procedures in vine-growing and winemaking. In this way, both consumers and producers could have legitimate expectations related to the product, that is a wine production whose taste and quality would remain within a certain quality bandwidth year after year.

Indeed, already in 1395, Philip the Bold condemned the planting of an "evil and disloyal grape called Gaamez" and passed a law ordering that all Gaamez vines in Burgundy be chopped down and pulled from the earth, in order to improve the production of quality wines in his kingdom.[15]

In France, the trend of protecting taste and quality of wines originating from a certain area intensified in the eighteenth century: a 1731 edict of the Council of State prohibited to plant vines without royal permission,[16] and the regional court of Metz even issued a decree that all vines planted in the region before 1700 should be uprooted.[17] The attention towards preserving the organoleptic qualities of wines produced in a specific area grew in the twentieth century,

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14 UNESCO, *Rencontres Internationales Planète Terroirs, UNESCO 2005: Actes* (UNESCO 2005).

15 Rosalind K. Berlow, 'The "disloyal grape": the agrarian crisis of late fourteenth-century Burgundy' (1982) 56 Agricultural History 426.

16 Georges Martin. *Documents relatifs aux défenses de planter des vignes sans autorisation dans la généralité de Guienne au XVIIIe siècle*. (Protat Frères, Imprimeurs 1907).

17 Roger Dion, *Histoire de la vigne et du vin en France des origines au XIXe siècle* (CNRS Editions 1959).

also as a result of the gradual spreading of the cultivation of specific grape varieties in various locations around the world.

For these reasons, the law-making bodies of some countries and regions devised delimitation strategies such as the French *Appellation d'origine contrôlée* (AOC) system;[18] and, within the EU, the labels of Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI).[19] These provisions are aimed at ensuring that goods produced in specific regions keep their qualities over time.

Under this system, the protected wines are characterised by the following factors: the geographical area in which the grapes are grown, the grape varieties that are used, the methods of vine cultivation and pruning, and the technique of wine production.[20] Whereas initially these delimitation strategies were brought in with the only aim of guaranteeing the origin and quality of the wines, research highlighted that nowadays they provide potentiality for what Marx called 'monopoly rent'.[21] On the other hand, they have been censured as restricting the research and development of new production techniques, whereas such innovations could even improve the quality of first-rank wines.[22]

3 Wine Culture

Wine is part of the food system both as a beverage and as an ingredient for cooking recipes. For thousands of years it has been a distinguishing element of various cultures[23] and is now a relevant part of modern nations' gastronomical traditions. Therefore, similarly to other consumer behaviours, drinking wine often expresses the consumer awareness that he or she has a certain individual identity or shares a specific group identity.[24] Drinking wine is a behaviour

18 One example thereof is the Décret du 18 février 1950 relatif à la définition de l'appellation controlée "Coteaux du Layon" <https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000669378&pageCourante=02094> accessed 25 March 2020.

19 See section 8.2.

20 See section 8.2.

21 Karl Marx, *Capital: a critique of political economy,* Volume 3 (Penguin 1981, first published 1894) 910.

22 Elizabeth Barham, 'Translating terroir: the global challenge of French AOC labeling' (2003) 19(1) Journal of Rural Studies 127.

23 T. Egea et al., 'Spirits and liqueurs in European traditional medicine: Their history and ethnobotany in Tuscany and Bologna (Italy)' (2015) 175 J Ethnopharmacol 241.

24 Marion Mouret et al., 'Social representations of wine and culture: A comparison between France and New Zealand' (2013) 30(2) Food Quality and Preference 102, at 103.

enacted conforming to particular social rules: for instance, often celebrating an event calls for toasting.[25]

In many cultures, wine has long been a basic element of meals, and in the course of time wine production and consumption traditions developed along with culinary practices in many regions. In ancient times people were deeply distrustful toward water, which was often suspected to transmit bacteria and diseases, thus wine was the most common beverage accompanying food. In Europe, in the countries lying on the Mediterranean Sea, the traditional diet is based on bread, oil and wine. For this reason, the food culture of the South-European countries during the early Middle Ages considered wine as a basic element to be consumed every day, and not just on special events.[26] Especially France, Italy and Spain, which are countries characterised by an ancient oenological culture, attached greatest importance and careful attention to wine for a long time, and still do.

Moreover, wine is perceived as a high status drink, thanks to its taste and even more to its high profile.[27] It is often related to conviviality, friendship and pleasure, and can be considered as a hallmark of national identity.[28] In particular, wine consumption in Western countries is characterised by appreciation of and for the wine itself: its colour is observed, its aroma inhaled, its taste evaluated in order to take pleasure in all these elements.[29]

With the passing of time, many cultures established habits of wine and food matching, pairing specific food dishes with particular wines, with the aim of intensifying the gastronomic experience: this is usually done choosing combinations highlighting harmonious complementarity or well-balanced contrast based on the dishes' and wines' perceptual characteristics and physiochemical

25 Marion Demossier, 'Gout du vin et gouts des vins chez les britanniques au XXIe siècle' (2004) 31(111) Revue des Oenologues et des Techniques Vitivinicoles et Oenologiques 49; Marion Demossier, 'Consuming wine in France. The "Wandering" drinker and the "Vin-anomie"' in T. M. Wilson (ed), *Drinking cultures: Alcohol and identity* (Berg 2005) 129.

26 Massimo Montanari, 'Production structure and food systems in the early Middle Ages' in Jean-Louis Flandrin and Massimo Montanari (eds), *Food: A Culinary History from Antiquity to Present* (Columbia University Press 1999) 172.

27 Ibidem.

28 Grégory Lo Monaco and Christian Guimelli, 'Représentations sociales, pratique de consommation et niveau de connaissance: le cas du vin' (2008) 78 Cahiers Internationaux de Psychologie Sociale 35; Grégory Lo Monaco, Christian Guimelli and Michel-Louis Rouquette, 'Le sens commun actuel à la lumière des petites histoires du passé: Analyse diachronique de la représentation sociale du vin' (2009) 24(2) Psihologia Sociala 7.

29 Mouret et al. (n 24).

properties. In Europe, these pairings are aimed at finding the optimal amalgamation of tastes between the food dishes and the wine accompanying them.

In traditional Chinese culture, grape wine, compared to more popular non-grape wines, such as rice wine and fruit wines, has a high prestige, due to its 'humanistic' links to literature and poetry,[30] but it was not included in gastronomic traditions. However, during the last forty years, great changes took place in this respect.[31] Westerners introduced the habit of grape wine drinking into China, and their wine consumption culture deeply affected the way in which Chinese people drank wine.[32] At present, Chinese people still consider wine as an upmarket good and a high-profile product.[33] Many scholarly research essays focusing on wine consumption in China pointed out that wine is often associated with a wealthy and fashionable lifestyle and a high social condition, in line with Western standards. Seemingly, Chinese people regard wine-drinking as an elegant behaviour revealing style, grace and discernment, so much so that wine has even been equated to a "trophy drink".[34] Moreover, in China wines produced abroad are considered as stand out elements referring to a glamorous, sophisticated and exotic food culture.[35]

The traditional Chinese culture has an undeniable role in the choice of the wine-type. At first, as in traditional Chinese culture red is associated with luck, red wine became more popular than white wine. The link between red and luck led Chinese consumers to perceive red wine as associated with economic success and affluence.[36] For this reason, red wine is often served at important meetings of people of considerable status, for instance business or state dinners, and during Chinese New Year celebrations. Furthermore, there is a

30 Mouret et al. (n 24).

31 Richard C.Y. Chang, Jakša Kivela and Athena H.N. Mak, 'Food preferences of Chinese tourists' (2010) 37 Annals of Tourism Research 989.

32 Mouret et al. (n 24).

33 Lara Agnoli, Roberta Capitello and Diego Begalli, 'Geographical brand and country-of-origin effects in the Chinese wine import market' (2014) 21(7/8) J. Brand Manag. 541; Fang Liu and Jamie Murphy, 'A qualitative study of Chinese wine consumption and purchasing: implications for Australian wines' (2007) 19(2) Int. J. Wine Bus. Res. 98; Andrew Muhammad et al., 'The evolution of foreign wine demand in China' (2013) 58 Australian Journal of Agricultural and Resource Economics 392; Pei Xu et al., 'Willingness to pay for red wines in China' (2014) 25(4) J. Wine Res. 265.

34 Xiaoling Hu et al., 'The effect of country-of-origin on Chinese consumers' wine purchasing behavior' (2008) 3(3) J. Technol. Manag. 292.

35 Agnoli, Capitello and Begalli (n 33); Xu et al. (n 33).

36 Liu and Murphy (n 33); Simon Somogyi et al., 'The underlying motivations of Chinese wine consumer behavior' (2011) 23 Asia Pacific Journal of Marketing and Logistics 473; Xu et al. (n 33).

widespread belief that red wine can improve cardiovascular health. This belief is also rooted in Traditional Chinese medicine, based on the perceived analogy between grape wine and distilled spirits containing therapeutic herbs: as the latter are deemed helpful in enhancing physical health, similar healing effects are ascribed to red wine.[37]

In the same ways as the inhabitants of many Western countries, Chinese people are appreciative of their own gastronomic culture, which is often called the "drinking and eating culture". However, in Western cuisine dishes are served sequentially, and therefore it is possible to pair a specific wine to each dish. On the contrary, in Chinese cuisine all dishes are served together, and as there are usually up to thirty dishes in a meal, pairing wine with dishes is in effect impossible.[38] Critical tasting is much less common than simple toasting (gan bei), and wines are held in high esteem much more as precious gifts than for their taste qualities.[39]

In China, some scholarly works pointed out, wine is mostly consumed at special events,[40] and very often purchased as a gift. Indeed, giving gifts is an essential trait of Chinese culture: recently offering lavish gifts has become a widespread practice[41] and research stresses that Chinese consumers purchasing wine spend larger amounts for gifts than for their own consumption.[42] In purchasing wine as a gift, Chinese consumers attach the greatest importance to brand, country of origin, price and gift packaging.[43] This order of priorities, according to some scholars, may derive from the widespread belief that the gift of a prestigious wine can reveal the high social status of the giver.[44] Some

37 Somogyi et al. (n 36); Xu et al. (n 33).

38 Ben Haobin Ye, Hanqin Qiu Zhang and Jingxue (Jessica) Yuan, 'Intentions to participate in wine tourism in an emerging market: Theorization and implications' (2014) 38 Journal of Hospitality & Tourism Research 506.

39 Pedro Ballesteros, 'Sauvignon blanc in China, a great potential' *Asian Wine & Spirits News* (8 February 2016) <https://aws-silkroute.com/sauvignon-blanc-in-china-low-key-now-but-the-potential-to-shine-in-the-future/> accessed 4 January 2020.

40 Pierre Balestrini and Paul Gamble, 'Country-of origin effects on Chinese wine consumers' (2006) 108(5) Br. Food J. 396; Hu et al. (n 34); Liu and Murphy (n 33).

41 Chen Xi, Ravi Kanbur and Xiaobo Zhang. 'Peer effects, risk pooling, and status seeking: What explains gift spending escalation in rural China?' *CEPR Discussion Paper No. DP8777* (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 1988708> accessed 4 January 2020.

42 Ying Yu et al., 'Chinese choices: A survey of wine consumers in Beijing' (2009) 21 International Journal of Wine Business Research 155.

43 Ye Yang and Angela Paladino, 'The case of wine: understanding Chinese gift-giving behavior' (2015) 26 Mark. Lett. 335.

44 Hyunok Lee et al., 'Wine markets in China: Assessing the potential with supermarket survey data' (2009) 4(1) Journal of Wine Economics 94; Liu and Murphy (n 33).

experts detected a constant trend in the purchase of wine as a gift,[45] but other commentators stressed that, as a consequence of Xi Jinping's austerity campaign against corruption,[46] the purchase of high end wines as gifts has been reduced, in spite of the fondness for finest quality goods usually characterising Chinese culture.[47]

4 The Relationship between Production, Consumption and Trade

The main component of grape wine is obviously wine grapes, which are an extremely delicate produce, and can therefore not be moved to distant markets unless undergoing at least some steps of treatment. Planting inferior wine grapes in unsuitable regions, without specific knowhow, will bring forth low quality wine; consequently, the sale price of this undifferentiated product will be scarcely above the production cost. On the contrary, planting high quality vine varieties on suitable vineyard land, and growing the grapes, making and marketing the wine in the light of the best technological knowledge and skills can result in high quality wine, being sold at a higher price. However, choosing to pursue quality strategies requires large investments.[48]

In fact, even before initiating wine production, an investor wishing to produce at economically sustainable costs shall have available large sums in order to cover in advance the significant establishment costs and the first years in which expenses go well beyond income. Furthermore, as the lifetime of vines can be longer than thirty years, it is essential to obtain and keep solid property rights over the vineyard land.[49]

Each winemaker should therefore have at his or her disposal the best possible combination of the factors which are essential for wine production: good

45 Muhammad et al. (n 33).

46 Guy Collins and Scott Reyburn, 'Wine sales drop for second year as Bordeaux Demand Wanes' (*Bloomberg*, 29 January 2014) <https://www.bloomberg.com/news/articles/2014-01-29/wine-sales-drop-for-second-year-as-bordeaux-demand-wanes> accessed 30 January 2020.

47 Vera Seidemann, Glyn Atwal and Klaus Heine, 'Gift Culture in China: Consequences for the Fine Wine Sector' in Roberta Capitello, Steve Charters, David Menival, and Jingxue (Jessica) Yuan (eds), *The Wine Value Chain in China: Global Dynamics, Marketing and Communication in the Contemporary Chinese Wine Market* (Elsevier 2017) 47.

48 Kym Anderson and Glyn Wittwer, 'Asia's evolving role in global wine markets' (2015) 35 China Economic Review 1.

49 Ibidem.

vines, a suitable territory, updated traditional production know-how, and the best technologies.[50]

Concerning the territory, in the course of centuries it became clear that the best areas for grape growing are those located in the belt between 30° and 50° latitude north and south of the Equator, characterised by dry weather during the summer harvest period and rainfalls almost exclusively during the winter. Centuries of experience allowed the identification of the most appropriate sites and the best grape varieties to be grown in known regions. Moreover, scientists identified new regions in which the grape vine can be grown and selected varieties and new cultivation methods. Wine grapes have been grown also in areas which in the past were not considered suitable to this end, developing new methods and techniques to obtain quality products.[51]

As regards traditions, they define the scope of the local demand, besides the processes through which wine is produced. Local demand has great importance for wine producers, because they can fulfil the demand easily, without much effort and at quite a low cost, whereas export markets have rather high fixed costs of entry.[52] Some scholars highlighted that in order to study in detail the development of demand, it is necessary to investigate not only the cultural and oeno-gastronomic roots of the potential consumers, but also other factors, such as their real incomes and the relative prices of the wine available on a specific market.[53]

Innovative technologies can enhance the efficiency of traditional production and marketing techniques: this goal can be reached over long time-spans by trial and error or investing private or public funds in research and development. Although, compared to New World wine producers, Old World wine producers in Europe traditionally rely less on new technologies and more on *terroir*, both groups made larger investments in research and development in the past fifty years. Moreover, both Old and New World countries' governments increased funding for post-secondary education in viticulture, oenology and

50 Ibidem.

51 Orley Ashenfelter and Karl Storchmann, 'Wine and climate change' *AAWE* working paper no. 152 (2014) <https://ideas.repec.org/p/ags/aawewp/164854.html> accessed 4 January 2020.

52 Richard Friberg, Robert W. Paterson and Andrew D. Richardson, 'Why is there a home bias: A case study of wine' (2011) 6(1) Journal of Wine Economics 37.

53 George J. Stigler and Gary S. Becker, 'De Gustibus Non Est Disputandum' (1977) 67(2) American Economic Review 76.

wine marketing.[54] It is interesting to notice that these new technologies can be transferred to other areas and even other countries, spreading all over the world.[55] The process of transferral of technologies has been speeded up in the past twenty years by way of fly-in fly-out vine-growers and experts in oenology coming from both Old and New World wine-producing countries.[56]

Another chance is given by joint ventures, which integrate the technical knowledge and market experience of two or more firms: sharing their know-how, the partners contribute to the rapid spread of the most modern technologies to new regions.

Research has stressed that modern technologies are of the utmost importance in two main areas. The first area concerns the definition of methods and practices allowing winemakers to know in advance the customers' needs, in order to direct the production so that it can fulfil these needs, enhancing the sales and optimizing the winemakers' profits. Moreover, research and development investments developed labour-saving technologies which could be adopted in land-abundant and labour-scarce regions, replacing human harvesters and pruners through mechanical devices. In a similar way, robots allow to speed up bottling and labelling activities in wineries.[57]

In sum, through the best possible combination of territories, characterised by certain geomorphology, soil, vegetation and climate peculiarities, traditions and technologies, winemakers working in specific areas being part of wide territories all over the world can offer to potential customers the wine products most consistent with their preferences, and can convey these products to buyers through local and international trade.

5 Data on Global Wine Production, Consumption and Trade

According to research, in 2013 there were more than one million winemakers around the world:[58] the significant number of employees shows that this

54 Lucia Cusmano, Andrea Morrison and Roberta Rabellotti, 'Catching-up trajectories in the wine sector: A Comparative Study of Chile, Italy and South Africa' (2010) 38(11) World Development 1588.

55 Alan L. Olmstead and Paul W. Rhode, 'Biological globalization: The other grain invasion' in Timothy J. Hatton, Kevin H. O'Rourke and Alan M. Taylor (eds), *The new comparative economic history: Essays in honor of Jeffrey G. Williamson* (MIT Press 2007) 115.

56 Andrew Williams, *Flying winemakers: The new world of wine* (Winetitles 1995).

57 Kim Anderson and Nanda R. Aryal, *Growth and Cycles in Australia's Wine Industry: A Statistical Compendium,1843 to 2013* (University of Adelaide Press 2015) 42.

58 Tom Kierath and Crystal Wang, 'The Global Wine Industry' *Morgan Stanley* (22 October 2013) <http://gavinquinney.com/wp-content/uploads/2013/11/MS_wine.pdf> accessed 4 January 2020.

economic sector has a great importance. However, according to data from the *Organisation Internationale de la Vigne et du Vin* (OIV), between 2000 and 2018 the worldwide area under vine shrank from 7.85 to 7.4 million hectares (ha), with a reduction of 4.5 percent.[59] In order to interpret these data from a merely economic point of view, it could be posited that the reduction of the areas under vine resulted from a crisis of the wine sector, or that investors made an informed choice, favouring the product quality over the product quantity. Therefore, it is necessary to relate these data to other relevant data, such as those concerning the world wine production and trade.

However, a clear and uniform trend among different world regions is absent. In the period between 2013 and 2017, the grape land decreased in traditional wine-producing countries, such as France, Italy and Spain, but the New World countries planted new vines: so did, among others, the Russian Federation (+42.1%), Hungary (+ 22.7%), Uzbekistan (+ 18.7%), and China (+ 14.9%).[60]

Examining the wine production, we can notice that in the period between 2000 and 2013, whereas the land under vine diminished, the world wine production did not show a steady trend, fluctuating between 304.2 million hectolitres (mhl) in the period 1986–1990 and 258.0 mhl in 2012.[61] In 2013, wine production showed a minor increase, growing to 290.1 mhl[62] and then adjusted to 282 mhl.[63] Table 8.1 shows the different levels of wine production, consumption, and trade globally between 2014 and 2018.

Some experts who analysed the world wine production in detail stressed that in 2017 and 2018 the wine production in the New World continued to rise. In 2018, the United States' wine production reached 23.9 mhl; Argentina registered 14.5 mhl; in South Africa wine production amounted to 9.5 mhl; and New Zealand registered 3.0 mhl.[64] In 2018, in the Old World, where the traditional

59 Jean-Marie Aurand, 'Conjoncture Vitivinicole Mondiale 2015' *Organisation Internationale de la Vigne et du Vin* (18 April 2016) <http://www.oiv.int/public/medias/4577/conference-de-presse-avril-2016.pdf> accessed 31 January 2020; OIV, '2019 Statistical Report on World Vitiviniculture' <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf> accessed 4 January 2020.

60 OIV, 'Statistical Report on World Vitiviniculture 2018', <http://www.oiv.int/public/medias/6371/oiv-statistical-report-on-world-vitiviniculture-2018.pdf> accessed 4 January 2020.

61 OIV, 'World Vitivinicultural Statistics 2013–2014', <http://www.oiv.int/public/medias/6292/oiv-world-vitivinicultural-statistics-2013-2014-en.pdf> accessed 4 January 2020.

62 Ibidem.

63 OIV (n 60).

64 Ibidem.

wine producing countries are located, France produced 48.6 mhl, Germany 10.3 mhl, Romania 5.1 mhl, Italy 54.8 mhl, and Spain 44.4 mhl.[65]

Some commentators pointed out that the group of countries including the ten most important wine producers in the EU, which was the biggest contributor to the high production levels of the 1970s and 1980s, has gradually lost its predominance: in fact, its share of worldwide wine production decreased from 70 percent in 1957 to around 60 percent in 2016.[66] On the contrary, as the New World countries (among them, United States (US), Australia, Chile, New Zealand and China) extended their vineyards, enlarging their production potential, they increased their share of global wine production. These data show that dramatic changes are transforming the wine sector: on the one hand the European traditional wine producers might have difficulty to adapt to changing market conditions.[67] On the other hand, new producers appeared on the global market since the late 1980s: among them are both Anglo-Saxon countries (South Africa, New Zealand, Australia and the United States), and Latin American countries (Argentina, Chile, Uruguay, and Brazil).[68]

However, it is possible that also change in climate might have played a role and could still have an impact in the present and in the future. Indeed, climate change could have a relevant influence on agriculture[69] and in particular on viticulture and wine production,[70] favouring quantitatively and qualitatively better results in some areas compared to others.

Moving to consumption, the data collected by OIV in 2019 highlight that in 2018 the world wine consumption reached 292 mhl, with a difference between production and consumption of 46 mhl.[71] It is interesting to notice that

65 Ibidem.

66 Leonida Correia, Sofia Gouveia and Patrícia Martins, *'The European wine export cycle' (2019) 8(1) Wine Economics and Policy 91.*

67 J. François Outreville and Michael Stephen Hanni, 'Multinational firms in the world wine industry: an investigation into the determinants of most-favoured locations' (2013) 24(2) Journal of Wine Research 128.

68 J. Sebastián Castillo, Emiliano C. Villanueva and M. Carmen García-Cortijo, 'The international wine trade and its new export dynamics (1988–2012): a gravity model approach' (2016) 32(4) Agribusiness 466.

69 Hasanul Banna et al., 'Financing an efficient adaptation programme to climate change: a contingent valuation method tested in Malaysia' (2016) 25(2) Cah Agric 1; Guillaume Lacombe, Anan Polthanee and Guy Trébuil, 'Long-term change in rainfall distribution in Northeast Thailand: will cropping systems be able to adapt?' (2017) 26(2) Cah Agric 1.

70 Gregory V. Jones et al., 'Climate change and global wine quality' (2005) 73(3) Clim Change 319.

71 OIV (n 60).

the difference between production and consumption was significantly higher in the period from 1986 to 1990, when it reached 64.7 mhl due to a period of overproduction.[72]

Between 2000 and 2013 the historical wine-producing countries registered a sudden decrease in wine consumption, which traditionally reached high levels, and consumption quickly decreased. On the contrary, the New World countries, where wine consumption levels were steadily low, significantly increased their consumption:[73] in 2018 US, China and the Russian Federation were respectively at the first, fifth and seventh place globally for wine consumption.[74] Noteworthy are the positions of some countries which were not traditionally big wine consumers: among them there are the tenth position of Australia, the fourteenth of South Africa, and the fifteenth shared by Japan and the Netherlands.[75] Moreover, a transfer of wine consumption was reported already in the period 2000–2013: while in 2000, 31 percent of the global wine consumption took place outside European countries, the extra-European percentage raised to 39 percent between 2000 and 2013.[76] In this increase, a major role has been carried out by the enlargement of the Asian market.[77]

The third interesting group of data concerns world wine trade. The global wine market is becoming more and more globalised, and trade experienced such a dramatic growth that the relationship between trade and production is expressed by an ever increasing percentage.[78] The abolition of trade barriers and the creation of integrated economic areas pushed the growth of the international trade of wine. Concerning wine trade, the most important integrated economic areas can be considered the European Union (EU), the North America Free Trade Agreement (NAFTA), Mercado Común del Sur (MERCOSUR),

72 OIV (n 61).

73 Andrea Dal Bianco, Vasco Ladislao Boatto and Francesco Barra Caracciolo, 'Cultural convergences in world wine Consumption' (2013) 45(2) FCA Uncuyo. 219.

74 OIV (n 60).

75 Ibidem.

76 OIV, State of the vitiviniculture world market, <http://www.oiv.int/public/medias/2231/en-press-release-oiv-10-11-14.pdf> accessed 25 March 2020.

77 Armando Maria Corsi, Nicola Marinelli and Veronica Alampi Sottini, 'Italian wines and Asian markets: Opportunities and threats under new policy scenarios and competitive dynamics' Paper presented at the 54th Conference of the Australian Agricultural and Resource Economics Society, Adelaide (2010).

78 Kim Anderson and Signe Nelgen 'Wine's Globalization: New Opportunities, New Challenges' *Wine Economics Research Centre Working Paper N° 011* (2011), <https://econpapers.repec.org/paper/adlwinewp/2011-01.htm> accessed 1 August 2020.

and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). The WTO, which favoured a progressive decrease of tariffs and the enactment of a productive regulation of non-tariff barriers, also played a meaningful part in the boosting of trade.[79]

As shown by the statistics published by OIV, the decrease or suppression of trade barriers caused in the period 2001–2017 a crucial increase of sparkling wine and bottled wine trade, both in volume and in value. On the contrary, bulk wine trade shows a decreasing trend, both in volume and in value.[80] Table 8.2 shows the volumes of global wine trade between 2013 and 2017. Table 8.3 shows the value of global wine trade between 2013 and 2017.

In effect, wine can be shipped in bulk in order to save costs; in some cases, bulk wine imports are subsequently blended with local wines. As labels can be put not only by the original producer but also by food retail chains, blended wines containing a percentage of imported wine are labelled as local wines; the original name of the imported wine is lost as well as its specific taste. Instead, bottled wine labels clearly indicate the wine origin, winemaker and brand.[81]

Consequently, due to the increase in trade of sparkling and bottled wines, we can assume that customers are becoming more careful about wine quality and make better-informed purchasing choices.

An event which had multiple effects on world trade was the 2008 world economic crisis, which decreased wine production, curtailed wine consumption and influenced the international market negatively. Due to the shortage of economic resources which customers could spend purchasing wine, there was a temporary increase of trade in bulk wines.[82] However, in 2011 the market recovered from the 2008 crisis and started growing again. Combining these data with the ones related to the decrease in the vineyard area, we can deduce that the world wine sector has developed techniques pursuing both a higher production and higher quality of wines.

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79 Angela Mariani, Eugenio Pomarici *and* Vasco Boatto, 'The international wine trade: recent trends and critical issues' (2012) 1 Wine Economics and Policy 24. See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178 and Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019).

80 OIV (n 60).

81 COGEA, *Study on the competitiveness of European wines: Final report* (European Union, 2014).

82 OIV, 'Vine and Wine Outlook 2012', <http://www.oiv.int/public/medias/4524/oiv-vine-and-wine-outlook-2012-completfinal.pdf> accessed 4 January 2020.

6 Wine Production, Consumption and Trade in the EU

6.1 *Data on EU Wine Production, Consumption and Trade*

Sections 2 and 3 already stressed that grape vine cultivation and wine production are in large part a millennial cultural heritage of European countries. The European Union (EU) is not only the largest wine producing region but also the principal world importer and exporter.

In the EC/EU in the 60's and early 70's, production intensified due to the following factors: the raising wine demand and the adoption, in 1962, of the Common Agricultural Policy, in which grapes and wine had crucial importance.

This policy established few standards of quality and ensured in any case that the unsold grapes and wine would be paid to the farmers at above market prices. The surplus was destined for export, used in the production of industrial alcohol, transformed into animal feed, put in storage, or destroyed. As these subsidies granted to farmers and winemakers entailed significant growing costs, in 1978 the EC/EU started to adopt new policies, aimed at regulating vineyards and restraining production.[83] Table 8.4 shows the surface under vine in European vineyards between 2014 and 2017. Table 8.5 shows the volumes of EU wine opening stocks between 2009 and 2019.

In 2018, Italy, Spain and France were the biggest wine producers in the EU, followed by Portugal, Germany and Hungary.

In the period 2013–2017 there were seventeen EU Member States among the main wine-consuming countries, namely France, Italy, Germany, United Kingdom, Spain, Portugal, Romania, Netherlands, Belgium, Austria, Hungary, Sweden, Greece, Czech Republic, Denmark, Poland and Croatia.[84] Table 8.6 shows their total wine consumption.

The EU Member States consumed 54 percent of the world wine consumption in the period 2002–2006; this percentage raised to 55 percent in the period 2007–2011, and slightly decreased to 53 percent in the period 2012–2016.[85]

Let us examine some data related to the EU Member States wine export, compared with the total agri-food export to third countries.[86] The acronym PGI, meaning Protected Geographical Indication, refers to quality wines with

83 Barbara Insel, 'The Evolving Global Wine Market' (2014) 49(1) Business Economics 46.

84 OIV (n 60).

85 ISMEA, 'The state of the European GI wines sector: a comparative analysis of performance' (2017) <http://efow.eu/wp-content/uploads/2017/11/ISMEA-report.pdf> accessed 4 January 2020.

86 Ibidem.

geographical indication. Table 8.7 shows the relationship between wine export and total agri-food export from the EU Member States between 2012 and 2016.

The data highlight the good performance of the wine sector, second in value behind the fruit and vegetable sector.[87]

In 2018, EU Member States wine export reached the value of €22.7 billion (bn). More than half of the value, that is €11.6 bn, accounting for 51 percent of the total wine exports, was exported outside the EU. The main importer of EU wines was the United States, importing €3.8 bn, which is 33 percent of the total extra-EU exports; Switzerland imported €1.0 bn, which is 9 percent of the extra EU exports; China and Canada imported almost the same value, representing 8 percent of extra EU exports; Japan and Hong Kong imported both €0.8 bn, which is 7 percent of extra EU export.

The largest wine exporter was France, with €5.4 bn extra-EU exports in 2018, corresponding to 47 percent of the total EU wine exports to extra-EU countries. Italy and Spain followed with €3.1 bn, which is 26 percent, and €1.2 bn, corresponding to 10 percent of the total extra-EU exports, respectively.[88]

The EU Member States are also wine importers: in 2018 they imported wine in the value of €13.4 bn: 20 percent of this amount came from extra-EU countries. Tables 8.8 and 8.9 show respectively the main wine imports from extra-EU countries and the main wine importers among the EU Member States.

6.2 *EU Wine Regions*

In earlier times, wine was consumed where it was traditionally produced. At present, twenty-one EU Member States are wine producers, fourteen of which have important production levels. The spread of vineyards and wine production allows us to grasp immediately the importance of the wine sector in the EU, and clarifies the reason of the tireless efforts put by the EU in its regulation, supporting wine growers and promoting wine consumption within and out of the regional borders.

The EU distinguished its wine regions, grouping them in growing zones, mainly characterised by the relevant climate.

– Zone A, comprising almost the whole Germany, Luxembourg, Belgium, the Netherlands, United Kingdom, the Čechy region of the Czech Republic and those northern European countries in which commercial winemaking is a very limited business.

87 ISMEA (n 85).

88 Eurostat, 'Wine production and trade in the EU' (21 November 2019) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20191121-1> accessed 4 January 2020.

- Zone B, comprising the Baden region in Germany, Austria, the French regions of Alsace, Champagne, Jura, Loire, Lorraine and Savoie, parts of the Czech Republic, Poland, Slovakia and Romania.
- Zone C, which is subdivided into:
  - Zone C I, comprising the French regions of Bordeaux, Burgundy, Provence, Rhône and Sud-Ouest, some areas in the extreme north of Italy, some areas in the north of Spain, most of Portugal, and parts of Hungary, Poland, Slovakia, and Romania.
  - Zone C II, encompassing the most part of Languedoc-Roussillon in France, much of northern and central Italy, most of northern Spain and some parts of Slovenia, Bulgaria and Romania.
  - Zone C III a, including some parts of Greece, Cyprus and Bulgaria.
  - Zone C III b, comprising some parts of Portugal, small parts near the Mediterranean coast of France and Corsica, southern Italy and Spain, Malta, parts of Cyprus, and most of Greece.[89]

7 China Wine Production, Consumption and Trade

7.1 *Data on China Wine Production, Consumption and Trade*

In 1978 China's "reform and opening-up policy" was launched by Deng Xiaoping, significantly transforming the country's economy: the centrally-planned economy was gradually abandoned changing China into an economic world power more and more driven by the market.[90] This allowed a significant development of the wine industry in the course of time. In the period, spanning from 1980 to 1990, vineyards developed gradually, reaching about 30,000 hectares producing less than 900,000 tons of grapes. Later on, the Chinese government reflected on the opportunity to preserve cereal production for feeding both humans and livestock, rather than using it as a source of alcohol, also because it was concerned about the social and health issues connected with the consumption of high-strength alcoholic drinks. For these reasons, in 1987 the National Winemaking Conference suggested the Four Changes strategy for

89 Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 [2008] OJ L 148, Annex IX.

90 Marcus Vinicius De Freitas, 'Reform and Opening-up: Chinese Lessons to the World' *Policy Center for the new South* (2019) <https://www.policycenter.ma/sites/default/files/PCNS-PP-19-05.pdf> accessed 4 January 2020.

the alcoholic beverage industry. The main proposals were the following: changing from grain wine to fruit wine, from distilled wine to fermented wine, from high-strength alcohol drinks to low-strength ones, and from low-end to high-end wine. As grape wine is included among fermented fruit wines, the grape wine industry received a strong support through this strategy and developed significantly since then.[91]

In 2002, the State Economic and Trade Committee (SETC) declared that the development of fruit wine and in particular grape wine was its main goal, marking the beginning of a period focused on the growth of the grape wine industry.[92]

A very common product until then was the half base wine, made up by about 50 percent grape wine and other ingredients: mainly purified water, grape juice and sugar.[93]

In 2003 the SETC enacted the new Chinese Wine Technical Specifications (CWTS). QB/T 1980–94, the Standard regulating half base wine in force till then ceased to be valid: the new rules established that the half base wine could no more be included in the grape wine category and had to be withdrawn from the market by the end of June 2004.[94]

In 2006, the new national Standard of wine GB 1503–2006 was issued, replacing the GB/T 15037 in force till then. This Standard, developed in accordance with the CWTS and the definition of wine made by OIV, established that the term 'wine' identifies a product originating from a complete or partial alcoholic fermentation of fresh grapes or grape juice. In this way, the wine Standards in force in China were aligned with international ones.[95]

The development of the Chinese wine industry was made possible and supported by the enactment of the regulations cited above and by further factors: according to some scholars, among them are "the fast growing economy and increasing market demand, the development of society, the advancement

91 Hua Li, Jia-Gui Li and He-Cai Yang, 'Review of grape and wine industry development in recent 30 years of China's Reforming and Opening-up' (2009) 25(4) Mod Food Sci Technol 341.

92 Liling Zeng and Gergely Szolnoki, 'Some Fundamental Facts about the Wine Market in China' in Roberta Capitello, Steve Charters, David Menival and Jingxue (Jessica) Yuan (eds.), *The Wine Value Chain in China* (Elsevier 2017) 15.

93 Ibidem.

94 Ibidem.

95 Ibidem.

of technology and management, and the competition by foreign competitors after China's WTO accession".[96]

The combination of all these factors ensured that in 2012 the wine production reached 1.35 mhl,[97] and even 9.1 mhl in 2018,[98] whereas the production in the 1970s did not exceed 0.85 mhl per year.[99]

Now, focusing on China wine consumption, it emerges that China has become the largest wine-consuming country in Asia.[100] In China, the annual wine consumption grew quickly from 331,000 tons in 2002[101] to 1,930,000 tons in 2017, decreasing to 1,760,000 tons in 2018.[102] The annual consumption per capita has also increased from 0.25 litres (L) in 2002 to 1.37 L in 2016, decreasing to 1.28 L in 2018.[103] During the period 2012–2018 dramatic changes occurred regarding domestic and imported wines. The domestic wine production dropped from 1,382,000 tons in 2012 to 978,000 tons in 2018. Meanwhile, the wine import suddenly rose from 394,500 tons in 2012 to 687,500 tons in 2018.[104]

According to some scholars, these data suggest that individual preferences of wine consumers play a central role in the Chinese wine market.[105] In fact, wine drinking is linked to many cultural and lifestyle traits that have gradually become common in China[106] and plays an ever more relevant role in family meetings, wedding parties, and formal dinners.[107] A deeper knowledge of the peculiarities of the different wines is spreading among consumers,

96 Yuanbo Li and Isabel Bardají, 'A new wine superpower? An analysis of the Chinese wine industry' (2017) 26 Cah. Agric. 65002, 2. See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178.

97 ISMEA (n 85).

98 OIV (n 60).

99 Tatiana Bouzdine-Chameeva, Jacques-Olivier Pesme and Wenxiao Zhang, 'Chinese wine industry: Current and future market trends' <https://www.wine-economics.org/wp-content/uploads/2013/07/Bouzdine_Pesme_Zhang.pdf> accessed 1 August 2020.

100 OIV (n 60).

101 Wang Yabin and Jaigui Li, 'Segmentation of China's online wine market based on the wine-related lifestyle' *British Food Journal* (2019) <https://www.emerald.com/insight/content/doi/10.1108/BFJ-04-2019-0295/full/pdf?title=segmentation-of-chinas-online-wine-market-based-on-the-wine-related-lifestyle> accessed 4 January 2020.

102 OIV (n 60).

103 Yabin and Li (n 101).

104 Ibidem.

105 Ibidem.

106 C. Juhua, L. Li, and A. Yun, 'A survey of the perception and consumption of wine by teachers in Qinhuangdao University' (2009) 11 Chinese and Foreign Grapes and Wine 268.

107 J. Li, W. Yabin and Y. Hecai, 'A review of the factors affecting wine consumer behavior' (2016) 44(2) Anhui Agricultural Sciences 262.

due also to the wide spread of wine tasting events, festivals, fairs, and wine conferences.[108]

A number of elements promoted wine consumption (and still do) in China: among them economic, social, technology and education factors. On the other hand, other factors contribute, at least in part, to discourage wine consumption, including the anticorruption campaign launched by the Chinese government in 2012.

The economic factors promoting wine consumption in China include the striking economic development that took place in China in 2005–2014; China's Gross Domestic Product (GDP) growing above 10 percent annually;[109] the reduction of import tariffs thanks to the conclusion of certain Free Trade Agreements (FTAS) having a direct bearing on wine trade. Indeed, in 2006 the import tax on bottled wine dropped from 43 percent to 14 percent, and the import tariff on bulk wine declined from 43 percent to 20 percent. As a consequence, there was a reduction in the price of imported wine, and the price/quality ratio of the latter became gradually more competitive with Chinese wine.

Moreover, since 2005 China signed FTAS with Chile, New Zealand and Australia, three countries producing and exporting wine. These FTAS allowed a gradual reduction of the import taxes charged on wine from these three countries until the taxes have been completely eliminated.[110] Therefore, since 2006 the imported wine dramatically grew both in volume and value, making China the fifth main wine importer worldwide, with an increase of wine import of 79 percent in the time span between 2014 and 2018.[111]

Among the most important social and educational factors there is the growth of the urban upper-middle class, formed by those having annual household incomes from 106,000 to 229,000 Renminbi.[112] These consumers have larger economic resources at their disposal and can therefore afford the purchase of larger quantities of better quality wines.[113] A further relevant element

108 Yabin and Li (n 101).

109 Zeng and Szolnoki (n 92).

110 Ibidem.

111 OIV (n 60).

112 Dominic Barton, Yougang Chen and Amy Jin, 'Mapping China's middle class' *McKinsey & Company* (2013) <http://www.mckinsey.com/industries/retail/our-insights/mapping-chinas-middle-class> accessed 4 January 2020.

113 Somogyi et al. (n 36); Kym Anderson and Glyn Wittwer, 'How large could Australia's wine exports to China be by 2018?' (2013) 28(6) Wine & Viticulture Journal 60.

is the better knowledge shared by a progressively larger number of customers of the sensory attributes characterising various wines, which are linked to the grape variety, wine colour, and aroma.[114] In fact, many scholarly works highlighted that the average wine consumer in China is young, well educated, and has quite a high income.[115] Therefore, it can be hypothesized that this kind of customers tends to adopt less austere lifestyles than those which were common in the past,[116] when almost the totality of Chinese consumers did not yet develop a palate for wines of high quality.[117]

The larger availability of economic resources to be spent in the purchase of wine as well as the spread of a better knowledge of the peculiarities of the different wines are confirmed by further data. Between 2010 and 2014 there was a significant decrease in the sales of wine priced below 20 Renminbi, and vice-versa a higher tendency of consumers to purchase wines sold between 20 and 50 Renmimbi. The sales of wines in this price range experienced a strong growth, confirming that the most part of Chinese consumers consider the wines in this price range as characterised by the best quality/price ratio.[118]

The better knowledge of the newest achievements in viticulture and oenological techniques gained by the wine sector professionals also plays a role in this regard.[119]

Among the most important technologic factors is the rise of e-commerce, which encourages new consumption: in effect, e-commerce offers certain advantages to wine producers, simplifying the process of reaching potential customers and interacting with them,[120] and brings benefits also to consumers, increasing the variety of available products.[121]

114 Ping Qing, Aiqin Xi and Wuyang Hu, 'Self-Consumption, Gifting, and Chinese Wine Consumers' (2015) 63 Canadian Journal of Agricultural Economics 601; Angelo A. Camillo, 'A strategic investigation of the determinants of wine consumption in China' (2012) 24(1) Int. J. Wine Bus. Res. 68; Hong Bo Liu et al., 'The Chinese wine market: a market segmentation study' (2014) 26(3) Asia Pac. J. Mark. Logistics 450.

115 Han Lin and Ernesto Tavoletti. 'The marketing of Italian wine brands in China: The 'mainstreaming' approach' (2013) 20 Transition Studies Review 221; Muhammad et al. (n 33) Ye, Zhang and Yuan (n 38).

116 Steve Charters, Jingxue Yuan, Roberta Capitello and David Menival, 'Introduction' in Roberta Capitello et al. (eds.), *The Wine Value Chain in China* (Elsevier 2017) 3.

117 Lee et al. (n 44); C. Moslares and R. Ubeda, 'China's wine market: strategic considerations for Western exporters' (2010) 3(1) Int. J. Chin. Cult. Manag. 69.

118 Zeng and Szolnoki (n 92).

119 Li, Li and Yang (n 91).

120 Zeng and Szolnoki (n 92).

121 Youchi Kuo et al., 'The new China playbook' *The Boston Consulting Group* (2015) <http://www.iberchina.org/files/2016/BCG-The-New-China-Playbook.pdf> accessed 1 August 2020.

Whereas the above-mentioned factors contributed to the increase of wine consumption, the anticorruption campaign launched in 2012 had the opposite effect. Since wine makes social exchange easier and establishes an elegant, luxurious and comfortable atmosphere, it is usually served at Chinese business banquets, where the host shows his deference to the guests offering high-end food and drinks.[122] Doubtlessly, honouring guests is a central element of Chinese culture,[123] however, many experts stressed that offering and gifting luxury products may lead not only to excessive spending of public or corporate funds,[124] but also to some individual donors having to curtail their expenditure on strictly necessary household articles.[125] With the purpose of preventing luxury gift giving to public officials, in April 2012 a government campaign against corruption was started, which culminated with the arrest of certain officials. These events had a ripple effect on establishments linked to wine consumption and purchase, including hotels and restaurants where business banquets usually took place, and shops selling luxury goods, where high-end wines were preferred gifts. In any case, some scholarly work showed that the anticorruption campaign affected not only high-end wines, but the whole wine category.[126]

Examining the 2018 per capita wine consumption in China, which reaches 2 L per capita, it can be noticed that this figure is much lower than that of Portugal, France and Italy, reaching respectively 63 L, 50 L and 44 L per capita.[127] However, keeping in mind that China's adult population exceeds 1 bn, and that wine consumption represents less than 4 percent of the whole Chinese alcohol consumption, it can be inferred that wine consumption in China still offers great chances of growth.[128]

Having outlined the data concerning production and consumption, it is now possible to compare these data with those concerning wine import. Table 8.10 shows China's levels of wine production, consumption, and import between 1986 and 2018.

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122 Zeng and Szolnoki (n 92), at 18.

123 Qing, Xi and Hu (n 114).

124 Zeng and Szolnoki (n 92).

125 Xi, Kanbur and Zhang (n 41).

126 Suzanne Mustacich, 'China cuts back on big-buck Bordeaux. A government campaign against lavish spending has led wine drinkers to spend less' *Wine Spectator* (2013) <http://www.winespectator.com/webfeature/show/id/48299> accessed 4 January 2020.

127 Natalie Wang, 'Which country drinks the most wine?' *Vino Joy News* (18 July 2019) <https://vino-joy.com/2019/07/18/which-country-drinks-the-most-wine/> accessed 4 January 2020.

128 Anderson and Wittwer (n 113).

Whereas until 1995 wine production covered consumption, later on consumption gradually grew until 2017 exceeding production, in this way boosting imports.

In order to get a clearer picture, it is useful to distinguish import by volume from import by value.[129] Table 8.11 shows China's wine import by volume and value between 2014 and 2018.

In the given years, taking into consideration wine import by volume, China is placed on the fifth place worldwide, whereas considering wine import by value, China is placed on the fourth place worldwide.[130] These data are of particular interest, when compared with the austerity drive launched in 2012. Since the latter has probably caused a decrease in the import of high-end wines, the data cited above seems to confirm that there was an increase in the import of good quality and medium price bottled wine.

According to some scholars, there are basically three reasons for China's high import rate in the wine sector: domestic production not covering consumption, decrease of the import tariffs for wines imported from countries benefiting from specific FTAS establishing favourable conditions, and size of the wine stock reserves after the peak season for sales.[131]

Moreover, some studies stressed that at present imported wines represent nearly 30 percent of all wines consumed in China, and this figure may rise.[132] In any case it is interesting to notice that in the past years China showed to be not only a host country of FDI but also the home country of Chinese investors making investments abroad. Investment concerning the wine sector includes the acquisition of vineyards in Australia and winegrowers' estates in France, aiming at producing quality wines to be sold back to China.[133]

7.2 *China Wine Regions*

With its 875,000 hectares planted with vines, the second largest area in the world,[134] China is doubtlessly a central participant in the current wine market. Although at the moment only 13 percent of the grapes grown in China are used

129 OIV (n 61).

130 Ibidem.

131 Li and Bardají (n 96).

132 CNFOODNET, 'China Food Network' (2017) <http://www.cnfoodnet.com/content-65-17736-1.html> accessed 4 January 2020.

133 Louise Curran and Michael Thorpe, 'Chinese FDI in the French and Australian wine industries: liabilities of foreignness and country of origin effects' (2015) 9(3) Front Bus Res China 443.

134 OIV (n 60).

for wine,[135] China is nevertheless one of the biggest wine producers and in 2018, with its 9.1 mhl production, China was included in the list of the top ten largest wine producers worldwide.[136]

The main areas for grape growing are located in some regions of the belt extending between 25° and 45° north latitude.[137] As its wine production is quite young, China is still attempting to apply the concept of *terroir* in the description of its vineyards: much research has been carried out in order to identify the areas most suited for wine production, taking advantage of their different geomorphological and climate characteristics, and specific methods and techniques of vine growing and wine making are being developed.

The most important areas identified as suitable for wine production are Shandong, Hebei, Shanxi, and more recently, Ningxia, Xinjiang, and Yunnan.

Shandong, a province located on China's east coast, is one of the main wine-producing provinces: the output of its over 140 wineries constitutes the 40 percent of China's total wine production. Besides the long history of its wine industry and the availability of the best winemaking technologies, its main asset is its warm temperate continental monsoon climate. Due to the relative warmth of its winters, it is the only region in Northern China in which vines do not need to be buried in the cold season. However, summers are usually quite rainy, raising the risk of vine diseases. With an area under vine of about 20,000 hectares, Shandon produces 4.45 mhl wine per year, mostly from the grape varieties Cabernet Gernischt, Riesling and Chardonnay.[138] Specific rules on Shandong manor wine are prescribed by Regulation DB37/T 2207-2012.[139]

The second Chinese region as to wine production is Hebei, which has more than 11,500 hectares under vine and an annual wine production of about 1.13 mhl. The most suitable areas for viticulture are the hilly zone of Huailai, northwest of Beijing, and, in the north of the province, the coastal district of Changli. The most common grape varieties grown in Hebei are Cabernet Sauvignon, Chardonnay, Merlot and Marselan. The wine production of Shandong and Hebei together accounts for more than 50 percent of the whole Chinese wine

135 Shen Xiu Hui, *Il Vino In Cina: Caratteristiche della produzione interna e prospettive per gli importatori stranieri* (Centro Studi Assaggiatori 2016) 15.

136 OIV (n 60).

137 Hui (n 135).

138 'Shandong Wine' *Wine-Searcher* (18 October 2018) <https://www.wine-searcher.com/regions-shandong> accessed 4 January 2020> accessed 4 January 2020.

139 Wayne Zheng et al., *Translated English of Chinese Standard*, <www.ChineseStandard.net> accessed 25 March 2020.

production, both by yield and by value.[140] Specific norms regulating Hebei grapes are included in Regulation DB13/T 1142–2009.[141]

The main part of Shanxi is a plateau partly surrounded by mountains. Its climate is continental with four definite seasons, and is characterised by low humidity, high-intensity sunlight, and a large thermal excursion. Vines are mostly cultivated on terraced hills or on the base of the mountain ranges in the South-East of the province. Although its production is not very large, Shanxi nevertheless has an important place in the Chinese wine industry because of its renowned labels, among which there are Sanxi Fenju and Zhuyeqing.[142] The most common grape varieties grown in Shanxi are Chenin Blanc, Merlot, Cabernet Franc, and Cabernet Sauvignon.[143] Regulation DB14/T 1363–2017 governs the cultivation of Shanxi wine grapes.[144]

The wines produced in Ningxia are best known for their quality: indeed, one of the best vineyard areas in China is the large, intensively irrigated valley situated in this province, between the Helan Mountains and the Yellow River. The local government is striving to extend the province's vineyard area to 46,667 hectares by 2020, with the aim of reaching a wine production of 200 million bottles per year.[145] Ningxia's climate is continental, with high summer temperatures and very cold winters. For this reason, every autumn vines are buried to protect them from freezing.[146] As the wine industry has an important role in the economy of the province, both the central and the local governments made great investments in order to enhance its development, constructing appropriate infrastructures and supporting technical training and specialised education of professionals in the wine sector.[147] As a result

140 'Hebei Wine' *Wine-Searcher* (25 July 2019) <https://www.wine-searcher.com/regions-hebei> accessed 4 January 2020> accessed 4 January 2020.

141 Zheng et al. (n 139).

142 Xiaobing Li, *Modern China* (ABC-CLIO 2015).

143 'Shanxi Wine' *Wine-Searcher* (25 July 2019) <https://www.wine-searcher.com/regions-shanxi> accessed 4 January2020> accessed 4 January 2020.

144 Zheng et al. (n 139).

145 Xinhua, 'Ningxia Hui's winemakers turn ambitious, eye world's top spot' *China Daily* (9 July 2018) <http://www.chinadaily.com.cn/a/201807/09/WS5b42c1dca3103349141e17ae.html> accessed 4 January 2020.

146 Linhai Hao, Xueming Li and Kailong Cao, 'Toward sustainability: Development of the Ningxia wine industry' (2015) EDP Sciences 01021.

147 Department of Forestry, Ningxia Hui Autonomous Region People's Government. 2016. Notification on releasing the regulation on grapevine materials of the Helan Mountain East Foothill Wine Region. Management Committee of Ningxia Helan Mountain East Foothill Grape Industry Park. 2016. Notification on the release of methods of new financial support to enhance the development of the grape industry and measures for implementation.

of these efforts, some wines produced in Ningxia, such as Classic Chardonnay and Jiabeilan Bordeaux, reached very high quality levels, winning awards in both domestic and international wine competitions, even beating well-established brands. The achieved world recognition allowed to challenge the misconception according to which Chinese wines are per se of a poor quality.[148] The main varieties grown in the province are Cabernet Sauvignon, Merlot and Cabernet Franc, however some producers are starting to grow other varieties, such as Chardonnay, Riesling, Syrah, and even some sparkling wines.[149] The cultivation of wine grapes in Ningxia is governed by Regulation DB64/T 204-2016.[150]

Xinjang, situated in North-Western China, has more than 100,000 hectares under vine, 16,700 of which are dedicated to wine grapes: this makes Xinjiang the largest wine grape producing region in China. Producing wine in this province is quite challenging. The soil is very dry and rocky, and there are only two clearly marked seasons, with particularly cold winters: for this reason, vines often have to be buried in order to survive the tough weather. Moreover, due to its remote location, the transportation cost of the produced wine is quite high. However, the province produces more than 200,000 litres of wine annually, mostly from the grape varieties Cabernet Sauvignon, Cabernet Franc, Chardonnay and Merlot.[151] Regulation DB65/T 3245-2011 includes norms on the cultivation of grapes in Xinjang.[152]

Turning to Yunnan, a province located in southern China, its location on various mountain ranges leads to vineyards to be small in size and cultivated on terraces. The climate is mitigated by the Pacific and the Indian Oceans and ensures long growing seasons. As the vineyards are planted at high altitudes, where cool nights moderate the effects of hot days, they benefit from an extended ripening period, in which the grapes achieve a characteristic rich flavour. Irrigation is provided by the water of the Yangtze River, and distributed through an extensive channel system. The most common varieties grown in Yunnan are Cabernet Franc and Cabernet Sauvignon.[153] Regulation DB53/T

148 Adam Lechmere, 'Chinese wine wins top honour at Decanter World Wine Awards' *Decanter* (8 September 2011) <https://www.decanter.com/wine-news/chinese-wine-wins-top-honour-at-decanter-world-wine-awards-36689/> accessed 4 January2020.

149 'Ningxia Wine' *Wine-Searcher* (19 October 2018), <https://www.wine-searcher.com/regions-ningxia> accessed 4 January 2020.

150 Zheng et al. (n 139).

151 'Xinjiang Wine' *Wine-Searcher* (19 June 2019) <https://www.wine-searcher.com/regions-xinjiang> accessed 4 January 2020.

152 Zheng et al. (n 139).

153 'Yunnan Wine' *Wine-Searcher* (17 June 2017) <https://www.wine-searcher.com/regions-yunnan> accessed 4 January 2020.

712–2015 prescribes specific rules for the production of dry wine in Heqing County.[154]

Summing up, it emerges that China's central and local governments put much effort in the development of the country as a leading "new producing power" in the wine sector. In this way China has been able to play an important role in the global wine market, and it will be even more so in the future.

8 EU and China Wine Policies

8.1 *Introduction*

Similarly to other food and agriculture products, in most countries and in different ages wine has been the object of government actions affecting each aspect related to wine production, consumption and trade.[155] Some of the policy measures have a direct effect on prices and incomes of wine consumers and producers: measures of this kind include taxes and subsidies. Other policies limit the supply of wine, for instance import restraints or restrictions on areas in which certain wine grapes can be grown. A further type of regulations aims at reducing asymmetric information concerning the quality of wine: among them are compulsory labelling, limits on the use of specific additives and restrictions on the use of particular grape varieties.[156]

Sometimes, these quality standards and regulations aim at reducing the negative consequences of alcohol consumption, or at protecting consumers from unhealthy products, or at defending the interests of certain producer groups.[157]

8.1.1 Types of Wine Regulations

The first type, market regulations, includes taxes, subsidies and planting rights. Taxation on alcohol consumption may be direct, by means of excises, or indirect, via import tariffs. In any case, such measures are both a source of tax revenue for the government, and a means to reduce social problems related to excessive alcohol consumption.[158]

154 Zheng et al. (n 139).

155 Kym Anderson, Gordon Rausser and Johan Swinnen, 'Political Economy of Public Policies: Insights from Distortions to Agricultural and Food Markets' (2013) 51(2) Journal of Economic Literature 423.

156 Giulia Meloni et al., 'Wine Regulations' (2019) 41(4) Applied Economic Perspectives and Policy 620.

157 Ibidem.

158 Ibidem.

The second type, vine and vineyard regulations, includes geographical indications (GIS), which limit the growing of particular wine grapes to certain territories, specifying provisions on irrigation, cultivation and pruning, and on the whole process of wine making.[159]

The third type, concerning oenological practices, defines what has to be understood under the term wine, what materials can be used, what ingredients can be added during wine making, for instance in order to increase the potential alcohol content of the wine,[160] which subtractive methods and technologies can be used, for example to concentrate the must[161] or to remove alcohol from the produced wine, and what methods and techniques can be used concerning the fermentation and aging of the wine.[162]

The last type, relating to wine bottling and labelling, includes, for instance, the duty to list in the wine label certain additives or allergens such as sulphites.[163]

8.2 *EU Wine Policies*

A few years after the founding of the European Community in 1957, Council Regulation 24/62/EEC was issued: besides requiring the establishment of a vineyard register in each Member State and the compilation and notification of yearly statistics on wine production, it established specific rules on quality wines.[164]

Regulation (EC) No 816/1970, following and completing the provisions of the common market organisation (CMO) for the wine sector implemented in 1962, was related to interventions on undifferentiated products, termed table wines. It established a price and intervention system (private storage, compulsory distillation), a system for trade with third countries (Common Customs Tariff, export refunds), rules concerning production and controlling planting, and rules concerning oenological processes and conditions for release to the market.[165] Simultaneously, Regulation (EC) No 817/70 was issued,

159 Ibidem.

160 Ibidem.

161 Matthias Schmitt and Monika Christmann, 'The use of dextrose in winemaking', BIO Web of Conferences 7, 02034 39th World Congress of Vine and Wine (2016) <https://www.bio-conferences.org/articles/bioconf/pdf/2016/02/bioconf-oiv2016_02034.pdf> accessed 26 January 2020.

162 Meloni et al. (n 156).

163 Ibidem.

164 Council Regulation 24/62/EEC of 4 April 1962 on the Progressive Establishment of a Common Organisation of the Market in Wine [1962] OJ 30/989.

165 Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organisation of the market in wine [1970] OJ L 99. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31970R0816> accessed 25 March 2020.

establishing special provisions relating to quality wines produced in specified regions.[166]

In the following years some Regulations were issued, granting subsidies and conversion premiums and defining oenological practices.[167] However, after some years, a number of elements, such as a loss of market share of EU wines, the high costs linked to the provisions included in the Regulations in force, and the new issues related to climate change and sustainable agriculture persuaded the EU to reform its wine policies, introducing new Regulations.[168]

In 1999, Regulation (EC) No 1493/1999 removed the price regime and simplified distillation measures. Some measures focused on production aimed to achieve a better market equilibrium: a temporary vine planting ban until 31 July 2010, except in case of a specific derogation; premiums for the permanent abandonment of wine-growing, referring to vineyards located in areas whose production was not aligned on demand and therefore presumably of lower quality; and support for the restructuring and conversion of vineyards, in order to adapt the production to market demand, and therefore presumably the planting of vines producing premium wines.

Three forms of intervention were aimed at preserving market balance: aid for private storage, aid for specific uses, and provisions concerning

166 Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions [1970] OJ L 99/20. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31970R0817> accessed 25 March 2020.

167 Council Regulation (EEC) No 1163/76 of 17 May 1976 on the granting of a conversion premium in the wine sector, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31976R1163R(02)> accessed 25 March 2020; Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31979R0337> accessed 25 March 2020; Council Regulation (EEC) No 1708/79 of 24 July 1979 determining, for the 1979/80 wine-growing year, the prices to be paid under the compulsory distillation of the by-products of wine-making and the maximum amount of the contribution from the Guarantee Section of the European Agricultural Guidance and Guarantee Fund, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31979R1708> accessed 25 March 2020; Commission Regulation (EEC) No 2600/79 of 23 November 1979 on storage contracts for table wine, grape must and concentrated grape must, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX%3A31979R2600> accessed 25 March 2020; Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31987R0822> accessed 25 March 2020; Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31987R0823> accessed 25 March 2020.

168 Meloni et al. (n 156).

distillation. The latter included: compulsory distillation of by-products of wine making; distillation of wine produced from grapes not classified solely as wine grape varieties; distillation aimed at the production of potable alcohol; crisis distillation to be realised in exceptional cases of market disturbance. Further provisions concerned for instance protection and control arrangements for certain terms, the use of geographical indications, the labelling of imported products, and a system of import duties and export refunds based on the undertakings accepted under the Uruguay Round negotiations.[169]

In 2008, Regulation (EC) No 479/2008 was issued, aimed to increase the competitiveness of EU wine producers; strengthen the reputation of Community quality wine; recover old markets and win new markets within the EU and worldwide. To this end, it extended some measures set out in Regulation (EC) No 1493/1999, namely the restructuring and conversion of vineyards, and by-product distillation; it introduced a grubbing-up scheme until the end of the wine year 2010/2011; it redesigned the system of designations of origin and geographical indications for quality wines; and it established a transitional planting right regime for the period 2015/2018.

Certain national measures aimed at promoting or supporting the domestic production of wines became optional or were suppressed.[170]

Interestingly, Article 10 of Regulation (EC) No 479/2008 concerned Community PDO or PGI wines or wines with an indication of the wine grape variety, providing support to information or promotion measures concerning these wines in third countries, thereby improving their competitiveness in those countries.

New norms for the period 2014–2020 are contained in Regulation (EC) No 1308/2013 establishing a common organisation of the agricultural products markets. This Regulation encompasses measures for promotion, restructuring and conversion of vineyards, and for innovation in the wine sector. It ended the ban on the planting of new vineyards: it replaced the transitional planting rights regime, from 2016 to 2030, with a new scheme of authorisations for vine plantings; it introduced flexibility to the previously-established quotas, in

169 Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine [1999] OJ L 179, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31999R1493> accessed 25 March 2020.

170 Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 [2008] OJ L 148, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0479&from=EN> accessed 25 March 2020.

order to meet the market demand; and it clarified some provisions concerning PDO and PGI wines.[171]

Many provisions distinguish the new vine planting authorisation system from its predecessor. Authorisations may be granted without a cost being charged to producers but are non-transferable; authorisations for new plantings allow Member States an annual growth corresponding to 1 percent of the total area planted with vines in their territory. Finally, Regulation (EC) No 1308/2013 allows Member States to issue authorisations for specific areas eligible for the production of wines without a geographical indication.[172]

The current regulatory framework allows to produce certain types of wine only in specific geographical areas, using specific grape varieties and applying specific production techniques. Vivid critiques have been moved to this system, since climate change and global warming move the suitable areas for wine production further north, and the regulations in place do not allow for modification of the areas and methods of production.[173]

8.3 *China Wine Policies*

As the wine industry gradually developed in China, policymakers at both national and local level issued dedicated Standards and policies.

In 1982 the government issued the Food Hygiene Law, aimed at regulating the growing number of privately owned businesses operating in the field of food manufacturing emerging from the economic reforms. It established Standards for food content, additives, containers, manufacturing conditions and equipment, prohibiting potentially harmful products and practices.[174]

Striving to regulate the wine industry, in 1984 the Ministry of Light Industry issued the QB921-84 Light Industry Professional Standard: "Wine and Its Experimental Method", establishing the first provisions specifically focused on wine production: a control system was designed, but the requirements of the

171 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347.

172 Meloni et al. (n 156).

173 Orley Ashenfelter and Karl Storchmann, 'The Economics of Wine, Weather, and Climate Change' (2016) 10(1) Review of Environmental Economics and Policy 25.

174 The Food Hygiene Law of the People's Republic of China; Peng Liu, 'Tracing and periodizing China's food safety regulation: A study on China's food safety regime change' (2010) 4 Regulation & Governance 244.

Standard were still low. This allowed some wineries to enter the market with low-quality wines, which caused a decline in the reputation of the Chinese wine industry, also among domestic consumers.[175]

In 1987, concerned about the possibility that the food supply difficulties and the famine occurred in the 1960s could happen again, the government issued legislation aiming at preserving cereal production as a food source rather than alcohol source: as a result, the production of grain wine was discouraged, whereas the production of grape wine received a strong support, developing significantly since then.[176] Grape wine started to be produced in large quantities, but its quality was still poor.[177]

In 1994 a more detailed legal framework concerning wine was provided by three new light industry Standards. GB Standards establish the minimum technical standard for the production of food and beverages all over the country. Among GB Standards, we can distinguish the mandatory standards, identified with the acronym GB, and the voluntary standards, identified with the acronym GB/T.[178] The National Standard GB/T 15037-1994 Wine gave clear definitions of wine products and requirements needed to comply with the national as well as international standards, stipulating, for instance, that only fermented grape wine can be termed 'wine'. However, as the acronym GB/T indicates, the requirements established were not mandatory, but just recommended.[179]

The second Standard issued in 1994 was the industry Standard QB/T1980-1994 Half-juice Wine, concerning a type of wine mixing grape juice with water, sugar and other fruit juice. Although half-juice wine was the leading product in the wine market, it presented a number of quality problems, for instance those related to substances added during the production process. The Standard QB/T1980-1994 established strict rules for the production of this type of wine, in order to fight against wine adulteration by means of potentially harmful chemicals.

In 2003 the government repealed this Standard, establishing that the production of half-juice wine would be no more allowed after 2004: consequently, half-juice wine disappeared from the market in the following years.[180]

175 Y. Fang, H. Yang and X. Zhang, 'Development Process, Current status and Future Trends Of Chinese Grape and Wine Industry' in Roberta Capitello, Steve Charters and David Menival (eds) *The Wine Value Chain in China*: *Consumers, Marketing and the Wider World* (Elsevier 2017) 269.

176 Li, Li and Yang (n 91).

177 Fang, Yang and Zhang (n 175).

178 Hui (n 135).

179 Ibidem.

180 Ibidem.

The Standard QB/T1982-1994 Wild Grape Wine was the third Standard issued in 1994: it directed the production of wine produced from local grape varieties.[181]

A new Food Hygiene Law was issued in 1995. As alluded to by its title, it concerned all foods and beverages, establishing specific mandatory requirements for their production.

For instance, it stipulated that food containers had to be absolutely clean, detergents used for washing food had to be safe for humans, storage, forwarding and loading equipment should not endanger food safety, water used in production processes had to comply with national standards, and workers in charge of production and delivery had to follow mandatory protocols.[182]

In 2001, in order to access to the WTO, China was required to gradually converge to international standards. Consequently, China issued several new regulations, standards and norms enhancing product quality rather than quantity.

The GB 15037/2006 National Food Safety Standards – Wines provided new and more detailed provisions, amending and replacing GB/T 15037/1994 Wines.[183] Only some chapters and sections of this Standard are mandatory: namely Chapter 3, Sections 5.2, 5.3, 5.4, 8.1 and 8.2. The remaining provisions are mere recommendations.

The most important changes include amendments to the definitions of key terms, made with reference to OIV Regulation 2003 and Technical Specifications for China Wine Brewing. In particular the Standard specifies, under Article 3.1, that the term 'wines' "refer to fermentation wines that contain certain of alcohol content, products of complete or partial fermentation of fresh grapes or grape juice as the key ingredients". On the whole, this Standard provides harmonisation with relevant international standards and regulations aiming at guaranteeing food safety and fostering healthy development. To reach these objectives the Standard specifies also analysis methods, inspection guidelines, and requirements related to labelling, packaging, transportation, and storage of wine.

Moreover, the Standard adds product classifications according to sugar content; it establishes the need to specify if the product contains specific

181 Ibidem.

182 Yongming Bian, 'The Challenges for Food Safety in China' *China Perspective Online* (May–June 2004) 53 <https://journals.openedition.org/chinaperspectives/819#tocto2n3> accessed 4 January 2020.

183 GB 15037/2006 National Food Safety Standards – Wines, <https://www.chinesestandard.net/PDF/English.aspx/GB15037-2006> accessed 25 March 2020.

substances or compounds; and it determines the requirement to indicate the net content.[184]

Other laws and regulations establishing the recommended standards for wines are the following: GB/T 15038-2006 Analytical Methods of Wine and Fruit Wine,[185] in force since January 2008, which outlines sensory, physical and chemical analytical methods of wine and fruit wine;[186] GB/T 23543-2009 Good Manufacturing Practice for Wine Enterprises,[187] issued in 2009, establishing the Good Manufacturing Practice for producing wines in China; and SB/T11122— 2015 Norm of Terminology Translation of Imported Wines,[188] in force since September 2015, which contains the Chinese translation of many foreign terms related to wine, such as the wine grape varieties, the most important wine regions, and the major wineries of the eleven countries considered. It is important to notice that the SB/T11122— 2015 includes also the norms for wine import and labelling.

8.4 *Reflections on EU and China Policies in Support of Wine Production*

As highlighted in the sections above, both EU and China paid a growing attention at encouraging and supporting wine production, and in particular the production of GI wines.

In the EU, specific provisions for the promotion of quality wines are included in the following Regulations: Council Regulation 24/62/EEC, Regulation (EC) No 817/70, Council Regulation (EEC) No 823/87, Regulation (EC) No 1493/1999, Regulation (EC) No 479/2008 and Regulation (EC) No 1308/2013. In China, thanks to the support of both local administrations and the central government, some provinces such as Ningxia are producing quality wines, among which there are Jiabeilan Bordeaux and Classic Chardonnay. The global competitivity of these wines is showed by the awards won in international wine competitions, beating even well-established brands.

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184 *Appendix A7: National Standards-Wine and Beverage* (2015) <https://webcache.googleusercontent.com/search?q=cache:20UkihD7IZQJ:https://manualzz.com/doc/35127314/translated-chinese-gb-standards---appendix-a7--national+&cd=2&hl=it&ct=clnk&gl=it> accessed 4 January 2020.

185 GB/T 15038-2006 Analytical Methods of Wine and Fruit Wine <https://www.chinesestandard.net/PDF/English.aspx/GBT15038-2006> accessed 25 March 2020.

186 Ibidem.

187 GB/T 23543-2009 Good Manufacturing Practice for Wine Enterprises <https://webstore.ansi.org/standards/spc/gb235432009> accessed 25 March 2020.

188 SB/T11122 – 2015, <https://www.dropbox.com/s/gr10v190sibi2xn/Norma%20Terminologia%20Vini_Nomi%20italiani.pdf?dl=0> accessed 25 March 2020.

It is doubtless that the policies of the two giants in support of wine production achieved promising results. However, concerning EU policies, some experts identified a number of improvements which could give a greater support to the penetration of EU wines into the global market. Some recommendations concern in particular PDO and PGI wines positioned in the Top range and Ultra-premium segments: according to these commentators "it would be appropriate to combine [in the labels] the acronyms used by different Member States in a single acronym to be used worldwide, associated with a mandatory logo (…) For these wines it would be appropriate to continue with information and promotion activities, as 'PDO-PGI popularity' emerges from the analysis as a key factor of competitiveness for wines in the higher price/quality ranges. With regard to wines that enter the Commercial and Super premium segments for which the 'Origin of the product' is more important than PDO-PGI labels (…) it would be appropriate to introduce into EU regulations the indication of the country/region of origin (for example, an umbrella brand covering wines of a member country – e.g. Italy – or region – e.g. Tuscany). It would thus be appropriate to extend the financing of activities envisaged by the Promotion measure of the wine CMO to this type of wines".[189]

In any case, the cited study found that it is important to give support to all the EU wines, and not only to PDO and PGI wines. This could be done acting on various fronts: urging more firms to draw from the funds established by the CMO for penetration of new markets, such as Republic of Korea, the Philippines and Mexico; starting the negotiations or accelerating the signing of bilateral agreements between the EU and third countries regarding (also) wine, such as China and Russian Federation; and promoting technological adaptation, aiming, for instance at the relocation of the bottling processes.[190] Indeed, the cited study found that a growing segmentation is likely to occur in the near future, and it concluded that it could be imprudent to limit the whole production exclusively on PDO-PGI wines. On the contrary, these experts suggest that attention should be given to and production should be continued of wines in the lower range as well, which may still represent the everyday beverage of lower income earners.[191]

189 COGEA (n 81).
190 Ibidem.
191 Ibidem.

9 Conclusions

China's policies aimed at two complementary objectives: promoting the consumption of fermented grape wine and increasing its quality production. The main purpose was to meet the domestic demand, which at the moment is met thanks to imports from historical wine-producing countries.

For these reasons, the Chinese government greatly supported the development of viticulture in other provinces in addition to those where it was traditionally practiced, often overcoming obstacles related to remote location or climate rigidity.

Moreover, considering that a better education in viticulture and winemaking could benefit both wine production and consumption, the Chinese government funded specific universities offering masters in viticulture and winemaking, aimed at the development of the wine sector. As a consequence, a better knowledge of the organoleptic characteristics of different wines is gradually spreading, as well as a deeper understanding of how drinking wine can provide health benefits, as shown by several studies.[192] Moreover, the newer Chinese generations such as the new wave of millennials, are acquiring the habit to consume wines also in a private context, and no longer only in formal occasions as their predecessors did.

It is important to recall that there is a positive feedback loop between wine consumption and growing economies, where middle-class consumers are striving for a better quality of life. Wine can be attractive for these consumers depending on how it is advertised and marketed. Keeping in mind this socio-economic development trend occurring in China, but which can also take place in other historically non-wine-consuming countries, the most recent EU policies aim at increasing the competitiveness of the Member States' wines. In order to reach this goal, two approaches are pursued: one encourages the production of quality PDO and PGI wines, and the other promotes EU wines in foreign markets.

192 Among them are the following: Chiva-Blanch G, Urpi-Sarda M, Llorach R, Rotches-Ribalta M, Guillén M, Casas R, Arranz S, Valderas-Martinez P, Portoles O, Corella D, et al. Differential effects of polyphenols and alcohol of red wine on the expression of adhesion molecules and inflammatory cytokines related to atherosclerosis: a randomized clinical trial. Am J Clin Nutr 2012 95(2), 326–34; Modun D, Music I, Vukovic J, Brizic I, Katalinic V, Obad A, Palada I, Dujic Z, Boban M. The increase in human plasma antioxidant capacity after red wine consumption is due to both plasma urate and wine polyphenols. Atherosclerosis 2008 197(1), 250–6.

Regarding the first approach, it is important that the EU, as well as China, continue to support the production of quality wines, which has to be updated by means of environmentally friendly methods, in the belief that the consumption of quality products allows consumers to combine the pleasure of taste with the protection of human health and the environment.

The second approach focuses on third country communication, with the aim to enhance exports to countries outside the EU. This measure, whose purpose is to make EU wine producers even more competitive against New World wines, has assumed an increasingly important role in the National Support Programmes of Member States, especially in those traditionally focused on wine export.

Doubtlessly, many elements of the overall framework can neither be known in advance, nor easily controlled. Among them are climate change consequences: modifications in air humidity and temperature which are already altering some grape characteristics, and which in turn affect the wine. In order to effectively respond to such changes, some experts suggest that the EU should adopt appropriate policies, modifying, if needed, the borders of the production areas of PDO and PGI wines, or their traditional cultivation techniques: these modifications cannot be implemented under the legislation currently in force.

Other elements which could influence trade are the exchange rate fluctuations, and the possibility of a global reduction in international trade: the latter could occur due to political reasons, such as trade wars, or socio-environmental concerns related to globalization. In this case, the EU could draw a lesson from the policies promoting wine consumption enacted by China, and boost domestic consumption of local wines, together with (or instead of) similar actions to be carried out in third countries, with the aim to win back domestic clients.

To conclude, wine industry deserves to be protected by means of appropriate and updated policies, as both the EU and China have issued and continue to do, not only for its undeniable economic value, but also considering wine's cultural significance and symbolic meanings.

TABLE 8.1 World wine production, consumption and trade[a]

mhl (million hl)	2014	2015	2016	2017	2018
production	270	275	270	249	292
consumption	241	243	244	246	246
trade (exp)	104	106	104	108	108

[a] OIV (n 60).

TABLE 8.2 World wine trade by volume[a]

Mhl	2013	2014	2015	2016	2017
sparkling	6.7	7.2	7.6	8.1	9.1
bottled	56.5	57.5	57.2	56.5	61.3
bulk	38.6	39.4	40.8	39.2	37.5

[a] OIV (n 60).

TABLE 8.3 World wine trade by value[a]

Billion Euro	2013	2014	2015	2016	2017
sparkling	4.4	4.7	5.2	5.4	5.9
bottled	18.4	18.4	20.4	20.9	22.0
bulk	3.0	2.7	2.8	2.8	2.5

[a] OIV (n 60).

TABLE 8.4 Areas under vine in European vineyards[a]

kilohectares (kha)	2014	2015	2016	2017
EU-28	3,343	3,315	3,317	3,312

[a] OIV, 'State of the Vitiviniculture World Market April 2018', <http://www.oiv.int/public/medias/5958/oiv-state-of-the-vitiviniculture-world-market-april-2018.pdf> accessed 4 January 2020.

TABLE 8.5 Evolution of EU wine opening stocks by category[a]

million hectolitres (mhl)	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
At prod.	117.7	114.5	110.0	103.7	97.3	110.0	104.0	111.0	117.3	110.3	130.6
Protected Designation of Origin (PDO)	72.6	75.0	71.4	69.3	64.6	64.4	65.0	70.1	74.2	71.5	80.0
Protected Geographical Indication (PGI)	n/a	17.7	18.9	19.2	15.5	18.5	17.5	19.2	20.7	17.4	21.6
At trade	57.4	55.8	54.8	53.1	55.4	56.8	59.0	55.4	54.2	44.2	47.6
Total EU level	175.1	170.4	164.9	156.9	152.8	166.8	163.0	166.5	171.6	154.6	178.3

[a] European Commission, 'G.2. Wine, spirits, horticultural products, specialised crops' *Directorate-General for Agriculture and Rural Development* (20 October 2019), <https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/wine-harvest-forecast-2019-2020_en.pdf> accessed 4 January 2020.

TABLE 8.6 Total wine consumption in the EU top 17 wine consuming countries[a]

mhl	2013	2014	2015	2016	2017
EU main wine consuming countries	122.2	120.5	121.4	122.5	123.0

[a] OIV (n 60).

TABLE 8.7 Wine export from the EU Member States[a]

EU 28	2012	2015	2016
Total agri-food export	100%	100%	100%
Wine (includes table and varietal wines)	8.0%	7.7%	7.8%
PGI wine	7.0%	6.9%	6.9%

[a] ISMEA (n 85).

TABLE 8.8 Main wine exporting countries to the EU[a]

Country	Value (bn €)	Percentage of the total extra-EU imports
Chile	0.6	22%
Australia	0.45	17%
US	0.43	16%
South Africa	0.4	15%
New Zealand	0.37	14%

[a] Eurostat, 'Wine production and trade in the EU' (21 November 2019) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20191121-1> accessed 4 January 2020.

TABLE 8.9 Main wine importers among the EU Member States[a]

Member State	Values (bn €)	Percentage of the total extra-EU imports
United Kingdom	1.2	47%
Germany	0.3	11%
Netherlands	0.2	9%
France	0.2	8%

[a] Eurostat, 'Wine production and trade in the EU' (21 November 2019) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20191121-1> accessed 4 January 2020.

TABLE 8.10 China's wine production, consumption and import[a]

mhl	86–90	91–95	96-00	01-05	06-10	2011	2012	2013	2014	2015	2016	2017	2018
Prod.	2.7	5.1	9.6	11.4	12.6	13.2	13.5	11.8	13.5	13.3	13.2	11.6	9.1
Cons.	2.7	5.0	9.8	12.3	14.1	16.3	17.1	16.5	17,4	18.1	19.2	19.3	17.6
Imp.	n/a	n/a	0.3	0.5	1.7	2.9	3.6	3.9	3.8	5.6	6.4	7.5	6.9

[a] OIV (n 61); OIV (n 60); OIV, 'Country Profile: China', <http://www.oiv.int/en/statistiques/?year=2016&countryCode=CHN> accessed 4 January 2020.

TABLE 8.11 China's wine import by volume and by value[a]

China's wine import	2014	2015	2016	2017	2018
By volume (mhl)	3.8	5.6	6.4	7.5	6.9
By value (billion Euro)	1.1	1.8	2.1	2.5	2.4

[a] OIV (n 61).

CHAPTER 9

Wine and Liquor Laws in Canada – Trends and Regulatory Challenges

Daniel Hohnstein

1 Introduction

The sale of wine, beer, spirits and other alcoholic beverages (referred to generally as "liquor" in Canadian law) is governed by a patchwork of provincial regulatory regimes and federal legislation that have long restricted inter-provincial trade within the Canadian domestic market and imports into Canada. At the core of these regimes are powerful provincial liquor control authorities and their government-owned enterprises. These public bodies have broad statutory authority to govern all aspects of trade and commerce in liquor products, while also operating powerful importation and distribution monopolies within their home provinces.[1]

Domestically, frictions related to restrictions on the inter-provincial trade of wine and other alcoholic beverage products within Canada led to negotiated outcomes between the provinces in a specific chapter of the 2015 *Agreement on Internal Trade*[2] and specific provisions in the subsequent 2017 *Canada Free Trade Agreement* (CFTA).[3] Ongoing internal barriers to trade between the provinces also led to the establishment of the Alcoholic Beverages Working Group (ABWG) under the aegis of the CFTA, mandated to "identify specific opportunities and recommend initiatives to further enhance trade in alcoholic beverages within Canada, while being mindful of social responsibility, international

1 The market power of these liquor control authorities is substantial. For example, the Liquor Control Board of Ontario (LCBO), controls liquor sales in Canada's largest province and is one of the world's largest buyers and retailers of beverage alcohol. See Liquor Control Board of Ontario, 'About the LCBO', <https://www.lcbo.com/content/lcbo/en/corporate-pages/about.html>.

2 *Agreement on Internal Trade* (2015), Chapter Ten (Alcoholic Beverages), <https://www.cfta-alec.ca/agreement-on-internal-trade/>.

3 *Canada Free Trade Agreement* (2017), Article 304 and Article 1103, paras. 5–8, <https://www.cfta-alec.ca/canadian-free-trade-agreement/>. See also the reservations set forth in the schedules of each province in Annex I (Exceptions for Existing Measures) and Annex II (Exceptions for Future Measures).

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obligations, and fiscal considerations".[4] More recently, inter-provincial trade restrictions have led to legal challenges of provincial laws before Canadian courts, including a constitutional case that proceeded to the Supreme Court of Canada, Canada's highest court of appeal.

At the international level, there is a long history of discord between Canada and its trading partners over the trade-restrictive effects of Canada's liquor control regimes on imports of wine and other liquor products. Under the *General Agreement on Tariffs and Trade, 1947* (GATT 1947), there were formal challenges against Canada's provincial alcoholic drink marketing agencies (i.e., the provincial liquor control authorities) in the late 1980s and early 1990s.[5]

Friction between Canada and the United States of America over the provincial liquor control regimes prompted a specific chapter on wine and distilled spirits in the 1988 *Canada-United States Free Trade Agreement* (CUSFTA)[6] and specific provisions in its successor, the 1994 *North American Free Trade Agreement* (NAFTA).[7] Most recently, in a side letter to the *United States-Mexico-Canada Agreement* (USMCA), Canada committed to eliminate certain trade-restrictive provincial measures on the sale of wine in grocery stores in order to resolve trade disputes with the United States before the World Trade Organization (WTO).[8]

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4 *Canada Free Trade Agreement*, 'Trade in Alcoholic Beverages – Federal-Provincial-Territorial Action Plan: Trade in Alcoholic Beverages', <https://www.cfta-alec.ca/trade-in-alcoholic-beverages/>.

5 These matters led to formal dispute settlement reports in 1988 and 1992. See GATT 1947, Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37; and GATT 1947, Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 18 February 1992, BISD 39S/27.

6 *Canada-United States Free Trade Agreement*, 1988, Chapter Eight, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng>.

7 *North American Free Trade Agreement* (NAFTA), Article 312 and Annex 312.2, which incorporated the 1988 CUSFTA provisions in respect of Canada and the United States and introduced new provisions between Canada and Mexico. *North American Free Trade Agreement* (NAFTA), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>.

8 These matters are discussed below. Side letters dated 30 November 2018 between the Honourable Chrystia Freeland, Minister of Foreign Affairs (Canada) and the Honorable Robert E. Lighthizer, U.S. Trade Representative, <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/letter-wine.pdf>; WTO, *Canada – Measures Governing the Sale of Wine in Grocery Stores* (DS520), <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds520_e.htm>; and WTO, *Canada – Measures Governing the Sale of Wine in Grocery Stores* (*second complaint*) (DS531), <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds531_e.htm>.

Similar frictions between Canada and the European Union prompted bilateral trade agreements concerning alcoholic beverages (1989) and wine and spirits (2003).[9] Most recently, the European Union has addressed specific issues with Canada through provisions in the *Comprehensive Economic and Trade Agreement* (CETA).[10]

Finally, there have been a number of challenges brought against Canada before the WTO Dispute Settlement Body. In 2006, the European Communities challenged certain tax exemptions and reductions for wine and beer, and the dispute ultimately ended in a mutually agreed solution.[11] In 2017, the United States challenged certain measures governing the sale of wine in grocery stores.[12] In 2018, Australia initiated a broader challenge against certain federal and provincial measures governing the sale of wine.[13] The latter two challenges are discussed at the end of this chapter.

Against this rich canvass, the chapter shows that Canada's liquor control regimes are under challenge both domestically, by Canadian consumers and producers, and internationally, by the United States and Australia, while also under close scrutiny by many other countries. The chapter explains that these internal and external pressures have started to generate change in the form of

9 See *Agreement Between Canada and the European Community Concerning Trade and Commerce in Alcoholic Beverages* ["*1989 Alcoholic Beverages Agreement*"], <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100679>, as amended by Annex VIII of the *Agreement Between Canada and the European Community on Trade in Wines and Spirit Drinks* ["*2003 Wines and Spirit Drinks Agreement*"], <https://treaty-accord.gc.ca/text-texte.aspx?id=104976&page=6>; and *2003 Wines and Spirit Drinks Agreement* <http://www.treaty-accord.gc.ca/text-texte.aspx?id=104976>.

10 These provisions are discussed below. CETA, Annex 30-B (Amendments to the 1989 alcoholic beverages agreement and the 2003 wines and spirit drinks agreement), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/30-A.aspx?lang=eng#b>.

11 World Trade Organization (WTO), *Canada – Tax Exemptions and Reductions for Wine and Beer*, WT/DS354/2, G/L/806/Add.1, G/SCM/D72/1/Add.1, Notification of Mutually Agreed Solution, 23 December 2008, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/SCM/D72-1A1.pdf>.

12 A dispute settlement panel was formally requested by the United States in 2018. See WTO, *Canada – Measures Governing the Sale of Wine in Grocery Stores* (*Second Complaint*), WT/DS531/7, Request for the Establishment of a Panel by the United States (29 May 2018), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/531-7.pdf>. As discussed below, this matter appears to have been settled by the above-referenced side letters exchanged during the course of USMCA negotiations (n 8).

13 The report of the WTO panel in that dispute is expected in July 2020. See WTO, *Canada – Measures Governing the Sale of Wine*, WT/DS537/11/Add.3, Communication from the Panel – Addendum (11 March 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/537-11A3.pdf>.

incremental liberalization of the Canadian regulatory landscape for trade in wine and other liquor products. The optimist may perceive a period of rapid reform on the horizon, leading to unrestricted international and inter-provincial trade in wine and other liquor products across open provincial borders. The realist, however, will be more cautious, acknowledging the deeply entrenched liquor control regimes in each province, the constitutional authority that supports them, and the complex web of economic and political interests that could simultaneously resist and propel change. The chapter first offers an overview of the Canadian regulatory landscape and the provincial liquor control regimes that govern it (Section 2). It then moves to discuss the domestic challenges to inter-provincial trade restrictions (Section 3). The chapter also explores the drivers of international trade negotiations and dispute settlement proceedings (Section 4) before drawing a number of policy conclusions (Section 5).

2 An Overview of the Canadian Regulatory Landscape and the Provincial Liquor Control Regimes That Govern It

Our discussion begins with an overview of the regulatory framework governing trade in liquor products within Canada, including the fundamental characteristics of the Canadian market and an explanation of the long-standing constitutional and legislative foundations that underpin those characteristics. The objective is to provide the reader with a high-level map of Canada's regulatory landscape,[14] which will provide insight into the reasons underlying its complexity and its historically trade-restrictive character, as well as important context for the discussions that follow in sections 3 and 4. This will also illustrate the challenges faced by vintners, exporters and agents seeking to trade wine into and within Canada. This section discusses the characteristics of the Canadian market for wine and other liquor products (2.1) before analysing the constitutional context of the Canadian regulatory landscape (2.2). The chapter then examines the federal legislation that has delegated to provincial authorities the control over all imports of wine and other alcoholic beverage products into Canada since 1928 (i.e., the *Importation of Intoxicating Liquors Act*) (2.3), including the recent amendments that permit the possibility of unrestricted inter-provincial trade (2.4).

14 As will become apparent, a detailed survey of the relevant measures in each Canadian jurisdiction is impossible within the scope of this chapter. The reader is therefore asked for some forgiveness where general explanations gloss over the specifics, the exceptions, and the otherwise devilish details of the Canadian liquor control regimes.

2.1 *Characteristics of the Canadian Market for Wine and Other Liquor Products*

2.1.1 Regulation is De-centralized and Differs Across Canada's Provinces

There is not one regulatory regime that governs the liquor market throughout Canada, but rather thirteen separate regimes – one in each of Canada's ten provinces and three territories.[15] As discussed in part 2.2, below, this is a consequence of (a) Canada's constitutional distribution of legislative powers between the central, federal government and the provincial governments, and (b) a ninety-year-old, post-prohibition federal statute that establishes provincial government monopolies over the importation of all wine and other alcoholic beverage products into each province.

Within each province, a legal framework of statutes, regulations, and administrative policies creates a regional liquor control regime that is administered by provincial authorities and/or government-owned enterprises. These public bodies generally have broad statutory authority to govern all aspects of the production, importation, transportation, marketing, sale, and consumption of liquor products within their home province. As each of these regimes are structurally and substantively different from one another, the market within each province presents different requirements, restrictions, opportunities and challenges for industry stakeholders, both within Canada and internationally.

The practical consequence of all this is that the "Canadian market" is fragmented into thirteen different markets divided by Canada's internal borders. This also means that, for each of the market characteristics outlined below, there are exceptions, qualifications, and caveats on a province-by-province basis.

2.1.2 The Provincial Governments Have Monopolies on Wholesale Supply and Generally Play a Dominant Role in Retail Supply

In all jurisdictions, the provincial liquor control authorities control the distribution of wine and other liquor products at the wholesale level of trade, often through government-owned enterprises (*e.g.*, "crown corporations", such as the Liquor Control Board of Ontario, BC Liquor Stores, and the Société des

15 Throughout this chapter, any general reference to Canada's "provinces" should be understood to include Canada's three territories (unless otherwise specified). While not relevant for the purposes of this chapter, there is a constitutional distinction between the provinces and territories of Canada. The ten provinces have independent authority and legislative powers under Canada's Constitution. In contrast, the three territories do not. The territories have historically been governed by the federal government, although powers have been increasingly delegated to them by the Parliament of Canada through a "devolution" process.

alcools du Québec). The retail channel and the hospitality industry are supplied through these government monopolies.[16]

There are also government monopolies on retail distribution in three provinces (New Brunswick, Northwest Territories, and Prince Edward Island),[17] while one province has fully privatized the retail sector (Alberta).[18] In the remaining provinces, the government monopolies that have historically supplied the retail market have been gradually yielding ground to private retailers, including in grocery stores. As a consequence, the retail markets in each of these provinces are served by a combination of public and private enterprises, in ratios that differ from province to province.[19] In British Columbia, where this trend is most advanced, approximately 700 private retail locations outnumber the 197 well-established government outlets.[20] In each jurisdiction, however, private retailers must source their stock from or through the government wholesale monopolies. In addition, licences issued

16 In some jurisdictions, there are policies that permit direct wine sales and deliveries from local wineries to retail and/or hospitality industry licensees. See *e.g.*, Liquor Control Board of Ontario, LCBO Board Policy, 'Direct Delivery to Licensees (Ontario Wine and Cider)' (September 2017), <http://www.doingbusinesswithlcbo.com/tro/CorporatePolicy/21Sept2017_DD_Policy_VC_Final.pdf>. However, note that this policy authorizes an Ontario winery to "sell and deliver its own products **directly** to licensees **on behalf of the LCBO**", and specifies that: "All sales under a direct delivery authorization are LCBO sales. Program participants sell and deliver products to Licensees on behalf of the LCBO".

17 Alcool NB Liquor, 'Corporate' ("The New Brunswick Liquor Corporation is a Provincial Crown Corporation responsible for the purchase, importation, distribution, and retail activity for all beverage alcohol in the Province of New Brunswick"), <https://www.anbl.com/corporate>; Northwest Territories Liquor and Cannabis Commission, 'About' ("…the NTLCC is responsible for the purchase, warehousing, distribution and sale of all alcoholic beverages in the Northwest Territories"), <https://www.ntlcc.ca/en/about>; and Prince Edward Island Liquor Control Commission, 'About PEI Liquor', <https://liquorpei.com/about-peilcc/>.

18 Alberta Liquor and Gaming Commission, 'About liquor in Alberta' ("In 1993, Alberta became the first Canadian province to privatize liquor retailing. … Alberta continues to be the only fully-privatized province when it comes to liquor"), <https://aglc.ca/liquor/about-liquor-alberta>.

19 For a very simple summary of these markets, see Patricia D'Cunha, 'How alcohol is sold in provinces across Canada', *City News* (16 April 2015), <https://toronto.citynews.ca/2015/04/16/how-alcohol-is-sold-in-provinces-across-canada/>.

20 BC Liquor Stores, 'About Us', <http://www.bcliquorstores.com/about-us> ("The Liquor Distribution Branch operates 197 retail stores located throughout the province under the brand BC Liquor Stores and is one of the largest retailers in British Columbia"); British Columbia, 'Private Liquor Store and BC Government Liquor Store Locations' <https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/reports/liquor_store_locations_bc.csv>.

by the liquor control authorities to operate private retail wine and liquor stores are often subject to restrictions on the scope of products that can be marketed and sold.

2.1.3 The Provincial Governments Use the Distribution Monopolies to Generate Substantial Government Revenue through Mark-ups and Additional Fees on Wine and Liquor Sales

One of the central policy objectives pursued by each liquor control authority is to generate government revenue through the profits earned on liquor sales.[21] Much of this profit is generated through mark-ups and other fees, which are amounts added to the cost of the goods to increase the prices paid by consumers. For example, for a bottle of wine:

- In establishing the retail price paid by consumers, the Liquor Control Board of Ontario (LCBO), applies an *ad valorem* mark-up of 71.5% to the landed cost of the product, a wine levy of CA$1.62 per litre, a cost of service (COS) differential if the product is imported, a volume levy of CA$0.29 per litre, an environmental levy of CA$0.0893 per container, and then rounds the final amount up to the nearest $0.05 increment, which generates a "rounding revenue";[22]
- The New Brunswick Liquor Corporation, which operates as Alcool New Brunswick Liquor (ANBL), applies a graduated mark-up consisting of (i) 147% to the first CA$8.99 per litre of the landed cost, (ii) 100% to any amount between CA$8.99-CA$15.00 per litre, and (iii) 50% on any amount in excess of CA$15.00 per litre;[23]
- In determining the wholesale price, the British Columbia Liquor Distribution Branch (LBD) applies a graduated mark-up of (i) 89% to the first CA$11.75 per litre, and (ii) 67% to any amount above CA$11.75 per litre, as well as a container recycling fee of $0.12 per bottle;[24] and

21 See *e.g.*, Liquor Control Board of Ontario, 'About Our Business', 'Pricing Policy' ("In setting retail prices for the products it sells, the LCBO strives to balance several key elements of its mandate", including: "Generating maximum profit to fund government programs and priorities"), <http://www.lcbo.com/content/lcbo/en/corporate-pages/about/about-ourbusiness.html#.WoNwcOjwaUn>.

22 Liquor Board of Ontario, *Pricing Examples* (Effective at Retail April 2019), at p. 4, <https://hellolcbo.com/app/answers/detail/a_id/1251>.

23 New Brunswick Liquor Corporation, "ANBL Markup Structure" (April 2018), at p. 2, <https://www.anbl.com/medias/f-pricing-policy-en.pdf>.

24 B.C. Liquor Distribution Branch, *Wholesale Pricing Model – An Overview of the Upcoming Changes* (February 2015), at pp. 13 and 29–30, <http://www.bcldb.com/files/Wholesale_Pricing_Changes-Overview.pdf>.

– The Alberta Gaming and Liquor Commission (AGLC) applies a flat mark-up of CA$3.91 per litre (to wine products containing 16% or less alcohol by volume).[25]

The income generated by these mark-ups and fees represents an important source of revenue for provincial governments.[26]

2.1.4 Each Provincial Government Has a Powerful Import Monopoly

The importation of all wine and other alcohol beverage products into Canada (and also from one province into another *within* Canada) is controlled by each of the provincial governments through their liquor control authorities. These powerful import monopolies have historically served to protect the government distribution monopolies and the revenue they generate on sales of wine and other liquor products to their captive markets within each province. The foundation of this arrangement is discussed in detail in part 2.2, and how it is changing is discussed in part 2.3, below.

2.1.5 Both Federal and Provincial Measures Provide Support for Domestic and/or Local Producers

It is common for provincial liquor control authorities to maintain measures that favour local products over competing products imported from not only other countries, but also from other regions within Canada. These measures may include reduced mark-up rates for local products (resulting in competitive consumer prices for local products versus relatively higher prices for imported products), retail channels that are reserved for sales of local or domestic products, and marketing support programs for local producers.[27]

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25 Alberta Gaming and Liquor Commission, 'Liquor Markup Rate Schedule' (effective 13 September 2019), <https://aglc.ca/liquor/about-liquor-alberta/liquor-markup-rate-schedule>.

26 For example, in 2018–2019, the Liquor Control Board of Ontario transferred $2.37 billion to the Government of Ontario. Similarly, the Alberta Gaming and Liquor Commission transferred over $826 million in "liquor net income" to Alberta's General Revenue Fund. See Liquor Control Board of Ontario, 'Annual Report 2018–2019', <https://www.lcbo.com/content/lcbo/en/corporate-pages/about/annual-report.html>; and Alberta Gaming and Liquor Commission, 'Annual Report 2018–2019', at p. 28, <https://aglc.ca/sites/aglc.ca/files/aglc_files/AGLC_AnnualReport_2019.pdf>.

27 See *e.g.*, Liquor Control Board of Ontario, "Support for Local Manufacturers", <https://www.lcbo.com/content/lcbo/en/corporate-pages/about/support-local-manufacturers.html>; and Liquor Control Board of Ontario, 'Support for Ontario Producers', <https://www.lcbo.com/content/lcbo/en/corporate-pages/about/year-in-review/support-for-ontario-producers.html>.

In addition, the federal government currently provides a controversial exemption from excise duty for producers of "100% Canadian wine" and small Canadian winemakers (i.e., with annual sales of less than CA$50,000).[28] Excise duty applies to other wine products produced or packaged in Canada (*e.g.* using imported ingredients),[29] and an equivalent rate of "additional" duty applies to all imports of packaged wine products under Canada's customs legislation.[30] In 2008, the European Union initiated dispute settlement proceedings before the WTO to address the detrimental effects of this exception on the competitive opportunities of imported wine in the Canadian market.[31] Although Canada and the European Union settled that dispute upon reaching a mutually agreed solution,[32] the exception for "100% Canadian wine" has remained in place and has remained a live issue.[33] The same exception is now one of the measures that Australia is challenging in WTO dispute settlement proceedings against Canada.[34]

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28 *Excise Act, 2001*, S.C. 2002, c. 22, s. 135(2), <https://laws.justice.gc.ca/eng/acts/E-14.1/page-15.html#docCont>.

29 See Government of Canada, 'Excise Duty Rates', 'Rates of Excise Duty on Wine' (13 February 2020), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edrates/excise-duty-rates.html#_Toc527013621>. At the time of writing, the rate of excise duty on wine is: (i) $ 0.319 (Canadian dollars) per litre of wine containing more than 1.2% but not more than 7% of absolute ethyl alcohol by volume (i.e., $ 0.24 per 750 ml bottle); and (ii) $ 0.665 per litre of wine containing more than 7% of absolute ethyl alcohol by volume (i.e., $ 0.50 per 750 ml bottle).

30 Subsection 21.2(2) of the *Customs Tariff* imposes an "additional" duty on imports of packaged wine at a rate that is equal to the excise duty discussed above. *Customs Tariff*, S.C. 1997, c. 36, s. 21.2(2), <http://laws-lois.justice.gc.ca/eng/acts/C-54.011/index.html>.

31 WTO, *Canada – Tax Exemptions and Reductions for Wine and Beer* (DS354), <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds354_e.htm>. See *Canada – Tax Exemptions and Reductions for Wine and Beer*, WT/DS354/1, G/L/806, G/SCM/D72/1, Request for Consultations by the European Communities, 4 December 2006, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/SCM/D72-1.pdf>.

32 WTO, *Canada – Tax Exemptions and Reductions for Wine and Beer*, WT/DS354/2, G/L/806/Add.1, G/SCM/D72/1/Add.1, Notification of Mutually Agreed Solution, 23 December 2008, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/SCM/D72-1A1.pdf>.

33 See *e.g.*, Government of Canada, Global Affairs Canada, "Second Meeting of the CETA Wines and Spirits Committee – Report" (24 September 2019) ("The EU expressed disappointment with Canada for not amending the federal excise duty law during its last budget exercise"), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2020-01-02-wines_spirits_agenda-ordre_du_jour_vins_spiritueux.aspx?lang=eng>.

34 WTO, *Canada – Measures Governing the Sale of Wine* (DS537), <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds537_e.htm>.

As discussed below, such measures are being challenged in both internal trade disputes within Canada and international trade disputes in the WTO. They are also being addressed through international trade negotiations between the Government of Canada and its closest trading partners.

One of the unusual consequences of this regulatory environment is that it is often as difficult to trade wine and other alcoholic beverages *within* Canada – that is, across Canada's internal borders, from province-to-province – as it is to import such products across the national border into Canada. The provinces generally continue to maintain their government monopolies over importation and distribution (i) for policy reasons related to public health and safety, and (ii) to maximize the revenue earned from liquor sales within their boundaries. However, there are growing exceptions and, as discussed below, the characteristics outlined above are in the process of evolving as the federal and provincial governments respond to domestic and international pressures to change.

2.2 *The Constitutional Context of the Canadian Regulatory Landscape*

To fully understand the characteristics outlined above, it is necessary to briefly consider how the constitutional distribution of legislative authority between the federal Government of Canada and the provincial governments affects how the trade and commerce of liquor products is regulated.[35]

Very generally summarized, the Parliament of Canada has jurisdiction over matters that are national, inter-provincial, or international in their nature or scope. This encompasses the regulation of matters relating to "trade and commerce", inter-provincial transportation and shipping, and federal taxation.[36] The federal jurisdiction over matters of "trade and commerce" has been interpreted to mean that the Parliament of Canada "can regulate trade generally in Canada, as well as the flow of trade across provincial or international borders", but cannot regulate the operation of particular industries or businesses within provinces.[37] The provincial legislatures, on

35 This distribution of legislative authority was established in the early days of Canada's formation, as a key element of the 1867 agreement that brought together a group of British North American colonies to form the federation then known as the Dominion of Canada. Today, this agreement is set forth in Part V of Canada's *Constitution Acts, 1867–1982*, ss. 91–93, <https://laws.justice.gc.ca/eng/Const/page-4.html#h-17>. See also Government of Canada, 'The constitutional distribution of legislative powers' (25 July 2018), <https://www.canada.ca/en/intergovernmental-affairs/services/federation/distribution-legislative-powers.html>.

36 *Constitution Acts, 1867 to 1982*, s. 91 (n 35).

37 Government of Canada, 'The constitutional distribution of legislative powers' (n 35).

the other hand, generally have exclusive jurisdiction over all matters of a "private and local nature",[38] including the regulation of "property and civil rights" within their provincial boundaries. This has been interpreted to give provinces "the authority to regulate trade and commerce within their respective territory".[39]

Accordingly, the Parliament of Canada has exclusive legislative jurisdiction to govern the trade of wine and other alcoholic beverages into Canada and between the provinces, but the provincial legislatures have exclusive jurisdiction to regulate the purchase, sale, possession, ownership and use of these products by consumers and businesses within their provincial boundaries. The tension between these exclusive jurisdictions is illustrated by the reasoning of Canada's highest court of appeal, the Supreme Court of Canada, that provinces do not have the constitutional authority to prohibit the importation of wine and liquor products into their territory, but they do have the constitutional authority to forbid the storage of such goods within provincial boundaries.[40]

Canadian courts actively interpret, apply, and maintain the tenets of the Constitution, including the distribution of powers, through the resolution of legal disputes. They have independent judicial authority to "read down" or declare of no force or effect a law that exceeds its constitutional jurisdiction or improperly impinges upon the exclusive jurisdiction of the other legislative authority. A federal regulation that impinges upon a provincial government's exclusive jurisdiction to regulate the trade and commerce of wine within its territory, for example, is vulnerable to being struck down by Canadian courts.

How this intersection in legislative jurisdictions has been managed by the federal and provincial governments is the subject of the next part of this chapter, below.

38 *Constitution Acts, 1867 to 1982*, ss. 92, 93 (n 35).

39 Government of Canada, 'The constitutional distribution of legislative powers' (n 35).

40 *Air Canada v. Ontario* (*Liquor Control Board*), [1997] 2 S.C.R. 581 (S.C.C.) at paras 54–55 [*Air Canada*], citing *Manitoba* (*Attorney General*) *v. Manitoba License Holders' Assn.* (1901), [1902] A.C. 73 (Manitoba P.C.) at p. 78 ("The provision of the *Constitution Act, 1867* that authorizes the establishment of provincial liquor monopolies is s. 92(16). … That section gives the provinces jurisdiction over 'generally all matters of a merely local or private nature in the province'. Section 92(16) has been understood to permit regulation by a province of the keeping of liquor within its boundaries. … It follows that, even if the provinces do not have the authority to prohibit the importation of liquor – and the decision of the Privy Council … established that provinces do not have that authority – they do have the authority to forbid its storage within provincial boundaries").

2.3 *The Importation of Intoxicating Liquors Act: Delegating Federal Control over Imports of Wine and Other Alcoholic Beverages to the Provinces Since 1928 …*

As a matter of international or inter-provincial trade, the importation of wine and other alcoholic beverages into a Canadian province is constitutionally a matter of federal jurisdiction. However, the Parliament of Canada has delegated the authority to control such imports to each of the provincial governments under the federal *Importation of Intoxicating Liquors Act* (IILA).[41] This concise but powerful statute was enacted in 1928 in response to requests from provincial governments, following the repeal of their prohibition laws throughout the 1920s,[42] for greater control over the trade of liquor products entering their territories.[43]

The single most import provision in the IILA is Subsection 3(1). It is this provision that has long granted the control that was requested by the provinces in the late 1920s, although it has recently undergone a profound change that will affect how, to what extent, and potentially whether this control will continue into the 2020s.

Today, Subsection 3(1) prohibits any person from importing or causing to be imported any "intoxicating liquor" into a province "from a place outside of Canada", unless such liquor has been purchased by or on behalf of the provincial government or "any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor".[44] In this way, the IILA not only delegates to provincial governments the power to control the importation of intoxicating liquor products into Canada,[45] but it also requires all such imports to be made by or through the government authorities established in each province for that purpose. This effectively grants to each provincial government a powerful import monopoly over all wine and other liquor products that enter its territory from outside Canada. The Government of Canada's rationale for this approach is that "[b]y

41 *Importation of Intoxicating Liquors Act*, R.S.C. 1985, c. I-3 ["*IILA* (current)"], <https://laws-lois.justice.gc.ca/eng/acts/I-3/FullText.html>.

42 See the Canadian Encyclopedia, 'Prohibition in Canada – Repeal of Prohibition Laws' <https://thecanadianencyclopedia.ca/en/article/prohibition>.

43 Government of Canada, 'Importation of Intoxicating Liquors Act', *News Release* (28 June 2012), <https://www.canada.ca/en/news/archive/2012/06/importation-intoxicating-liquors-act.html>.

44 *IILA* (current), s. 3(1) (n 41).

45 The IILA does not govern the importation of intoxicating liquors into Canada's territories (i.e., the Northwest Territories, Nunavut, and the Yukon Territory). Rather, this is governed by legislation in respect of each territory.

requiring that importations be made by provincial liquor authorities, the IILA provides provinces with the umbrella of federal authority to control imports into their jurisdiction".[46]

As a consequence, all trade in wine and other alcoholic beverages into Canada is managed through the provincial liquor control authorities. This means that wineries, breweries, distilleries, and distributors in other countries generally cannot directly supply consumers or commercial customers within Canada.[47] Instead, supplies imported into Canada must be negotiated with the government distribution monopolies on a province-by-province basis.[48]

Until recently, subsection 3(1) of the IILA also expressly prohibited anyone except the provincial liquor control authorities from "importing, sending, taking or transporting" intoxicating liquor products into a province from another place *within* Canada.[49] This provision precluded individual consumers

46 Canada Revenue Agency, 'Amendment to the Importation of Intoxicating Liquors Act' (28 June 2012), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edn31/amendment-importation-intoxicating-liquors-act.html>.

47 The only exception to this rule is the personal importation of liquor products that individuals physically bring with them when they return to Canada after travelling to other countries. See *e.g.*, CBSA, 'Travellers – Alcohol and Tobacco – Alcoholic beverages' (11 December 2013), <https://www.cbsa-asfc.gc.ca/travel-voyage/atl-lat-eng.html>. For travellers bringing wine with them when returning to Ontario, the LCBO imposes an import limit of 45 litres per person (*e.g.*, five cases of twelve 0.75 litre bottles per case) and applies an *ad valorem* "provincial border levy" of 39.6%.

48 Although "personal importation" mechanisms are available in certain jurisdictions to Canadian consumers who wish to import specific products for personal consumption, these transactions must be conducted through the provincial liquor control authorities. For example, residents of Ontario may import wine shipments of up to 45 litres (i.e., five cases) into Canada, but the shipments must be consigned to the LCBO (care of the purchaser) on the shipment manifest or bill of lading. The LCBO's customs broker processes these shipments, rather than the Canada Border Services Agency (CBSA), and imposes an *ad valorem* "provincial border levy" of 102.2% in addition to the federal excise duty and any applicable customs duties. See Liquor Board of Ontario, 'Importing Beverage Alcohol, Personal Importations – Having It Sent to You', <https://www.lcbo.com/content/lcbo/en/corporate-pages/about/aboutourbusiness/importing.html>. The B.C. Liquor Distribution Branch (LDB) also offers a "special order" mechanism to import products, although it is significantly more onerous and uncertain than the Ontario mechanism. See BC Liquor Stores, 'Customer Service – Special Orders', <http://bcliquorstores.com/customer-service#undefined>. See also Société des alcools du Québec (SAQ), 'Importing alcoholic beverages', <https://www.saq.com/en/frequently-asked-questions>; Nova Scotia Liquor Commission, 'Private Importations of Liquor', <https://www.mynslc.com/-/media/NSLC/PDFAbout/Permits-Docs/CFIA-Personal-Imports-Info.pdf?la=en>.

49 See *Importation of Intoxicating Liquors Act*, R.S.C. 1985, c. I-3 (previous version in force from 21 September 2017 through 20 June 2019) ["*IILA* (2017–2019)"], s. 3(1) ("Notwithstanding any other Act or law, no person shall **import, send, take or transport**, or cause to be

and businesses in the hospitality industry (such as restaurants and bars) from purchasing wine and other liquor products directly from suppliers located in other provinces within Canada. Likewise, it prevented any Canadian winemaker, brewer, distiller or supplier of liquor products from selling and shipping their goods directly to Canadian consumers and commercial customers in other provinces. It was only indirectly, through the liquor control authority of the purchaser's province, that a shipment from a supplier in another province could be ordered, if at all. This is a profound departure from the situation in almost all other countries, where individuals and businesses in the hospitality industry generally take for granted the ability to purchase wine and liquor directly from suppliers located within their own country.

2.4 *... But Permitting Unrestricted Inter-Provincial Trade Since 2019*

The Parliament of Canada partially liberalized the inter-provincial trade restriction imposed under subsection 3(1) of the IILA in 2012 and 2014 before removing it altogether in June 2019. The first round of amendments in 2012[50] and 2014[51] allowed for the possibility of inter-provincial direct-to-consumer (DTC)

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imported, sent, taken or transported, into any province **from or out of any place within or outside Canada** any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported, sent, taken or transported, or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor"), <https://laws.justice.gc.ca/eng/acts/I-3/20170921/P1TT3xt3.html>.

50 First, in June 2012, the Parliament of Canada amended the IILA to add an express exception to subsection 3(1) to permit "the **importation of wine from a province by an individual**, if the individual brings the wine or causes it to be brought into another province, in quantities and as permitted by the laws of the latter province, for his or her personal consumption, and not for resale or other commercial use". Parliament of Canada, Bill C-311, *An Act to amend the Importation of Intoxicating Liquors Act* (*interprovincial importation of wine for personal use*), 41st Parliament, 1st Session (28 June 2012), <http://www.parl.ca/DocumentViewer/en/41-1/bill/C-311/royal-assent/page-4>. See also Canada Revenue Agency, 'Amendment to the Importation of Intoxicating Liquors Act' (n 46); Government of Canada, 'Importation of Intoxicating Liquors Act', *News Release* (n 43). For the Parliamentary debate on this amendment, see "Bill C-311 (Historical), *An Act to amend the Importation of Intoxicating Liquors Act* (*interprovincial importation of wine for personal use*), <https://openparliament.ca/bills/41-1/C-311/>.

51 Second, in June 2014, the Parliament of Canada amended the exception, expanding its scope to cover interprovincial DTC shipments of "beer and spirits" in addition to wine. Parliament of Canada, Bill C-31, *An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*, 41st Parliament, 2nd Session (19 June 2014), s. 163 (" Paragraph 3(2)(h) of the *Importation of Intoxicating Liquors Act* is replaced by the following: (h) the importation of **wine, beer or spirits from a province**

shipments of wine from suppliers to individuals for personal consumption, while the latter amendment in 2019[52] opened up the possibility of inter-provincial wholesale shipments from suppliers directly to commercial customers.

The reason why these amendments merely allowed for the "possibility" of direct inter-provincial trade is that they only affected the *federal* legislation mandating the trade barriers between provinces. The other half of the equation comprised the *provincial* liquor control regimes that have long implemented those barriers. When the federal restriction on inter-provincial trade was entirely eliminated from subsection 3(1) of the IILA in June 2019, the decision on whether or to what extent to actually liberalize those barriers could only be taken by each of the provincial governments.

The Honourable Dominic LeBlanc, then Minister of Intergovernmental and Northern Affairs and Internal Trade, provided the following explanation for this amendment and its implications:

> For too long, Canadians have been frustrated by the restrictions on the transportation of Canadian beer, wine and spirits between provinces and territories. This legislation will remove the only remaining **federal** barrier to trade on alcohol, and **the onus will be on provincial and territorial governments to change their own regulations**, paving the way for direct-to-consumer alcohol sales from across Canada. Removing barriers to trade between provinces and territories fosters economic growth,

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by an individual, if the individual brings the wine, beer or spirits or causes them to be brought into another province, in quantities and as permitted by the laws of the other province, for his or her personal consumption, and not for resale or other commercial use"), <https://parl.ca/DocumentViewer/en/41-2/bill/C-31/royal-assent/page-182#14>. See also Canada Revenue Agency, 'Amendment to the Importation of Intoxicating Liquors Act for the Movement of Beer between Provinces', *EDBN20 Budget 2014* (20 June 2014), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edbn20/budget-2014-amendment-importation-intoxicating-liquors-act-movement-beer-between-provinces.html>; Canada Revenue Agency, 'Amendment to the Importation of Intoxicating Liquors Act for the Movement of Spirits between Provinces', *EDN38 Budget 2014* (20 June 2014), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edn38/budget-2014-amendment-importation-intoxicating-liquors-act-movement-spirits-between-provinces.html>.

52 Finally, in June 2019, the Parliament of Canada amended the wording of subsection 3(1) to completely remove the restriction on inter-provincial trade of wine and other intoxicating liquors. Parliament of Canada, Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 42nd Parliament, 1st Session (21 June 2019), s. 186(1), <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-97/royal-assent#ID0EZWHM>.

> reduces the regulatory burden on our small and medium-sized businesses, and creates good, middle-class jobs across the country.[53]

However, the Parliament of Canada's amendment of subsection 3(1) of the IILA did not occur spontaneously. Rather, it followed a decision in April 2018 by the Supreme Court of Canada concerning a constitutional challenge against a provincial measure that restricted the importation of liquor products from one province into another. In that decision, which is discussed below in the next part of this chapter, the Supreme Court of Canada established that a Canadian law will be found inconsistent with the Constitution of Canada if its primary purpose is to restrict trade across a provincial border.[54]

Today, only the liquor control regimes of British Columbia,[55] Manitoba,[56] and Nova Scotia[57] permit individuals within those provinces to receive inter-provincial DTC shipments of wine from wineries located in other provinces within Canada.[58] Although the liquor control regimes of the other provinces continue to maintain inter-provincial trade barriers to different degrees, there are indications that inter-provincial DTC shipments from wineries in other provinces are nonetheless entering their borders *in practice*.[59]

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53 Intergovernmental Affairs, 'Canada acts to eliminate barriers to interprovincial trade in alcohol', *News Release* (9 April 2019), <https://www.canada.ca/en/intergovernmental-affairs/news/2019/04/canada-acts-to-eliminate-barriers-to-interprovincial-trade-in-alcohol.html>.

54 *R. v. Comeau*, 2018 SCC 15 (SCC), paras 106–107 [*R. v. Comeau*], <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17059/index.do>.

55 Government of British Columbia, 'B.C. allows Canadian wines to be shipped across provincial borders', *News Release* (12 July 2012), <https://news.gov.bc.ca/releases/2012ENER0082-001009>; B.C. Reg. 130/2012, *Liquor Possession Regulation*, s. 2, <http://www.bclaws.ca/civix/document/id/complete/statreg/130_2012>.

56 Manitoba Liquor and Lotteries, Liquor Mart, 'Shipping Canadian Wine to Manitoba – Interprovincial Direct Sale & Delivery of Wine for Personal Consumption', <https://www.liquormarts.ca/retail-marketing/shipping-canadian-wine-manitoba>.

57 Nova Scotia, Finance and Treasury Board, 'Nova Scotia Opens Borders to Import Wine', *News Release* (25 July 2015), <https://novascotia.ca/news/release/?id=20150625005>.

58 In addition, the Saskatchewan Liquor and Gaming Authority (SLGA) permits inter-provincial DTC wine shipments from B.C. wineries only. See Saskatchewan Liquor and Gaming Authority (SLGA), 'Direct shipping from British Columbia', <https://www.slga.com/permits-and-licences/liquor-permits/importing-alcohol>.

59 See David Lawrason, 'The B.C. Wine Boom and How Ontario Consumers Can Get Aboard', *Canadian Wine Insider Report* (November 2019), *Wine Align* ("The better way to experience B.C. wine in depth is ordering direct-to-consumer (DTC) on the internet. This bypasses Ontario regulations and mark-ups, **and is widely practiced, although never overtly promoted, because it actually contravenes Ontario regulation**"), <https://www.winealign.com/articles/2019/11/07/canadian-wine-insider-report-november-2019/>.

3 Domestic Challenges to Inter-provincial Trade Restrictions

In recent years, there have been a number of important domestic legal challenges in Canada concerning inter-provincial barriers to trade in liquor products. One matter prompted the Supreme Court of Canada to provide guidance on the circumstances in which a measure that restricts cross-border trade between provinces will violate Canada's Constitution (3.1). This guidance has since been applied in provincial courts to discipline a trade-restrictive measure that favoured local liquor products over imported products (3.2). In addition, a dispute settlement appeal panel under Canada's former *Internal Free Trade Agreement* has determined that the same measure violated provincial free trade obligations (3.3). These domestic cases are briefly discussed in this part.

3.1 *The Supreme Court of Canada's Decision in* R. v. Comeau

On 19 April 2018, the Supreme Court of Canada issued a landmark decision regarding the issue of whether Canadian measures that restrict inter-provincial trade in liquor products are contrary to the Constitution of Canada. Specifically, the question before the Court in the matter of *Her Majesty the Queen v. Gerard Comeau*[60] (*R. v. Comeau*) was whether the liquor control regime in New Brunswick, which restricts imports of wine, beer, and other alcoholic beverage products into the province,[61] is contrary to section 121 of the *Constitution Act, 1867*, which provides that all articles produced or manufactured in any of the provinces shall "be admitted free" into each of the other provinces.[62]

The liquor control regime in the Province of New Brunswick places strict limits on the amount of liquor that a resident is permitted to possess from any source other than the New Brunswick Liquor Corporation (the liquor control authority that maintains a statutory monopoly on the importation, distribution, transportation and sale of alcoholic beverage products in the Province of New Brunswick).

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60 *R. v. Comeau*, para. 106 (n 54).

61 Subsection 134(b) of the *New Brunswick Liquor Control Act* prevents residents of New Brunswick from having or keeping liquor products purchased from any source other than the New Brunswick Liquor Corporation in any amount beyond a prescribed threshold. *New Brunswick Liquor Control Act*, R.S.N.B. 1973, c. L-10, <http://laws.gnb.ca/en/ShowTdm/cs/L-10//>.

62 *Constitution Acts, 1867 to 1982*, s. 121 ("All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces") (n 35).

In October 2012, a resident of New Brunswick (Mr. Comeau) crossed over to the neighbouring Province of Quebec to purchase relatively inexpensive beer and spirits for his personal consumption. Upon returning back across the provincial border, he was stopped by the Royal Canadian Mounted Police (RCMP), who charged him under New Brunswick's liquor control legislation and issued him a fine. This was not the first time that New Brunswick's liquor control measures had been enforced against residents importing liquor products from Quebec.[63]

Mr. Comeau disputed the charge and challenged the liquor control measure as contrary to Canada's Constitution. The provincial court of first instance sided with him, finding that the measure was of no force or effect on the basis that it infringed Section 121 of the *Constitution Act, 1867*. The Crown appealed this decision, and the Supreme Court of Canada ultimately heard the matter to resolve the constitutional issue.

In deciding the case, the Supreme Court determined that Section 121 of Canada's Constitution "prohibits laws that **in essence and purpose** restrict trade across provincial boundaries", but it "does not prohibit laws that yield only incidental effects on interprovincial trade".[64] The Court explained that a law which has the effect of restricting trade across provincial boundaries will not violate Section 121 if its primary purpose is not to impede trade, but to fulfil some other objective. As an example, it explained that "a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate [Section] 121".[65] However, "where the primary purpose of the broader scheme is to impede trade, or if the impugned law is **not connected in a rational way** to the scheme's objective, the law will violate [Section] 121".[66]

The Court considered that "a rational connection between the impugned measure and the broader objective of the regulatory scheme exists where, as a matter of reason or logic, the former can be said to serve the latter".[67] In this regard, the Court appears to have incorporated an enquiry into the analysis that is similar to the primary legal test under the chapeau of Article XX of the GATT 1994, which requires a "rational connection" between the restriction on trade and the policy objective of the measure.

63 The Canadian Press, '17 charged in New Brunswick for importing Que. beer, liquor', *CTV News* (10 October 2012), <https://www.ctvnews.ca/world/17-charged-in-new-brunswick-for-importing-que-beer-liquor-1.990337>.

64 *R. v. Comeau*, paras 8, 53, 90, 95, 97, 106 (n 54).

65 *R. v. Comeau*, para. 112 (n 54).

66 *R. v. Comeau*, para. 113 (n 54).

67 *R. v. Comeau*, para. 113 (n 54).

The Court developed a two-part legal test to determine whether a Canadian measure violates section 121 of the Constitution. First, the essence of the measure must be to limit the free flow of goods across a provincial border; and, second, the primary purpose of the measure must be to restrict trade across a provincial border.[68]

In applying this legal test to the facts before it, the Court determined that "the objective of the New Brunswick scheme is not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick". It concluded that the primary purpose of the trade-restrictive measure was to prohibit "holding excessive quantities of liquor from supplies not managed by the province" and that the province's "ability to exercise oversight over liquor supplies in the province would be undermined if non-Corporation liquor could flow freely across borders".[69] On this basis, the Court ruled that the measure does not contravene Canada's Constitution.

3.2 *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*

In *R. v. Comeau*, the Supreme Court of Canada upheld a provincial liquor control measure that was clearly designed and enforced to restrict trade in liquor products across provincial boundaries, reasoning that its restriction on trade was not its "primary purpose", but merely an "incidental effect of its role in a legislative scheme with a different purpose". This did not mean, however, that the provincial liquor control regimes were safe from constitutional challenge. Rather, the legal test formulated by the Supreme Court in *R. v. Comeau* has since been applied to successfully challenge a trade-restrictive measure under another provincial regime.

On 19 June 2018, the Alberta Court of Queen's Bench found that the mark-up regime applied by the Alberta Gaming and Liquor Commission (AGLC) to beer products sold within the province, in combination with an inter-related grant program for local craft brewers, violated section 121 of Canada's Constitution by creating a trade barrier related to a provincial boundary.[70]

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68 *R. v. Comeau*, paras 106, 108, 111, 114 (n 54), as summarized in *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission* (2020), 97 Alta. L.R. (6th) 244 (Alta. C.A.) [*Steam Whistle v. AGLC* (ABCA)], para. 81, <https://www.canlii.org/en/ab/abca/doc/2019/2019abca468/2019abca468.pdf>.

69 *R. v. Comeau*, paras 124–125 (n 54).

70 *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, (2018) 293 A.C.W.S. (3d) 65, 79 B.L.R. (5th) 244 (ABQB) [*Steam Whistle v. AGLC* (ABQB)], para. 95, <https://www.canlii.org/en/ab/abqb/doc/2018/2018abqb476/2018abqb476.pdf>.

This case involved a legal dispute between a 'craft' beer brewer based in the Province of Ontario, Steam Whistle Brewing Inc. (Steam Whistle), and the AGLC. The AGLC applied a mark-up to all beer products, but was effectively exempting products made by local craft brewers in Alberta through a corresponding government grant program.[71] Justice Marriott found that this provided a competitive advantage to craft beer products produced in Alberta over craft beer products imported from the other provinces.[72]

Justice Marriott then applied the Supreme Court of Canada's reasoning and legal analysis in *R. v. Comeau* and concluded that the AGLC's mark-up regime creates a trade barrier that in "essence and purpose" relates to a provincial border and, therefore, offends section 121 of the *Constitution*. While she accepted that "not all grant programs and supports relate in essence and purpose to a provincial boundary" and considered that "provincial governments are entitled under federalism to achieve policy objectives, including supporting local businesses", she was "also mindful of the Supreme Court's admonition … that 'a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme'".[73]

The Government of Alberta appealed, but the Alberta Court of Appeal upheld the decision, dismissing the appeal.[74] In doing so, it confirmed that not only trade-restrictive laws, but also other governmental actions with trade-restrictive effects could be challenged as contrary to section 121. This means that administrative policies developed and administered by provincial liquor control authorities that support local liquor products to the detriment of the competitive opportunities of imported liquor products (*e.g.*, variable mark-ups, exclusive retail channels, and marketing support schemes) are all within the scope of a constitutional challenge.

3.3 *Artisan Ales Consulting Inc. v. Government of Alberta re: Mark-ups on Beer*

In a separate matter between Artisan Ales Consulting Inc. (an agent for domestic and imported beer products) and the Government of Alberta, a dispute settlement appeal panel constituted under the former *Agreement on Internal Trade* reached a similar conclusion to that of the Alberta Court of Queen's Bench in *Steam Whistle v. AGLC*, confirming on 11 May 2018 that the preferential treatment of local small beer brewers was inconsistent with Alberta's domestic

71 The Court found that the exemption was implemented as a corresponding grant whose purpose was to off-set the mark-up. *Steam Whistle v. AGLC* (ABQB), paras 88 and 97 (n 70).

72 *Steam Whistle v. AGLC* (ABQB), para. 95 (n 70).

73 *Steam Whistle v. AGLC* (ABQB), paras 74–97 (n 70), citing *R. v. Comeau*, para. 113 (n 54).

74 *Steam Whistle v. AGLC* (ABCA), paras 54–114 (n 68).

free trade obligations.[75] Together with the court decisions in *Steam Whistle v. AGLC*, this outcome has compelled the AGLC to cancel the impugned mark-up and support regime and replace it with alternative measures.[76]

4 International Trade Negotiations and Dispute Settlement Proceedings

In addition to the internal, domestic pressures to liberalize Canada's liquor control regimes, some of Canada's closest international trading partners are also spurring reform through a combination of regional trade agreement negotiations with Canada and WTO dispute settlement proceedings against Canada. These efforts have been producing results, and it is notable that the pressure applied to Canada's federal authorities through international processes have resulted in changes implemented by the provincial government authorities. This part of the chapter examines three examples in two different settings: firstly, Canada's Commitments to the EU under the *Comprehensive Economic and Trade Agreement* (CETA) concerning mark-ups and cost-of-service differentials (4.1); and, secondly, WTO dispute settlement proceedings brought against Canada by the United States and Australia (4.2).

4.1 *Canada's Commitments to the EU under the Comprehensive Economic and Trade Agreement (CETA) concerning Mark-ups and Cost-of-Service (COS) Differentials*

The regional trade agreement between Canada and the European Union, the *Comprehensive Economic and Trade Agreement* (CETA), entered into provisional application on 21 September 2017.[77] Negotiations took place between 2009 and 2016,[78] producing one of the most complex and comprehensive trade

75 *Appeal of the Report of the Panel in the Dispute between Artisan Ales Consulting Inc. and the Government of Alberta regarding Mark-ups on Beer* (11 May 2018), ISBN no. 978-1-894055-97-0, <https://www.cfta-alec.ca/wp-content/uploads/2018/06/GOA-vs.-Artisan-Ale-appeal-report-Final.pdf>.

76 Government of Alberta, 'Trade challenge launched to support small brewers', *Announcement* (26 November 2018), <https://www.alberta.ca/release.cfm?xID=6210929D6ECA0-0C0B-DEEE-A25BFAB183BA00B6>.

77 See Government of Canada, 'Text of the *Comprehensive Economic and Trade Agreement*', <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

78 Government of Canada, 'Chronology of events and key milestones' (CETA) (20 June 2018), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng>.

treaties in existence at that time. Among the negotiated outcomes of the CETA were amendments updating and emphasizing the commitments in two previous bilateral agreements concerning trade in wine, spirits, and other alcoholic beverages between Canada and the European Union.[79]

Among other things, the CETA provisions reinforced that Canada's provincial liquor control authorities must ensure that all mark-ups, cost-of-service (COS) charges, or other pricing measures are non-discriminatory and in conformity with basic "national treatment" obligations.[80] More specifically, they required that any COS differentials added by provincial liquor control authorities to the prices of imported products must not be applied on an *ad valorem* basis (that is, on the basis of a product's value), but must instead reflect actual "additional costs necessarily associated with the marketing" of such products, justified in line with standard accounting procedures.[81] In addition, the CETA provisions required Canada's provincial liquor control authorities to make information on COS charges publicly accessible.[82]

In principle, COS charges are applied to the pricing of wine and other alcoholic beverages for the purpose of recovering the costs that a provincial liquor control authority incurs in relation to the logistics, shipping, storage, handling, and other services necessary to transport the products from their point of

79 CETA, Annex 30-B (Amendments to the 1989 alcoholic beverages agreement and the 2003 wines and spirit drinks agreement), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/30-A.aspx?lang=eng#b>. For the previous agreements that are the subject of the amendments in CETA Annex 30-B, see *Agreement Between Canada and the European Community Concerning Trade and Commerce in Alcoholic Beverages* (the "*1989 Alcoholic Beverages Agreement*"), <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100679>, as amended by Annex VIII of the *Agreement Between Canada and the European Community on Trade in Wines and Spirit Drinks* (the "*2003 Wines and Spirit Drinks Agreement*"), <https://treaty-accord.gc.ca/text-texte.aspx?id=104976&page=6>; and *2003 Wines and Spirit Drinks Agreement*, <http://www.treaty-accord.gc.ca/text-texte.aspx?id=104976>.

80 CETA, Annex 30-B, Section D, Article 4a (Pricing), paragraph 1 ("Competent authorities of the Parties shall ensure that any mark-up, cost of service or other pricing measure is non-discriminatory, applies to all retail sales and is in conformity with Article 2", where "competent authorities" is defined to mean "a government or commission, board or other governmental agency of a Party that is authorised by law to control the sale of wines and distilled spirits") (n 79).

81 CETA, Annex 30-B, Section D, Article 4a (Pricing), paragraphs 1–5 ("Each Party shall ensure that a cost of service is not applied to a product of the other Party on the basis of the value of the product") (n 79).

82 CETA, Annex 30-B, Section D, Article 4a (Pricing), paragraph 6 ("Competent authorities shall make available applicable cost of service differential charges through publicly accessible means, such as their official website") (n 79).

origin to store shelves. A COS "differential" reflects the difference between the costs to bring imported products to market and the relatively lower costs to bring like domestic products to market.[83] The concept of a COS charge must be distinguished from the concept of a mark-up: COS charges are purely a cost-recovery mechanism, and should therefore be based on an accounting of actual costs, while mark-ups are applied for the broader purpose of generating revenue, including profit, and can generally be set in any manner (provided that they are not applied in a discriminatory manner that modifies the conditions of competition to the detriment of imported products *vis-à-vis* like domestic products).

Historically, the Liquor Control Board of Ontario (LCBO), the liquor control authority for the Province of Ontario, applied COS differential rates to imported products on an *ad valorem* basis. In publicly accessible pricing examples, the LCBO blended the COS differential into the mark-up, which gave the appearance of a variable mark-up that was higher for imported products than it was for local Ontario products. For example, the LCBO mark-up rates in November 2017 were listed as 69.5% for Ontario wine products and 75.5% for imported wine products.[84] The 6% difference was accounted in the COS differential applied to all imported wine products, regardless of origin.[85]

However, application of a COS differential on an *ad valorem* basis – that is, as a percentage of landed cost – at a general rate for all imported products, regardless of their origin, risks departing from the actual costs incurred to bring a particular product (or group of products from a particular region) to market. This was exacerbated by the fact that the COS differential rate was being applied after federal customs duties and excise tax had been applied, which inflated the COS charge in proportion to those amounts.

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83 "'Cost of service differential' means the amount by which the cost of service attributable to an imported product differs from the cost of service attributable to the like domestic product". *2003 Wines and Spirit Drinks Agreement*, Annex VIII, Article B (amending Article 1.c. in the *1989 Alcoholic Beverages Agreement*) (n 79).

84 Liquor Control Board of Ontario, "Pricing Examples – Effective at Retail November 2017", at p. 6 ("LCBO pricing examples for table wine"; footnote 4 provides that "LCBO mark-up as a share of Landed Cost is 75.5% for imports and other domestic, and 69.5% for Ontario wines"), previously available online at <http://hellolcbo.com/ci/fattach/get/99870/0/filename/Pricing+Examples+November+2017.pdf> (no longer accessible).

85 Liquor Control Board of Ontario, Letter to 'All Trade Partners' dated 2 January 2018 regarding 'Updates/Changes to Cost of Service Differential (COSD), Wine Markup, Federal Excise Tax, Beer Price Change Schedule' ["LCBO letter re COS differential"], <http://www.doingbusinesswithlcbo.com/tro/Forms-Documents/LettersToTheTrade/Downloads/Letter%20to%20Trade%20-%20Pricing%20Updates%20Jan%202018%20Effective%20April%201%202018.pdf>.

Expressly to comply with the CETA obligations outlined above, the LCBO amended its pricing measures effective 1 April 2018 to cease applying the COS differential to imported products on a general *ad valorem* basis. Going forward, the LCBO implemented a COS differential based on product volume, using region-specific "fixed per-litre" rates for each product category.[86] In addition, the COS differential was separated out from the mark-up, resulting in identical mark-up rates for imported and local products.[87]

In a letter issued to stakeholders in January 2018, the LCBO provided the following explanation for these changes:

> For several years, as permitted by previous trade agreements, the LCBO has administered a differential in the percent mark-up between imported and domestic spirits and wines referred to as a Cost of Service Differential (COSD). The differential has been +6% on imported wines and +7% on imported spirits. The newly enacted Canada-European Union Comprehensive Economic and Trade Agreement (CETA) continues to permit the application of a COSD for imported products but now requires it to be based on fixed per-litre rate, rather than the value of the product. The following per-litre rates for imported products are derived from an independent audit of LCBO's financial and operational data and will come into effect April 1, 2018

COSD (CAD$/litre)	Spirits	Wine
EU	$0.09730	$0.6015
NAFTA	$1.2390	$0.3159
Other	$1.5503	$0.6496

> On April 1, 2018, the *ad valorem* markup for wine products will increase two percentage points and the following new rates will come into effect. Please note: the application of the new COSD will result in the same markup rates applied to imported and domestic products.[88]

86 LCBO letter re COS differential (n 85).

87 See *e.g.*, Liquor Control Board of Ontario, 'Pricing Examples – Effective at Retail April 2019', at p. 4 ("LCBO pricing examples for table wine") <https://hellolcbo.com/ci/fattach/get/146228/0/filename/Pricing+Examples+2019_COSD+dynamic+April+2019.pdf>.

88 LCBO letter re COS differential (n 85).

The foregoing case study illustrates how one of Canada's most important trading partners, the European Union, successfully leveraged international trade negotiations to address an issue affecting trade in European wine and other alcoholic beverages into Canada, promoting the amendment of measures that are now, in principle, less trade-restrictive than before.[89] While such change is incremental, the European Union's leverage under the CETA continues to be applied through ongoing bilateral discussions conducted in the Specialized Committee on Wine and Spirits established pursuant to Chapter 26 of the Agreement.[90] For example, in the most recent meeting of the Committee, "Canada confirmed that both Ontario and Quebec are in the process of completing the audit of the cost of service differential fees as requested by the EU in November 2018", the results of which would be shared with the EU, and the parties "agreed to discuss the audit results once the reports become available".[91]

Similarly, during the plurilateral trade negotiations that led to the conclusion of the *Trans-Pacific Partnership* (which later entered into force as the *Comprehensive Agreement for Trans-Pacific Partnership*),[92] both Australia and New Zealand secured commitments from Canada with respect to COS differentials and mark-ups. In side letters with each of these parties dated 4 February 2016, Canada provided confirmation that: (i) COS differentials applied by Canada's provincial liquor control authorities to imports of wine and distilled spirits from Australia and New Zealand "will not exceed the actual difference in the costs of the distribution, marketing and sale of an imported wine or distilled spirit compared to the cost of distribution, marketing and

89 Although not discussed in this chapter, the EU also secured other commitments during the CETA negotiations relating to trade-restrictive measures affecting imported wine and other liquor products in the Canadian market. For example, Canada agreed that private retail wine stores authorized to sell only domestic wines would be limited in number to no more than 60 outlets in British Columbia and 292 outlets in Ontario. See CETA, Annex 30-B, Section B, read together with the *1989 Alcoholic Beverages Agreement* and the *2003 Wines and Spirit Drinks Agreement* (n 79).

90 See Government of Canada, Global Affairs Canada, "Canada-European Union Comprehensive Economic and Trade Agreement (CETA) – Governance and committees – Specialized Committees – Wine and Spirits" (4 March 2020), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/committees-comites.aspx?lang=eng>.

91 Government of Canada, Global Affairs Canada, 'Second Meeting of the CETA Wines and Spirits Committee – Report' (24 September 2019) (n 33).

92 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng>.

sale of a like domestic wine or distilled spirit"; and (ii) most-favoured-nation (MFN) treatment will be accorded to imports of wine and distilled spirits from Australia and New Zealand with respect to mark-ups, COS charges, and other pricing measures adopted or maintained in Canada.[93]

4.2 *Challenges before the WTO Dispute Settlement Body*

There are clearly important opportunities to address trade-restrictive measures in the course of negotiating a bilateral trade agreement. However, without the context of such negotiations, an alternative source of leverage may be necessary. One such alternative is recourse to dispute settlement proceedings, either under a regional trade agreement or at the WTO.[94] Moreover, even within the context of bilateral trade negotiations, the existence of a formal dispute can crystallize the matter at issue and provide important bargaining value for the purposes of resolving it.

As discussed below, the United States and Australia have recently initiated separate WTO disputes to challenge certain Canadian measures concerning the sale of wine. In 2017, the United States commenced dispute settlement proceedings with respect to measures in the Province of British Columbia that restricted sales of wine in grocery stores to local products. In 2018, Australia initiated a broader WTO dispute that encompassed the same measures as well as Canada's federal excise tax exemption for 100% Canadian wine and a number of other measures under the liquor control regimes of Ontario, Nova Scotia and Quebec. These disputes have been effective at promoting the reform of the measures in British Columbia, which have since been amended to permit the sale of both imported and domestic products in grocery stores. The pending panel report in Australia's dispute could lead to additional changes, promoting the liberalization of other measures at issue.

93 Side letter from Canada to Australia dated 4 February 2016 regarding wines and distilled spirits, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/02-L-04.aspx?lang=eng>; and Side letter from Canada to New Zealand dated 4 February 2016 regarding wines and distilled spirits, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/02-L-05.aspx?lang=eng>.

94 See Julien Chaisse and Debashis Chakraborty, Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System, University of Pennsylvania Journal of International Economic Law, Vol. 28, No. 1, 2007, 155–185 and Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178.

4.2.1 The United States' WTO Challenge against Restrictions on Wine Sales in BC Grocery Stores

On 1 April 2015, the Province of British Columbia began to implement measures permitting sales of wine and other liquor products in grocery stores.[95] (While readers in most countries will not consider wine sales in grocery stores to be anything novel, they are still a relatively recent development in certain Canadian jurisdictions, including British Columbia and Ontario.)

Under the new measures, wine store licensees in British Columbia (BC)[96] were permitted to market and sell wine products either (i) in a separate store within a grocery store, provided it was "physically separated from the rest of the grocery store with controlled access and separate cash tills," or (ii) on grocery store shelves in a designated area of the grocery store itself.[97] If a licensee opted to establish a "physically separated" store within a grocery store, the new measures allowed them to sell "any type of wine that is permitted under the terms and conditions of their licence", which could include both imported and domestic products.[98] However, if the licensee opted to sell wine from the grocery store shelves, the new measures specified that: "If the wine store licence allows all types of wine (imported and domestic) to be sold, **only 100% BC produced wine** (including cider, mead and sake) **may be sold off the shelf**, and the terms and conditions of the wine store licence will be amended to reflect this restriction".[99] Thus, the new measures clearly required that only "BC wines" could be sold on grocery store shelves in British Columbia.[100]

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95 For background on these measures, see B.C. Liquor Control and Licensing Branch, Policy Directive No. 15-01, *Liquor Policy Review Recommendations #19 and 20: Phased-in Implementation of Liquor in Grocery Stores* (26 February 2015) [*Policy Directive No. 15-01*], <https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/policy-directives/15-01_phased-in_implementation_of_liquor_in_grocery_stores.pdf>. See also B.C. Reg. 241/2016, *Liquor Control and Licensing Regulation*, ss. 58(1)(a)(iii), 62–65.1, 67–68, <http://www.bclaws.ca/civix/document/id/complete/statreg/241_2016#section54>.

96 The term "licensee" refers to a person who holds a licence under the B.C. *Liquor Control and Licensing Act*, SBC 2015, c. 19, to sell wine.

97 *Policy Directive No. 15-01* (n 95).

98 *Policy Directive No. 15-01* (n 95).

99 *Policy Directive No. 15-01* (n 95).

100 The regulations define the term "BC wine" to mean wine, cider, or sake in respect of which the ingredients used in the fermentation process (*e.g.*, sugar, plants, honey, milk or rice) are only from British Columbia. B.C. Reg. 241/2016, *Liquor Control and Licensing Regulation*, s. 1 (n 95).

All of the licensees that began selling wine in B.C. grocery stores "opted for the on-the-shelf model".[101] The high costs of building a "physically separated" store within a grocery store and the relatively significant loss of floorspace for the grocery store's own products appear to have discouraged this alternative.[102] As a consequence, grocery store shelves were *de jure* restricted to "BC wine" products, while the grocery store retail channel was otherwise *de facto* closed to imported wines.

In response to these measures, the United States initiated two WTO disputes in 2017.[103] The first proceeding, dispute no. WT/DS520, was initiated on 23 January 2017[104] with the circulation of the United States' request for consultations to Canada (the procedure that commences formal dispute settlement proceedings between WTO members). The second proceeding, dispute no. WT/DS531, was initiated on 2 October 2017, when an almost identical request for consultations was circulated.[105] In both requests, the United States identified the "measures maintained by the Canadian province of British Columbia ('BC') governing the sale of wine in grocery stores" as the measures at issue. Australia, New Zealand, Argentina, and the European Union formally joined the consultations in both proceedings. However, these consultations were not successful in resolving the matter, and the United States proceeded to request the establishment of a panel in May 2018.[106]

The United States' singular claim was that the "BC wine measures" were inconsistent with Canada's obligations under Article III:4 of the GATT 1994 on

101 Maryse Zeidler, 'Whole Foods, Liberty Wines partner to bring first wine sales to Vancouver grocery store', *CBC News* (13 October 2019), <https://www.cbc.ca/news/canada/british-columbia/vancouver-wine-in-grocery-store-1.5319141> ("The 32 stores across the province that have a wine licence have opted for the on-the-shelf model").

102 Zeidler (n 101); Glen Korstrom, 'B.C. allows imported wine on licensed grocery store shelves', *Vancouver Courier* (13 July 2019), <https://www.vancourier.com/news/b-c-allows-imported-wine-on-licensed-grocery-store-shelves-1.23884624>; and Glen Korstrom, '29 B.C. grocery stores now sell wine', *Business in Vancouver* (28 September 2018), <https://www.vancouverisawesome.com/vancouver-news/bc-grocery-stores-sell-wine-1940087>.

103 As discussed in the next part of the chapter, below, Australia also commenced a WTO dispute that challenged these measures, among others administered in other provinces.

104 *Canada – Measures Governing the Sale of Wine in Grocery Stores*, G/L/1174, WT/DS520/1, Request for Consultations by the United States (23 January 2017), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/520-1.pdf>.

105 *Canada – Measures Governing the Sale of Wine in Grocery Stores* (*Second Complaint*), WT/DS531/1, G/L/1186, Request for Consultations by the United States (2 October 2017), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/531-1.pdf>.

106 *Canada – Measures Governing the Sale of Wine in Grocery Stores* (*Second Complaint*), WT/DS531/7, Request for the Establishment of a Panel by the United States (29 May 2018), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/531-7.pdf>.

the basis that they (i) "provide advantages to BC wine through the granting of exclusive access to a retail channel of selling wine on grocery store shelves", and (ii) "discriminate against imported wine by allowing only BC wine to be sold on regular grocery store shelves while imported wine may be sold in grocery stores only through a so-called 'store within a store.'"

Due to the simplicity of the legal claim, the substantive content of the measures at issue, and the relevant factual circumstances, this appeared to be a relatively straightforward matter. The "national treatment" obligation in Article III:4 of the GATT 1994 has been described as "a cornerstone of the GATT/WTO multi-lateral trading system,"[107] and the legal analysis that is applied to resolve a claim under this measure is well-developed in the WTO jurisprudence. In the context of the United States' claim, Article III:4 requires U.S. wine imported into Canada to be "accorded treatment no less favourable" than wine of Canadian origin in respect of all Canadian laws, regulations and requirements affecting the internal sale, offering for sale, purchase, and distribution of wine products in the Canadian market. In order to succeed, the United States merely needed to demonstrate that the BC measures had modified the conditions of competition in the BC wine market to the detriment of imported wine products (*e.g.*, by granting BC wine a competitive advantage over imported wine). As indicated above, the texts of the measures spoke for themselves, and there was very little nuance in the factual circumstances.

However, the dispute never proceeded to the constitution of a panel, let alone to the exchange of written submissions or a hearing. Instead, the matter was settled in the course of the negotiations to update the *North American Free Trade Agreement* (NAFTA), which eventually culminated in the conclusion of the *United States, Mexico, and Canada Agreement* (USMCA).[108]

In a side letter to the final legal text of the Agreement dated 30 November 2018, the United States agreed to "take no further action at the World Trade Organization (WTO) in relation to the BC measures, including in relation to WTO

107 Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589, para. 242. See Julien Chaisse and Puneeth Nagaraj 'Changing Lanes – Trade, investment and intellectual property rights' (2014) 36(1) *Hastings International and Comparative Law Review* 223–270.

108 This new agreement, which is intended to replace the *NAFTA* when it enters into force, is referred to as the 'USMCA' (*United States, Mexico, and Canada Agreement*) in the United States, the 'T-MEC' (*Tratado entre México, Estados Unidos y Canadá*) in Mexico, and the 'CUSMA' (*Canada-United States-Mexico Agreement*) in Canada. The final legal text of the Agreement is available online at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>.

disputes WT/DS520 and WT/DS531, prior to November 1, 2019" in exchange for the commitment that "[British Columbia] shall eliminate the measures which allow only BC wine to be sold on regular grocery store shelves while allowing imported wine only to be sold in grocery stores through a so-called 'store within a store,' and those contested measures shall not be replicated".[109]

Accordingly, in an executive order issued 8 July 2019, the Government of British Columbia amended the *Liquor Control and Licensing Regulation* to remove the restrictions that permitted only "BC wine" to be sold on grocery store shelves.[110] In this respect, the order introduced section 65.1, which provided, *inter alia*, that: "On the coming into force of this section, a BC wine restriction under a wine store on grocery shelves licence ceases to have effect"; and "No BC wine restriction may be imposed on a wine store on grocery shelves licence".[111] Two days later, on 10 July 2019, the B.C. Liquor Regulation Branch issued *Policy Directive 19-08*, which provided the following explanation of the corresponding change in policy:

> In a side letter to the Canada-United States-Mexico (CUSMA) trade agreement, the Province committed to eliminating measures which only allow sales of BC wine on grocery store shelves by November 1, 2019. To address the CUSMA commitment, the Liquor Control and Licensing Regulation was recently amended to eliminate regulatory measures that only allowed sales of BC wine on grocery store shelves.
>
> This new policy reflects those amendments and enables licensees who are permitted to sell wine on grocery store shelves to sell both domestic and imported wine (including cider, mead and sake).[112]

109 Side letters dated 30 November 2018 between the Honourable Chrystia Freeland, Minister of Foreign Affairs (Canada) and the Honorable Robert E. Lighthizer, U.S. Trade Representative, <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/letter-wine.pdf>.

110 Order in Council 400/2018, approved and ordered 8 July 2019, amending B.C. Reg. 241/2016, *Liquor Control and Licensing Regulation*, <http://www.bclaws.ca/civix/document/id/oic/oic_cur/0400_2019>.

111 B.C. Reg. 241/2016, *Liquor Control and Licensing Regulation* (n 95), s. 65.1.

112 B.C. Liquor Control and Licensing Branch, Policy Directive No. 19-08, *Allowing Imported Wine Sales on Grocery Store Shelves* (10 July 2019), <https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/liquor-regulation-licensing/policy-directives/19-08_allowing_imported_wine_on_grocery_stores_shelves.pdf>.

4.2.2 Australia's WTO Challenge against Canadian Federal and Provincial Measures Concerning the Sale of Wine

On 18 January 2018, Australia commenced a WTO dispute against Canada "with regard to measures maintained by the Canadian Government and the Canadian provinces of British Columbia ('BC'), Ontario, Quebec and Nova Scotia governing the sale of wine".[113] In addition to the measures that only permitted "BC wine" to be sold on grocery store shelves in the Province of British Columbia (as discussed above in the context of the U.S. WTO disputes), Australia also challenged the following measures:[114]

- The exemption from federal excise duty for "100% Canadian wine" under subsection 135(2) of the Canadian *Excise Act, 2001*, claiming that it is inconsistent with Articles III:1, III:2, and III:4 of GATT 1994;
- A number of measures under the Province of Ontario's liquor control regime that place conditions on the sale of wine in grocery stores, claiming that these measures are inconsistent with Article III:4 of the GATT 1994;
- A basic wine tax imposed in certain alternative sales channels in the Province of Ontario under the *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, with a variable rate that is reduced for "Ontario wine" and, thus, higher for "non-Ontario wine",[115] claiming that this variable tax rate is inconsistent with Articles III:1 and III:2 of the GATT 1994;
- A number of measures under the Province of Quebec's liquor control regime, claiming that these measures are inconsistent with Article III:4 of the GATT 1994; and

113 *Canada – Measures Governing the Sale of Wine*, G/L/1209, WT/DS537/1, Request for Consultations by Australia (16 January 2018), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/537-1.pdf>.

114 *Canada – Measures Governing the Sale of Wine*, WT/DS537/8, Request for the Establishment of a Panel by Australia (16 August 2018), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/537-8.pdf>.

115 See *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c. 26, Sched., ss. 27–29, 31, <https://www.ontario.ca/laws/statute/96a26#BK32>; Government of Ontario, Ministry of Finance, 'Beer and Wine Tax – Wine Basic Tax' (26 March 2020), <https://www.fin.gov.on.ca/en/tax/bwt/index.html#winerate>; Government of Ontario, Ministry of Finance, 'Wine Tax Information Sheet – Winery Retail Stores (not Wine Boutiques)' (17 December 2019), <https://www.fin.gov.on.ca/en/tax/bwt/infosheet3.html>; and Government of Ontario, Ministry of Finance, 'Wine Tax Information Sheet – Wine Boutiques' (17 December 2019), <https://www.fin.gov.on.ca/en/tax/bwt/infosheet4.html>.

– A reduced mark-up applied to sales of wine from local wine producers under the Province of Nova Scotia's liquor control regime, claiming that this variable tax rate is inconsistent with Articles III:1 and III:2 of the GATT 1994.

Australia also claimed that, with respect to each of the provincial measures that it considered to be inconsistent with GATT Article III obligations, Canada has not complied with its obligations under GATT Article XXIV:12 because it has not "taken reasonable measures as may be available to it to ensure observance of the provisions of the GATT 1994 by the Governments and authorities of British Columbia, Ontario, Quebec and Nova Scotia which are regional or local governments and authorities within its territories".[116] To the extent that it remains a live issue, the outcome of this claim will be interesting, considering that the constitutional distribution of powers precludes the federal Government of Canada from impinging on the exclusive legislative authority of the provinces to regulate the trade and commerce of wine *within* provincial boundaries. Canada may have to rely on the phrase "reasonable measures as may be available to it" in addressing its obligation under Article XXIV:12.

Unlike the U.S. disputes discussed above, Australia's dispute has continued through the entire dispute settlement process, including the constitution of a panel, the exchange of written submissions,[117] and two hearings (i.e., two "substantive meetings with the parties"). New Zealand, the United States, the European Union, Argentina, and Chile joined the consultations phase, indicating their interest in the Canadian measures at issue. In addition, the following countries participated as third parties, filing written submissions with the panel: Argentina, Chile, China, the European Union, India, Israel, the Republic of Korea, Mexico, New Zealand, the Russian Federation, South Africa, Chinese Taipei, Ukraine, Uruguay, and the United States.[118]

116 *Canada – Measures Governing the Sale of Wine*, WT/DS537/8, Request for the Establishment of a Panel by Australia (16 August 2018) (n 114).

117 Australia's written submissions are publicly accessible. See Government of Australia, Department of Foreign Affairs and Trade, 'WTO Disputes, *Canada – Measures Governing the Sale of Wine* (DS537)', <https://www.dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/summary-of-australias-involvement-in-disputes-currently-before-the-world-trade-organization>.

118 The third party written submissions of the European Union and the United States are publicly accessible. See European Union, Third Party Submission in *Canada – Measures Governing the Sale of Wine*, WT/DS537 (28 June 2019), <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158088.pdf>; and United States of America, Third Party Submission in *Canada – Measures Governing the Sale of Wine*, WT/DS537 (28 June 2019), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.fin.%28public%29_2.pdf>.

According to the schedule circulated by the panel in March 2020,[119] the final report is expected to be issued to the parties on or about 4 June 2020 and then circulated to the members thereafter (after it has been translated). By the time this chapter is published, the reader will likely have ready access to the panel's findings and recommendations in this report.[120]

The settlement of the U.S. dispute has effectively resolved Australia's claim with respect to the measures that blocked imported wine products from being sold on grocery store shelves in the Province of British Columbia, rendering this issue moot. The claims concerning the measures under the other provincial liquor control regimes are generally more complex. As the findings of the panel may be subject to an appeal (notwithstanding the current suspension of the WTO Appellate Body), it is perhaps premature to speculate on the potential outcomes. However, it is notable that in June 2019 the LCBO indicated its intention to issue "unrestricted authorizations" to 87 grocers that would permit them to "sell imported and domestic beer, cider and wine".[121] This was picked up by the United States Department of Agriculture's Foreign Agricultural Service in a Global Agricultural Information Network (GAIN) report[122] and was a topic of discussion raised by Canadian representatives at a meeting of the CETA Specialized Committee on Wine and Spirits in September 2019.[123]

Depending on the outcome, this dispute could lead to reform in the Canadian federal legislation and the provincial liquor control regimes, potentially with the effect of liberalizing the Canadian market to some degree for imported wine products. However, considering the entrenched nature of the provincial liquor control regimes in Canada, such reform is likely to be a gradual and incremental process.

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119 *Canada – Measures Governing the Sale of Wine*, WT/DS537/11/Add.3, Communication from the Panel – Addendum (11 March 2020) (n 13).

120 For a copy of the final report of the panel when it is circulated and publicly accessible, see the official website for this dispute: WTO, *Canada – Measures Governing the Sale of Wine* (DS537), (n 34).

121 Government of Ontario, 'More Choice, Convenience and Fairness for Beer and Wine Consumers', *Backgrounder* (6 June 2019), <https://news.ontario.ca/mof/en/2019/06/more-choice-convenience-and-fairness-for-beer-and-wine-consumers.html>.

122 United States Department of Agriculture, Foreign Agricultural Service, GAIN Report, 'Ontario Expands Alcohol Distribution', *GAIN Report No. CA19023* (14 June 2019), <https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Ontario%20Expands%20Alcohol%20Distribution_Ottawa_Canada_6-14-2019>.

123 Government of Canada, Global Affairs Canada, 'Second Meeting of the CETA Wines and Spirits Committee – Report' (24 September 2019) (n 33).

5 Conclusion

The Canadian markets for wine and other liquor products are governed by a complicated patchwork of regulatory regimes that have long imposed restrictive effects on both Canadian stakeholders trading inter-provincially within Canada and foreign producers and exporters seeking to trade into Canada. For decades, inter-provincial and international trade barriers have persisted as the *status quo* under the federal *Importation of Intoxicating Liquors Act* and each of the provincial liquor control regimes that implement its provisions. In recent years, however, there have been positive changes toward increasing liberalization. With significant pressure now being applied both domestically and internationally, this trend can be expected to continue, albeit incrementally.

The amendment of the *Importation of Intoxicating Liquors Act* (i.e., the federal legislation that establishes the government-controlled importation monopolies in each province) in June 2019 to remove the restriction on inter-provincial trade was an important step forward. Prior to this amendment, Section 3(1) of the Act had long imposed inter-provincial trade barriers by requiring provincial government authorities to control imports of wine and other liquor products from not only outside of Canada, but also from other provinces *within* Canada. Following the Supreme Court of Canada's ruling in *R. v. Comeau* in April 2018, this element of the Act was vulnerable to challenge as contrary to the prohibition on "laws that in essence and purpose restrict trade across provincial boundaries" under Section 121 of Canada's *Constitution Act, 1867 to 1982*. This vulnerability was confirmed in June 2018 when a court in the Province of Alberta applied the Supreme Court's legal test to find a provincial measure restricting interprovincial trade in beer products to be invalid (a decision that was subsequently upheld by the Alberta Court of Appeal).

By withdrawing the federal mandate for inter-provincial trade barriers, the Government of Canada has introduced the possibility of unrestricted trade in wine and liquor products between the provinces. However, it has left the decision on whether or to what extent to actually liberalize those barriers to each of the provincial governments. As discussed in this chapter, the provincial government monopolies over the importation and distribution of alcoholic beverages are deeply entrenched, and there is a complex web of economic factors, policy objectives, and political interests that sustain the inter-provincial and international trade restrictions. The complexity and sensitivity of these circumstances are manifest in the Supreme Court of Canada's decision in *R. v. Comeau*, where the Court stopped short of finding invalid a provincial measure that was clearly designed and enforced to restrict inter-provincial trade in liquor products for the reason that it was part of a larger legislative scheme with

a different policy objective – i.e., public supervision of trade and consumption of alcoholic beverages more generally.

Over time, increasing friction from Canadian producers seeking greater access to Canadian markets in other provinces, as well as advocacy on behalf of consumer groups pursuing freer access to imported products, is expected to wear down the inertia of the inter-provincial trade restrictions. In this respect, the important efforts of the Alcoholic Beverages Working Group established under the *Canadian Free Trade Agreement* constitutes another important step forward.

At the same time, some of Canada's closest trading partners are promoting change through a combination of ongoing bilateral trade negotiations and dispute settlement proceedings. Examples examined in this chapter include the negotiated outcomes achieved by the European Union under the CETA, the commitments provided by Canada to Australia and New Zealand in side letters to the CPTPP, and the settlement of WTO disputes between Canada and the United States in side letters under the USMCA. Perhaps the most profound changes will come in the wake of the pending resolution of the WTO dispute between Canada and Australia, in which the federal excise tax exception for "100% Canadian wine" and a number of measures under the provincial liquor control regimes in Ontario, Nova Scotia and Quebec concerning the sale of wine could be found to be inconsistent with Canada's obligations under the GATT 1994. The recommendations and rulings in the panel report (and/or an Appellate Body report, if the matter is appealed) have the potential to not only promote narrow compliance measures in the short term, but also to re-shape Canadian policies and regulatory reforms more broadly in the longer term with the aim of ensuring compliance with Canada's WTO obligations.

Overall, the foregoing indicates that a combination of internal and external pressures will continue to generate change in the form of incremental liberalization of the Canadian regulatory landscape for trade in wine and other liquor products.

CHAPTER 10

The Protection of Foreign Investment in the Wine Sector

Laurence Ponty, Baptiste Rigaudeau and Jean-Robin Costargent

1 Introduction

Much has already been written about the internationalization of wine trade and consumption. Interestingly, apart from highly publicized transactions, such as the acquisition of famous *Bordeaux châteaux* by Chinese investors, there is much less discussion about foreign investment and, in particular, foreign direct investment ("FDI") in the sector. This is certainly because most operations remain confidential and are not necessarily recorded with authorities, much less interprofessional associations.

Indeed, investing in the wine sector at a global level primarily belongs to the actors of the private sector. It is a decision to be made on the basis of multiple factors, starting with a series of economic drivers. However, the impact of the legal aspects relating to foreign investments should not be underestimated by decision-makers.[1] The purpose of this Chapter is to draw the attention of their advisers to both national and international policies and instruments regulating and aiming at protecting foreign investments from their implementation throughout their whole duration, with a focus on rules specifically relevant to the wine sector, when existing.

From the investor's point of view, three main categories of questions arise when it comes to the legal aspects of an envisaged cross-border project. First, what is the nature of the project? Can it qualify as a foreign investment? Second, is the implementation of the project allowed in the targeted country? In other words, what are the conditions imposed on the investor by the

1 Organisation of Vine and Wine Intergovernmental Organisation, 2019 Statistical Report on World Vitiviniculture, December 2019, p. 19 [http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf]; See also Per and Britt Karlsson, Global Wine Production 2019 Is Returning To 'Normal,' Says Pau Roca Of The OIV, Forbes, November 3, 2019 [https://www.forbes.com/sites/karlsson/2019/11/03/global-wine-production-2019-of-263-mhl-is-a-return-to-normal-says-pau-roca-of-the-oiv/#3f182cc2745b].

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host country to enter into its market? Is the host country's foreign investment regime liberal or restrictive? Does the same regime apply to all types of foreign investment or is investment in the wine sector subject to specific rules? Third, once the project has been implemented (and even during the implementation phase), do efficient instruments exist to protect the investment against adverse measures taken by the host country and its bodies? Are dispute settlement mechanisms available outside of the courts of the host country? And if so, are they amenable to all types of investment or are they sector specific?

This Chapter attempts to provide guidance in respect of those interrogations by way of a three-fold approach: First, by mapping out the various categories of foreign investors and foreign investment in the wine sector and the reasons triggering foreign investment decisions from an economic perspective (section 1). Second, by identifying the relevant features and new trends of national or regional foreign investment regulatory frameworks (section 2); And third, by showing how foreign investment can be protected via international investment protection treaties (section 3).

2 The Economic Reality of Foreign Direct Investment in the Wine Sector

The wine market (as opposed to other agri-food products) is multifaceted due to the cultural and affective dimensions, coupled with its high diversity in the quality and specificities of the product.

Since the 2000s, globalization and national regulations have deeply changed wine consumption patterns and consequently provoked deep transformations among the various actors of this industry. This has encouraged both concentration at the top scale and segmentation of the small players.

In this light, identifying foreign investments in the wine sector is quite a complex issue, which starts with its own definition.

2.1 *Specificities of the Wine Industry as a Market for Foreign Direct Investors*

2.1.1 Definition of Foreign Direct Investment and Investor

A clear definition of foreign direct investment, and consequently, of foreign direct investors, is a prerequisite to the identification of foreign direct investments in the wine sector. Another appropriate framework of definition for such a massively exported and imported product as wine seems to be the

International Monetary Fund ("IMF")'s "Balance of Payments Manual."[2] In this Manual, Foreign Direct Investment ("FDI") is defined as "the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy."[3]

Foreign Direct Investor ("Investor") is the "investor, who is resident in another economy, [which] owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise)."[4]

FDI is (i) an investment project targeted by (ii) a foreign direct investor which tries to obtain a "lasting interest". It implies that the potential investor acquires a "significant degree of influence" on the management of the domestic company, target of the investment, materialized by a threshold of 10% of shares.[5] As such, direct investors' objectives diverge from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise.[6] According to Professors Agarwal and Ramaswami, from the direct investor's perspective, three main criteria usually prompt the decision to invest: "*international diversification*", "*internalization advantages*" and *"country-specific advantages."*[7] The question is whether the above definitions of foreign direct investment and investor are appropriate to reflect the economic reality of FDI in the wine sector and which of the three criteria is more relevant to its investors.

2.1.2 Typology of the Actors in the Wine Industry

In such a complex market as the wine industry, identification of the investing companies and targeted investments requires beforehand a mapping and categorization of the industry actors. The wine industry's production chain is generally structured over three main actors:[8] grape growers; wine merchants; and administrative institutions.

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2 IMF, *Balance of Payments Manual* (fifth edition).

3 IMF, *Balance of Payments Manual* (fifth edition), §360, at 86; See also the OECD definition in *Benchmark Definition of Foreign Direct Investment* (4th Edition, 2008) §11.

4 IMF, *Balance of Payments Manual* (fifth edition) §362, at 87.

5 M. Duce, 'Definitions of Foreign Direct Investment (FDI): a methodological note', background material for the BIS Meeting of the CGFS Working Group on FDI in the financial sector (2003).

6 OECD, *Benchmark Definition of Foreign Direct Investment* (4th Edition, 2008) §11.

7 S. Agarwal and S.N. Ramaswami, 'Choice of market entry mode: Impact of ownership, location and internationalization factors', (1992) 23(1) Journal of International Business Studies 1–27.

8 E. Montaigne and A. Coelho, 'Structure of the producing side of the wine industry: Firm typologies, networks of firms and clusters', *Wine Economics and Policy* (1st ed. 2012) 41–53.

The first and main link of the chain consists of grape growers. Despite major technology improvements, farm holdings are extremely heterogeneous within the wine sector. Diversity within the actors is observed by the degree of vertical integration of the grape grower into the wine chain,[9] its degree of specialization and professionalization. When grape growers are distinct from wine producers, the production responsibility rests with wine merchants. For instance, within the Champagne appellation, local grape growers produce 90% of the grapes, and the merchants produce 70% of the Champagne.[10]

Wine merchants primarily sell wine to their customers. They may, however, also be involved in the wine production process. This potential dual role explains why their activities are usually subject to strict regulations in France and most producing countries.[11]

Finally, the role of the administrative institutions, often focused on regional clusters (such as "appellations" or wine regions), is decisive. They define the product specifications, set the production rules, or even the packaging of the product, as well as channels to market the appellation. Each wine producing region has its own institutions: in the European Union, those are typically inter-professional bodies and registered designation councils,[12] in the United States, clusters' organizations.[13] However, those institutions are not-for-profit associations, syndicates or volunteer organizations and therefore not usually targeted by investors.

Within the wine industry chain (from grape growing to the product supply to end-customers), the actors falling both in the category of investors and investments are, therefore, grape growers and wine merchants.[14] While throughout the last decades these actors have remained less diversified and concentrated than the leading firms in other food industries, their activity has nevertheless significantly changed.[15]

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9 *i.e.* does the grape grower only sell the grapes or does it also make the wine?

10 Comité Interprofessionnel du vin de Champagne, Statistics (2018), available on the CIVC website: <https://www.champagne.fr/fr/economie/filiere>.

11 See, for an example, Decree n° 2000–739 dated August 1st, 2000, on regulation of authorized wine keeper statute. The list of French various regulations of the wine merchants activity is detailed on the French Custom website: <https://www.douane.gouv.fr/fiche/obligations-des-negociants-en-vin>. See also French Custom edited guide, 'La vente de vin à l'étranger, les fondamentaux', published on May 2016.

12 *Syndicats* in France, *consortia di tutela* in Italy, *consejos reguladores* in Spain.

13 E. Montaigne and A. Coelho, 'Structure of the producing side of the wine industry: Firm typologies, networks of firms and clusters', *Wine Economics and Policy* (1st ed. 2012) 41–53.

14 J-F Outreville, *Foreign Direct Investment in the Wine and Spirits Sector* Œnométrie XXI-VDQS 21ème Colloque Annuel, Lyon, 2014).

15 E. Montaigne and A. Coelho, 'Structure of the producing side of the wine industry: Firm typologies, networks of firms and clusters', *Wine Economics and Policy* (1st ed. 2012) 41–53.

2.1.3 The Impact of Globalization on the Actors of the Wine Industry

The globalization of wine trade, the development of logistical distribution platforms and changes in the consumption model (from quantity to quality) have forced wine industry actors to operate differently. Since the early 2000s, international wine trade has exploded. World exports have increased from 61 million hectolitres exported to 108 million hectolitres between 2000 and 2018, *i.e.* an increase of 77% for an annual growth rate of 3%.[16] Exports' value has similarly seen a spectacular increase, from 13.4 billion euros in 2000 to 31.3 billion euros in 2018, *i.e.* a 134% growth.[17] Consequently, not only wine trading has increased in general, but export also involves more expensive wines.

Since the late 20th century, the conjunction of the sharp decrease of wine consumption in the European Union and the emergence of new winemaking regions (the "New World" wines) in South America (especially Chile and Argentina) and Australia has generated deep mutations in the wine industry. These changes have created a structural gap between supply and demand, causing price and revenue instability.[18]

Customers' profiles are also undergoing a structural evolution. In some regional markets (European Union), customers emphasize quality over quantity whereas in other markets they mostly focus on lowering the prices in order to meet the growing demand, for instance in China.[19]

For some observers, the globalization of the wine sector has triggered the restructuring of the offer and the emergence of an "oligopoly with a fringe competitive market", *i.e.* a market dominated by several multinational companies, with a remaining part composed of a galaxy of small actors.[20]

More specifically, this phenomenon has led to the restructuring of the largest wine operators into multinational enterprises. At the same time, it has also fostered the emergence of specialized wine funds created by institutional investors early in the 2000s.[21]

16 International Organization of Vine and Wine, 'Note de conjoncture mondiale' (2019).

17 International Organization of Vine and Wine, 'Note de conjoncture mondiale' (2019).

18 J-F Outreville, *Foreign Direct Investment in the Wine and Spirits Sector* Œnométrie XXI-VDQS 21ème Colloque Annuel, Lyon, 2014).

19 Xerfi Study, 'The Global Alcoholic Beverage Industry' (2018).

20 J-L Rastoin, E. Montaigne and A. Coelho, 'Globalisation du marché international du vin et restructuration de l'offre', INRA Sciences Sociales – N° (2006).

21 J-L Rastoin, E. Montaigne and A. Coelho, 'Globalisation du marché international du vin et restructuration de l'offre', INRA Sciences Sociales – N° (2006).

These new trends were accompanied by a significant increase of FDI in the wine sector. Indeed, many firms in the wine, beer and spirits sector have acquired other companies based on the belief that only very large players may benefit from the cost advantages necessary to remain competitive.[22]

2.1.4 The Impact of the Wine Industry's Recent Mutations on Investment Decisions

Foreign investments in the wine industry have been determined in light of the recent mutations of the wine market, in particular trade globalization, societal evolutions in wine consumption and the emergence of new producers and markets. For investors in the sector, "*international diversification*" is, however, the main criteria driving their decision. Indeed, from a local (and even subsistence) farming and producing industry, the wine production market has evolved towards massive inward and outward transactions. By way of illustration, in 2018, 44% of the wine drunk was produced in another country.[23] Conversely, the production market has remained geographically concentrated. In 2018, Italy, France and Spain produced 148,3 million hectolitres of wine (51% of the world production) while 49% of it was consumed by the United States, France, Italy, Germany and China. 50% of the value exported (*i.e.* EUR 15,5 billion) was sold by France and Italy.[24]

In parallel with traditional markets, the impact of globalization on wine trade has created new markets for alternative techniques (biodynamic) or grapes (vintage varieties), small "appellations" or wine regions, ignored by regular investors. The emergence of "brands" and trends in the consumption of wine, publicized via the internet, allows these "alternative" producers to flourish due to direct market outreach capabilities.

Finally, from a trading standpoint, the inherent volatility of the financial market is hindered by the wine production cycle. From the moment the grapes are starting to grow to the sale of wine bottles, the production cycle lasts one, and more often two, years. The volume of the production is highly weather-dependent. For instance, in 2018, Portugal has lost 1,5 million hectolitres from 2017 production (-18%) because of unfavourable weather conditions.[25] This explains why this long and risky production cycle prompt investors to look for new lands abroad, in order to hedge their investment risk.

22 Xerfi Study, 'The Global Alcoholic Beverage Industry' (2018).
23 International Organization of Vine and Wine, 'Note de conjoncture mondiale' (2019).
24 International Organization of Vine and Wine, 'Note de conjoncture mondiale' (2019).
25 International Organization of Vine and Wine, 'Note de conjoncture mondiale' (2019).

2.2 *Identification of FDI in the Wine Sector*

2.2.1 The Criteria of "International Diversification" in Wine Investments

There are several investment methods. One of the key entry modes – land acquisition or "greenfield" – is often unavailable to potential investors, as most of available land in the major "appellation" regions are already owned and cultivated.

A rare 'recent' example of greenfield investment appeared in the late 2000s: several French winemakers invested in Argentinean lands to produce wine locally.[26]

Investors have often recourse to alternative entry methods including joint-venture agreements or local alliances, part ownership or full acquisition of local actors. The latter strategy has been most frequently used.[27]

Foreign investors' main incentive for acquiring a local vineyard is to comply more easily with local regulations: foreign acquisition investments are more sensitive to regulation barriers. For instance, to export to the US, foreign investors' strategy would typically consist in the acquisition of a local importing company for easier and quicker compliance with the relevant US regulations.[28]

The establishment of a corporate relationship, and then of a business relationship, between the foreign investor and its targeted investment differs from one industry sector to another. Specifically, this varies depending upon how these various actors collaborate for the purpose of generating cash flows.

The rentability of the relevant investment also depends on the typology of the investor.

2.2.2 Identification of Foreign Direct Investors in the Wine Sector

Investors in the wine sector can be split into two categories.

The first category consists of patrimonial investors, interested in securing financial assets over a long time period and often interested in the most-renowned *chateaux*. The second category consists of industrial operators seeking industrial synergies and economies of scale for distribution or focusing on market segments.

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26 See the work of Michel Rolland with Malbec grapes at the Clos de los Siete, near Mendozza: *See* 'How a Frenchman helped transform Argentina's wine industry', *Financial Times* (September 19, 2016).

27 L. Curran and M. Thorpe, 'Chinese FDI in the French and Australian wine industries: Liabilities of foreignness, assets of foreignness and interactions with host country institutions', AIBNE Chapter Special Conference on China (2014) 6.

28 S. Globerman and D. Shapiro, 'Assessing International Mergers and Acquisitions as a Mode of Foreign Direct Investment', in L. Eden and W. Dobson (eds), *Governance, Multinationals and Growth* (Cheltenham, 2005).

2.2.3 Patrimonial Investors in the Wine Sector

Patrimonial investors only fall under the IMF's definition of FDI if they acquire more than 10% of the stakes of the *chateau* and acquire significant influence on the targeted company's management.

Examples of such investments include some rare (and spectacular) acquisitions: for instance, the purchase of the 8.66-hectare Grand Cru vineyard of Clos des Lambrays in Morey-Saint-Denis by LVMH for 100 million euro.[29]

A topical example of patrimonial investors as per the IMF definition is Chinese investment in the French wine sector.

In 2018, more than 155 *chateaux* were acquired or partly acquired by independent Chinese investors, including 140 in the Bordeaux region, up from 31 in 2013.[30] The production has thus become Chinese-centred: almost 90% of the wine produced in these vineyards is exported to China.[31]

Patrimonial investments imply high financial risk and costs attached to the conservation of the land and the *chateau*. Consequently, it restricts these transactions to very wealthy individuals, not interested in liquid and cost-effective investments.

To the contrary, hedged and diversified portfolios offer to individual investors the possibility to invest in vineyards' stakes and in their products (operating through Liv-Ex Fine Wine indexes), somewhat "de-risking" the activity.[32]

The significant development of wine funds has partly removed one of the core-elements of an FDI: the ability for an investor to influence the management and the strategy of the targeted investment.

FDI nowadays seems therefore to be better embodied by industrial investors than by patrimonial investors.

2.2.4 Industrial Investors in the Wine Sector

Industrial investors in the wine sector consist mainly of multinational companies which activities include notably the production and sale of beverages (wine, beer, spirits).

As the wine market is an oligopoly, the most dominant actors are investing in various beverages, and not only wine – considering that wine represents over 13% of alcoholic beverage consumption in 2018 and 17% in value.[33]

29 Article from Business of fashion, 'LVMH Acquires Clos des Lambrays Vineyard in Burgundy' (2014).

30 L. Lemaire, *Le Vin, le Rouge, la Chine* (Sirène Production Edition, 2019) 86.

31 L. Lemaire, *Le Vin, le Rouge, la Chine* (Sirène Production Edition, 2019) 93.

32 Lucy Warwick-Ching, 'How to invest in wine', *Financial Times* (2013), <https://www.ft.com/content/6dcf4168-cc63-11e2-bb22-00144feab7de>.

33 Xerfi Study, 'The Global Alcoholic Beverage Industry' (2018).

The top 10 wine producing multinationals are:[34]

Top 2018 wine producers	% of world production	Incorporation country
E & J Gallo	2.7%	USA
Constellation Brands	1.7%	USA
The Wine Group	1.5%	USA
Treasury Wine Estate	1.12%	Australia
Viña Concha y Toro	1.03%	Chile
Castel Frères	1.02%	France
Accolade Wines	0.97%	Australia
Pernod Ricard	0.97%	France
Grupo Peñaflor	0.9%	Argentina
FeCoVita Coop	0.70%	Argentina

Except for Pernod Ricard which is the only spirit-focused group of this top 10 and which has a strong external growth strategy, FDI are performed by multinationals which core business is not necessarily alcoholic drinks and beverages and even less wine production and sale.

The below table shows major transnational vineyard transactions during the last three years, listed per target country:[35]

Target Company	Target Country	Investor type	Deal Value in M USD
Susana Balbo Wines (68.18%Stake)	Argentina	US investment fund	35
Accolade Wines Australia Limited	Australia	US investment fund	769

34 International Organization of Vine and Wine, 'Note de conjoncture mondiale' (2019).

35 These transactions are documented deals extracted from the database ThomsonOne Transactions between companies with the same incorporation country have been excluded from this study. Transactions operated from a shell company to a target company when the nationality of the ultimate beneficiary was the same as the target company have also been excluded.

Target Company	Target Country	Investor type	Deal Value in M USD
Kilikanoon Estate Pty Ltd (80%Stake)	Australia	Chinese wine producer	16
Schlumberger A G	Austria	Swiss individual	105
Domaine Bonneau du Martray	France	US individual	105
Chat eau Phelan Segur	France	Belgium individual	29
Chat eau Margui vineyard SAS	France	US wine seller	10
Far nese Vini Sr l	Italy	US investment fund	196
Casa Vincola Zonin SpA (36.1%Stake)	Italy	UK investment fund	73
Freixenet, S.A. (50.67%Stake)	Spain	German wine seller	659
Outpost Wines	USA	French insurance company	40

An analysis of the typology of investors also shows a growing implication of major investment funds, allowing investors to limit their risk exposure.[36]

The first conclusion which can be drawn from the above benchmark is that transactions involving vineyards or wine brands are much rarer than transactions involving spirits or beer brands and production facilities.

This is a consequence of the diminishing ratio in wine consumption as opposed to beer and the increasing popularity of spirits among new types of consumers. Notably, the last decade has seen the emergence of new consumers from Africa, Russia or Asia, with a cultural background favouring spirits rather than wine.

The second conclusion is that the main wine producing countries encourage both foreign investors to invest in their territories and their nationals to invest abroad.

As the main producing countries are also among the main wine consumers, they are the ones who attract most foreign investors. Indeed, foreign investors are mostly interested in investing in production centres close to their customers.

36 See *e.g.* the acquisition by The Carlyle Group Management of Accolade Wines (top 10 wine producer) in June 2018 for 769 million USD.

Remarkably, investors from emerging and developing economies, mainly China, have recently grown into larger foreign direct investors in the above regions.

To assess the market of the target country and the viability of their proposed investment, foreign investors have, however, to review carefully the regulatory framework of the target country regarding foreign investment and, in particular, FDI.

3 Selected Overview of the Regulatory Landscape of Foreign Direct Investment and Its Relevant Features to the Wine Industry

Among significant wine producing countries, legislation on foreign investment varies from traditionally restrictive regimes, like the Australian or the Chinese regimes, to very open regimes, like the European Union.

However, major developments recently took place with, on the one hand, the EU introducing a foreign investment screening mechanism to safeguard strategic sectors and, on the other, China opening up its legislation and granting, as a principle, equal treatment to foreign investors.

The below analysis concentrates on the most significant regulations and recent changes including the above-mentioned regimes and their relevant features to the wine industry, starting with an overview of the Australian case as one of the most sophisticated examples of a restrictive regime (section 2.1). Section 2.2 addresses new developments in the EU and Section 2.3 focuses on China.

3.1 *Restrictive Regimes: the Example of Australia*

Australia has implemented an FDI screening mechanism characterised by a case-by-case approach and the application of a national interest test.

The Australian screening process is governed by a series of laws, regulations and policy documents including, among others,[37] the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the "FATA"); the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (the "FATR"); and Australia's official "Foreign Investment Policy" statement together with Ministerial Statements. The concrete process is primarily carried out by the Foreign Investment Review Board (the "FIRB") and the Australian Tax Office (the "ATO"). At the outcome, the decision however belongs to the Treasurer.[38]

37 See also Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth); the Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015 (Cth); the Financial Sector (Shareholdings) Act 1998 (Cth).

38 The minister in charge of government revenue and expenditure.

Since the Australian regime is very detailed and comprises rules applicable to specific kinds of investments, the below sections exclusively focus on the rules applicable to investment in agricultural land and agribusinesses, which are directly relevant to investment in the wine sector.[39]

3.1.1 The Scope of Agricultural Land and Agribusiness

"Agricultural land" is defined, under the FATA, as "land, in Australia, that is used or could reasonably be used, for a primary production business".[40] Such type of "business" notably includes "a business of cultivating or propagating plants (…) or their products or parts (…)".[41]

The concept of agribusiness was introduced in the FATR (2015). An Australian entity or business is an agribusiness when the following two conditions are met: (i) the Australian entity or business uses assets in doing business wholly or partly, in specified classes of business included in the Australian and New Zealand Standard Industrial Classification Codes (ANZSIC), including agriculture, forestry and fishery businesses and certain food product processing businesses, and (ii) at least 25% of the acquired entity or business must derive earnings from agribusiness or the value of the assets used for agribusiness must exceed 25% of the assets' total value.[42]

The definitions of agricultural land and agribusiness are not mutually exclusive as often the acquisition of an agribusiness involves the acquisition of an interest in agricultural land.[43]

3.1.2 The Notification Requirements on Foreign Investors

Where a foreign investor invests in agricultural land and/or an agribusiness in Australia, it is subject to both (i) notification requirements with the ATO and (ii) prior approval of its investment through the screening process.

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39 For a global analysis of the Australian FDI screening regime, see the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 11–22.

40 FATA, section 4.

41 FATA, section 4, referring to the Income Tax Assessment Act 1997 (section 995-1).

42 FIRB Guidance Notes at: <https://firb.gov.au/resources/guidance/gn18>; G. Thomas, S. Lilly and L. Poat, 'Australia's new foreign investment regime – What does it mean for investment in the food and agribusiness sector?' in *Cultivate* (Norton Rose Fulbright, June 2016) Issue 11, at 11.

43 G. Thomas, S. Lilly and L. Poat, 'Australia's new foreign investment regime – What does it mean for investment in the food and agribusiness sector?' in *Cultivate* (Norton Rose Fulbright, June 2016) Issue 11, at 11.

First, according to the Register of Foreign Ownership of Agricultural Land Act 2015 (the "RFOALA"),[44] all foreign persons[45] holding an interest in Australian agricultural land[46] are required to give notice to the ATO, regardless of the value of the land. Notice must be given within 30 days of the relevant acquisition.[47]

Second, a foreign investor may have to obtain prior approval of its investment with the FIRB, depending on the screening threshold applicable.[48] Such screening threshold mainly varies depending on the type of asset being acquired and the country of origin of the investor.[49]

Thus, for agricultural land, the FIRB's prior approval is required where the total value of all interests in agricultural land held by the foreign person (alone or together with one or more associates) and the consideration for the acquisition of the interest in the agricultural land exceeds A$15 million.[50] However, a more favourable threshold applies to foreign investors from certain countries with which Australia has free trade agreements, such as Chile, New Zealand and the United States (A$1,192 million) and Thailand and Singapore (A$50 million).[51] Further, foreign persons undertaking a program of acquisitions of interests in agricultural land over a defined time period may apply for an exemption certificate without the need to seek approval for each individual acquisition.[52]

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44 RFOALA, section 19; the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 12.

45 According to the FATA, section 4 (to which the RFOALA, section 4 refers), a foreign person includes "a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest".

46 *i.e.* a freehold interest in agricultural land, or a right to occupy agricultural land under a lease or licence which remaining term (including any extension or renewal) is reasonably likely to exceed five years.

47 RFOALA, section 19. Foreign persons must also notify acquisitions of water rights, such as irrigation rights or rights to take water from Australian water sources.

48 See, the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 14.

49 It also depends on the nature of the investor (government or private), but for the purpose of this article, only thresholds applicable to private investors are being considered (the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 13).

50 FATA, section 52 and FATR, section 52.

51 FATR, section 40; FIRB Guidance Notes at: <https://firb.gov.au/guidance-resources/guidance-notes/gn17> and <https://firb.gov.au/guidance-resources/guidance-notes/gn34>; the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 14.

52 FATA, section 58; FIRB Guidance Notes, <https://firb.gov.au/guidance-resources/guidance-notes/gn17>; the Comparative Study of the Swiss Institute of Comparative Law

For agribusiness investment, a lower threshold of A$60 million applies. This threshold is met where the total of the consideration for the acquisition and the total value of the other interests held by the foreign person (and its associates, if any) in the entity or business or previously acquired from the entity or business exceed A$60 million.[53] Such as for agricultural land investments, this threshold is lower for investors from Chile, New Zealand and the United States (A$1,192 million).[54] Further, these thresholds only apply to acquisitions of a direct interest, *i.e.* an interest of at least ten per cent in the agribusiness.[55]

Where the acquisition of an agribusiness involves the acquisition of an interest in agricultural land, the foreign investor may be required to notify the FIRB even if the value of the acquisition of the agribusiness is below the threshold applicable to the acquisition of agribusinesses.[56]

3.1.3 The Grounds for Screening Foreign Investment

As mentioned above,[57] the basic criterion against which a decision will be made is whether the foreign acquisition is contrary to national interest, *i.e.* whether the investment is beneficial to Australia.

However, the national interest is not defined in the FATA. Instead, the FATA gives the Treasurer the power to decide on a case-by-case basis whether a specific investment aligns with national interest.[58]

(SICL) of 20 December 2018, at 14. Exemption certificates for agricultural land would generally be considered where (i) the total proposed value of acquisitions over a three-year period does not exceed A$100 million and (ii) the regions or localities where the agricultural land in which interests are to be acquired are defined clearly. Exemption certificates would generally be granted subject to a condition that limits the maximum value for a single transaction (*i.e.* value of the property, not the value of individual titles) to $10 million and a periodic reporting condition on acquisitions made during the period (FIRB Guidance Notes at: <https://firb.gov.au/guidance-resources/guidance-notes/gn17>).

53 FATA, section 51 and FATR, section 50; FIRB Guidance Notes at: <https://firb.gov.au/resources/guidance/gn18>.

54 FATR, section 40; FIRB Guidance Notes at: <https://firb.gov.au/resources/guidance/gn18>.

55 Also an interest of at least 5% in the agribusiness if the investor has entered into a legal arrangement relating to the business in which the interest is being acquired, or an interest of any percentage in the agribusiness if the investor is in a position to: (a) participate or influence the central management and control of the entity or business; or (b) influence, participate or determine the policy of the entity or business (FATR, section 16).

56 G. Thomas, S. Lilly and L. Poat, 'Australia's new foreign investment regime – What does it mean for investment in the food and agribusiness sector?' in *Cultivate* (Norton Rose Fulbright, June 2016) Issue 11, at 11.

57 Section 2.1.

58 Australia's Foreign Investment Policy at 8; the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 16.

For this purpose, the Treasurer may take into account a range of factors, typically including the impact of the proposed investment on:[59]

i. National security, *i.e.* to which extent the investment affects Australia's ability to protect its strategic and security interests;
ii. Competition, *i.e.* whether the investment (i) may result in the investor gaining control over market pricing and production of a good or service in Australia;[60] or (ii) may impact the make-up of the relevant global industry, particularly where concentration could lead to distortions to competitive market outcomes;[61]
iii. Australian tax revenues;
iv. The environment;
v. The economy and the community, *i.e.* the impact of any plans to restructure an Australian enterprise following an acquisition, the nature of the funding of the acquisition and the level of Australian participation in the enterprise after the foreign investment occurs, the interests of employees, creditors and other stakeholders, and the extent to which the investor will develop the project and ensure a fair return for the Australian people;[62] and
vi. The Treasurer further considers the character of the investor, namely the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision in its home state. The Treasurer also considers the corporate governance practices of foreign investors.

In addition to the above general factors, when examining foreign investment proposals in the agricultural sector, and therefore, of particular relevance to the wine sector, the Treasurer typically considers the effect of the proposed investment in:

i. The quality and availability of Australia's agricultural resources, including water;
ii. Land access and use;
iii. Agricultural production and productivity;

59 Australia's Foreign Investment Policy at 8–9.

60 For example, the Treasurer will consider a proposal that involves a customer of a product gaining control over an existing Australian producer of the product, particularly if it involves a significant producer.

61 A particular concern is the extent to which an investment may allow an investor to control the global supply of a product or service.

62 The investment should also align with the Government's aim of ensuring that Australia remains a reliable supplier to all customers in the future.

iv. Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and its trading partners;
v. Biodiversity; and
vi. Employment and prosperity in Australia's local and regional communities.[63]

Further, under the national interest test, where a foreign investor proposes to acquire an interest in agricultural land that will be used for a primary production business, the decision-maker will consider whether there was an opportunity for Australian investors to acquire the given parcel of agricultural land or agricultural land entity, and have regard to the openness and transparency of the sale process.[64]

Thus, there is a wide range of factors that may be taken into account by the Australian authorities while reviewing a foreign investment proposal in the wine sector when it involves the acquisition of agricultural land or an agribusiness. These factors should be carefully considered by investors beforehand. However, while the Australian FDI screening process appears quite strict and demanding, reportedly, out of a total of 14,360 decided applications in 2016–17, only three applications were rejected.[65]

3.2 *Open Regimes and their Limits: the Case of the UE*

The EU is the main provider of and the main destination for FDI in the world.[66] The EU is also one of the world's most open locations to invest and has one of the least discriminatory frameworks towards foreign investors.

63 Australia's Foreign Investment Policy at 9–10.

64 For the factors to be considered, see FIRB Guidance Notes at: <https://firb.gov.au/resources/guidance/gn18>; the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 16.

65 The Treasurer may, however, impose conditions on approvals. Thus, in the period 2016–2017, 40% of approvals were issued subject to conditions. Further, if decisions of the Treasurer on FDI applications are excluded from review under Australia's statutory administrative law regime in the Administrative Decisions (Judicial Review) Act 1977, judicial review under common law may be available. However, review of the decisions at the international level is unlikely. Many of Australia's recent bilateral and multilateral investment treaties provide that decisions made under the country's FDI regime are not subject to investor-state dispute settlement in international arbitration under those treaties (the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 19).

66 FDI stocks held in the rest of the world by investors resident in the EU amounted to €7,412 billion at the end of 2017. Meanwhile, FDI stocks held by third country investors in the EU amounted to €6,295 billion at the end of 2017 <https://ec.europa.eu/trade/policy/accessing-markets/investment/>.

Regardless, on 19 March 2019, the European Parliament and Council adopted Regulation 2019/452 establishing a framework for the screening of FDI into the EU (the "Regulation"). The Regulation entered into force on 10 April 2019. Member States ("MS") and the Commission have 18 months as of this date to implement the necessary arrangements for the application of this new mechanism. It shall therefore apply from October 2020 and shall be binding in its entirety and directly applicable in all MS.

3.2.1 Grounds for Screening Limited to Security and Public Order

The goal of the new framework is to create a system to cooperate and exchange information on investments from non-EU countries that may affect security or public order in the EU and its MS. **In particular**, it:

i. creates a cooperation mechanism where MS and the Commission can exchange information and raise concerns related to specific investments;
ii. allows the Commission to issue opinions when an investment involves a threat to the security or public order of more than one MS, or when an investment could undermine a project or programme of interest to the whole EU;[67]
iii. encourages international cooperation on investment screening, including sharing experience, best practices and information on issues of common concerns;
iv. sets certain requirements for MS, which wish to maintain or adopt a screening mechanism at national level. But MS will keep the last word over whether a specific investment operation should be allowed on their territory; and
v. acknowledges the need to operate under short business-friendly deadlines and strong confidentiality requirements.[68]

3.2.2 A Mechanism Based on Cooperation among MS and the Commission, Rather than Notification from the Investor

The Regulation does not introduce *per se* an FDI screening process, but a cooperation mechanism at the EU level.

As such, the Regulation does not provide for any monetary or control thresholds to trigger the FDI screening mechanism, while MS and third countries, such as Australia,[69] often do.[70]

67 Such as Horizon 2020 and Galileo (see Section 2.2.2).

68 <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1532>.

69 See Section 2.1.2.

70 14 EU MS (Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Spain, UK) have already implemented a national

Further, unlike the Australian regime,[71] EU Regulation 2019/452 does not require investors to notify their FDI to the EU.

Instead, it establishes a cooperation mechanism among MS and the Commission,[72] requiring a MS to inform the other MS and the Commission about any FDI it is screening. It also enables another MS to raise concerns and provide comments should it consider that the FDI in question is likely to affect its security or public order. Further, it gives the Commission the power to issue a non-binding opinion if the investment is likely to affect security or public order in one or more MS.[73]

In addition to this power, the Commission may also issue[74] an opinion where it considers that the proposed FDI is likely to affect projects or programmes of EU interest.[75] Again, such a review may only be undertaken on the grounds of security or public order.

Lastly, MS are responsible for reporting to the Commission. MS were first required to notify the Commission of their existing screening mechanisms by 10 May 2019. They must also notify the adoption of a new mechanism or change of the existing mechanism within a period of 30 days.[76] MS are further required to submit annual reports to the Commission on FDI which took place on their territory and those MS which have a screening mechanism in place must also submit annual reports on the application of such mechanism.[77] Notably, this report shall include information on FDI screened and undergoing screening, screening decisions prohibiting FDI, screening decisions subjecting FDI to conditions or mitigating measures, and the sectors, origin, and value of FDI screened and undergoing screening.[78]

3.2.3 A Limited Impact on the Wine Sector

To determine whether an FDI may affect security or public order, the Regulation targets, in particular, the following sectors and activities:

i. "critical infrastructure", which includes energy, transport, water, health, communications, media, data processing or storage,

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FDI screening mechanism, reviewing FDI mainly on grounds of national security or public order.

71 See Section 2.1.2.

72 Which is mainly set forth in its Art. 6.

73 Such opinion is to be communicated to the other Member States.

74 Under Art. 8.

75 *i.e.* projects or programmes involving a significant share of EU funding, or which are subject to EU legislation regarding critical infrastructure, critical technologies or critical inputs (an indicative list of projects or programmes of EU's interest can be found in the Annex to the Regulation).

76 Art. 3.

77 Art. 5.

78 Art. 7.

aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;

ii. "critical technologies", which includes artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies;

iii. the supply of critical inputs, including energy or raw materials, as well as food security; and

iv. access to "sensitive information" or the ability to control sensitive information.

At first glance, wine sector activities hardly fall within the above categories and are, therefore, certainly not among the activities primarily targeted by the new EU mechanism.

However, the Regulation does not include any formal test criteria for the MS to determine whether a specific FDI is a threat to security and public order. Consequently, such criteria will have to be inferred from general EU law and case-law.[79]

Since investment screening mechanisms constitute restrictions to the freedom of movement of capital, the test for assessing the compatibility of FDI with security and public policy should be carried out in light of the principle of necessity and proportionality of restrictions to such freedom, as well as "overriding reasons relating to the general interest", as defined by the CJEU.[80]

According to the CJEU, the general interest includes, among others, the interest in environmental protection, town and country planning and consumer protection.[81] At the same time, the CJEU made clear that purely economic objectives cannot constitute an "overriding reason."[82]

As to town and country planning, in particular, the CJEU recalled that: " (…) [it] ha[d] already accepted that national rules may restrict the free movement

79 The Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 63.

80 Art. 65 TFEU; Case C-112/05, *Commission of the EU Communities v. Federal Republic of Germany*, Judgment of the Court (Grand Chamber), 23 October 2007, para. 72; the Comparative Study of the Swiss Institute of Comparative Law (SICL) of 20 December 2018, at 63.

81 Case C-400/08, *European Commission v. Kingdom of Spain* Judgment of the Court (Second Chamber), 24 March 2011, para. 74; Case C-384/08 Attanasio Group [2010] ECR I-0000, para. 50.

82 Case C-400/08 (n 80) para. 74: "(…) On the other hand, purely economic objectives cannot constitute an overriding reason in the public interest (see, to that effect, inter alia, Case C-96/08 CIBA [2010] ECR I-0000, paragraph 48 and the case-law cited)."

of capital in the interest of objectives directed at resisting pressure on land or at maintaining, as a town and country planning measure, a permanent population in rural areas".[83]

Thus, although the Regulation imposes new restrictions on FDI, the grounds for screening remain limited, especially as regards the wine sector. Foreign investors in the sector may, however, wish to pay special attention to the impact which their investment may have on (i) environment given, in particular, climate change and related issues, (ii) town and country planning and (iii) consumers protection within the meaning of the CJEU case-law. This may, of course, coincide with the factors taken into account at national level in the framework of a MS's screening process, if any.[84] However, where the MS in which the FDI is contemplated does not have any national screening mechanism into place, the CJEU case-law described above may prove fully relevant in the context of the implementation of the Regulation.

3.3 *Opening Regimes: China and Its New Law on Foreign Investment*

China adopted a new law on Foreign Investment on 15 March 2019, together with an implementing regulation on 12 December 2019, which entered into effect on 1 January 2020 (the "FIL"). It replaces the Law on Sino-foreign Equity Joint Ventures, the Law on Wholly Foreign-owned Enterprises and the Law on Sino-foreign Cooperative Joint Ventures (the "CJV").[85] These laws only regulated FDI, whereas the FIL also covers "indirect investment".[86]

The FIL envisages four types of investment:

i. The establishment, independently or jointly with any other investor, of a foreign invested enterprise ("FIE") (*i.e.* the vehicle through which foreign investors must undertake their investment in China according to the existing regime);

83 Case C-567/07 *Woningstichting Sint Servatius,* 1 October 2009, [2009] ECR I-9021, para. 29 (referring to *Konle*, para. 40; *Reisch and Others*, para. 34, and *Festersen*, paras 27 and 28); see also Case C-452/01, Konle, 23 September 2003.

84 In France, even if the SAFER S (agencies in charge of the development and rationalization of the rural territory) are not part *per se* of the French FDI screening mechanism, they may prevent a foreign (as well as a French) investor from acquiring agricultural land by exercising a pre-emptive purchase right, where the sale of the land to the investor constitutes a threat to general interest objectives, such as the protection of agriculture and environment and the viability of farms.

85 Art. 42.

86 Further, these laws only covered the setting up of FIE S and investing in projects, whereas the FIL also includes merger and acquisition into the scope of foreign investment (Art. 2).

ii. The acquisition of shares, equity, property shares or any other similar rights and interests of an enterprise in China;
iii. Investment in any new project in China, independently or jointly with any other investor; and
iv. Investment in any other way stipulated by laws or regulatory sources.[87]

3.3.1 An Objective of Protecting Foreign Investment and Promoting National Treatment, Subject to Restrictions

The FIL aims at protecting foreign investment[88] and achieving a level playing-field for foreign and domestic investors in the Chinese market.[89] It thus provides for:

i. The prohibition of expropriation of foreign-owned assets other than in special circumstances;[90]
ii. The free transfer of foreign currency into and out of China, for returns of capital, profits, capital gains, royalty payments, etc; and[91]
iii. Pro-investment policies, such as the possibility for foreign investors to comment during the legislative process,[92] to participate in public procurement processes,[93] and the obligation for local governments to comply with contractual and other legal commitments and to establish systems for transparency in rule-making.[94]

However, the FIL excludes from equal treatment foreign investments into industries, which are listed in the "Market Access by Foreign Investors special Administrative Measures" (the so-called "Negative List").[95] Although such a List has been shortened in 2019, it still covers industries in many sectors, into which foreign investment is either prohibited or restricted, such as transportation, infrastructure, agriculture, mining, manufacturing and culture.[96]

87 Art. 2 and Chapter 2.
88 Chapter 3.
89 Arts 3 and 4.
90 Art. 20.
91 Art. 21.
92 Arts 10.
93 Art. 16.
94 Art. 18.
95 Arts 4 and 28.
96 The Negative List is not a new concept created by the Law but was enacted by it. It has been applied within free trade zones since 2013 and was expanded to the entire country in 2018.

3.3.2 Impact on Foreign Investment in General

First, the FIL establishes a foreign investment information reporting system through the Enterprise Registration System (established by the Ministry of Commerce) and the Enterprise Credit Information Publicity System (established by the State Administration of Market Regulation).[97] The FIL first indicates that reporting will be based on the principle of necessity and that the authorities may not require repetitive information where it can be obtained through interdepartmental information sharing. Further, the scope and contents of the information have been specified by recent regulations,[98] and cover information relating to the establishment of, and changes to, FIEs and their subsidiaries, as well as information to be reported on an annual basis.

By doing so, the FIL formally abandons the prior notification system, which required approval of foreign investment by the Ministry of Commerce and registration with the Administration of Industry and Commerce. Apart from investments falling within the Negative List, foreign investors are now only required to register their investments with the relevant agencies.[99]

Second, the FIL reinforces China's foreign investment security review system.[100] This system will, in principle, be carried out by the National Development and Reform Commission[101] and will apply to all foreign investment, including FDI, covered by the Law.[102] Details are, however, still missing regarding the scope of the review and the process.[103]

Third, the FIL unifies the system for both domestic and international investors by requiring existing foreign investors and FIEs to follow the organization

97 Art. 34.

98 Including the Foreign Investor Information Reporting Measures, adopted on 30 December 2019 and the Notice Regarding Foreign Investor Information Reporting Related Matters, adopted on 32 December 2019.

99 However, this simplification process was already engaged prior to the adoption of the Law.

100 Art. 35. See also the prior National Security Law of 1 July 2015.

101 Instead of the Ministry of Commerce (Notice of April 2019).

102 And not only to mergers and acquisitions as it was the case before (see Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Guo Ban Fa [2011] No. 6, 3 February 2011) ("Circular 6")).

103 So far, however, the reviewing body was required to take into account the impact of the transaction on: (i) the national security, including the domestic product manufacturing capacity, domestic service provision capacity, and relevant equipment and facilities needed for the national security; (ii) the stable operation of national economy; (iii) the basic living of the people; and on (iv) the research and development capacity for key technologies related to the national security (Art. 2 of Circular 6) (See O. D. Nee, Jr, *China's Foreign Investment Law* (Westlaw) § 13:18).

form and corporate governance rules under the Chinese Company Law and Partnership Law (and other applicable laws).[104] For FIEs formed before its adoption, the FIL, however, provides for a five-year transition period to comply with such laws.[105]

Since most Sino-foreign joint-ventures were established under the Chinese joint-ventures laws, which provide for a specific corporate governance framework, difficulties are expected during the transition process. Reconciliation between the two governance systems is, therefore, expected to trigger much negotiation between foreign investors and their Chinese counterparts in the future.

3.3.3 Impact on Foreign Investment in the Wine Sector in Particular

First, the Negative List has been shortened to increase access of foreign investors to agriculture. Thus, the prohibition of foreign investment in the development of wildlife, including plant resources, has been cancelled, which may provide new (although probably limited) opportunities to investors in the wine sector. However, close attention to the Negative List should be paid as it is subject to frequent updates.

Second, the FIL now provides specifically for protection of foreign investors' intellectual property rights,[106] which may prove to be of particular relevance in the wine sector for protecting, especially, tradenames, geographical indications or trade secrets. Thus, although it encourages technology cooperation on the basis of free will and business rules, the FIL:

i. Provides that infringements of intellectual property rights will be carefully investigated and the infringers held liable;
ii. Prohibits administrative agency or its employee forcing the transfer of any technology by administrative means; and
iii. Imposes on administrative agencies and their employees the obligation to keep confidential the trade secrets of foreign investors and FIEs to which they have access in performing their duties, and not to divulge nor illegally provide others with such secrets.

Following the accession of China to the WTO, commentators say that with the introduction of the FIL, "a new phase may begin" in respect of protection of intellectual property rights.[107]

104 Art. 31.
105 Art. 42.
106 Arts 22, 23 and 39.
107 O. D. Nee (n 102) § 6:10. See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa*

Other wine producing countries are in the process or are contemplating reviewing their FDI policy on a short- or medium-term basis.

In Switzerland, for example, which is one of the world's largest FDI destination,[108] a public debate was recently launched as to whether FDI result in a loss of jobs and know-how, and even possibly threats to national security due to the sale of critical infrastructures. To this effect, the Federal Council released a special report[109] in February 2019 to investigate whether the existing legal framework offers sufficient protection against potential risks and whether a FDI screening mechanism should be introduced. In short, the report concludes that (i) Switzerland's open policy towards foreign investments is of key importance to the country and that (ii) current legislation allows "the authorities to effectively counter any potential risks and that introducing an investment control would currently bring no additional benefits to Switzerland." The Federal Council, nonetheless, intends to conduct a monitoring procedure and to have its report updated within the next four years, to check whether appropriate steps will be needed in the future. However, not much impact in the wine sector is expected since foreign investment in the Swiss vineyard remains almost inexistent to date.[110]

Other wine producing countries, which are planning to develop further their wine industry, such as Armenia[111] are at the same time encouraged by UNCTAD to review their FDI policy so as to limit potentially excessive investor guarantees and reducing exposure to investor-State dispute settlement.[112]

4 The Protection of Foreign Investment in the Wine Sector

The wine industry resembles no other sector. This is because wine carries such an historical, cultural, and social significance. Yet, the wine industry also sees the performance of many daily economic operations and contractual

Clara High Technology Law Journal 153–178 and Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p.

108 According to recent figures, foreign direct investments in Switzerland in 2017 amounted to around CHF 1,088 billion (Direct Investment 2017, Volume 8, Swiss National Bank, at 4) <https://www.snb.ch/en/mmr/reference/Direktinvestitionen_2017/source/Direktinvestitionen_2017_12.en.pdf>.

109 "Cross-border Investments and Investment Controls".

110 According to representatives of wine promotion agencies, chambers of agriculture or interprofessional associations of winegrowers.

111 UNCTAD Investment Policy Review, Armenia (2019) 74.

112 UNCTAD Investment Policy Review, Armenia (2019) 15.

arrangements which are common to all other economic sectors. In many respects, it operates just like any other industrial sector. These operations, be they a simple share purchase or a more complicated domain acquisition, may, under certain conditions, be protected from State interference under international investment protection treaties.

These treaties have been entered into by States since the 1950s and have developed a regime of protection of foreign investment aimed at shielding investors from illegal State measures (3.1). This regime is a legal instrument available to all foreign investors, including wine industry investors (3.2). Besides, decisions already rendered by international tribunals ruling on foreign investment disputes involving food and beverage businesses demonstrate the importance for these investors of such international treaty protection (3.3)

4.1 *Protection of Foreign Investment under International Treaties*

As early as the late 1950s, States have entered into treaties and other international instruments to ensure the protection of investments made by their nationals (individuals or companies) within the territories of other contracting States.[113]

Replacing ancient and traditional international investment protection mechanisms such as diplomatic protection, these treaties were designed to achieve a higher substantive and procedural level of protection of foreign investors and investments.[114] Conclusion of investment protection treaties boomed in the 1980s and 1990s and there is now over 2,300 of such instruments in force.[115]

These treaties are most often bilateral (BITs) but can also be multilateral investment treaties (MITs).[116] As a matter of example, the top four biggest wine

113 UNCTAD, *Bilateral Investment Treaties* (1959–1999) 1; Yannaca-Small (ed.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2nd ed., 2018) 6–8; Julien Chaisse and Flavia Marisi 'Is Intellectual Property "Investment"? Formation, Evolution, and Transformation of the Intellectual Property Rights – Foreign Direct Investment Normative Relationship' (2019) 34(1) *Ohio State Journal on Dispute Resolution* 97–152; Julien Chaisse and Christian Bellak 'Navigating the Expanding Universe of Investment Treaties – Creation and Use of Critical Index' (2015) 18(1) *Journal of International Economic Law* 79–115; Wang G (2010) International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law, *Asia Pacific Law Review*, 18:1, 19–44.

114 By affording these investors a possibility to use directly actionable remedies against illegal State actions (*i.e.* without the need for the home State to espouse their own claims first).

115 UNCTAD, 'Investment Policy hub' <https://investmentpolicy.unctad.org/international-investment-agreements>.

116 Examples of such MITs include, for example, the former North American Free Trade Agreement (NAFTA), the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, or the Energy Charter Treaty (ECT).

producing countries, Italy, France, Spain and the United States of America are respectively party to 114, 150, 126 and 89 such treaties in force.

In these treaties, States guarantee foreign nationals standards of protection (previously developed under general international law and in treaties dating back as early as 1788).[117] These standards are to be mutually afforded to investors/investments made in the territory of the other state (the Host State), provided that certain jurisdictional requirements are met.

4.1.1 Requirements to Be Met to Invoke Protection under Foreign Investment Treaties

Jurisdictional requirements in investment protection treaties vary with each treaty but most often relate to the definition of the protected investment (*ratione materiae*), of the protected investor (*ratione personae*), and the temporal application of the treaty in question (*ratione temporis*). Should an investor or an investment fail to meet any of these cumulative requirements, it would be unable to claim protection under the relevant treaty.[118]

First, the definition of the protected investment typically includes a general description of an investment followed by a non-exhaustive illustrative list of types of investments which could be afforded treaty protection, such as the one included in Article 1(5) of the Hong Kong Special Administrative Region of the People's Republic of China-Italy BIT.[119]

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117 Yannaca-Small (ed.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2nd Ed., 2018) 3; Leben (ed.), *DROIT INTERNATIONAL DES INVESTISSEMENTS ET DE L'ARBITRAGE TRANSNATIONAL* (2015) 3–74 (*in French*).

118 See Julien Chaisse and Rahul Donde 'The State of Investor-State Arbitration – A Reality Check of the Issues, Trends, and Directions in Asia-Pacific' (2018) 51(1) *The International Lawyer* 47–67.

119 Article 1(5) of the Hong Kong SAR-Italy BIT reads: "*'investment' means every kind of asset, held or invested directly or indirectly, and in particular, though not exclusively includes:*

(a) movable and immovable property and any other property rights such as mortgages, liens, pledges or usufructs;

(b) shares in and stock, bonds and debentures of a company and rights derived therefrom and any other form of participation in a company including a joint venture;

(c) claims to money or other assets or to any performance under contract having a financial value;

(d) rights in the Field of intellectual property, technical processes, goodwill and knowhow;

(e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;…". See also Article I(1) of the China-France BIT in French.

Relevant case law relating to the definition of investment has also interpreted treaty investment definitions to further delimit the contours of a self-standing international law concept of investment. Accordingly, it is generally recognized that a protected investment must not only fit the treaty definition, but also present several features that differentiate it from an ordinary commercial transaction (which would *not* be protected under the treaty). Tribunals interpreting these definitions have generally recognized four such features: substantial commitment in capital or kind, certain duration of the investment, certain regularity of return and assumption of an investment risk.[120]

In the wine industry context, most foreign investments into real estate or into shares of companies owning assets used for wine making (*e.g.* vineyard or winery) or wine dealing (*e.g.* wine dealership network) could be covered by such wide-ranging definitions. Likewise, commercial contractual rights could fall under this definition, such as, for example, rights under a distribution agreement with a State entity, or IP rights which use would be transferred contractually. Some treaties also include in their investment definitions (sometimes elsewhere in the treaty) a requirement that the investment have been either specifically approved by state authorities or made in accordance with the host State's laws, or both.[121]

Second, only those investors (either individuals, or legally incorporated companies) falling within the boundaries of the relevant definition of "investor" in the treaty and as developed in case law may invoke the protection of their investment under this treaty. In particular, investors must be foreign nationals, since investment protection treaties do not provide recourse to domestic investors to seek redress against their own State. Foreign nationality is typically established in accordance with the law of the State which nationality is at issue. Corporate nationality generally involves a more complex analysis than the nationality of an individual given the frequent complexity of corporate structures and commonly sparks considerable debate about the applicable criteria to determine such corporate nationality (*i.e.* should tribunals rely on the place of incorporation, the nationality of the controlling shareholder, the nationality of the ultimate beneficiary owner?).[122]

120 *See for further reading* Dolzer and Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd Ed, 2012) 66–74.

121 *See for example* Article 2 of the China-Switzerland BIT: "***The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations*** *by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement. …*" (emphasis added).

122 Yannaca-Small (ed.), *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2nd Ed., 2018) 230–261.

Third and lastly, many investment treaties provide for time bar or statute of limitations rules which prevent investors from bringing claims on the basis of alleged breaches which occurred before a certain point in time,[123] before the entry into force of a treaty, or in relation to investments made after a certain treaty was denounced or expired.

4.1.2 Standards of Protection to Be Afforded by States to Foreign Investors

After laying out the conditions to be met for their application, investment treaties then include provisions setting out standards of protections to be afforded to qualifying investors and investments. These protections usually include the following:

- National and Most Favored Nation (MFN) treatment: under this standard, States must usually afford foreign investors the same level of protection as they afford their own nationals, and nationals of other countries with which they have signed an investment protection treaty;[124]
- Fair and equitable treatment: under this standard, tribunals have typically recognized, *inter alia*, States' obligation to afford foreign investors protection against discriminatory, arbitrary, egregious, shocking conduct from State authorities, against frustration of legitimate expectations, or against denial of justice;[125]
- Full protection and security: under this standard, tribunals have held States to be bound to provide, at a minimum, protection and security to investors against physical harm perpetrated by third parties (*e.g.* rioters);[126]

123 For example, under Article XIII(3)(a) the Canada-Romania BIT, investors can only submit their dispute to arbitration if "*not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage*."

124 *See for example* Article 3(1) of Hong Kong SAR of the PRC-Italy BIT: "*Each Contracting Party shall in its area accord investments or returns of investors of the other Contracting Party treatment and protection not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any other State, whichever is more favourable to the investor concerned.*" See also Julien Chaisse and Jamieson Kirkwood 'Putting the Pieces Together: Anatomy of the (Invisible) Belt and Road Investment Treaty' (2020) 23(1) *Journal of International Economic Law* 79–115.

125 *See for example* Article 3(1) of China-Portugal BIT: "*Investments of investors of each Party shall all the time be accorded fair and equitable treatment in the territory of the other Party.*"

126 *See for example* Article 4 of Israel-Japan BIT: "*Each Contracting Party shall in its Territory accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*"

– Protection against unlawful expropriation: under most interpretations of this standard, States can only expropriate investors for a public purpose, in accordance with due process and with the payment of prompt and just compensation.[127]

Lastly, these treaties usually provide for a dispute resolution clause allowing investors to sue directly the host State before different forums, *i.e.* usually, the State's own national court system, international arbitration tribunals or other dispute resolution systems agreed upon by the treaty signatories.[128] Recent treaties have also adopted in a more consistent fashion a requirement on the investor to exhaust local remedies (*i.e.* administrative and judicial remedies) before being allowed to submit a claim for adjudication before another international forum.[129] Further, most BITs provide for a so-called "cooling-off" period of several months (triggered by a notice of dispute communicated by the investor to the State) to allow an opportunity for the disputing parties to reach an amicable settlement before resorting to a contentious dispute resolution process (such as arbitration or litigation).[130]

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127 *See for example* Article 4(1) of Romania-Sweden BIT: "Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected, directly or indirectly, to other measures having similar effect (hereinafter referred to as expropriation) unless the following conditions are fulfilled;
   a) the measures are taken in the public interest and under due process of law;
   b) the measures are not discriminatory; and
   c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency."

128 See Reinisch A (2013) The Scope of Investor-State Dispute Settlement in International Investment Agreements, *Asia Pacific Law Review*, 21:1, 3–26.

129 *See for example* Article 15.1 of Belarus-India BIT: "*In respect of a claim that the Defending Party has breached an obligation under Chapter 11, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within two (2) year(s) from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.*"

130 *See for example* Article XI(2) of Lebanon-Spain BIT: "*If these disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute shall be submitted, at the choice of the investor, to:*
   – the competent court of the Contracting Party in whose territory the investment was made;

4.2 *Wine-related Investment and BIT Disputes*

As discussed above, protected wine-related investments can take many forms, most of them not industry-specific.

These investments, given the heavily regulated nature of the wine sector (and more generally the wine and spirits sector), are likely to encounter some degree of State interference. Using protection against unlawful State interference via international treaties and neutral dispute resolution forum is thus of paramount importance.[131]

Investment disputes brought on the basis of BITs or other investment protection treaties arise out of measures (actions or omissions) attributable to the State with a detrimental impact on the protected investment.

The State's actions or omissions may impact an investment in a variety of ways. The most straightforward example of a State measure is the direct taking of the investment by the State through an expropriation. In such case, the property of the investment, the control over the investment, together with the value of that investment have all been transferred compulsorily to the State. Yet, as seen above, under international law, strict conditions must be met by a State for an expropriation to be lawful. Should the State fail to meet such conditions, the expropriated investor may be entitled to claim compensation for the value of its investment before an arbitral tribunal. As an example, a foreign wine maker seeing its vineyards and winery facilities expropriated absent any public purpose, without due process or proper compensation may be entitled to claim compensation before an international tribunal on the basis of a BIT.

Yet, State measures which are deemed to breach the provisions of BITs often take a blurrier form. These measures can result in for example:

- the revocation of favourable tax measures/incentives which prompted the investment in the first place;[132]

- an ad hoc court of arbitration established under the Arbitration Rules of the United Nations Commission on International Trade Law;
- The International Centre for Settlement of Investment Disputes (ICSID) …"

131 Dolzer and Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd Ed, 2012) 235–236.

132 *See for example*, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award dated 31 May 2019, at 5–7; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles dated 12 March 2019, at 202–208. Both cases involved claims against Spain from foreign investors, due to the State's decision to revoke of tax incentives, originally established to attract foreign investment in the solar energy sector.

- the implementation of new, unforeseeable, discriminatory regulatory requirements aimed at favouring domestic investors over foreign ones;[133]
- the State, or a dedicated administrative authority (like a SAFER, *Société d'aménagement foncier et d'établissement rural* in the French context)[134] may, under discriminatory pretences, illegally refuse the sale of a domain to or by a foreign investor or stall a wine development project undertaken by such foreign investor;
- the State may fail to afford police protection to a wine making operation being interfered with by protesters or other individuals;[135]
- the State may also fail to provide a functioning legal system to allow the investor to enforce its rights (be they contractual or tortious) to protect the qualifying investment in court.[136]

All these types of actions and omissions, provided certain conditions are met, may lead to claims by foreign investors for compensation against the State.

4.3 *Agricultural or F&B Disputes Resolved through Investor-State Dispute Settlement*

Although the wine industry involves both massive amounts of foreign investment and strict regulatory control by State authorities, it does not appear to have ever been the topic of an international dispute brought under an investment protection treaty (at least out of those many disputes that are in the public domain).

Nevertheless, foreign investors in the wine industry should pay great attention to the need to achieve the highest level of protection of their investment

133 *See for example, Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2012 ((dispute relating to the State's decision to apply extraordinary taxes to profits made by foreign operators in the natural resources sector from 2006 to force renegotiation of Profit Sharing Contracts to increase the State's share of profits).

134 *See* n. 82. *See also* Chi-Chung Kao (2015) Alternative Access to Investor-State Arbitration for Taiwanese Corporate Investors against China via Treaty Shopping, *Asia Pacific Law Review*, 23:2, 121–152.

135 *See discussed below, for example Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 and *Border Timbers Limited, et. a. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Awards dated 25 July 2015.

136 *See White Industries Australia Limited v. The Republic of India,* UNCITRAL, Award dated 30 November 2011 (dispute over undue delays incurred by an Australian investor in the Indian judicial court system to enforce another commercial arbitration award. The tribunal held that India failed to provide the relevant investor with effective means to enforce its rights.).

under investment protection treaties. Indeed, several investor-state disputes have arisen in similar sectors (agriculture or food and beverage (F&B)) over the years and demonstrate the importance of addressing foreign investment protection issues in the wine sector.

For example, on 28 July 2015, an international arbitration tribunal rendered two final awards ruling on two parallel disputes relating to farming properties in Zimbabwe.[137] In this case, several German and Swiss investors (individuals and companies owned or controlled by these individuals) owned large farming estates in Zimbabwe since the 1980s. However, starting in 2005, the Zimbabwean government enacted several laws and regulations resulting in the compulsory sale of several of these companies' assets to the State, only to be redistributed to domestic owners. Further, remaining commercial and private properties of these investors were invaded and ransacked by individuals, allegedly without police intervention.[138] Having lost either all or most of the control and value of their investments as a result of the State's actions and omissions, the investors brought in 2010 international arbitration claims against Zimbabwe under the Germany-Zimbabwe and Switzerland-Zimbabwe BITs. The arbitration tribunal constituted to rule on the investors' claims held that Zimbabwe, by its conduct towards the investors, had breached its obligations to provide protection to the related investments under both treaties and could not invoke any state of necessity to excuse its liability.[139] The tribunals also ordered Zimbabwe to restitute the expropriated assets to the investors, and if not possible, to pay over USD 190 million in damages, including moral damages.[140]

Another relevant example is the *Micula et al v. Romania* case ("Micula I") which related to the Swedish Micula brothers' beverage business in Romania.[141]

137 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 and *Border Timbers Limited, et. al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Awards dated 25 July 2015; *see also*, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica* (ICSID Case No. ARB/19/13) (Claims arising out of a series of alleged measures by Government agencies against the claimant's company, including the forced closure of Ibérico's food production facilities, the revocation of related permits and the initiation of bankruptcy proceedings).

138 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 25 July 2015, at 204–216.

139 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 25 July 2015, at 204–216.

140 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 25 July 2015, at 304–305 and *Border Timbers Limited, Border Timbers International* (*Private*) *Limited, and Hangani Development Co.* (*Private*) *Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award dated 25 July 2015, at 304–305.

141 *Ioan Micula, Viorel Micula and others v. Romania* (*I*), ICSID Case No. ARB/05/20.

In 2005 the Micula brothers, together with a number of their companies, filed a claim against Romania on the basis of the Sweden-Romania BIT before an arbitration tribunal. The claim was based on the alleged failure by the Romanian government to protect their investments, principally their food and beverage production business.[142] The investors contended that the revocation by Romania following its accession to the EU of certain economic incentives put in place in the 1990 to attract investments in disfavoured regions[143] resulted in a breach of their legitimate expectations that their F&B operations would benefit from this incentive regime (thus breaching the fair and equitable treatment standard included in the Romania-Sweden BIT) until at least 2009.[144] Agreeing with the Claimants, the tribunal held that Romania had indeed breached the investors' legitimate expectations and ordered it to pay over USD 85 million plus interest to the investors.[145]

Both disputes are examples of (i) instances of State interference against which foreign investors may seek protection through BITs; and (ii) the importance for foreign investors in the wine-making sector to structure their investments to accord with the requirements of BITs and thus to enjoy fully the benefit of these treaties' provisions.

5 Conclusion

The current importance of foreign investment in the wine sector can hardly be overstated. Taking many forms, originating from ever more diverse sources, it is constantly growing. Yet, the sector itself also involves intense regulation from public entities. The recent emergence of this sector as prime source of foreign investment must undoubtedly come with the necessary emphasis on protection of investment flows in ways other industries have become well accustomed to, *i.e.* through MITs and BITs.

As shown, investment disputes in similar sectors have arisen before. The International Center for Settlement of Investment Disputes (ICSID), the leading

142 *Ioan Micula, Viorel Micula and others v. Romania* (*I*), ICSID Case No. ARB/05/20, Award dated 11 December 2013, at 47.

143 *Ioan Micula, Viorel Micula and others v. Romania* (*I*), ICSID Case No. ARB/05/20, Award dated 11 December 2013, at 40–76.

144 *Ioan Micula, Viorel Micula and others v. Romania* (*I*), ICSID Case No. ARB/05/20, Award dated 11 December 2013, at 77–82.

145 *Ioan Micula, Viorel Micula and others v. Romania* (*I*), ICSID Case No. ARB/05/20, Award dated 11 December 2013, at 367.

institution administering investor-state disputes, reports that, as of 2019, 29 cases were filed which related to investments made in "Agriculture, Fishing & Forestry" in addition to three other cases relating to F&B enterprises.[146]

That disputes have been brought before ICSID is a clear indication of the need for wine investors to avail themselves of international treaty protections. Such protections may not prove necessary for many such investors. Their activity will not be impacted by measures attributable to State entities or States themselves (*e.g.* regulatory restrictions on the sale/acquisition of certain real estate assets used for wine-making purposes). Likewise, those wine sector actors which will have already developed sophisticated contractual practices achieving stronger and more stable protections of their economic interests (be they in relationships with public or private entities) will be less likely to see the need to resort to international investments treaties for protection. This is not to say however that they would be immune from the consequences of the many types of State measures impacting their economic sector, as explained above.

And, for many other wine sector actors, lacking a sophisticated contractual practice, the protections provided for in investment protection treaties will prove invaluable, as they have done in the past in other sectors. Indeed, research shows that most wine sector operators are small to medium size enterprises which do not benefit from constant legal advice and protection (whether it be distilled by an internal legal department or by external counsel). As a result, these SMEs either do not enter into formal contracts with commercial counterparts, or rely on lean contractual protections, leaving them dramatically exposed to adverse consequences stemming from the conduct of their private or public counterparts. And while their size may be relatively limited, the economic and financial value of the commercial relationships they are involved in cannot be underestimated (*e.g.* relationships involving long term sale, distribution or franchising agreements – whether these agreements be actually implemented through a written contract). The first protection measures these types of actors must thus implement revolves around the improvement of the documentation of their commercial relationships by developing the use of contracts and other documentary evidence, among other tools.

These types of economic actors, together with the larger entities involved in the wine sector, will also often *a priori* qualify as foreign investors within the meaning of investment protection treaties (e.g. by setting up joint ventures with local commercial parties to develop a wine making enterprise, or

146 Data collected from https://icsid.worldbank.org/en/Pages/cases/.

by acquiring a stake in a winery later impacted by State measures). As a result of that potential status, they must familiarize themselves with relevant investment treaty protections, which, while appearing a distant option at first sight, have repeatedly proven beyond doubt their practical efficiency to safeguard foreign investor' interests in troubled times.

PART 2

The Role of Intellectual Property Law in the Wine Market

CHAPTER 11

Grafting the Old and New World

Towards a Universal Trademark Register that Cancels Generic IGO Terms

Danny Friedmann

1 Introduction

While Indications of Geographical Origin (IGOs)[1] signal the geographical origin and trademarks identify the commercial origin of goods in the marketplace, both sustain valuable reputations.[2] Moreover, IGOs represent a significant amount of commercial value.[3] Whereas the Paris Convention for the Protection of Industrial Property[4] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)[5] were able to rein in the biggest

1 To avoid a semantic confusion, instead of using Geographical Indications (GIs) as a container term that includes appellations of origin (AOs) and GIs as such, this author follows the practice of the WTO Secretariat to call AOs and GIs together indication of geographical origin (IGOs). See Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPs Agreement on Geographical Indications Summary of the Responses to the Checklist of Questions (IP/C/13 AND ADD.1), Note by the Secretariat, IP/C/W/253/Rev.1, TRIPs Council, 24 November 2003, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/ip/c/w253r1.pdf>. However, if GIs are used in the name of legislation, but in fact both AOs and GIs are meant, I will put the GIs between quotation marks: "GIs". Indications of source include IGOs and indications of commercial source.

2 Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge Intellectual Property and Information Law Series, Cambridge: CUP, 2012) 2, <https://ssrn.com/abstract=1863350>.

3 The worldwide sales value of GI products registered in the 27 members of the EU was estimated at €54.3 billion in 2010 at wholesale stage in the region of production. It increased by 12% between 2005 and 2010. GIs represented 5.7% of the total food and drink sector (€956.2 billion, source: FoodDrinkEurope). Wines accounted for 56% of total sales (€30.4 billion), agricultural products and foodstuffs for 29 % (€15.8 billion), spirit drinks for 15 % (€8.1 billion) and aromatised wines for 0.1 % (€31.3 million). Tangue Chever, Christian Renault, Séverine Renault and Violaine Romieu, 'Value of Production of Agricultural Products and Foodstuffs, Wines, Aromatised Wines Protected by a Geographical Indication (GI)', *Final Report for European Commission* (2012) 4, <http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report_en.pdf>.

4 WIPO Paris Convention for the Protection of Industrial Property, as amended on 28 September 1979, entered into force on 3 June 1984, <https://wipolex.wipo.int/en/details.jsp?id=12633>.

5 Trade-Related Aspects of Intellectual Property Rights (TRIPs) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in

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differences between the national and regional systems, a similar harmonization of the IGO systems has not manifested itself. On the contrary: there are more than 23 separate national definitions of IGOs.[6] However, IGOs can be protected in two fundamentally different ways. On the one hand, the US (New World countries') approach, which favors the pre-existing trademark system. On the other hand, the EU and Switzerland (Old World countries') approach, which favors a *sui generis* system. Switzerland uses a national register that allows for the registration of only Swiss IGOs for agricultural products, including wine, processed agricultural products,[7] and non-agricultural products,[8] while the EU allows also non-EU members to register in their international register for wine, spirits and agricultural products, but not for non-agricultural products. The international registers of the EU, Lisbon Agreement and Geneva Act of the Lisbon Agreement have universalist aspirations, which undermine the outdated territoriality principle of trademark law.[9] In both the Old and the New World there is a consensus that there must be protection against misleading and confusing uses of the IGO. There is also consensus that there should be protection against dilutive uses. This undermines the specificity principle of trademark law, so that there will be no erosion of the distinctiveness or tarnishment of the reputation of an IGO. Moreover, there is also consensus against unfair competition, to protect consumers and producers, respectively. In the absence of fair competition, potential consumers would lack information about the quality of the good and would align the good with the lowest quality they had come across. As a

Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

6 TRIPS Council (n 1).

7 Ordinance on the Protection of Designations of Origin and Geographical Indications for Agricultural Products, Processed Agricultural Products, Forestry Products and Processed Forestry Products (PDO/PGI Ordinance) adopted on 28 May 1997, came into force 1 July 1997 (SR 910.12), <https://www.admin.ch/opc/en/classified-compilation/19970229/index.html>. See also the Ordinance on Vine Growing and Imports of Wine (Wine Ordinance) adopted on 13 November 2007 and came into force 1 January 2008 (SR 916.140), <https://www.admin.ch/opc/de/classified-compilation/20071607/index.html>.

8 Ordinance on the Register of Designations of Origin and Geographical Indications of Non-Agricultural Products (PDO/PGI Ordinance of Non-Agricultural Products) adopted on 2 September 2015, came into force on 1 January 2017 (SR 232.112.2), <https://www.admin.ch/opc/de/classified-compilation/20151957/index.html>.

9 In times of globalized trade and the e-commerce, territorialism can lead to conflicts between trademarks – Danny Friedmann, 'The Uniqueness of the Trade Mark: A Critical Analysis of the Specificity and Territoriality Principles' (2016) 38(11) E.I.P.R. 678–686, <https://ssrn.com/abstract=2956409>.

consequence, producers would not have any incentive to guarantee the quality of the good.[10]

However, the EU and US have a diametrically opposite view on the desirability of absolute protection against the use of a geographical name by those based outside the eponymous region.

The policy of the EU (but also Switzerland)[11] is to protect IGOs also against translation, imitation, usurpation and evocation, no matter whether there is any confusion. The explanation for this high level of protection is the *terroir*, the link between place and product.[12] This link is the weakest in the Paris Convention's indication of source, which protects the link between the product and source of origin.[13] In the TRIPs Agreement's GI, this link is stronger between product and place ("geographical origin") via quality, reputation[14] or other characteristic. The link is the strongest in the Lisbon Agreement's

10 G.A. Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism', (1970) 84(3) Quarterly J. of Econ. 488–500, *passim,* <https://www2.bc.edu/thomas-chemmanur/phdfincorp/MF891%20papers/Ackerlof%201970.pdf>.

11 Evocation in Switzerland's legislation can be found in:

Article 50a(8)(a) Federal Act on the Protection of Trade Marks and Indications of Source of 28 August 1992, in force since 1 April 1993: "Registered geographical indications are protected in particular against: any commercial use for other products, whereby the reputation of the protected designation is exploited." <https://www.admin.ch/opc/en/classified-compilation/19920213/index.html>.

Art. 16(7)(a) Federal Act on Agriculture of 29 April 1998, in force since 1 January 1999: "Registered designations of origin and geographical indications are protected in particular against: any commercial use in relation to other products which takes advantage of the reputation of a protected designation." <https://www.admin.ch/opc/en/classified-compilation/19983407/index.html>.

Article 17 PGO/PGI Ordinance of 28 May 1997, in force 1 July 1997: "(a) the protected name is imitated or alluded to; (b) the protected name is translated; (c) the protected name is accompanied by an expression such as «style», «type», «method», «as produced in», «imitation», «using the recipe» or similar; (d) the origin of the product is indicated; (e) the product is used as an ingredient or component." <https://www.admin.ch/opc/en/classified-compilation/19970229/index.html>.

12 A critical account on *terroir* can be found in one of Hughes 'seminal works: Justin Hughes, Champagne, Feta and Bourbon, 'the Spirited Debate About Geographical Indications', 58 hastings L.J. *passim*, <https://ssrn.com/abstract=936362>.

13 Article 10 of the Paris Convention (n 4).

14 A 'general reputation', 'given reputation', specific reputation' is meant in Article 22.1 TRIPS. In Lisbon 'reputation' is absent and implied in the quality and characteristics of the product for which it is best known. WIPO, 'Geographical Indications' Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT/10/4), Tenth Session, Geneva, 25 March 2003, 4, <https://www.wipo.int/edocs/mdocs/sct/en/sct_10/sct_10_4.pdf>.

appellations of origin (AOs),[15] where there must be a link between product and place ("geographical environment") via quality and other characteristics, including natural and human factors. Irrespective of the strength of the links, the EU is protecting both GIs and AOs, which it calls protected geographical indications (PGIs) and protected designations of origin (PDO) respectively, at the maximum level.

After the Introduction, Section 2 maps the legal playing field into three groups: 1) "agnostic" protection of indications of origin; 2) protection via a *sui generis* system; and 3) co-existential protection where these systems should be able to exist side-by-side. Section 3 demonstrates that both the EU and the US are including their preferred IGO protection methods in either FTA's or bilateral agreements, since multilateral treaties are not always adopted at a large scale and regional treaties do not affect jurisdictions outside that region. The Sino-EU Agreement on GIs of 2019 provides opportunities for EU IGOs and poses a potential threat for third parties' IGOs in China. However, the 2020 US-China FTA adjusts the PRC's IGO obligations into a possible goldilocks zone of IGO protection. This chapter shows in a dialectic way that although the Old and New World IGO systems are perceived as antithetical, they do not have to conflict with each other. Their seeming contradiction could be overcome in a synthesis of a hybrid IGO system with the best characteristics of each system.

1.1 *Protecting GIs Using the Trademark System*

The US system is exemplary for protecting GIs using the trademark system. GIs are descriptive of their geographical origin. The historical decision *Abercrombie & Fitch, Co. v Hunting World, Inc.*[16] made clear that descriptive marks, including GIs, cannot be registered as ordinary trademarks, without acquiring distinctiveness.[17] In that influential 2nd Cir. case of 1976, Judge Friendly provided the "spectrum of distinctiveness" from generic, to descriptive, to suggestive, to arbitrary, to fanciful. A generic mark is a common name for the products or services in connection with which it is used and, in principle, cannot be

15 The same definition of AO can be found in the Geneva Act of the Lisbon Agreement (n 118).

16 *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4; 189 U.S.P.Q. 759. Decided on 16 January 1976.

17 Descriptiveness can be seen as the "primary meaning"; acquired distinctiveness as the "secondary meaning". For a fruit vendor, the mark "Apple", would be descriptive. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4; 189 U.S.P.Q. 759. Decided on 16 January 1976, 3.

registered as a trademark, or when it was, it should be cancelled. Suggestive,[18] arbitrary[19] and fanciful[20] words are inherently distinctive, thus eligible for trademark registration. However, instead of calling it a "spectrum of distinctiveness," a better description is, in my opinion, "a circle of distinctiveness," since merely descriptive marks can become distinctive,[21] fanciful marks can become generic,[22] and cancelled, in the case of the US by the Lanham Act;[23] and marks that arguably had become generic, can make it sometimes back to distinctiveness.[24]

Although some IGOs can be protected via ordinary trademarks,[25] there are certification and collective trademarks that are better suited for IGO

18 A word that suggests, but does not directly describe, some aspect of the goods or services falls into the "suggestive" category and is inherently distinctive. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (5th ed., Thomson West, 2019), §§ 11:62 to 11:72. An example: "Head & Shoulders" for an anti-dandruff shampoo.

19 An "arbitrary" mark is a word that is in common usage in the language but is arbitrarily applied to the goods or services in question in such a way that it is does not even suggest some aspect of the goods or services. McCarthy (n 18), §§ 11:11 to 11:14. The mark "Apple" for computer is considered arbitrary. Apple founder Steve Jobs told its biographer: "I had just come back from the apple farm. It sounded fun, spirited and not intimidating." Walter Isaacson, *Steve Jobs* (New York: Simon & Schuster, 2011) 63.

20 A "fanciful" mark is a word that is coined for the express purpose of functioning as a trademark. McCarthy (n 18), §§ 11:5 to 11:10. An example is "Xerox".

21 *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4; 189 U.S.P.Q. 759. Decided on 16 January 1976, 3. "For non-inherently distinctive designations, the applicant for registration has the burden to prove that the designation sought for registration has an "acquired distinctiveness" (secondary meaning.)." McCarthy (n 18), § 15:60.

22 "Aspirin" is a famous example. *Bayer Co. v. United Drug Co.* – 272 F. 505 (S.D.N.Y. 1921).

23 15 U.S.C. § 1064(3).

24 "Where a generic association of a word or term has become obsolete and is discoverable only by resort to historical sources or dictionaries compiled on historical principles to preserve from oblivion obsolete words, then, from the viewpoint of trademark and like law, the word or term is no longer a generic word." *Miller Brewing Co. v. Falstaff Brewing Corp.*, 655 F.2d 5, 8 n.2 (1st Cir. 1981). See, Peter J. Brody, 'Reprotection for Formerly Generic Words', (2015) 82 U. Chi. L. Rev. 475, 491.

"[A] mark can move over time on the continuum from generic to distinctive and then back again." Amanda Reid et al., *Fundamentals of Intellectual Property Law Copyright, Patent and Trademark* (London/Alphen aan den Rijn: Kluwer Law International B.V., 2018), Part III, §1, II, C.

25 IGOs can be registered and used as trademarks in the following situations:
- in case the geographical indication is perceived as too remote and obscure ("Balashi" for beer. See: *In re Brouwerij Nacional Balashi NV*, 80 USPQ2d 1820 (TTAB 2006));
- or if they do recognize it, they would see it merely as a symbolic or non-geographical use of an IGO (French fries);
- when the IGO has become a generic name and no-one expects a link to a place of origin (on 5 July 1946, a minimalist two-piece swim wear was introduced in Paris four

protection.[26] Where an ordinary trademark distinguishes the source of the good or service from one undertaking from those of other undertakings; a certification or collective trademark distinguishes the source of the goods or service of one undertaking with a certificate or undertaking that is part of a collective from those undertakings without a certificate or that are not part of the collective. A certifier, which is the proprietor of a certification mark for an IGO, could, for example, certify that a vintner is producing a wine in the region that meets the requirements of geographical origin and quality, and license to her the use of the collective trademark for the GI.[27] In the same vein, a vintner that is a member of an association or *collectivité* which is the proprietor of a collective trademark for a GI can use the GI if she meets the requirements for the membership of the collective, for example in regard to the geographical origin, quality and method of production.[28] It is, moreover, vitally important that if a certification or collective trademark had become generic, it should be cancelled just like ordinary trademarks. This point has remained unpalatable for the EU, Switzerland and contracting parties to the Lisbon Agreement to date.

The preference of the US has always been to use the trusted and familiar trademark system with which it had much experience in protecting IGOs. However, the US does make limited use of a *sui generis* system for wine AOs: the register for the so called American Viticultural Areas (AVAs) under the Alcohol and Tobacco Tax and Trade Bureau (TTB). "Any person may submit an AVA petition to TTB to establish a grape-growing region as a new AVA."[29] The petitioner must provide evidence that the proposed name for the AVA is used in the delimited grape-growing region,[30] and that there are sufficient distinguishing

days after the detonation of an atomic bomb at the Bikini Atoll, a coral reef in the Marshall Islands. The designer Louis Réard called it "bikini", because it was just like the atomic bomb: "small and devastating";

- merely a type denomination which does not lead to a place of origin association (Ford "Capri");
- where the IGO cannot possibly be a source indicator ("Alaska" as a trademark for bananas);
- or when the trademark has acquired secondary meaning ("Jura" is a Swiss Canton, but the trademark has acquired distinctiveness as a source indicator for coffee machines).

26 Danny Friedmann, 'In Marks We Trust', (2018) 13(7) JIPLP 593–594, <https://doi.org/10.1093/jiplp/jpy059>.

27 15 U.S.C. §1054.

28 15 U.S.C. §1054. Collective trademarks have been around since the Washington Conference of the Paris Convention of 1911 where Article 7*bis* was adopted; which was incorporated in Article 1(2) of the TRIPS.

29 27 U.S.C. §9.11(a).

30 27 U.S.C. §9.12(a)(1)(i)-(iii) *juncto* §9.12(a)(2).

features that originate from the *terroir*: a connection between geographic or climatic features and the delimited grape-growing region.[31]

1.2 *Protecting Appellations of Origin Via the* Sui Generis *System*

Wine merchants in 19th century France used geographical names in a non-geographical way to categorize different styles of wine and identify the category of quality. The end result was often a blend of different wines from different origins.[32] This upgrading of wines by merchants led to resistance from consumers.[33]

In the 1870s, the *phylloxera* crisis destroyed many vineyards in France and caused merchants to buy grapes, especially raisins and wine from countries not hit by the crisis, or from its then own "*département*" Algeria.[34] After the crisis, merchants wanted to return to selling grape wines. However, they were outcompeted by merchants that offered cheaper raisin wines, due to their lower production costs. In addition, false designations of origin flooded the market. Both were considered unfair competition. In order to restore the prestige of French wine, the heterogeneity of the wine needed to be reduced, which would facilitate the identification of quality wines. At the end of the 19th century, the French authorities listed the acceptable wine improvement practices that "enhanced quality without denaturing" the wine.[35]

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31 27 U.S.C. §9.12 (a)(3)(i) Climate; (ii) Geology; (iii) Soils; (iv) Physical features; (v) Elevation.

32 Merchants used a table of equivalences of appellations or vineyards to facilitate this task. Within the Beaujolais appellation, one can distinguish between the vineyards of Brouilly, Moulin à Vent, Saint-Amour, *etc*., each with their particular qualities. Teil found the following passage in a 1926 book by Laneyrie: "Excellent Brouilly was served under the name Moulin-à-Vent, because it was the best Beaujolais wine that could be found to honour the appellation under which it was served." F. Laneyrie, *Résultat en bourgogne des premières années d'application de la loi dite de protection des appellations d'origine. Étude documentaire* (première étape sur la voie de sa suppression 1926), (Macon: author's printing), 19. Geneviève Teil, 'Protecting Appellations of Origin: One Hundred Years of Efforts and Debates', in William Caenegem and Jen Cleary (eds.), *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development* (New York: Springer, 2017) 151, <https://www.academia.edu/37637786/Protecting_Appellations_of_Origin_One_Hundred_Years_of_Efforts_and_Debates>.

33 This seems to coincide with Romanticism and its reverence of nature (*ie* noble savage).

34 Giulia Meloni and Johan F.M. Swinnen, 'The Rise and Fall of the World's Largest Wine Exporter (and Its Institutional Legacy)', LICOS Discussion Paper No. 327/2013 (2012), <https://ssrn.com/abstract=2280257>. Daniela Caruso and Joanna Geneve, 'Trade and History: The Case of EU-Algeria Relations' (2015) 33(1) Boston Un. Int'l L.J., <https://ssrn.com/abstract=2487958>.

35 Teil (n 32), 154. See also Roger Dion, *Histoire de la Vigne et du Vin en France. Des Origines au XIXè Siècle* (Paris: Flammarion, 1977) 768.

After the French Law of 9 May 1919, which protected AOCs,[36] the Legislative Decree of 30 July 1935 provided a system for *appellations d'origine contrôlée* (AOCs) under the supervision of a committee.[37] Since 1947, this committee became the *Institut National de l'Origine* (INAO). Until 1990, INAO's responsibility was limited to wines and spirits.[38] In 1990, its jurisdiction was extended to agricultural products and foodstuffs.[39] In 2006, INAO's name was changed into the *Institut National de l'Origine et de la Qualité*, but the INAO acronym was maintained.[40]

In 2008, an EU reform of AOCs required all producers to rewrite their link to *terroir*, to verify its quality. An alternative conception of an AOC is to see the vintner as an author, who gives her interpretation of the *terroir* expressed in the wine.[41] This would allow for some variation within the AOC.

The concept of INAO was first followed by some important wine-producing countries (Italy, Spain and Portugal) and later adopted by the whole European Community/European Union. INAO asserted that an AOC guarantees a close link between the product, quality and the *terroir*, which is a clearly

36 Danny Friedmann, 'Geographical Indications in the EU, China and Australia: WTO Case Bottling Up Over Prosecco', in Julien Chaisse (ed.), *Sixty Years of European Integration and Global Power Shifts; Perceptions, Interactions and Lessons* (Oxford: Hart Publishing, 2019) 415, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3218810>. INAO also protected *vins délimités de qualité supérieure* (VQDS), a category which was created in 1949 to fill the gap between the categories of *vin de pays* (VdP) and AOC. After the Pomel report on 23 March 2006, the VDQS category was eliminated to simplify the French wine classification system. Legislation on the *vin de pays* terminology was created in 1973 and passed in 1979. It allowed producers to distinguish wines that were made using grape varieties or procedures other than those required by the AOC rules. In 2009, the VdP classification was replaced by *Indication Géographique Protégée* (IGP), which is the French equivalent of protected geographical indication (PDO). The lowest in the quality hierarchy is the *vin de table*, which only needs to indicate the country of origin.

37 Legislative Decree of 30 July 1935, on the defense of the wine market and the economic regime for alcohol, <https://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr022fr.pdf>. Dion, (n 35), 768 and Pierre Galet, *Dictionnaire Encyclopédique des cépages et de leurs synonymes* (Beaube: éditions Libre & Solidaire, 2014) 1120.

38 Michael Blakeney et al., *Extending the Protection of Geographical Indications: Case Studies of Agricultural Products in Africa* (London: Routledge, 2013) 70.

39 Blakeney et al. (n 38), 70.

40 Le comité d'histoire des offices agricoles (The history committee of the agricultural offices), INAO Presentation, <http://www.histoire-offices.com/root/DGAll/racine/fr/navigation-gauche/inao>.

41 Geneviève Teil, 'Nature, the Co-Author of Its Products? An Analysis of the Recent Controversy Over Rejected AOC Wines in France', (2014) 17(3–4) J. of World Intel. Prop. 96–113.

defined geographical area with its own geological, agronomical, and climatic characteristics, *etc.* as well as particular traditions by the people in order to get the best from the land. This notion of *terroir* encapsulates both natural and human factors and means that the resulting product may not be reproduced outside its territory. As will be pointed out in Section 2, the Lisbon Agreement also uses the links between place, product and qualities, which also meet each other in the term *terroir* as justification for the protection of its AO s.

Between 2014 and 2016, trademark-intensive industries were responsible for 30.2% of total direct and indirect employment in the EU. However, they raised 37.3% of the total GDP.[42] In comparison, the GI-intensive industries were responsible for 0,2% of the total direct and indirect employment and raised only 0.1% of the total GDP.[43] It is no wonder that some New World countries have some reservations about investing in the Old World system.

2 Mapping the Legal Playing Field

This section provides a brief overview of the development of the three different groups of treaties relevant for IGO s. Six multilateral treaties and one regional treaty are presented in chronological order to explain their evolution.

The first group consists of multilateral treaties that are agnostic in regard to how indications of origin should be protected; the drafters of the Paris Convention, Madrid Agreement, and GATT did not mind how a country would protect IGO s, as long as it did so.

The second group is composed of a multilateral IGO treaty, the Lisbon Agreement, and a regional treaty, which set up the EU PDO/PGI system. This group of IGO treaties have a clear preference for *sui generis* systems and a maximalist approach to IGO protection. Both treaties shield the IGO s against becoming generic.

The third group is formed by the Agreement on Trade-Related Intellectual Property Rights and the Geneva Act of the Lisbon Agreement, which both

42 Commission Staff Working Document, Report on the protection and enforcement of intellectual property rights in third countries, European Commission, Brussels, SWD(2019) 452 final/28, 8 January 2020, 4, <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158561.pdf>.

43 *Ibid.*

aim at letting countries of both doctrinal convictions become a member and co-exist to protect IGOs in the way they see fit, either via AOs/PDOs or GIs/PGIs.

2.1 *Group 1: "Agnostic" Protection of IGOs*

The Paris Convention for the Protection of Industrial Property (Paris Convention),[44] a treaty that applies to industrial property in the widest sense (that is, every intellectual property that can be registered) and in addition aims to repress unfair competition; and the more specialized Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods.[45] Both instruments were drafted at the end of the 19th century. They are both agnostic about which methods treaty members should use to protect IGOs. Finally, GATT 1947 had a modest influence as a treaty on the protection of distinctive regional or geographical names.[46] However, as the precursor organization to the WTO, its influence was significant because GATT 1947 provided a blueprint of principles such as non-discrimination; national treatment and most-favored nation (MFN)[47] for TRIPS as a whole. In addition, GATT 1947 provided the framework to subsequently establish a binding and enforceable dispute settlement mechanism for the WTO agreements, including TRIPS. GATT 1947 was updated by GATT 1994,[48] and has been completely eclipsed by TRIPS[49] in regard to the protection of IGOs.

Article 10 of the Paris Convention (1883) obligated the Paris Union countries to seize the imports of goods bearing false indications of the source when this was the name of a specific locality. That specific locality did not have to be a member country of the Paris Union.

The treaty was revised in The Hague, the Netherlands, in 1925. Article 1(2) of the so called 'The Hague Act' introduced the industrial property objects to be

44 Paris Convention (n 4).

45 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1883, adopted on 14 July 1967, entered into force on 26 April 1970.<https://wipolex.wipo.int/en/text/286779>.

46 GATT 1947 (n 73).

47 National Treatment can be found in Article III of the GATT 1947 (n 73), and Article 3 of the TRIPS (n 4). MFN can be found in Article I of the GATT 1947 and Article 4 of the TRIPS.

48 2 General Agreement on Tariffs and Trade, The WTO Agreement Series, WTO. <https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf>.

49 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

protected, which include trademarks, indications of source and appellations of origin,[50] and the repression of unfair competition.

The problem is that some countries would consider a name an indication of source or AO, while the same name is considered generic in one or more other countries. Some examples of products where this happened, so that the primary meaning of the indication of source or AO was lost, were given at the Conference of Paris in 1880: "*eau de Cologne*," "*cuir de Russie*" and "*velours d'Utrecht*".[51]

2.1.1 Extension of Products and Geographical Scope

Wine was explicitly mentioned as an example of goods that could be protected via industrial property, pursuant to Article 1(2) of the Washington Act of 1911 of the Paris Convention.[52] Also The Hague Act of 1925[53] reiterated that industrial property does not only apply to industry and commerce. The London Act of 1934, explicitly extended the categories that are included in industrial property with "all manufactured or natural products."[54]

The geographical scope of the interested party was extended from "Any manufacturer or trader engaged in the manufacture or trade of his product, and established in the locality falsely indicated as the source" in the Paris Convention of 1883,[55] to "the region where this locality [was] situated" in the Brussels Act of 1900.[56] The London Act of 1934 expanded the "region where the locality was situated" further into "either [...] the region where this locality is located, or in the country falsely indicated."[57]

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50 AO s relate to indications of origin as *species* to its *genus*. Thus, an indication of source can signal a commercial or a geographical origin. Unlike most intellectual property rights, AO s have a collective or group character.

51 G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm in 1967* (BIRPI, Geneva 1968), 139, footnote: Conférence internationale pour la protection de la propriété industrielle, Ministère des Affaires étrangères (International Conference for the Protection of Industrial Property, Ministry of Foreign Affairs), Paris, 1880, *Actes* I, 88.

52 Paris Convention 1911 (Washington Act, adopted on 2 June 1911, entered into force on 1 May 1913).

53 Paris Convention 1925 (The Hague Act, adopted on 6 November 1925, entered into force on 1 June 1928).

54 Paris Convention 1934 (London Act, adopted on 2 June 1934, entered into force on 1 August 1938).

55 Article 10(2) of the Paris Convention 1883.

56 Article 10(2) of the Paris Convention 1900 (Brussels Act, adopted on 14 December 1900, entered into force on 14 September 1902).

57 The London Act 1934 of the Paris Convention changed the text of Article 10(1) into "an indication of source, the name of a specific locality or country" and Article 10(2) into "the

For some of the Paris Union countries (members of the Paris Convention), the provisions of Articles 9 and 10 did not go far enough. Under Article 15 of the Paris Convention 1883 (Article 19 of the Stockholm Act of 1967 of the Paris Convention and its amendment of 1979),[58] countries of the Paris Union reserve the right to make special agreements among themselves for the protection of industrial property.[59] Examples are the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods[60] or the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.[61] In this respect, Article 1(1) of the Madrid Agreement 1891 stated:[62] "Any product bearing a false indication of source in which one of the Contracting States, or a place situated in one of them, is, directly or indirectly, indicated as country or as place of origin, will be seized upon importation in each of the said States." In contrast to the Paris Convention,[63] the Madrid Agreement limited the scope of protection to false indications of source from exclusively contracting countries of the Madrid Agreement. Membership of the Paris Union was not sufficient.

2.1.2 Higher Standards for Wine

Article 4 of the Madrid Agreement 1891 stated[64] that each country can decide which of the appellations have become generic, and thus do not have to be

locality falsely indicated as place of origin, or in the region where this locality is situated, or in the country falsely indicated, either in the country or where the false indication of source is employed", without any material difference. However, it is interesting to see the formulations of the geographical scope evolve into Article 22(1) TRIPS, the most influential definition of a GI: "in the territory, or region or locality within that region."

58 Article 15 of the Paris Convention Lisbon Act 1958; London Act 1934; The Hague Act 1925; Washington Act 1911; Brussels Act 1900; Paris Convention 1883.

59 This was possible under Article 15 of the Paris Convention (n 45).

60 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1883, adopted on 14 July 1967, entered into force on 26 April 1970.<https://wipolex.wipo.int/en/text/286779>.

61 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958, as revised at Stockholm on 14 July 1967, and as amended on 28 September 1979. <https://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html#P269_21394>.

62 Article 1 (1st para) Madrid Agreement 1911 (Washington Act, adopted 2 June 1911, 1 May 1913); Madrid Agreement 1925 (The Hague Act 1925 adopted on 6 November 1925, entered into force 1 June 1928); Madrid Agreement 1934 (London Act, adopted on 2 June 1934, entered into force on 1 August 1938).

63 Article 10 of the Paris Convention 1883. The Paris Union countries were obligated to seize the imports of goods bearing false indications of the source of goods when this was the name of a specific locality of any country in the world.

64 Article 4 of the Madrid Agreement (n 45).

protected. However, "the regional appellations of origin for wine products [are] not being included in the reservation established by this article."[65] Here you already can see a higher standard for products of the vine emerging. One can observe that the position of France has been consistent for over a century: at the Washington Revision Conference of 1911, France proposed to extend the reservation with respect to appellations for wine products to regional appellations for all other products whose natural qualities were taken from the soil and climate (*terroir*). In addition, France proposed enhanced protection for wine appellations where this was mandated by regulations of the country of origin, which had then been communicated to other countries through the intermediary of the International Bureau. There was no support for these proposals, so France had to withdraw them.[66] During the London Revision Conference of 1934, France tried to extend the reservation with respect to wine products using terms intended to give such products a generic character, such as: "way," "genre", "type", *etc.*, even in combination with the true place of origin,[67] to no avail. France's determination to implement high protection standards foreshadowed the arrival of first French, then EU and Swiss protection of wine IGOs against usurpation.

The London Act of 1934 of the Madrid Agreement introduced Article 3*bis*,[68] which prohibits false indications that are capable of deceiving the public. It provides 'wine lists' as one of the examples of a commercial communication that could be a false indication deceiving the public. In addition to the term "false", the Lisbon Act of 1958 of the Madrid Agreement introduced the term "deceptive". Where "false" refers to an incorrect indication of origin, "deceptive and misleading" extends it to the use of fictitious indications of origin or any other indication that might be considered one of origin.[69] The terms "deceptive" and "misleading" also suggest intention.

65 Article 4 of the Madrid Agreement (n 45).

66 *Actes* Revision Conference Washington 1911, 10, Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford: OUP, 2015) 13.27, <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_source.pdf>.

67 France's proposal was withdrawn by the Director of the International Bureau following 'categorical opposition' from the UK Government. *Actes* 1934, 201–2 (programme proposal), 425–6 (report of fourth sub-committee), via Ricketson (n 66), 13.27.

68 Article 3*bis* of the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (London Act 1934): "The countries to which this Agreement applies also undertake to prohibit the use, in connection with the sale or display or offering for sale of any goods, of all indications in the nature of publicity capable of deceiving the public as to the source of the goods, and appearing on signs, advertisements, invoices, wine lists, business letters or papers, or any other commercial communication."

69 Ricketson (n 66), 13.18.

The Madrid Agreement[70] had a good start. It was signed by Brazil, France, Great-Britain, Guatemala, Portugal, Spain, Switzerland and Tunisia. However, as of 9 March 2020, the Madrid Agreement had only 36 contracting parties. The problem that IGOs are well known in one country, but generic descriptors in others, is not unique to the Paris Convention – it also takes place in the Madrid Agreement.[71] To counter this problem, another special Paris Union agreement was set up in 1958[72] (discussed below in Section 2.2).

Before TRIPs became effective in 1995, the 1947 General Agreement on Tariffs and Trade (GATT 1947)[73] provided Article IX:6 on the protection of distinctive regional or geographical names. No specific standards were imposed but there were calls on the GATT contracting parties to cooperate in this field. In comparison to the Paris Convention,[74] GATT 1947 had a relatively successful Dispute Settlement system,[75] although it was consensus-based,[76] where the panel reports bound the parties to the particular dispute. In 1987, the GATT panel in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, concluded that Article IX:6 of the GATT 1947

70 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, adopted on 14 April 1891 and entered into force on 15 July 1892, <https://wipolex.wipo.int/en/text/281783>.

71 Ricketson (n 66), 13.16.

72 Lisbon Agreement (n 61).

73 GATT 1947, signed on 30 October 1947 and entered into force on 1 January 1948, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified, <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>. GATT 1947 was terminated one year after the date of entry into force of the WTO Agreement, on 1 January 1996 (document PC/12, L/7583).

74 Article 28(1) Paris Convention states that disputes can be brought before the International Court of Justice (ICJ). The decisions by the ICJ might be binding to the parties of the dispute according to International Law, but they are not enforceable. In addition, Article 28(2) Paris Convention allows countries to declare not be bind by paragraph 1 when they sign the Act or deposit its instrument of ratification or accession. Not once has a member of the Paris Union brought a case before the ICJ in regard a dispute concerning the application or interpretation of the Paris Convention.

75 GATT 1947, Articles XXII and XXIII, *supra* note 73. GATT 1994 became a part of the WTO Agreement, which was signed on 14 April 1994 and came into force on 1 January 1995. GATT 1994 is Annex 1A of the WTO Agreement and makes use of the Understanding on rules and procedures governing the settlement of disputes, which is Annex 2 of the WTO Agreement.

76 GATT 1947 had an unwritten principle on consensus decision making. This lead to the situation where each defendant government had the power to block any phase of the dispute settlement process. Mary E. Footer, 'The Role of Consensus in GATT/WTO Decision-making', (1996–1997) 17 NW. J. Int'l L. & Bus. 653, 671.

was designed to protect "distinctive regional and geographical names of products of the territory of a contracting party as are protected by its legislation".[77] The GATT panel did not agree that when Japanese wines used "*chateau*" or "*vin rosé*" it was detrimental to the protection of distinctive regional or geographical names of products of the territory of a contracting party, because the names affixed to the products could not misrepresent their true origin when the name of the producing country was clearly indicated.[78] The member countries of the international and regional treaties of Group 2 have a completely different perspective on this.

2.2 *Group 2: Protection Via* Sui Generis *Systems*

Inspired by AO's strict connection between *terroir* and products, high standards of production, and to counter the problem of IGOs that are protected in one country but considered generic and thus unprotectable in other countries, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was set up in 1958.[79] The European Community (EC), as it was called at the time, was an intergovernmental organization and could not become a member of the Lisbon Agreement. Therefore, first the EC, which later would become the EU, arranged its own PDO/PGI system. Both the Lisbon Agreement and the PDO/PGI system have opted for a maximalist approach to IGO protection via a *sui generis* system with international registers.

Member countries of the Lisbon Agreement, a Special Union of the Paris Convention,[80] can apply for the registration of their AO in the register at the International Bureau, which is the Secretariat of WIPO.[81] Other members of the Special Union can oppose within one year.[82] After this probation time, the registration becomes incontestable.[83] If a member registered an AO in the

77 Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (1987) (GATT L/6216 – 34S/83) paras 5.14–5.15, <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87beverg.pdf>.

78 Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (1987) (GATT L/6216 – 34S/83) paras 5.14, <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87beverg.pdf>.

79 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958, as revised at Stockholm on 14 July 1967, and as amended on 28 September 1979. <https://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html#P269_21394>.

80 Article 19 of the Paris Convention Stockholm Act 1967, amendment of 1979 (n 58).

81 Article 9 of the Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979), <https://wipolex.wipo.int/en/treaties/textdetails/12412>.

82 Article 5(3) of the Lisbon Agreement (n 61).

83 Article 5(4) of the Lisbon Agreement (n 61).

international register but the denomination has been used as a trademark by third parties in that country, the member country has two years to phase it out, if it advised the International Bureau within three months after the abovementioned probation time.[84] Under the Lisbon Agreement, AO s are clearly superior to trademarks to protect IGO s.

Article 2(1) of the Lisbon Agreement provides the following definition of AO:[85]

> [An] "appellation of origin" means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

Producers within the *terroir*, who are willing to produce the product according to certain prescribed production methods regulated within the contracting state, can use the AO on their products.

Article 3 of the Lisbon Agreement provides the standard of protection:

> Protection shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind," "type," "make," "imitation," or the like.

This protection against usurpation,[86] imitation[87] and translation goes clearly beyond protection against confusion and deception. The subject matter is not limited to wines and spirits but can include agricultural products and foodstuffs. In contrast to Article 23(1) of the TRIP S, a wine name cannot be used for a non-wine product. Then again, the Lisbon Agreement does not protect against evocation, as the EU Regulation and Swiss legislation do.

84 Article 5(6) of the Lisbon Agreement (n 61).

85 Lisbon Agreement (n 61).

86 The *travaux preparatoires* define usurpation as the "illicit adoption" of an appellation (and provide "counterfeiting" as a possible synonym). Union Internationale pour la Protection de la Propriété Industrielle (International Union for the Protection of Industrial Property), Actes de la Conférence Réunie a Lisbonne du 6 au 31 Octobre 1958 (Proceedings of the Conference Meeting in Lisbon from 6 to 31 October 1958), (1863) at 815.

87 Here non-confusing imitation is meant.

The Lisbon Agreement has established an international register[88] which functions as a shield for the AO s against becoming generic.[89] There are no renewal or maintenance costs for the registration of AO s, which is not conducive to making the administration of the special Paris Union financially sustainable.

From its inception in 1958, France, Italy (EU members since 1958), Portugal (EU member since 1986) and Hungary (EU member since 2004) signed the Lisbon Agreement and later acceded to it. Greece (EU member since 1981), Spain (EU member since 1986) and Romania (EU member since 2007) signed the treaty in 1959, but never acceded to it. The Czech Republic and Slovakia (EU members since 2004) signed and acceded to the treaty in 1992, and Bulgaria (EU member since 2007) also signed and acceded to the treaty in 2007. As of 9 March 2020, the Lisbon Agreement had only 30 contracting parties, and five signatories that did not accede to the agreement.[90]

This is in stark contrast to the Paris Convention with its 196 contracting parties or 164 WTO members that need to comply with TRIP s.

A participation in this treaty of seven EU members out of a total of 27, based on the protection of AO s, did not meet the high aspirations of the EU. Within the EU, most members did not protect the IGO s for their products as AO s but used their existing trademark system instead. Thus, IGO s were not protected against non-confusing uses, and the producers were more flexible to use the production methods they wished.

2.2.1 EU PDO/PGI System

As an intergovernmental organization, the EU could not become a contracting party to the Lisbon Agreement; therefore, it had to set up its own system.

The EU legislation for wine designations started with Regulation 817/70 (1970) laying down special provisions relating to quality wines produced in specified regions.[91] After that, a complex framework of legislation developed

88 Article 5 of the Lisbon Agreement (n 61).

89 Except if the product becomes generic in the country of origin – Article 6 of the Lisbon Agreement, *supra* note 61. See also Danny Friedmann, 'TPP's Coup de Grâce: How the Trademark System Prevailed as Geographical Indication System' in Julien Chaisse, Henry Gao, and Chang-fa Lo (eds.), *Paradigm Shift in International Economic Law Rule-Making, TPP as a New Model for Trade Agreements?* (New York: Springer, 2017) 279, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090172>.

90 As of 27 February 2020, not one common law country outside the EU has become a member of the Lisbon Agreement or Geneva Act of the Lisbon Agreement.

91 Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions, OJ: JOL_1970_099_R_0020_002, <https://op.europa.eu/en/publication-detail/-/publication/b3c785df-af4b-4baa-856a-ef5647b1a886/language-en>.

for the protection of AOs and GIs for wine.[92] Regulation 1493/1999[93] was set up to decrease the export subsidies[94] and increase the quality, rural development,[95] and competitive performance of wine.[96] Authorized oenological processes and practices were exclusively determined at the EU level.[97]

Article 93(1)(a) of Regulation 1308/2013 provides the definition of designation of origin[98] that the EU is calling a protected designation of origin (PDO):

> "a designation of origin" means the name of a region, a specific place or, in exceptional and duly justifiable cases, a country used to describe a [wine] fulfilling the following requirements: (i) the quality and characteristics of the product are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors;[99]

Note that this definition is materially almost identical to the definition of AO found in Article 2(1) of the Lisbon Agreement.[100] In parallel, Article 93(1)(b) of Regulation 1308/2013 provides a definition of PGI which is materially almost identical to the definition of GI in Article 22(1) of the TRIPS:

> "a geographical indication" means an indication referring to a region, a specific place or, in exceptional and duly justifiable cases, a country, used

92 Michael Blakeney, *The Protection of Geographical Indications, Law and Practice* (2nd Edition, Cheltenham: Edward Elgar Publishing, 2019) 193–298.

93 Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine OJ L 179, 14.7.1999, p. 1–84, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31999R1493>.

94 Recital 4 (n 93).

95 Recital 2 (n 93).

96 Recital 16 (n 93).

97 Recital 47 (n 93).

98 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347, 20.12.2013, p. 671–854, <http://data.europa.eu/eli/reg/2013/1308/oj>.

99 Article 93(1)(a)(i) (n 98).

100 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958, as revised at Stockholm on 14 July 1967, and as amended on 28 September 1979. <https://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html#P269_21394>.

> to describe a product referred to in [wine] fulfilling the following requirements: (i) it possesses a specific quality, reputation or other characteristics attributable to that geographical origin;[101]

The link between product and place is stronger for a PDO than for a PGI. The grapes from which a PDO is produced must come exclusively from its geographical area.[102] For a PGI this needs to be at least 85 percent of the grapes used for the production.[103] The production of both the PDO and PGI wine needs to take place in their geographical areas.[104] PDO wine can only be obtained from vine varieties belonging to the family of *Vitis vinifera*.[105] For PGI wine, vine varieties belonging to *Vitis vinifera* or a cross between the *Vitis vinifera* species and other species of the genus *Vitis* are allowed.[106] PDOs and PGIs may be used by any operator marketing a wine which has been produced in conformity with the corresponding product specification.[107]

Despite their different production criteria, PDOs and PGIs are protected at the same maximalist level: Article 103 of Regulation 1308/2013 provides their scope of protection. PDOs and PGIs and the wines using those protected names in conformity with the product specification shall be protected not only against non-compliance to the product specifications,[108] dilution,[109] confusion[110] and unfair competition,[111] but also against:

> (b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated or

101 Article 93(1)(b)(i) (n 98).
102 Article 93(1)(a)(ii) (n 98).
103 Article 93(1)(b)(ii) (n 98).
104 Articles 93(1)(a)(iii) and 93(1)(b)(iii) (n 98). Thus bottling a PDO or PGI outside its geographical area is no longer possible, in contrast to C-47/90 – *Delhaize Frères v. Promalvin and Others*, Judgment of the Court of 9 June 1992, ECLI:EU:C:1992:250, <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=FD003883B33B43933FC7F7943B0D74A4?text=&docid=97214&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3164272>.
105 Article 93(1)(a)(iv) (n 98). *Vitis* is a genus of 79 species accepted by the botanical community, including *Vitis vitifera*, *Vitis ripardia*, *Vitis lambrusca*. The Plant List, A working list of all plant species, <http://www.theplantlist.org/1.1/browse/A/Vitaceae/Vitis/>.
106 Article 93(1)(b)(iv) (n 98).
107 Article 103(1) (n 98).
108 Article 103(2)(a)(i) (n 98).
109 Article 103(2)(a)(ii) (n 98).
110 Article 103(2)(d) (n 98).
111 Article 103(2)(c) (n 98).

accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;[112]

Of paramount importance is Article 103(3) of Regulation 1308/2013, which shields PDOs or PGIs from becoming generic in the EU. In contrast to the Lisbon Agreement, the EU regulations apply a "first in time, first in right" principle in case of conflict between trademarks and PDOs/PGIs relating to the same type of product.[113] It also provides a grandfather clause, absent in the Lisbon Agreement, that allows the continued use of trademarks, if they were either registered before the date of the PDO/PGI in the country of origin, or before 1 January 1996.[114]

2.2.2 EU Subsidiarity as a Means to Enhance Innovation

PDO and PGI wine producers face a changing and challenging market. The EU acknowledges that they require procedures allowing them to swiftly adapt to market demands but admits that it is penalized by the length and complexity of the current amendment procedure.[115] The EU understands that producers should also be allowed to innovate. Therefore, the EU reduced the steps of such procedures and to give effect to the principle of subsidiarity, decisions on amendments which do not concern essential elements of the product specification should be approved at Member State's level instead of the EU level.[116]

2.3 *Group 3: Protection Via Co-Existential Treaties*

Finally, the last group, consisting of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[117] and the Geneva Act of the Lisbon

112 Article 103(2)(b) (n 98).

113 Article 102(1)(a) (n 98).

114 Article 102(2) (n 98).

115 Recital 15 Commission Delegated Regulation (EU) 2019/33 of 17 October 2018 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector, the objection procedure, restrictions of use, amendments to product specifications, cancellation of protection, and labelling and presentation, C/2018/6622, OJ L 9, 11.1.2019, p. 2–45, <https://eur-lex.europa.eu/eli/reg_del/2019/33/oj>.

116 Recital 15 Commission Delegated Regulation (EU) 2019/33 of 17 October 2018 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector, the objection procedure, restrictions of use, amendments to product specifications, cancellation of protection, and labelling and presentation, C/2018/6622, OJ L 9, 11.1.2019, p. 2–45, <https://eur-lex.europa.eu/eli/reg_del/2019/33/oj>.

117 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in

Agreement on Appellations of Origin and Geographical Indications,[118] aims to include countries of the two doctrinal persuasions in regard to IGO protection, that is, to let the *sui generis* and trademark systems peacefully co-exist. Because TRIPS, which provides the minimum standards for the protection and enforcement of intellectual property rights, is an integral part of the Agreement Establishing the World Trade Organization (WTO Agreement),[119] its influence cannot be underestimated.[120] The WTO Agreement incorporated an improved version of GATT 1947's dispute settlement mechanism for TRIPS (and GATT 1994 and GATS).[121] In contrast to TRIPS, the Geneva Act of the Lisbon Agreement of 1979[122] still has to proof itself. Because it allowed the membership of intergovernmental organizations, the EU decided to join and deposited its instrument of accession to the Geneva Act of the Lisbon Agreement with the International Bureau of WIPO on 26 November 2019.[123] Because the EU was

Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

118 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.

119 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

120 This is *a fortiori* the case since Article 2(1) of the TRIPS incorporates Articles 1 through 12 and Article 19 of the Paris Convention. Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

121 Understanding on rules and procedures governing the settlement of disputes (Dispute Settlement Understanding), Annex 2 of the WTO Agreement, <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>. Article 2(4) DSU: "Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus. (footnote 1). "Footnote 1: The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision."

Article 2(4) DSU the consensus-based decisions are a bit tempered by the footnote, "which takes the non-objective process toward a proactive decision-making" where it is assumed that no one has objectives unless those with an objective express this explicitly. Footer (n 76).

122 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.

123 European Union Joins Geneva Act of WIPO's Lisbon Agreement, Enabling Entry into Force Geneva, PR/2019/841, WIPO, 26 November 2019, <https://www.wipo.int/pressroom/en/articles/2019/article_0015.html>.

the 5th eligible party to join the treaty,[124] it entered into force on 26 February 2020, according to Article 29(2) of the Geneva Act.[125] In contrast to GATT and TRIPS, the Geneva Act of the Lisbon Agreement, administered by WIPO, does not have a binding dispute settlement mechanism.[126]

Atypically, the members of the Geneva Act of the Lisbon Agreement shall become members of the same Special Union as the states party to the Lisbon Union Agreement of 1979, and the 1967 Act, no matter whether they are party to the Lisbon Agreement of 1979 or the 1967 Act.[127] This means that the EU will have 27 votes; a decisive influence not just on the Geneva Act of the Lisbon Agreement, but also within the Lisbon Agreement of 1979. In contrast, a more typical procedural approach is applied on matters concerning states that are bound by the 1967 Act, because in that case only contracting parties that are bound by the 1967 Act are exclusively eligible to vote.[128]

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124 Attracted by EU's membership, the Swiss Federal Institute of Intellectual Property (IPI), has written a report to open the consultation process, to see whether Switzerland should join the Geneva Act of the Lisbon Agreement. Template for Switzerland's accession to Geneva Act of the Lisbon Agreement on designations of origin and geographical indications and on its implementation (amendment of the federal law on the protection of trademarks and indications of origin), Explanatory report to open the consultation process, IPI, Bern 22 May 2019, <https://www.admin.ch/ch/d/gg/pc/documents/3056/Markenschutzgesetz_Erl.-Bericht_de.pdf>.

125 European Union Joins Geneva Act of WIPO's Lisbon Agreement, Enabling Entry into Force Geneva, PR/2019/841, WIPO, 26 November 2019, <https://www.wipo.int/pressroom/en/articles/2019/article_0015.html>.

126 In contrast to the WIPO-administered Paris Convention, Berne Convention for the Protection of Literary and Artistic Works, Patent Cooperation Treaty (PCT) and the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, neither the Lisbon Agreement nor the Geneva Act of the Lisbon Agreement have a specific mechanism for the settlement of disputes within the Lisbon system. However, this could be designed or "the WIPO Center, an international dispute resolution service provider, would be available to assist in such exercise upon request." Information Note on the Question of Dispute Settlement within the Lisbon System, prepared by the Secretariat, Working Group on the Development of the Lisbon System (Appellations of Origin) Eighth Session, Geneva, December 2 to 6, 2013, LI/WG/DEV/8/INF/1, 8 November 2013, paras 10 and 35, <https://www.wipo.int/edocs/mdocs/mdocs/en/li_wg_dev_8/li_wg_dev_8_inf_1.pdf>. However, these WIPO-administered treaties refer their members to bring their cases concerning the application and interpretation of these respective treaties to the International Court of Justice (ICJ). One should realize that the decisions of the ICJ are binding according to international law, but they are not enforceable. Not once brought a member of the abovementioned WIPO-administered treaties a case before the ICJ.

127 Article 21 of the Geneva Act (n 118).

128 Article 22(4)(c) of the Geneva Act (n 101).

Articles 22 to 24 of the TRIPS,[129] dealing with the protection of IGOs, are the result of a fiercely negotiated compromise between the maximalist aspirations of the EU and Switzerland to protect IGOs via a *sui generis* register, and a wish by the US and other New World countries for a lower level of protection via their existent trademark system.[130] Article 22(1) of the TRIPS provides a definition of GIs:

> Geographical indications 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.[131]

The difference between this definition of a GI and the definition of an AO, according to Article 2(1) of the Lisbon Agreement,[132] is that the latter requires both natural "and" human factors, instead of either/or. Certification or collective trademarks can fulfill the requirements of Article 22(1) of the TRIPS to function as a GI, but could also meet the standards of Article 23(1) of the TRIPS.[133] Just as the Lisbon Agreement[134] and the EU PDO/PGI system,[135] TRIPS

129 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

130 "GIs was perhaps the most emotional topic of the negotiations, not only for its economic and trade impact but also for the sociocultural and historical aspects involved. While it is feasible to deal with one's own market, the fear relates to the possibility of losing third markets." Thu-Lang Tran Wasescha, 'Negotiating for Switzerland' in Jayashree Watal and Antony Taubman (eds.), *The Marking of the TRIPS Agreement, Personal Insights from the Uruguay Round Negotiations* (WTO Geneva 2015) 182, <https://www.wto.org/english/res_e/booksp_e/trips_agree_e/history_of_trips_nego_e.pdf>.

131 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

132 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 31 October 1958, as revised at Stockholm on 14 July 1967, and as amended on 28 September 1979. <https://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html#P269_21394>.

133 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

134 Article 3 of the Lisbon Agreement (n 61).

135 Article 103(2)(b) of the Regulation (EU) No 1308/2013 (n 98).

provides enhanced protection against translation, usurpation and imitation for wines and spirits GIs.[136] However, in contrast to the Lisbon Agreement and the EU PDO/PGI system, TRIPs only prevents the use of a GI identifying wines for wines not originating in the place indicated by the GI in question or identifying spirits for spirits not originating in the place, even where the true origin of the goods is indicated or the IGO is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.[137] So, unlike the Lisbon Agreement and EU PDO/PGI system, TRIPs does not protect against geographical names on dissimilar goods, or as the EU PDO/PGI system against evocation of an IGO. Uncontroversially, TRIPs also protects IGOs against confusion,[138] unfair competition,[139] false indications[140] and free riding.[141]

Article 23(3) of the TRIPs expounds that in case of homonymous GIs for wines, protection shall be accorded to each indication, unless a GI, although literally true, falsely represents a geographical origin.[142] The TRIPs members need to come to a practical solution by differentiating the GIs from each other to protect consumers from being misled.[143] TRIPs also provides grandfather[144] and "first in time, first in right" clauses in regard to good faith prior trademarks.[145]

In contrast to the shields against genericness of the Lisbon Agreement[146] and EU PDO/PGI system,[147] Article 24(6) of the TRIPs allows WTO members to stop protecting GIs that have become generic, are no longer protected in

136 Article 23(1) of the TRIPs (n 5).
137 Article 23(1) of the TRIPs (n 5).
138 Articles 22(2)(a) and (3); and 24(8) of the TRIPs (n 5).
139 Article 22(2)(b) of the TRIPs (n 5).
140 Article 23(2) of the TRIPs (n 5).
141 Article 22(4) of the TRIPs (n 5).
142 Trade-Related Aspects of Intellectual Property Rights (TRIPs) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.
143 Article 23(3) of the TRIPs (n 5).
144 A WTO member should continue to protect GIs that existed immediately prior to the date of entry into force of the WTO Agreement in that member. Article 24(3) TRIPs (n 5).

Article 24(4) of the TRIPs. A member can tolerate another member that identifies wines or spirits in connection with goods or services by a national or domiciliary who has used the GI in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

145 Article 24(5) of the TRIPs (n 5).
146 Article 6 of the Lisbon Agreement (n 61).
147 Article 103(2)(b) of Regulation 1308/2013 (n 98).

the country of origin, or fell into disuse.[148] Article 24(6) of the TRIPS[149] also provides a grandfather clause in respect to products of the vine for which the relevant indication is identical to a generic name of a grape variety existing in the territory of a member as of the date of entry into force of the WTO Agreement.[150] Article 23(4) of the TRIPS prescribes negotiations for a multilateral system for notification and registration of GIs for wines.[151] Instead of aiming for the low hanging fruit, *ie* establishing an international wine register, these negotiations have led to no tangible results. The problem is that there is no consensus about scope and purpose of the negotiations. The unanswered questions are: "should the register be limited to wines and spirits?" and "should the enhanced protection of Article 23(1) of the TRIPS extend to other kinds of goods and services?"[152]

Article 24(1) and (2) of the TRIPS state that members shall not refuse to conduct negotiations or to conclude bilateral or multilateral agreements to increase individual wine GIs, and the TRIPS Council should review the process.[153] Both the EU and US have been very active in this respect. Section 3 below will demonstrate an important bilateral agreement and FTA both jurisdictions concluded with the PRC.

The Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications[154] went into effect on 26 February 2020. The Act

148 Article 24(9) of the TRIPS (n 5).

149 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

150 A salient example of this is the prosecco grape that was unilaterally renamed "glera" to transubstantiate the grape name into an IGO. See Friedmann (n 36), 424–426.

151 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

152 In the Doha Declaration, the WTO members agreed to negotiate the establishment of the notification and registration system and to address the expansion of the system beyond wines and spirits. WTO, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) para 18.

153 Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

154 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.

allows the international registration of AOs and GIs through a single registration procedure with WIPO and permits the accession to the Act by intergovernmental organizations, such as the EU and the African Intellectual Property Organization (OAPI). In *Commission v Council* in 2017, the CJEU decided that the EU, and not just the seven EU members that are members of the Lisbon Union, had exclusive competence to negotiate the revision of the Lisbon Agreement.[155] Another innovation of the Geneva Act on the Lisbon Agreement is the possibility to let more than one contracting party register an AO or GI for a trans-border geographical area.[156]

Article 11 of the Geneva Act[157] provides the scope of protection that member countries must provide to prevent any unauthorized use of the AOs or GIs in three situations:

1) Identical goods to the AO or GI that will, by definition, lead to confusion; that are either false indications or do originate in the geographical area but are not complying with the applicable requirements for using the AO or GI;[158]

155 The CJEU held that the draft revision agreement falls within the field of common commercial policy, for which Article 3(1) of the Treaty on the Functioning of the EU (TFEU) of the Lisbon Treaty confers exclusive competence. "[T]he Lisbon Agreement is not an end in itself, but a means to the end of developing trade between the contracting parties in a fair manner." Case C-389/15 *European Commission v. Council*, Judgment of the Court, 25 October 2017, EU:C:2017:798, paras 46 and 60, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=30A935AC7D08C56359ECFADB79C61DB5?text=&docid=195942&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3697065>.

Article 3(2) TFEU defines that the conclusion of international agreements as exclusive competences if the EU has a corresponding internal competence (which is here common commercial policy). Article 3 TFEU, OJ C 326, 26.10.2012, p. 51–51, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>. On the EU system of competences before and after the Treaty of Lisbon, see Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime' (2012) 15(1) J. of Int'l Econ. L. 51–84.

156 Article 2(2) of the Geneva Act, *supra* note 118. This seems inspired by the EU cross-border geographical indications for the spirits "Irish Whiskey" from Ireland and Northern Ireland (United Kingdom which was a member of the EU) and "Ouzo" from Greece and Cyprus. See Recital 62 of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. OJ L 343, 14.12.2012, p. 1–29, <http://data.europa.eu/eli/reg/2012/1151/oj>.

157 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.

158 Article 11(1)(a)(i) of the Geneva Act (n 118).

2) Dissimilar goods or services to which the AO or GI applies, if such use would indicate or suggest a connection between those goods or services and the beneficiaries of the AO or the GI, that would be likely to dilute in an unfair manner, or take unfair advantage of, that reputation;[159]
3) And if the AO or GI is imitated, usurped or translated, even if the true origin of the goods is indicated, or is accompanied by terms such as "style", "kind", "type", "make", "imitation", "method", "as produced in", "like", "similar" or the like.[160] The first four prohibited qualifiers of the non-exhaustive list of the Geneva Act are identical to those stated in the Lisbon Agreement of 1979.[161] The Geneva Act added "style", "method", "as produced in", "like", and "similar", inspired by their most influential contracting party (the EU),[162] but not the term "flavour".

Article 12 of the Geneva Act provides that registered AOs and GIs cannot be considered generic in a contracting party.[163] However, the Agreed Statement Number 2,[164] concerning Article 12 of the Geneva Act, mitigates the absoluteness of this shield against becoming generic, *viz.* if before an international registration the denomination or indication constituting an AO or GI in the contracting party of origin, might be considered generic in another contracting party, the principle of prior use should be applied.[165] In the absence of any prior use clauses in the Lisbon Agreement of 1979, the Geneva Act does protect these prior uses. The first sentence of Article 13(1) of the Geneva Act states that AOs and GIs shall not prejudice applied for or registered prior trademarks in good faith or acquired through use in good faith.[166] This could be interpreted as that the prior trademark should have priority over junior AOs or GIs, so that they could not be registered or in case they were registered that they should be invalidated. However, the second sentence of Article 13(1) of the Geneva Act elaborates that even if that prior trademark is not given full protection in

159 Article 11(1)(a)(ii) of the Geneva Act (n 118).
160 Article 11(2) of the Geneva Act (n 118).
161 Article 3 of the Lisbon Agreement of 1979 (n 61).
162 Article 103(2)(b) of Regulation 1308/2013 (n 118).
163 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.
164 An agreed statement is a statement agreed by the parties, for the purposes of the Act only.
165 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.
166 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.

a contracting state, if the law of that contracting state enables this, "protection of the registered appellation of origin or geographical indication shall not limit the rights conferred by that trademark in any other way."[167] This suggests that the prior trademark should co-exist with the AO or GI.

Subsequently, the Geneva Act will not undermine the use of non-confusing personal names in business[168] or the right of any person to use a non-confusing plant variety or animal breed denomination in the course of trade.[169]

The preference of the US delegation for using the trademark system to protect IGOs also became clear when it made an intervention as observer to the Working Group on the Development of the "Lisbon System"[170] about the financial sustainability of the Geneva Act of the Lisbon Agreement.[171] The US delegation observed the amount of applications for AOs and GIs of 1,130 in the Lisbon Express database [which will generate a one-off fee of Sfr 500 per application] but noted that 118 of these applications have been cancelled [thus earning a total of Sfr 506,000].[172] In comparison, the Madrid Protocol Union received 55,000 international applications in one year (2017), receiving Sfr 653 for each basic application, so that Sfr 32 million was collected that year just for filing fees. Moreover, the Madrid Protocol Union has many more earning opportunities, such as fees for extending designations of protection to other countries, *etc*.[173] The US delegation also observed that the vast majority of the notified AOs or GIs were from Europe instead of sub-Saharan Africa, a region

167 Second sentence of Article 13(1) Geneva Act (n 118).

168 Article 13(2) of the Geneva Act, *supra* note 118.

169 Article 13(3) of the Geneva Act, *supra* note 118.

170 It seems that the term "Lisbon System" is used in the same way as "Madrid System", *infra* note 208. In the case of the latter to describe both the Madrid Agreement Concerning the International Registration of Marks of 1891, as well as the Protocol Relating to the Madrid Agreement of 1989, which has become more relevant. In the case of the first to describe the Lisbon Agreement of 1958 and the more relevant Geneva Act of the Lisbon Agreement. Both the Protocol and the Geneva Act allowed for more flexibility than the original Agreements.

171 Working Group on the Development of the Lisbon System (LI/WG/DEV-SYS/2): Day 1 (AM), 27 May 2019, webcast from 40:00-43:44, <http://webcast.wipo.int/>.

172 *Ibid.*

173 For example: one of the main principles of trademark law is territoriality; which means that a trademark registered in one jurisdiction is exclusively valid in that jurisdiction. In times of global trade and e-commerce this has become problematic. Priority rights (Article 4(A)(1) Paris Convention (n 4)), well-known marks (Article 16(2) and (3) of the TRIPS (n 5)) and the Madrid system (Madrid Agreement Concerning the International Registration of Marks of 1891 and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989) form exceptions.

that could use any uplifting economic incentive.[174] The question is whether any common law country that is not a member of the EU is willing to join the Geneva Act[175] since it is not clear whether countries can impose the genuine use requirement for their certification or collective marks that they would like to use as GIs.[176]

3 FTAs that Include IGO Provisions and Bilateral IGO Agreements

The enhanced protection regime of Article 23(1) of the TRIPs,[177] even without an international register in place, was a great accomplishment for the universalist IGO aspirations of the EU and Switzerland. All 164 WTO members have to comply to TRIPs and implement Article 23(1) of the TRIPs in their national legislations.[178] Currently, the EU is building upon its *acquis communautaire*, ratcheting up the IGO standards and widening the scope of protected subject matter via FTAs and specific IGO agreements.[179] The repropertization of 41 geographical names that were perceived as generic by New World countries, better known as "the claw-back list",[180] is always on the EU's trade policy agenda. In its

174 Working Group on the Development of the Lisbon System (LI/WG/DEV-SYS/2): Day 1 (AM), 27 May 2019, webcast from 40:00-43:44, <http://webcast.wipo.int/>.

175 WIPO Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, adopted on 20 May 2015 and came into force on 26 February 2020, <https://wipolex.wipo.int/en/text/285856>.

176 Jenjira Yanprasart and Stéphanie de Potter, 'The international debate on appellations of origin and geographical indications', *IGIR*, *Maastricht University Blog* (5 March 2018), <https://www.maastrichtuniversity.nl/blog/2018/03/international-debate-appellations-origin-and-geographical-indications>.

177 Trade-Related Aspects of Intellectual Property Rights (TRIPs) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm>.

178 *Ibid.*

179 Also Switzerland is actively pursuing the international protection of its IGOs and high protection and enforcement standards. As of 27 February 2020, it has concluded 11 bilateral treaties on GIs and indications of source, with Germany, Czechoslovakia, France, Spain, Portugal, Hungary, EU, Mexico, Russia, Jamaica and Georgia. Bilateral Agreements, Agreements on Geographical Indications, IPI, <https://www.ige.ch/en/law-and-policy/international-ip-law/bilateral-agreements/agreements-on-geographical-indications.html>.

180 Commission, 'WTO talks: EU steps up bid for better protection of regional quality products', IP/03/1178, (28 August 2003), <http://europa.eu/rapid/press-release_IP-03-1178_en.htm?locale=en>.

37 FTAs, the EU is incorporating lists of its IGOs that it would like its treaty parties to protect[181] in exchange for protection of the countries' IGOs in the EU. It is considered that the EU style protection of IGO works also for the rest of the world and can guarantee authenticity of products, safeguard cultural heritage and stimulate rural development. In the absence of any IGOs, a trade partner can use the protection of the EU IGOs as negotiation chip.

On its turn, the US is using FTAs, and the private sector in the US is also lobbying for the protection of GIs via trademarks.[182] The US had 14 FTAs in force with 20 countries as of 9 March 2020.[183] In these FTAs, the US is incorporating GI protection via trademarks, stressing that this method is a precondition for innovation and competition.

The litmus test for success of the international IGO registration system is how IGOs are protected in third countries such as the PRC. Therefore, the Sino-EU IGO bilateral agreements and the IGO provisions in the 2020 US-China FTA (as a response to the Sino-EU agreement) provide an indication of the level playing field in the PRC. To the PRC, with the most populous market, the EU wants to export its PDO and PGI products, and the US and other New World countries want to export their respective products using predominantly generic names but also their own IGOs.[184]

The proliferation of FTAs and Bilateral agreements can lead to the "spaghetti bowl phenomenon"[185] or "noodle bowl effect"[186] when one is focusing on Asia. In regard to wine IGOs, this entails fragmentation of legislation, which makes it more difficult for exporters of wine to know how to interpret certain IGO laws. However, historically, for example in copyright law, the pendulum of

181 There are 37 EU FTAs in force, as of 9 March 2020, <https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/>.

182 For example via the Wine Institute (<http://www.wineinstitute.org>) and Consortium for Common Food Names (<http://www.commonfoodnames.com>).

183 There are 20 US FTAs in force, as of 9 March 2020, <https://ustr.gov/trade-agreements/free-trade-agreements>.

184 In 2019, Australia overtook France as the biggest wine exporter to China – see Andy Morton, 'Australia beats France to head China's 2019 wine value charts – figures', *Just-Drinks* (22 July 2019), <https://www.just-drinks.com/news/australia-beats-france-to-head-chinas-2019-wine-value-charts-figures_id128923.aspx>.

185 The term "spaghetti bowl phenomenon" was coined in Jagdish Bhagwati, 'US Trade Policy: The Infatuation with FTAs', *Discussion Paper Series No. 726* (April 1995) 4, <https://core.ac.uk/download/pdf/161436448.pdf>.

186 Focusing on Asia's international investment agreements, Chaisse called this the "noodle bowl effect" – Julien Chaisse and Shintaro Hamanaka, 'The "Noodle Bowl Effect" of Investment Treaties in Asia: The Phenomenon, the Problems, the Practical Solutions' (2018) 33(2) ICSID REV 501–524.

bilateralism has swung back and forth.[187] One could choose to be sanguine and see especially countries that have signed bilateral IGO agreements and FTAs with different parties as a kind of maternity room of new IGO standards for a future multilateral IGO agreement.

3.1 *Sino-EU Bilateral GI Agreements*

In 2006, EU and the PRC started to cooperate on IGOs, resulting in the registration and protection of 10 IGO names on both sides in 2012.[188] Building on this, the EU and the PRC concluded the negotiations on a bilateral agreement to protect 100 EU IGOs in the PRC and 100 Chinese IGOs in the EU against imitations and usurpation on 6 November 2019.[189]

The EU list of IGOs to be protected in China includes products such as *Cava*, *Champagne* and *Porto*.[190] Among the Chinese products, the list includes for example *Anji Bai Cha* (*Anji* White Tea), *Panjin Da Mi* (*Panjin* rice) and *Anqiu Da Jiang* (*Anqiu* Ginger).[191] Four years after its entry into force, the list of protected IGOs will expand to cover an additional 175 IGO names from both sides. These names will have to follow the same registration procedure as the names already covered by the agreement (*ie* assessment and publication for comments).

3.2 *US-China FTA*

The Economic and Trade Agreement Between the Government of the US and the Government of the PRC (first phase) was signed on 15 January 2020.[192] It is significant that Chapter 1 of this FTA is about intellectual property. Section

187 "Between 1891 and 1904 the United States had entered into treaties with at least fifteen countries for the protection of copyright." Ruth Okediji, 'Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection' (2003–2004) 1 Un. of Ottawa L. and Tech. J. 134. See also Paul Goldstein and Bernt Hugenholtz, *International Copyright, Principles, Law, and Practice* (Oxford: OUP 2013) 31–33.

188 EU-China Geographical Indications – 10 plus 10 project, 30 November 2012, <https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1297>.

189 EU-China Geographical Indications Agreement, 6 November 2019, <https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/food_safety_and_quality/documents/infographic-factsheet-eu-china-agreement_en.pdf>.

190 List of EU GIs protected,<https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/food_safety_and_quality/documents/eu-100-list-of-gis-eu-china-agreement_en.pdf>.

191 List of Chinese GIs protected, <https://ec.europa.eu/info/system/files/food-farming-fisheries/food_safety_and_quality/documents/china-100-named-products-eu-china-agreement_en.pdf>.

192 'Economic and Trade Agreement Between the Government of the US and the Government of the PRC', *USTR* (15 January 2020), <https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf>.

F (Articles 1.15–1.17) is about IGOs. It is clear that the Sino-EU Bilateral "GI" Agreement made the US concerned about three issues: continued market access of its goods using generic names; China's perception of what constitutes generic names; and the possibility that China would interpret multi-component terms according to the *pars pro toto* strategy.[193]

In the FTA, the PRC pledges to take measures so that the recognition of IGOs by the PRC, "pursuant to an international agreement" (read the Sino-EU Bilateral "GI" Agreement of 2019) will not undermine market access for US exports of goods using trademarks.[194] The PRC will give the US the opportunity to raise disagreements about the acknowledgments of lists of IGOs.[195]

To determine what is generic, the PRC pledged to take into account competent sources such as dictionaries,[196] how the good is marketed and used in trade in China;[197] whether the term is used in standards such as the *Codex Alimentarius*,[198] and whether the good is imported in a way that will not mislead the public about place of origin.[199] Importantly, China has agreed that any IGO may become generic over time and subject to cancellation,[200] that it will ensure that a generic component which is part of a protected multi-component term will not be protected individually,[201] and will make explicit which terms are not protected.[202] In other words, the new US-China FTA suggests that the US has succeeded becoming the preferential partner in regard to IGOs and has simultaneously averted the possibility of a *pars pro toto* interpretation.[203]

3.3 IGO Protection in China

China has streamlined its IGO protection. Before it used three separate ways of protection: 1) the registration of certification and collective trademarks via the CTMO (China Trademark Office) (this was also applicable for foreigners); 2) an IGO register of the General Administration for Quality Supervision Inspection and Quarantine (AQSIQ) for domestic and since 2016 also for foreign "GIs";[204]

193 Friedmann (n 36), 426–427.
194 Article 1.15(1) (n 192).
195 Article 1.15(2) (n 192).
196 Article 1.16(1)(a)(i) (n 192).
197 Article 1.16(1)(a)(ii) (n 192).
198 Article 1.16(1)(a)(iii) (n 192).
199 Article 1.16(1)(a)(iv) (n 192).
200 Article 1.16(1)(b) (n 192).
201 Article 1.17(1) (n 192 and 193).
202 Article 1.17(2) (n 192 and 193).
203 Friedmann (n 36), 426–427.
204 'Notice on the Measures for the Protection of Foreign Geographical Indication Products', *AQSIQ*, 28 March 2016.

3) in case of domestic agricultural products, a register of the Minister of Agriculture and Rural Affairs for IGOs.[205]

Since 17 March 2018, the institutional reform plan of the State Council was approved at the first session of the 13th National People's Congress of the PRC: AQSIQ ceased to exist and its responsibility in regard to GI protection was taken over by China National Intellectual Property Administration (CNIPA), who also has become in charge of CTMO. On 27 November 2019, the Measures for the Protection of Foreign GI Products was amended to make clear that CNIPA will also administer the protection of foreign GI products in China.[206]

4 Conclusion

Grafting different *Vitis* species can lead to hybrids with better organoleptic characteristics and a higher resistance against diseases. In the same vein, this chapter explored whether the best parts of the Old and New World in regard to IGO protection could be grafted on one another. The best part of the EU PDO/PGI system, the Lisbon Agreement and the Geneva Act of the Lisbon Agreement is the attainable goal of a universal IGO register.[207] This would overcome the outdated territoriality[208] of intellectual property regimes. This would be very welcome since the advent of the era of globalized trade and e-commerce has

205 Measures for the Administration of Geographical Indications of Agricultural Products, promulgated by Decree No. 11 of the Ministry of Agriculture on 25 December 2007, and Amended by Decree No. 2 of the Ministry of Agriculture and Rural Affairs on 25 April 2019, and came into effect on the same day, <http://pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=be32f34574844abfbdfb&keyword=&EncodingName=big5%%27&Search_Mode=&Search_IsTitle=0>.

206 Announcement No. 338 of CNIPA on Amending the Measures for the Protection of Foreign Geographical Indication Products, 27 November 2019, <http://en.pkulaw.cn/display.aspx?cgid=fae90a4aedb8ab36bdfb&lib=law>.

207 The EU PDO/PGI register for wine is an electronic database called E-BACCHUS. <https://ec.europa.eu/agriculture/markets/wine/e-bacchus/>. The EU PDO/PGI register for agricultural products and foodstuffs is an electronic database called Database of Origin and Registration (DOOR), <https://ec.europa.eu/agriculture/quality/door/list.html>. Both databases allow the registration of non-EU GIs.

208 For example: one of the main principles of trademark law is territoriality; which means that a trademark registered in one jurisdiction is exclusively valid in that jurisdiction. In times of global trade and e-commerce this has become problematic. Priority rights (Article 4(A)(1) Paris Convention (n 4)), well-known marks (Article 16(2) and (3) of the TRIPS (n 5)) and the Madrid system (Madrid Agreement Concerning the International Registration of Marks of 1891 and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989) form exceptions.

led to many conflicts between IGOs in different jurisdictions. Therefore, a system that protects the universal uniqueness is preferable.[209]

This high standard for truly distinctive IGOs is also recommendable since it would undermine specificity.[210] This would ensure that use by non-competitors is not allowed, in the same way that protection against dilution and the registered well-known mark prohibit such use,[211] since they can lead to erosion of the distinctiveness or tarnishment of the IGO and free-riding.[212]

Then again, the substantiation of *terroir* is flawed, its delineation often arbitrary,[213] and presently under the influence of climate change. In addition, there seems to be no conclusive evidence about the benefits for EU countries, let alone for developing countries, to have PDOs/PGIs; it might be that the result of PDOs and PGIs could also be attained using certification or collective trademarks. The mirror site of cherishing authenticity, cultural heritage and shielding IGOs against genericide is unfortunately rigidity which stifles innovation and competition. The IGO system, preferred by the US, is more willing to cancel the IGO protection of generic terms and let private parties determine and amend their own standards of production, which has led to innovation and competition. Creating a universal wine IGO register of certification or collective marks with a high external and internal enforcement standard would be a logical first step. This would entail that wine IGOs would be protected against confusion, deception, imitation, usurpation, evocation and free-riding but that IGOs be cancelled once they become generic. WIPO or WTO could administer the universal wine IGO register, preferably with a binding and enforceable dispute settlement mechanism.[214] Just like the trademark registers

209 In case of homonyms, the junior PDO/PGI needs to be sufficiently distinctive – Article 118j(1)(3) of Regulation 491/2009.

210 The specificity principle applied to trademarks means that a trademark is registered only for the designated goods or services – see Friedmann (n 9), 679–680.

211 Article 16(2) and (3) of the TRIPs (n 5).

212 A universal register for trademarks could decouple the trademark from goods or services, and instead coupling the extension of trademark use to the protection against confusion, dilution and free-riding – Friedmann (n 9), 680–681.

213 An example: *Cava* can be produced in Catalonia, Aragon, Castile and León, Extremadura, La Rioja, Basque Country, Navarre and Valencia. In other words, all over Spain where the climatic and environmental circumstances differ considerably.

214 Because WIPO has already experience with registers (Lisbon System; Madrid System; The Hague – International Design System; Patent Cooperation Treaty – International Patent System) and search within these registers, it is well positioned for such a register. It could set up a dispute settlement mechanism with binding and enforceable decisions. The other candidate, WTO, has already such a binding and enforceable dispute resolution system. In addition, Article 23(4) TRIPs and the Doha Declaration, already provide a mandate

around the world, the administration of a universal wine IGO register could be made financially sustainable if IGO proprietors had to pay renewal and maintenance fees.

The PRC was able to experiment with three different ways of protecting IGOs in its national legislation. Internationally, it signed a bilateral "GI" agreement with the EU in 2019 and an FTA with the US in 2020, which arguably will lead to an interesting cross-pollination. It seems that the combination of elements (maximalist protection as long as distinctiveness requirements are met) will have positive effects for third countries that either would like to export their protected IGOs or their generic named products to the PRC. Countries, such as the PRC, that have signed a bilateral IGO agreement with the EU and an FTA with the US might be a kind of maternity room of new IGO standards for a future multilateral IGO agreement.

to negotiate a system of notification and registration of GIs for wines and spirits, see Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the Marrakesh Agreement Establishing the World Trade Organization (annex 1C) signed in Marrakesh, Morocco on 15 April 1994, entered into force on 1 January 1995, <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> and WTO (n 152). The US blocked new appointments to the seven-member appellate body, paralyzing the WTO dispute system – see Keith Johnson, 'How Trump May Finally Kill the WTO', *Foreign Press* (9 December 2019), <https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/>. This proposal is under the assumption that these problems will be fixed.

CHAPTER 12

The Protection of Traditional Terms for Wines in the European Union and Beyond

Anke Moerland and Ramyaa Bhadauria

1 Introduction

The European Union (EU), accounting for almost half of the world's vineyards,[1] is the largest wine-producing region in the world, responsible for over 65% of annual wine production.[2] It is also the global leader in both imports and exports of wine.[3] Owing to the vast economic and commercial importance of the wine sector, it is heavily regulated in the EU. Since the 1960s, the EU has introduced more than two thousand regulations, directives and decisions on wine.[4] The purpose of this regulatory activity has been to address a structural imbalance in the EU wine market. This imbalance stemmed from vast surpluses of low-quality wines and made it necessary to distinguish quality wine from table wine.

The regulatory framework addresses manifold aspects[5] of the wine sector, from maximum vineyard surface allowed per individual EU Member State, minimum spacing between vines and yield restrictions to winemaking practices, wine classification, and wine labelling. These issues are addressed in various instruments of European wine legislation, in particular the basic common

1 'The Imported Wine Market in China 2018' (*European Commission*) <https://ec.europa.eu/chafea/agri/en/content/imported-wine-market-china-2018>.

2 'Wine: Support and Protection of EU Grape Growers, Wine Makers, Traders and Consumers Through Policy, Legislation, Labelling, Trade Measures and Market Monitoring' (*European Commission*) <https://ec.europa.eu/info/food-farming-fisheries/plants-and-plant-products/plant-products/wine_en>.

3 Eurostat, 'Wine Market Observatory, Dashboard: Wine (Market Data)' (European Commission 2019) <https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/wine-dashboard_en.pdf>.

4 Meloni G, and Swinnen J, 'The Political Economy of European Wine Regulations' (2013) 8 Journal of Wine Economics p.245.

5 Directorate-General for Internal Policies, 'The Liberalisation of Planting Rights in The EU Wine Sector' (European Parliament 2012) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/474535/IPOL-AGRI_ET(2012)474535_EN.pdf>.

 | DOI:10.1163/9789004438316_013

market organization Regulation 1308/2013,[6] which is read and interpreted in combination with delegated and implementing regulations, and further supplemented by guidelines and legal interpretations.[7] In this chapter, we discuss three regulations: Regulation 1308/2013, the delegated Regulation 2019/33[8] and the implementing Regulation 2019/34.[9] The latter two entered into force on 14 January 2019 and lay down rules on the application for protection of designations of origin, geographical indications and traditional terms in the wine sector.

This chapter focuses only on one aspect of the EU wine regulatory framework, namely the protection of traditional terms for wine (TTW).[10] TTW present recognized expressions of quality for wine products. They are used in two ways: first, to indicate the specific type of indication under which the wine product is protected, like a protected designation of origin (PDO) or protected geographical indication (PGI); or second, to describe product characteristics, like ageing processes, or production systems that are traditionally used to indicate the quality of the product.

Such terms are not particularly well-known, neither is the protection they enjoy. While they share similarities with geographical indications (GIs),[11] they do not form part of the body of intellectual property (IP) rights. The TRIPs Agreement does not cover TTW, nor does EU IP law. Nevertheless, the EU wine regime protects TTW, in a manner that is very akin to the regime in place for PDOs and PGIs.

6 Council Regulation (EC) No 1308/2013 of 17 December 2013 establishing a common organization of the markets in agricultural products, (OJ L 347, 20.12.2013).

7 'The EU Wine Legislation' (*European Commission*) <https://ec.europa.eu/info/food-farming-fisheries/plants-and-plant-products/plant-products/wine/eu-wine-legislation_en>.

8 Commission delegated regulation (EU) 2019/33 of 17 October 2018 as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector (OJ L 9, 11.1.2019).

9 Commission implementing regulation (EU) 2019/34 of 17 October 2018 laying down rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of The Council as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector, the objection procedure, amendments to product specifications, the register of protected names, cancellation of protection and use of symbols, and of Regulation (EU) No 1306/2013 of The European Parliament and of The Council as regards an appropriate system of checks (OJ L 9, 11.1.2019).

10 Traditional terms for wine are interchangeably indicated as traditional terms or 'TTW' throughout the chapter.

11 The term geographical indication (GIs) is used here according to the definition of the TRIPs Agreement, encompassing both PDOs and PGIs.

Countries outside of the EU do not protect such terms.[12] However, if foreign producers of wine products want to enter the EU market, the terms used to describe their wine products on the packaging or label cannot conflict with a traditional term protected in the EU. If they do, the products cannot be marketed in the EU. In order to increase protection of EU traditional terms abroad and to allow foreign wine producers to enter the EU market, the EU has concluded agreements with third countries, through which certain TTW are protected. At the same time, producers from some of these countries receive dispensation to enter the EU market, even when using TTW that are protected in the EU.

On the basis of doctrinal research into the most recent EU legislation, trade agreements, case-law and policy developments, we analyze how TTW are protected within and outside the EU. We assess the EU application, examination, opposition and infringement rules for TTW and compare them to the framework in place for GI s. In the second part, we address the question of how third countries can protect TTW in the EU. Some countries have concluded bilateral agreements with the EU, agreeing on certain standards of protection and dispensations. Others have directly applied to the EU for the recognition of their TTW, but in most cases without success. This has led countries like the United States and Argentina to declare the EU system as being discriminatory.

2 What Are Traditional Terms?

Traditional terms refer to certain expressions that traditionally are associated with specific wines bearing a designation or indication of origin. Article 112 of Regulation 1308/2013 defines traditional terms as terms traditionally used in Member States to designate:

1) that the product has a PDO or a PGI under Union or national law; or
2) the production or ageing method or the quality, colour, type of place or a particular event linked to the history of the product with a PDO or PGI.

2.1 *Types of Traditional Terms*

In essence, two different types of TTW exist. The first type is straightforward and basically expresses in the different languages of the Member States that these wine products are protected by a PDO or PGI. The terms used are,

12 Switzerland protects traditional expressions to the extent that it reserves certain terms for products from particular cantons but does not set up its own protection regime. See section 4.

however, not identical to a PDO or PGI, but refer to different national schemes in the various countries that are reserved to indicate a product with a PDO or PGI. Well-known national schemes that refer to wine protected under a PDO are *appellation d'origine contrôlée* (AOC) in France, *denominazione di origine controllata* (DOC) in Italy, *denominação de origem controlada* (DOC) in Portugal and *denumire de origine controlată* (DOC) in Romania. Indications like the German term *Landwein*, the Spanish *Vin de la Tierra*, the Hungarian *Tájbor* or the French *Vin de Pays*, on the other hand, refer to a product protected under a PGI.

For the second type of TTW, words, phrases, initials or numerals are used to convey information about specific production or ageing methods, or other characteristics of a product with a PDO or PGI. That can also be an event linked to the history of the product. Table 12.1 produced by Corsinovi and Gaeta illustrates how important type 2 terms relate to either the place of origin, production and ageing methods, other quality characteristics, historical terminology used with wines in those regions, colour, or a combination of quality characteristics and historical typology.

In total, 377 TTW have been registered in the EU.[13] 114 of them belong to the first type, namely terms that indicate that a product falls under a PDO or PGI, by referring to the relevant national scheme in the country's own language. 263 terms fall under the second category, describing the quality of wine or particular production processes. Protected terms range from describing wine as *young*, *old* or *premium,* to port as *tawny*, *ruby*, *vintage* or *crusted* and sherry as *cream*. The French term *château* refers to a historical expression that is related to a type of area and a type of wine, and it is reserved to wines coming from an estate. Other designations can consist of initials – *GD*, *IP* and *LP* indicate specific types of Marsala from Italy.[14] All TTW are available online in the E-Bacchus database.[15]

Similar to trademarks, TTW are registered in relation to the category of wine product they are used for. There are seventeen[16] categories of wine products

13 Number based on the information available on e-Bacchus database of the European Commission <https://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?event=resultsPTradTerms&language=EN>. However, not all traditional terms protected through agreements with third countries have been included in the e-Bacchus database. See section 4.2 of the present chapter.

14 Kennedy M, 'Sober reflection on traditional terms for wines' (2018) 8(2) Queen Mary Journal of Intellectual Property, p. 116.

15 *See* European Commission, E-Bacchus database <https://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?language=EN>.

16 The complete list of products is provided under Annex VII (Part II) of Regulation 1308/2013.

TABLE 12.1 The main traditional terms as referred to Regulation (EC) N. 607/2009

States	Place of Orgin	Production and Ageing Method	Quality Characteristics	Historical – Wine Typology	Color
Italy	Classico	Cannellino; Fine; Governo all'uso toscano; Occhio di Pernice; Passito or Vino passito; Liquoroso Rebola; Scelto, Stravecchio; Superiore Oldo Marsala; Torchiato; Vecchio; Verdolino; Vergine; Vino Fiore; Vino Novello or Novello, Vivace	Rierva; Superiore; Vendemmia Tardiva; Vermiglio	Amarone; Cerasuolo; Garibaldi Dolce (*or* GD); Recioto; Sangue di Giuda; Sciacchetrà; Soleras, Torcolato; Vin Santo or Vino Santo	Ambra; Ambrato; Claret; Chiaretto; Fiori d' Arancio; Rubino Oro
France	Château Clos	Vin jaune; Hors d' âge; Rancio; Sélection de grains nobles; Sur lie; Vendanges tardives; Vin de paille	Cru artisan Cru bourgeois Cru classé, *whether or not supplemented by* Grand, Premier Grand, Deuxième, Troisième, Quatrième, Cinquième; Grand cru; Villages		Ambré; Clairnet; Caret;

Spain	Añejo; Chacolí-Txakolina; Clásico; Criaderas y Solera; Crianza; Fondillón; Pajarete; Pálido; Solera; Sobremadre; Gran Reserve; Lágrima; Noble; Olosoro; Vino Maestro; Vendimia Inicial; Vino de Tea	Amontillado; Fino; Superior;	Dorado
Portugal	Canteiro; Frasqueira; Garrafeira; Nobre; Solera; Leve; Lagrima	Fino; Superior; Super Reserva; Reserva velha (ougrande reserva); Vintage	Escurbo; Ruby

SOURCE: GAETA, DAVIDE AND CORSINOVI, PAOLA, (2015), TRADITIONAL TERMS AND APPELLATION WINES DEBATES IN SIGHT OF TTIP NEGOTIATION, P. 9

that applicants can choose from, for example wine, wine from overripe grapes, liqueur wine or sparkling wine. The classification is dependent on a number of factors, including the actual alcoholic strength of a wine product, stage of fermentation, source of the product (whether fresh grapes, grape must or wine), etc. When registered for one category of wine products, protection is limited to that category: only where the registered term is used for the listed product categories, an infringement can occur. However, it is rather common that a traditional term is used and registered for more than one category of wine products. *Clos,* for example, is protected for ten product categories from France.[17]

2.2 *Objectives*

Avoiding consumer confusion is the main objective pursued by the protection of TTW. Consumers should not be misled as to the indication with which the product is protected or regarding product characteristics and quality conveyed by TTW.[18] This objective is identical with the rationale for protecting trademarks and GIs: conveying truthful information to consumers reduces their search costs on the market when making purchasing decisions.

Another objective is the protection of the economic importance of TTW and ensuring fair competition among producers of wine products.[19] Producers of EU wines have built a strong reputation regarding the quality of their wine; this quality, among others, is expressed through traditional terms.[20] Limiting the use of such terms to only those users who comply with the established conditions and prohibiting others from using them, preserves this reputation. At the same time, producers that used the traditional term prior to the grant of protection should be able to use the term under conditions of fair competition.[21]

One of the objectives of the recent amendments to the EU regulatory framework is to simplify and harmonize the grant of protection to TTW, where possible, with the procedures applicable to PDOs and PGIs.[22] However, the draft as

17 E-Bacchus database, supra 15.

18 *See* Recital 23 of Regulation 2019/34.

19 *See* Recitals 23 of Regulation 2019/33 and Regulation 2019/34.

20 "The use of traditional terms to describe grapevine products is a long-established practice in the Union." *See* Recital 23 of Regulation 2019/33.

21 *See* Recital 27 of Regulation 2019/44.

22 Recital 23 of Regulation 2019/33 sets out: "Furthermore, the procedures concerning the grant of protection to traditional terms should be simplified and harmonised, where possible, with the procedures applicable to the grant of protection to designations of origin and geographical indications.".

well as the adopted version of the new wine regulations[23] attracted significant criticism from a number of stakeholders, including the European Federation of Origin Wines. In a statement by its President, the Federation laments the lack of clarity in the proposed draft. According to them, the Commission has actually "taken another step towards deregulation of the sector".[24] The complexity of the current regulatory framework applicable to wine products, specifically the different requirements regarding labelling, GIs and TTW, make it hard for wine producers to comply with the rules and avoid conflict.

What is surprising is that the protection of tradition is not specifically mentioned as an objective. This is different from GIs, the purpose of which, among others, is to preserve rural development,[25] and thus arguably traditional products and processes. Kennedy highlights that where traditional terms for wine in the official language of its country of origin must have been used at least five years prior to the application for protection,[26] this may not be a sufficient period of time to really target terms that have been used in a long-standing fashion.[27] In comparison, the scheme for traditional specialties guaranteed (TSGs) protected in the EU requires a period of protection of at least 30 years, which is meant to allow transmission between generations.[28] This means that the rules applicable to traditional terms for wine do not emphasize tradition as an objective.

2.3 *Relationship with Intellectual Property Rights*

TTW are not considered a form of intellectual property. While standards of protection for GIs,[29] and even additional protection for GIs for wines and spirits,[30] are included in the TRIPS Agreement, TRIPS does not address TTW. WTO Members hence are under no obligation to confer protection to traditional terms.[31] The fact that TTW are not part of IP rights means that the principles, international dispute resolution systems and enforcement rules are not the same as those applicable to IP rights.

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23 *See* Regulation 2019/33 and Regulation 2019/34.

24 *See* European Federation of Origin Wines, 'Proposals from The European Commission for A 'Simplification' of The Wine Legislation: EFOW Denounces a Hidden Reform of the Sector' <http://efow.eu/proposals-from-the-european-commission-for-a-simplification-of-the-wine-legislation-efow-denounces-a-hidden-reform-of-the-sector/>.

25 *See* Art. 1(1) of Regulation 1151/2012.

26 *See* Art. 27(2)(a) of Regulation 2019/33.

27 Kennedy 2018 (supra 14), p. 116.

28 *See* Art. 3(3) of Regulation 1151/2012.

29 *See* Art. 22(1) of TRIPS Agreement.

30 *See* Art. 23(1) of TRIPS Agreement.

31 They fall under the category of technical regulation under the Agreement on Technical Barriers to Trade (TBT Agreement). See Kennedy 2018 (supra 14), p. 127.

The connection with GIs, or to be precise with PDOs and PGIs, is strong because the protection of TTW is always linked to a product that is protected through an EU PDO or PGI, or a national protection scheme that corresponds to a PDO or PGI. Examples of national schemes are AOC for France, DOC for Italy, Portugal and Romania or *Landwein* for Germany and Austria. Products that do not benefit from such a protection scheme, by definition, do not qualify for protection under TTW.

One therefore needs to be careful when assessing the protection schemes applicable to wine products: when wine products indicate a TTW on their label, it means that they are also protected by an EU PDO or PGI, or a national protection scheme. But only type 1 traditional terms tell the consumer under which national scheme of protection it is protected. Type 2 terms generally do not indicate the relevant scheme of protection. Some terms, like *amarone* or *clos*, however, are included in the name protected as a PDO and under the corresponding national protection scheme.[32]

3 Protection of Traditional Terms in the EU

The subject-matter, conditions and scope of protection of TTW are rather similar to those of GIs. In this section, we discuss procedural as well as substantive aspects of protection in order to highlight the recent amendments to the law as well as the similarities and differences with GIs.

3.1 *Application for a Traditional Term*

Within the EU, the competent authorities of Member States can submit applications for TTW to the Directorate General for Agriculture and Rural Development of the European Commission.[33] Relevant competent authorities are communicated to the Commission and listed on its website.[34] Overall, these are the specific public bodies or departments in Ministries dedicated to the wine sector. In

32 *Amarone* is contained in the indication 'Amarone della Valpolicella', which is protected as an EU PDO and Italian *Denominazione di Origine Controllata e Garantita* (DOCG). *Clos* is also contained in the designations 'Clos des Lambrays', 'Clos de la Roche', 'Clos de Vougeot/Clos Vougeot', 'Clos de Tart', 'Clos Saint-Denis', 'Chambertin-Clos de Bèze', which are also protected as EU PDOs and as French AOCs.

33 *See* Art. 25(1) of Regulation 2019/33.

34 European Commission, Applications for wine sector <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/registration-name-quality-product/applications-wine-products_en>.

some countries like Germany, the relevant authorities differ from Bundesland to Bundesland,[35] and in many cases even within a Bundesland from one region to another.[36]

The regime for TTW applications is different for third countries: both competent authorities and representative professional organizations established in third countries can make an application for a traditional term. We explain in section 4.1. in more detail which organizations are covered, but generally, these are producer groups operating in an area covered by a designation of origin or geographical indication.[37]

Comparing the application procedures for TTW with those applicable to PDOs and PGIs, we find that only the producer groups who work with the products in question can apply for a PDO or PGI.[38] In this regard, the application procedure for TTW from third countries, allowing representative professional organization to make the application, is more in line with the application procedures for PDOs and PGIs, than for traditional terms from an EU Member State.

When applying for a traditional term, the competent authority must provide a variety of information. This recently added list in Article 26(1) of Regulation 2019/33 includes:

(a) the name to be protected as a traditional term;
(b) the type of traditional term, whether it falls under Article 112(a) or (b) of Regulation (EU) No. 1308/2013;
(c) the language in which the name to be protected as a traditional term is expressed;[39]
(d) the grapevine product category or categories concerned;
(e) a summary of the definition and conditions of use;
(f) the protected designations of origin or protected geographical indications concerned.

In addition, a copy of the relevant national legislation governing the use of the term must be added.[40] The same information is also requested in the

35 All sixteen German Bundesländer list several authorities, *see* Ibid.

36 By way of example, the Bundesland Baden Württemberg lists 49 different competent authorities, *see* Ibid.

37 *See* Art. 25(2) of Regulation 2019/33.

38 *See* Art. 49(1) of Regulation 1151/2012.

39 Art. 24 of Regulation 2019/33 requires a traditional term to either be registered in the official or regional language of a Member State or third country from which the term originates, or in the language used in trade for this term. If the original script is not in Latin characters, the term shall be registered in both scripts.

40 *See* Art. 26(2) of Regulation 2019/33.

applicable form in Annex VII Application for Protection of Traditional Term to Regulation 2019/34.[41] Here, the information required has also been harmonized with the information requested in the Single Document for PDO and PGI applications.[42]

3.2 *Grounds of Refusal of Traditional Terms within the EU*

> Protection should only be granted to traditional terms that are *widely known and have a significant economic impact* on the grapevine products for which they are reserved.[43]

Even though Regulation 2019/33 does not speak about grounds for refusal, there are a number of criteria that a traditional term must fulfil, otherwise it will be refused registration. According to Article 27(1) and (2), a traditional term must

1. fulfil the definition of Article 112 of Regulation 1308/2013, being
   a. either a term used to indicate that the product has a protected indication of origin (type 1), or
   b. a term to designate the production or ageing methods or product characteristics or a product protected by a geographical indication (type 2);
2. be used in trade
   a. in a large part of the Union, or
   b. in at least the territory of the Member State or third country in question *if* the name is also reputed
3. be traditionally used
   a. for at least five years if used in the official language of the country where the term originates from, or
   b. for at least fifteen years if used in a language used in trade;
4. has not become generic (defined as the common name of the product in Article 27(3) Regulation 2019/33); and
5. be defined in the Member State's or third country's national legislation.

In other words, these conditions make sure that terms belong to type 1 or 2 TTW, that they either have a reputation in their country of origin or have been used in a significant part of the EU, that they have been used for a certain period of time and that they are not generic. In relation to the latter, as the

41 Art. 30(3) of Regulation 2019/34 provides that applicants need to use these forms and send them via email to the Commission.

42 *See* Annex I of Regulation 2019/34.

43 *See* Recital 27 of Regulation 2019/44 [emphasis added].

definition for generic terms is almost identical with that used in relation to GI s, it is expected that the assessment of a term's genericity will follow the case law on GI s.[44] In any case and identical to GI s,[45] as long as TTW are protected, they cannot become generic in the EU.[46]

Article 27 also establishes that it is sufficient that a term has been used in the official language for at least five years to be protected. However, use for at least five years may not be sufficient to confer protection where another producer in another country has also made traditional use of the term. This is what the European Court of Justice found in relation to 'crémant', a term which France and Luxembourg applied for protection as a traditional term.[47] However, Codorníu from Spain had made traditional use of the term under its trade mark 'Gran Cremant de Codorníu' since 1924, while the traditional description 'crémant' had been adopted in France and Luxembourg only in 1975. The Court therefore found that the reservation of the term to France and Luxembourg could not be justified.

3.3 *Objection Procedure*

An interest like that of Codorníu can be raised in the mandatory objection procedure foreseen by Section 2 of Regulation 2019/33. According to Article 30, objections can be raised by Member States, third countries or any natural or legal person having a legitimate interest on the grounds that

- one of the conditions of Article 27 Regulation 2019/33 is not fulfilled;
- a conflict with a trademark exists; or
- it concerns a homonymous term.

The first ground has already been dealt with in section 3.2, the other two will be addressed below. An objection is only admissible if it is filed with the Commission, using the form in Annex XI of Regulation 2019/34, "within two months of the date of publication, in the Official Journal of the European Union, of the implementing act."[48] The objection must contain details of facts, evidence and comments, accompanied by relevant supporting documents.[49] Such an

44 *See* Moerland, A., 'Descriptive Terms in International Trade' in: Heath, C., Kamperman Sanders A. and Moerland A. (Eds.), Intellectual Property Rights as Obstacles to Legitimate Trade?, IEEM International Intellectual Property Series vol. 9, Wolters Kluwer, pp. 95–96.

45 *See* Art. 103(3) of Regulation 1308/2013.

46 *See* Art. 113(3) of Regulation 1308/2013.

47 *See* C-309/89 *Codorníu SA v Council of the European Union* [1994] ECR I-1853. ECLI:EU:C:1994:197.

48 *See* Art. 22(1) of Regulation 2019/34.

49 *See* Art. 23(1) of Regulation 2019/34; the rules applicable to the objection procedure are almost identical for the cancellation procedure as well, *see* Art. 28 and 29 of Regulation 2019/34.

objection or opposition procedure also exists for GI registration within the EU, where the time limit for Member States, third countries or natural or legal persons with a legitimate interest is also two months.[50]

The Commission will first decide whether to reject the objection, after having given the objector the chance to rectify any missing details or documents.[51] If the objection is not rejected, the applicant will be informed and has two months to submit its observations. The objector can then again submit comments on these observations within two months of the issuance date of the observations. The Commission will eventually either reject or recognize the traditional term, having taken all evidence into consideration.[52]

3.4 *Relationship with Trademarks*

Grounds that can be brought in an objection procedure (or in an infringement procedure) include the existence of a trademark that consists of or contains a TTW, but where the TTW 1) does not fulfil the definition and conditions of use of that term, or 2) relates to a product different from the listed categories. In other words, if the product for which the trademark is used complies with the conditions of the TTW, the mark can contain the TTW. An example would be the wine carrying the trademark 'Clos des Lunes', where the wine fulfils the conditions of the traditional term *clos*.[53]

There are three situations in which TTW can conflict with a trademark, supposing the product does not comply with the TTW conditions. The three situations are identical to the rules applicable to GIs.[54] The most straightforward rule applies to posterior marks, so marks where the application of the mark is submitted after the TTW application. In such a situation, the trademark will be refused or invalidated.[55] The equivalent rule is included in the most recent amendment of the trademark instruments in the EU as an absolute ground of refusal.[56]

The second situation arises where we are dealing with prior marks, so marks that have been registered before the traditional term application. Where the earlier trademark does not have a reputation and renown, but has been applied for, registered or established by use in good faith, it may continue to be

50 *See* Art. 98 of Regulation 1308/2013.
51 *See* Art. 23(3) of Regulation 2019/34.
52 *See* Art. 31 of Regulation 2019/33.
53 Kennedy 2018 (supra 14), p. 118.
54 *See* Art. 102 and 101(2) of Regulation 1308/2013.
55 *See* Art. 32(1) of Regulation 2019/33.
56 *See* Art. 7(1)(k) of Regulation 2017/1001 and Art. 4(1)(j) of Directive 2015/2436.

used and renewed notwithstanding the protection of a TTW.[57] In effect, this means that prior trademarks used in good faith can coexist with the TTW; both enjoy protection. Trademark owners are then prohibited from enforcing their rights against legitimate users of the TTW.

The last situation regards prior marks that have a reputation and renown. Here, one has to assess whether the protection of the TTW would be able to mislead the consumer as to the true identity, nature, characteristic or quality of the wine product. If such confusion is likely to exist, protection of the TTW shall be refused.[58] In order to make this argument, the trademark holder needs to provide the proof of filing or use of the mark and its reputation and renown.[59]

3.5 *Relationship with Homonymous Traditional Terms*

Another ground of refusal concerns the situation where a TTW is wholly or partially homonymous with an already protected traditional term, PDO, PGI or wine grape variety name.[60] What this means is that the term is fully or partially identical with an already protected term, but both terms genuinely refer to the conditions and wine products the term stands for.

In this situation, the consequence is identical to that applied to homonymous GIs:[61] the TTW shall be registered where local and traditional usage minimizes the risk of confusion and where a sufficient distinction is applied in practice.[62] The aim is that producers of the products protected under both terms should be treated in an equitable manner. Where the homonymous term applied for misleads consumers as to the nature, quality or the true origin of the wine products, it shall not be registered.

An important difference with the law on PDOs and PGIs is that many homonymous traditional terms exist that are protected by several countries for different types of wine products and conditions. For example, *château* is protected for nine wine products from France and almost the same wine products from Italy. *Premier cru*, on the other hand, is protected for high quality wine and sparkling wine in France, but in Luxembourg for the more general category of wine. The case of *reserva* again indicates a further variation. It is not only protected both in Portugal and Spain for different wine products, but also

57 *See* Art. 32(3) of Regulation 2019/33.
58 *See* Art. 32(2) of Regulation 2019/33.
59 *See* Art. 23(2) of Regulation 2019/34.
60 *See* Art. 33(2) of Regulation 2019/33.
61 *See* Art. 100 of Regulation 1308/2013.
62 *See* Art. 33(1) of Regulation 2019/33.

within Portugal, it is protected for the wine products wine, liqueur wine, sparkling wine and quality sparkling wine, but then under different conditions.

Apparently, registration of these homonymous terms was possible because consumers are not likely to be confused and sufficient distinction is guaranteed in practice. Arguably, consumers know that if *reserva* is used on port wine, it refers to something different than if used on Marsala or sparkling wine. Nevertheless, this makes the system prone to criticism, particularly when the EU refuses the protection of the same term in third countries, by referring to the possible confusion among consumers.[63]

3.6 *Scope of Protection*

TTW that fulfil the conditions mentioned in Article 112 of Regulation 1308/2013[64] are protected against misuse and misleading use. In particular, Article 113(2) of Regulation 1308/2013 specifies three situations included in the scope of protection:

a) any misuse, including where accompanied by de-localizer expressions, such as style, type, method, as produced in, imitation, flavor, like or similar;
b) any other false or misleading indication as to the nature, characteristics or essential qualities of the product, placed on the packaging, advertising or commercial documents (such as invoices or delivery forms);[65] and
c) any other practice likely to mislead the consumer, in particular to give the impression that the wine qualifies for the protected traditional term.

The legal grounds against which TTW are protected are similar to those applicable to GIs,[66] with two important exceptions. First, TTW are not protected against any direct or indirect commercial use of the protected term for comparable products, or any use that exploits the reputation of the traditional term.[67] This is an important ground under GI law, as it does not require misleading use or misuse; for PDOs and PGIs, it is sufficient that a similar indication is used in commerce for comparable products or in a way that exploits a product's reputation. The scope of protection for TTW, in this respect, is more limited as compared to GIs.

63 *See* also section 4.3.
64 *See* Section 2.1 for type 1 and type 2 TTWs.
65 Kennedy 2018 (supra 14), p. 117.
66 *See* Art. 103(2) of Regulation 1308/2013.
67 *See* Art. 103(2)(a) of Regulation 1308/2013.

Second, the above situation a) (protection of TTW against any misuse) does not specifically mention evocation of the term as an actionable ground. Evocation is a concept that under GI law has been successfully used by right holders to prohibit others from using a similar name that evokes the GI.[68] Whether misuse may still cover many of the same situations that for GIs were handled under evocation is not clear.

Furthermore, in order to find an infringement of a TTW, not only one of the situations a), b) or c) need to be fulfilled. In fact, the uses described in those situations are only infringing if the TTW is used in the language it is registered for. Where another language is used to, for example, describe *cream* sherry with the German translation 'cremig', that would not amount to an infringement.

This is supported by a judgment of the German Higher Administrative Court of Rhineland Palatinate, which decided that the use of the term 'superior' on a German label for a German wine did not infringe upon the identical protected traditional term *superior* for wines from Portugal and Spain.[69] The Court noted that the term 'superior' is the same in German as in Portuguese and Spanish, and that the fully German label indicates that the German language version was used. Importantly, the Court also found that there was no risk for misleading the average consumer into believing that the German wine fulfills the production conditions of Portuguese or Spanish wines.

Indeed, while protection for TTW is limited to the registered language, use of the term in a different language can, under circumstances, be confusing or misleading for a consumer. In particular, this may be the case for terms that are protected under several languages, such as *reserva*, which is protected in seven languages.

Finally, similar to trademarks, the use of a term protected as a traditional term is only infringing if it is used for the same category of wine products for which it has been registered. For several TTW, this limitation of protection to the registered category of wine products is less problematic as it is protected for various categories of wine products, thereby enlarging the scope of protection.

In summary, protection is conferred to TTW that 1) fulfil the definition in Article 112 of Regulation 1308/2013, 2) where they are used in the registered

68 *See* for example C-87/97 *Consorzio per la tutela del formaggio Gorgonzola v. Käserei Champignon Hofmeister GmbH & Co. KG and Eduard Bracharz GmbH* [1999] ETMR 135. ECLI:EU:C:1999:115.

69 Decision by Oberverwaltungsgericht Rheinland-Pfalz from 10.09.2015, Aktenzeichen: 8 A 10345/15 und 8 A 10799/15. http://www.landesrecht.rlp.de/jportal/portal/t/7qe/page/bsrlpprod.psml?pid=Dokumentanzeige&showdoccase=1&doc.id=MWRE150002779&doc.part=L.

language, for 3) the category of wine products registered, and 4) where at least one of the three situations of misleading use or misuse is fulfilled.

3.7 *Enforcement*

Since TTW do not constitute intellectual property rights, they do not benefit from the measures agreed upon in Directive 2004/48.[70] Nevertheless, EU Member States have agreed that national authorities shall take all measures to prevent or stop the marketing, including the export of products that make unlawful use of a protected TTW.[71] These measures can be judicial or administrative. Importantly, national authorities shall act on their own initiative or at the request of a party – a special regime also applicable to GI s. This means that for example customs authorities at the border shall apply appropriate measures where they suspect wine products that make unlawful use of TTW. The advantage is that producers benefitting from a traditional term do not have to bear the risk and costs of preventing unlawful products, which holders of IP rights, except of GI s, generally have to.

4 Protection of Traditional Terms and Third Countries

In the absence of an international obligation, TTW are not protected in most countries other than EU Member States. Switzerland is a jurisdiction outside the EU that confers protection to traditional expressions, even though no substantive standards similar to those in the EU exist.[72] While most third countries do not protect TTW in their home countries, they have an interest in protecting TTW they use in the EU because failure to do so prohibits them from exporting their wine products into the EU wine market if the TTW is identical to an EU protected TTW. With the EU being the biggest wine market in the world, the inability to access the EU market entails substantial economic losses.

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70 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004).

71 *See* Art. 26 of Regulation 2019/34.

72 In fact, the Swiss Regulation 916.140 (Verordnung über den Rebbau und die Einfuhr von Wein) from 14.11.2007 sets out in Article 23 that 'country wines' or 'vin de pays' with traditional expressions are protected. Annex 3 lists such expressions from the different cantons. The laws of the different cantons determine these expressions. None of the laws, however, sets out standards of protection or procedures for applications. See also RÈGLEMENT 916.125.2 sur les vins Vaudois (RVV) du 27 mai 2009, chapitre VIII for canton Vaude and SGS 916.142 Verordnung über den Rebbau und den Wein (VRW) vom 17.03.2004, section 8 for canton Wallis.

Wine producers from third countries are required to seek formal recognition for a TTW if they intend to introduce their wine products into the EU market and the term corresponds to a pre-existing traditional term in the EU. In fact, it is only in relation to TTW that are protected in the EU that a need for a dispensation, mutual protection or a direct registration arises. Where a TTW from a third country does not correspond to a protected EU traditional term, a foreign wine producer is free to use said term on its wine labels and to import the wine into the EU,[73] in accordance with the rules of the corresponding third country.

For instance, wine manufacturers intending to use the term *classic* (or its variants such as *classico*) to describe their wine product, are required to seek recognition of the traditional term in the EU, as it conflicts with three pre-existing terms from Austria, Germany and Italy. Even if wine producers have been using the term *classic* within their home country for a number of years, they are only permitted to use the term on products in the EU market after they have obtained formal recognition in the EU.

There are two primary modes for a third country (or an applicant from a third country) to secure recognition of a TTW in the EU. The first is by filing an application directly to the European Commission. The second is done by way of bilateral agreements between the third country and the EU. This section analyses these two modes and addresses some concerns raised regarding discrimination among third countries.

4.1 *Protection of Traditional Terms from Third Countries through Direct Application*

In order to obtain recognition from the European Commission, TTW from third countries have to comply with all requirements that are also applicable to the protection of TTW from within the EU. In particular, a TTW from third countries must comply with the definition of a traditional term in Article 112 of Regulation 1308/2013, it must have been traditionally used in trade in a large part of the third country and it cannot be generic. If the applicant also indicates the language and category of wine products for which the TTW is applied for, a TTW from a third country can be registered, as elaborated under section 3.2.

An application for the registration of a TTW from a third country may be filed with the European Commission either by the competent authority of the third country or a representative professional organization established in the third country.[74] The expression 'representative professional organization' is

73 Art. 38(2) of Regulation 2019/33.

74 Art. 25(1) of Regulation 2019/33.

intended to describe an organization or an association of organizations established and operating in a particular area of the third country, which is involved in the production of grapevine products and has adopted the national rules regarding the production and protection of said grapevine products.

It is interesting to note that hardly any application from a third country has been registered by way of the application procedure. Twenty-nine countries have registered TTW in the EU. The United States of America is the only non-EU jurisdiction (next to the United Kingdom) which has successfully registered TTW (*classic* and *cream*) in the EU. These two terms were part of the twelve applications that wine producer groups from the United States filed in 2010 for registration as TTW in the EU. The other ten applications remain pending to date. It has been a point of concern for the United States that the EU does not provide any update on the status of the pending applications filed and that timelines regarding the registration or rejection of these TTW in the EU are absent.

The statement provided by the EU in response to such allegations has generally not been very clear or specific.[75] The EU stated that the pending applications were still under consideration and no precise deadline regarding the decisions were provided. Moreover, the EU also remarked that the concerns of third countries were taken into account during the simplification of the EU wine policy *i.e.* the development of new regulations. However, as discussed under section 4.3 of this chapter, the new wine regulations do not appear to sufficiently address the issues raised by third countries regarding the protection of TTW.

4.2 *Protection of Traditional Terms through Bilateral Agreements*

Since the protection of TTW by filing applications to the European Commission is riddled with drawbacks, the main avenue for third countries to obtain recognition for their TTW in the EU is through bilateral agreements.[76] Almost all TTW from third countries protected in the EU have been agreed upon through this manner. Since 2000, the EU has set out to conclude multiple bilateral agreements with almost all major exporters[77] of wine, such as Argentina, Chile, and the United States of America.[78] The agreements may broadly be

75 Statement by The European Union to The Committee on Technical Barriers To Trade 21 and 22 March 2018 (World Trade Organization, 2018), G/TBT/W/483.

76 Kennedy 2018, supra 14, p. 125.

77 *See* European Commission, Wine Dashboard https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/wine-dashboard_en.pdf.

78 However, the EU has not been able to set up an agreement with New Zealand so far.

categorized into three classes: agreements conferring 1) mutual recognition, 2) protection for EU TTW and dispensations for third country TTW, and 3) no protection for EU TTW but temporary dispensations for third country TTW.

4.2.1 Mutual Recognition

The first category includes agreements in which both parties confer mutual protection to each other's TTW. This means that both parties list the TTW that the other party shall protect according to their national legislation. Important examples of this category include the EU-Switzerland Wine Agreement,[79] the EU-Chile Association Agreement[80] and the EU-Serbia Stabilisation and Association Agreement[81] (as an example of an agreement with a Western Balkan country that is not a substantial exporter of wine to the EU).

The EU-Albania[82] and EU-Montenegro Stabilisation and Association Agreement[83] (as examples of agreements with candidates for future enlargement) contain certain features of this category, but do not yet offer mutual recognition. Rather, they put an obligation on the non-EU party (Albania and Montenegro respectively) to take the necessary measures for the protection of EU TTW.[84] Furthermore, the TTW listed in Appendix 2[85] of both agreements are EU terms. No list of TTW from Albania or Montenegro have been provided in the agreements.

The EU-Switzerland Agreement, as an example of the first category of agreements, confers mutual protection to names of wine-sector products,[86] which include traditional terms (referred to as 'traditional expressions'). This is done

79 Agreement between the European Community and the Swiss Confederation on trade in agricultural products (OJ L 114, 30.4.2002).

80 Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other (OJ L 352, 30.12.2002).

81 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part (OJ L 278, 18.10.2013).

82 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (OJ L 107, 28.4.2009).

83 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (OJ L 108, 29.4.2010).

84 See Art. 7 of the EU-Albania and EU-Montenegro Association Agreement.

85 Appendix 2 of the EU-Albania and EU-Montenegro Association Agreement provide the list of EU traditional terms that will be protected in the non-EU party (Albania and Montenegro respectively).

86 *See* Art. 5(1) of Annex 7 (Title II) of the EU-Switzerland Agreement.

by way of lists that both parties have drawn up.[87] The Appendix of the EU-Switzerland Agreement lists traditional expressions from nine EU Member States.[88] Some of the important ones, which are also commonly recited in other EU agreements, including the EU-Chile Association Agreement and the EU-Serbia Stabilization and Association Agreement, are *tawny*, *vintage* and *ruby*.[89] In addition, the EU-Switzerland Agreement lists a number of specific Community TTW , which include variants of *vinho generoso*, *vino dulce natural* and *crémant*.

In contrast, all the other agreements between the EU and third countries included in the present section (as well as the EU-Australia Wine Agreement discussed later in section 4.2.2) do not list any Community TTW but merely the traditional terms of specific EU Member States. Overall, the amount of EU TTW protected varies between around 150 in the EU-Switzerland Agreement to 320 in the EU-Serbia Agreement. EU partners overall protect between 40% and 85% of their own TTW.

The list of Swiss traditional expressions has twenty-eight entries. Seven expressions, such as *clos* (France), *cru* (France and Portugal) and *grand cru* (France) are already registered in the EU. Others, such as *dorin*, *goron* and *fendant* are unique entries that have not been registered in any of the EU Member States. While the agreement provides provisions for the mutual protection of traditional expressions listed in the Appendix, it does not provide clear provisions on the protection of TTW arising in the future. This suggests that it will be a matter of negotiation to include future TTW in the Appendix.

Another specifically regulated area in mutual recognition agreements is the treatment of homonymous TTW, which parties protect in the same or similar way as within the EU.[90] The EU and Switzerland, for instance, confer protection

87 Section A of Appendix 2 of the EU-Switzerland Agreement provides the protected names for wine-sector products originating in the Community and Section B provides the protected names for wine sector products originating in Switzerland. Similarly, lists of mutually protected traditional terms are provided in Appendix III and Appendix IV of the EU-Chile Agreement and Appendix 2 (Part A and Part B) of the EU-Serbia Association Agreement.

88 The EU Member States listed in the Appendix include Germany, France, Spain, Greece, Italy, Luxembourg, Portugal, United Kingdom and Austria.

89 The EU-Switzerland Agreement includes 156 EU TTW (including 18 Community TTW) in the Annex. The EU-Chile Association Agreement includes 250 EU TTW, and the EU-Serbia Association Agreement lists 326 EU TTW.

90 *See* Art. 5(5) of Annex 7 (Title II) of the EU-Switzerland Agreement and Art. 8(5) of Annex V (Title I) of the EU-Chile Association Agreement. Contrarily, the EU-Albania Association Agreement and EU-Montenegro Association Agreement do not contain any provisions regarding the protection or recognition of homonymous TTWs from both parties.

to seven terms from Switzerland that are already protected in an EU Member State: the term v*in de pays* from Switzerland is already protected as a TTW from Belgium, France and Italy. Similarly, the term g*rand cru* from Switzerland is also protected as a TTW from France.[91]

The EU-Switzerland Agreement foresees that the Joint Committee on Agriculture[92] will lay down the practical conditions regarding the usage of the terms.[93] It also takes decisions regarding disputes that may arise in connection with TTW (in case of confusion or discrepancy regarding the meaning or distinction of homonymous terms)[94] and set up working groups that administer the current Annexes to the Agreement.[95] Similarly, Title II of the EU-Chile Association Agreement provides for the establishment of bodies such as the Association Council (Article 3) and Association Committee (Article 6), which are entrusted with ensuring the proper implementation of the provisions of the agreements and taking decisions in the event of a dispute.

Mutual recognition agreements also address the relationship with trademarks, yet only posterior trademarks. Parties generally agree to reject posterior marks, similar to the treatment within the EU.[96] For instance, the EU-Switzerland Agreement in Article 7(1) bars registration of a brand name for a wine-sector product which contains or consists of a traditional expression protected under the Annex of the Agreement.[97] Similarly, the EU-Chile, EU-Serbia and EU-Albania Association Agreements set out the same rule for posterior marks.[98]

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91 Other homonymous terms that are protected in both Switzerland and the EU include *clos*, *cru*, *landwein*, *premier cru* and *schiller*.

92 Art. 6 of Annex 7 (Title II) of the EU-Switzerland Agreement lays down provisions for the establishment of a joint committee on agriculture which is made up of representatives from both the parties.

93 Unlike the EU-Switzerland Agreement, Art. 8(6) of Annex V (Title I) of the EU-Chile Association Agreement provides that the parties are directly responsible for laying down the practical conditions of use for making a distinction between homonymous traditional expressions.

94 *See* Art. 5(5) of Title II of Annex 7 of the EU-Switzerland Agreement.

95 *See* Art. 6 (7) of Annex 7 of the EU-Switzerland Agreement.

96 *See* section 3.4 of the present chapter.

97 Unless the product originates in the place where the traditional expression is used.

98 Art. 10 of the EU-Chile Association Agreement, Art. 8(2) of the EU-Serbia Association Agreement, Art. 8(2) of the EU-Albania Association Agreement and Art. 8(2) of the EU-Montenegro Association Agreement.

4.2.2 Protection of EU Traditional Terms and Dispensations for Third Country Traditional Terms

The second category of agreements is not based on mutual recognition. Rather, third countries accept to protect EU TTW at home in exchange of dispensations for their producers to use on their products TTW already protected in the EU when importing their wine products into the EU. Substantive standards of protection agreed upon concern the treatment of EU TTW, including conflict rules with trademarks.[99] The EU-Australia Wine Agreement is the key example from this category.

The EU-Australia Wine Agreement confers protection to EU TTW listed in Annex III.[100] Unlike the level of recognition described in section 4.2.1 above, the agreement does not automatically recognize the listed TTW from Australia within the EU. Instead, it establishes dispensations that permit Australian wine producers to use the terms *cream*, *crusted/crusting*, *ruby*, *solera*, *tawny* and *vintage* as part of the labelling.[101] For instance, while the term *tawny* is protected as a TTW from Portugal for port wine in the EU, Australian wine producers are permitted to use the term in connection with Australian port (fortified) wines according to defined conditions of use.[102]

The protection afforded to EU TTW in Australia is similar to the protection afforded within the EU. The agreement entails a prohibition to use the listed EU TTW for the description or presentation of wine originating in Australia in the registered language and for the listed category of goods.[103] In addition, the listed traditional expressions may not be used to describe wine in connection with terms such as 'kind', 'type', 'style', 'imitation' etc. (see also section 3.6).[104] Such use is only allowed if the use of the specified terms does not mislead consumers or does not constitute an act of unfair competition.[105]

Also the rules regarding the relationship with trademarks are similar to EU rules. Posterior trademarks containing or consisting of a listed traditional expression will not be registered.[106] Prior trademarks applied for or used in good faith before the Agreement came into effect are not rejected, but shall co-exist with the listed traditional expressions (see also section 3.4 above).[107]

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99 *See* Art. 16(1), (2) and (4) of the Agreement between the European Community and Australia on trade in wine (OJ L 28/3, 30.1.2009).

100 *See* Annex III of the EU-Australia Wine Agreement.

101 *See* Annex V of the EU-Australia Wine Agreement.

102 *See* Annex III of the EU-Australia Wine Agreement.

103 *See* Art. 16(1) and (4) of the EU-Australia Wine Agreement.

104 *See* Art. 16(1) and (2) of the EU-Australia Wine Agreement.

105 *See* Art. 16(5) of the EU-Australia Wine Agreement.

106 *See* Art. 16(7) of the EU-Australia Wine Agreement.

107 Ibid.

4.2.3 No Protection for EU Traditional Terms but Temporary Dispensations of Third Country Traditional Terms

Finally, the third category regards agreements that do not set out protection standards for TTW. The EU-US Wine Agreement[108] is the prime example of such an agreement.[109] Although consensus regarding the level and scope of protection for TTW could not be reached under the agreement, the US were granted temporary dispensations in connection with the use of terms that are registered as TTW in the EU. The dispensations expired in 2009, which made wine producer groups from the United States file twelve applications to the EU for the recognition of their terms, of which only two have been granted so far.[110]

Argentina and New Zealand, despite being major wine producers in the New World, have not yet concluded any agreement with the EU regarding the protection of wine products or traditional terms. Pursuant to the foregoing, it becomes clear that while the EU has a strong interest in the protection of TTW, the interest of third countries often varies and may not align with that of the EU. It is for this reason that bilateral agreements with third countries differ regarding the degree of protection for TTW, including no protection at all.

In addition to the obvious impact bilateral agreements have on contracting states, they also have an impact on the relationship of the EU with other non-contracting parties. For instance, the rules regarding the relationship with trademarks included in some EU wine agreements[111] also have an impact on the fate of trademark applications from other jurisdictions. No matter whether a trademark application is made by a foreigner or an EU national, applications for posterior marks that contain or consist of a protected TTW from a third country or the EU have to be rejected.

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108 Agreement between the European Community and the United States of America on Trade in Wine (OJ L 87/2, 24.3.2006).

109 EU agreements with certain other third countries including Japan (Agreement between European Union and Japan for Economic Partnership), South Korea (Free Trade Agreement between European Union and the Republic of Korea), Colombia and Peru (Trade Agreement between the European Union and its member states, of the one part, and Colombia and Peru, of the other part) do not include any provisions for the protection of TTWs either. In contrast to the EU-US Wine Agreement, those agreements do not extend any dispensations to third countries.

110 *See* section 4.1 of the present chapter.

111 All agreements discussed under section 4.2.1 include provisions for the rejection of posterior trademarks that correspond to a registered traditional expression. Much on similar lines, Art. 16(7) of the EU-Australia Wine Agreement also prohibits the registration or use of a trademark that contains any of the EU traditional terms within Australia.

4.3 *Ongoing Conflicts regarding the Protection of Traditional Terms from Third Countries*

Although provisions extending protection to TTW from third countries were incorporated into the EU regime to avoid discrimination between wines originating from within the EU and from third countries, the protection of TTW from third countries in the EU has been riddled with controversies and criticism for a long time. While a number of countries have been critical of the EU wine regulations, Argentina and the United States of America have been especially vocal. In particular, they have remarked that the EU wine regime discriminates against non-EU grapevine products, that it is inconsistent with the commitments under the WTO, that it lacks transparency and has excessive bureaucratic delays.

4.3.1 Discrimination among Third Countries and Inconsistency with WTO Obligations

Third countries that do not yet have an agreement with the EU and have been unable to obtain authorization by way of the application procedure, assert that the registration of TTW from third countries in the EU by way of agreements is discriminatory against non-parties of such agreements. They believe that the EU only approaches major wine exporters and leaves other countries behind. Third countries have also asserted that this discriminatory behaviour is inconsistent with the EU's obligations under the WTO. Specifically, the EU's preferential treatment has been alleged to constitute a violation of the most-favoured-nation (MFN) obligation under the TBT Agreement[112] as well as under the GATT 1994.[113,114]

In particular, Argentina has, in absence of an agreement with the EU, applied directly to the European Commission to recognize two of its TTW, *reserva* and *gran reserva*. The same terms were already registered in Spain. The Spanish Government and Spanish Wine Federation objected to the registration of the Argentine TTW, arguing that such registration would create a likelihood of confusion among consumers.[115] So far, no decision has been taken and the applications have been pending for over ten years, an issue which Argentina has consistently raised before the TBT Committee at the WTO.[116]

112 *See* Art. 2.1 of the Agreement on Technical Barriers to Trade.

113 *See* Art. I:1 of the General Agreement on Tariffs and Trade 1994.

114 For a detailed discussion of such discrimination, *see* Kennedy 2018 supra 14, pp. 125 ff.

115 *See* Kennedy 2018 supra 14, p. 124.

116 Statement by Argentina to The Committee on Technical Barriers to Trade 6 and 7 March 2019 (*World Trade Organization, 2019*), G/TBT/W/605.

A similar discrimination claim has been made by the United States regarding the ten pending direct applications made in 2010 that have not yet been approved.[117] In particular, the United States' application for the protection of *clos* is still pending, while protection for the same term from Switzerland has been extended by way of bilateral agreement.[118]

4.3.2 Excessive Bureaucratic Delays and Lack of Transparency

The European Commission has been tardy in replying to a number of applications for TTW from third countries. A majority of applications from third countries has been pending for a number of years, while the applications from Argentina and the United States have now been pending for a decade. Excluding the registration of the terms *classic* and *cream* from the United States, all TTW from third countries that are protected in the EU have received protection by way of bilateral agreements.

Despite the delay in examining the applications, the EU does not provide an update regarding the processing of the applications. Moreover, the statements submitted by the EU to the TBT Committee also fail to provide clarity regarding the status of the pending applications. Unless the EU provides transparency regarding the fate or processing of third country applications, the provisions for filing a direct application for a TTW from third countries seem merely theoretical and futile in practice.

The EU had stated in the TBT Committee that they would take the concerns of third countries into account in the development of the new wine regime. However, the recent wine regulations do not overcome the drawbacks of their predecessor (now repealed) regulations. None of the provisions in the EU's new wine regime tackle or address the problems raised by third countries.

5 Conclusion

The protection of TTW is an important form of protection for wine products in the EU. But since they do not constitute intellectual property rights protected under the TRIPS Agreement, other countries in the world hardly protect them. Nevertheless, when wine importers to the EU market want to use TTW that are protected in the Union, they need to seek recognition from the EU.

117 Statement by The United States to The Committee on Technical Barriers to Trade 26 and 27 February 2020 (*World Trade Organization, 2020*), G/TBT/W/732.

118 *See* Section A of Appendix 2 of the EU-Switzerland Agreement.

Despite not being a category of intellectual property, the protection of TTW in the EU shares many similarities with the rules for geographical indications. In particular, the objectives of protection, the treatment of homonymous terms, conflicts with trademarks, the scope of protection and enforcement provisions are very akin to geographical indications. Differences notably exist in relation to the applicant group and some grounds for refusal.

The EU has been extremely active in seeking protection for its TTW in third countries. For this purpose, it has not only provided statutory provisions allowing for the protection of TTW from third countries but also has set up bilateral agreements with a number of major wine exporting countries. They differ as to whether they offer mutual recognition of TTW from both parties and set out standards of protection along EU internal regulations, or whether they do not protect TTW at all but merely grant dispensations to third countries to use TTW protected in the EU on the wine imported into the EU.

The other mode of obtaining protection for TTW from third countries, through direct application to the Commission, has faced considerable criticism. Third countries (and EU Member States to a certain extent as well) face immense bureaucratic delays and a lack of clarity regarding the status of their applications. Also, several third countries have remarked that the EU protection scheme is discriminatory and not compliant with WTO obligations.

While it was expected that the new wine regime in the EU would address these problems, it is somewhat surprising that the new regulations introduced by the EU in 2019 do not include any provision that attempts to counter the drawbacks of the system. In particular, the regulations do not set any kind of timeline for the Commission to issue their decisions on applications in a timely fashion. Moreover, no provision was introduced allowing the applicant to request an expedited processing or an update regarding their pending applications. Unless clear measures to counter these concerns are taken, the protection of TTW in the EU presents an obstacle for wine producers from third countries.

CHAPTER 13

The Barolo Appellation of Origin in the Global Market

Anisha Mistry and Luca Valente

1 Introduction

"*There are the things of physics: the twisting liquid which evaporates depending on the wind and weather, the reflection in the glass; and our imagination adds atoms. The glass is a distillation of the earth's rocks*".[1] This quote exemplifies the process of winemaking we know today – an observation and immutable fact that has long seen the interaction between science, history and everyday life.

It is believed that wine culture began around eight to six thousand years ago in the Caucasus and followed the same path as civilization routes.[2] There is numerous archaeological evidence that viticulture had then spread to Mesopotamia, the Jordan valley, and Egypt by around five thousand years ago.[3] In the Mediterranean, evidence of advanced viticulture practices traces back to, at least, between two and three thousand BC, to the Egyptian, Phoenician, Greek and Roman civilisations.[4] The Phoenicians cultivated the wine and shared it with the world, but the Romans cultural hegemony stamped itself across most of what we now consider to be the Old World, in terms of wine production. Civilisations around Europe brought their industries with them, the Early Modern period made winemaking into a skilled pursuit in the Renaissance states of Italy where the appreciation of wine developed.[5]

The expansion of the wine culture through Europe gradually brought with it an understanding of site selection, storage types and the introduction of laws to regulate and protect wine production. As a result, French and German wine-growers established the tenets of modern wine classification systems by

1 R. FEYNMAN, R. B. LEIGHTON and M. SANDS, 'The Feynman Lectures on Physics – VOL. 1', (2010) 3(7) SICYON, <http://www.sicyon.com/resources/library/physics/The-Feynman-Lectures-on-Physics-Vol-I.pdf> accessed 28 January 2020.

2 M. MILLON, 'Wine, a Global History', (Reaktion Books 2013) 3.

3 I. TATTERSALL, and R. DESALLE, 'A Natural History of Wine', (Yale University Press 2015), 23.

4 A. SMITH, and J. DODD, 'The Wine Pocket Bible' (Crimson Publishing 2009) 10.

5 A. SMITH and J. DODD, 'The Wine Pocket Bible', cit. (n. 4), 10.

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developing distinguishable regional wines that saw the development of specific grape varieties.[6]

Regarding Italy, it was the colonising Greeks who played a major role in the development of the wine culture in the peninsula and who named Italy 'Oenotria' or 'land of wine'[7] due to the desirable combination of weather, temperate climate and volcanic soils from limestone to clay. Italy has extensive varieties of individual wine styles, terrains and grape varieties[8] including one particularly successful grape variety, Nebbiolo of Barolo and Barbaresco.

This chapter focuses on a specific Italian vine, the Nebbiolo grape and a particular wine, the Barolo cultivated in the Langhe hills. More importantly, this paper will provide an overview of the evolution of relevant legislation to evaluate whether a link between the legal protection of Barolo and its reputation worldwide could be established.

The nineteenth-century recorded an exponential growth in the wine trade industry.[9] Italy, in particular, saw 80% of the local population rely on wine trade as a living during the 1880s.[10] This period was also the turning point for the development of a more refined and tailored legislation regulating Barolo.[11] The second turning point was in the second half of the twentieth century when the Italian government established the DOC (Denominazione di Origine Controllata)[12] and the DOCG (Denominazione di Origine Controllata e Garantita)[13]

6 A. SMITH and J. DODD, 'The Wine Pocket Bible', cit. (n. 4), 11.

7 See the article: 'The Importance of Wine in Italy' (Venice Events, 8 November 2017), <https://veniceevents.com/news-blogs/importance-wine-italy> accessed 28 January 2020.

8 H. JOHNSON and J. ROBINSON, 'The World Atlas of Wine', (8th edn, Octopus Publishing Group 2019) 154.

9 G. MELONI, and J.F.M. SWINNEN, 'Bugs, Tariffs and Colonies: the Political Economy of Wine Trade 1860 – 1970', (LICOS Discussion Paper, No. 384, Katholieke Universiteit Leuven, 2014) 3, <http://hdl.handle.net/10419/172036> accessed 8 April 2020.

10 H. JOHNSON and J. robinson,'The World Atlas of Wine', cit. (n. 8), 11.

11 See Section 2 of this Chapter, 'History of the Laws Protecting Barolo'.

12 The DOC system sought to regulate boundaries, maximum yields and specified grapes and production methods and it was introduced with the Law n. 930 of 12 July 1963, <https://www.tuttocamere.it/files/camcom/1963_930.pdf> accessed 8 January 2020. For further information, see Section 2 of this Chapter: 'History of the Laws Protecting Barolo'.

13 When compared to the DOC, the DOCG is subject to stricter requirements having the aim to also guarantee the protection of labyrinthine landscape of hills covered by grape vines. Decree of the President of the Italian Republic of 1 July 1980, <https://www.gazzettaufficiale.it/do/gazzetta/foglio_ordinario2/2/pdfPaginato?dataPubblicazioneGazzetta=19810122&numeroGazzetta=21&tipoSerie=FO&tipoSupplemento=GU&numeroSupplemento=0&progressivo=0&numPagina=1&edizione=0> accessed 8 January 2020. For a further information about the DOCG, see Section 2 of this Chapter: 'History of the Laws Protecting Barolo'.

systems. The Barolo wine benefitted particularly from the latter system because of the particular *terroir*[14] of the Langhe, which expresses the subtlest of differences from vineyard to vineyard.[15]

A recent study on the composition of the soils in the Barolo areas,[16] subdivided Barolo zones based on specific geological characteristics, and found and identified four types of soil; the Lequio Formation, Diano Sandstone, Sant'Agata fossil marl and chalky-sulphurous soil.[17] The research found that these geographical characteristics translated into distinct sensorial differences between the wines for each producer.[18] So, when comparing two regions of the world of viticulture where terroir is explored and valued most highly i.e. Burgundy[19] and the Langhe, geological and micro-climatic conditions that define each vineyard can draw parallels between the Grand Crus of the Côte de Nuits[20] and the most important Barolo vineyards.[21] This also demonstrates the approach to recognise classification of vineyards, and their use as official appellations or zones where a few square kilometres could make all the difference to why one producer could be more valuable than the other, making the DOC and DOCG

14 The expression originated from the French wine industry and, within the international legal framework, its international reference point is Art. 22.1 of TRIPS; see: D. S. GANGJEE, 'Relocating Geographical Indications,' *Cambridge Intellectual Property and Information Law Series* (2011) 7, <https://ssrn.com/abstract=1863350> accessed 8 January 2020. Regarding the evolution of the concept of terroir within the French wine industry, see: D. W. GADE, 'Tradition, Territory, and Terroir in French Viniculture: Cassis, France, and Appellation Contrôlée', (2004) 94(4) Annals Ass'n AM. Geographers 848.

15 A. SMITH and J. DODD, 'The Wine Pocket Bible', cit. (n. 4), 79.

16 M. SOSTER and A. CELLINO, 'La Zonazione del Barolo', (Regione Piemonte, 2002).

17 These types of soils are: the Lequio Formation, Diano Sandstone, Sant'Agata fossil marl and chalky-sulphurous soil, M. SOSTER and A. CELLINO, 'La Zonazione del Barolo', cit. (n. 16), 236.

18 M. SOSTER and A. CELLINO, 'La Zonazione del Barolo', cit. (n. 16), 245. For an extensive study on the peculiar characteristic of each Barolo zone, see: K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', (University of California Press, 2014), 67–213.

19 This is the wine produced in the Burgundy region located in central eastern France, in the valley on the west bank of the Saône river, a tributary of the Rhone river. For a work about this wine and its history, see: A. KATZ, 'The Heart of Burgundy, a Portrait of French Wine Country', (Simon & Schuster 1999).

20 Côte de Nuits is located in the heart of Burgundy and it's on this terroir that some of the world's most prestigious wines are produced. It took its name from the village of Nuits-Saint-Georges and it is the location of 24 Grand Cru vineyards. For a detailed publication about the Crus of the Côte de Nuits, see: R. BLAKE, 'Côte d'Or: The wines and winemakers of the heart of Burgundy', (Infinite Ideas, 2017).

21 See the article: 'Barolo and Terroir', <https://www.trediberri.com/en/barolo-and-terroir/> accessed 3 April 2020.

ever more critical. As a consequence, this also led to extensive negotiations between producers, sometimes with disagreements that ended up in courts.[22]

In retrospect, the decision of planting in the Langhe region to benefit from the subalpine climate; the action of introducing grafting, and benefiting from a selection of the most sought-after grape varieties together offers an opportunity for a great new beginning to savour winemaking practices of a historic red wine.

In this area, the importance of tradition still holds that the same family that tends the wine produces the wine.[23] Today, wines such as Barolo can boast not only a vineyard, but the economy of the entire area as in the past decades the Langhe has become an important touristic destination and an active cultural centre.[24] However, the future of wine for these families will be a pivotal one. With climate change making an impact on some of the world's most classic regions, change is expected on some of the most venerable estates, with some grape varieties being more suited to the warmer temperatures.[25] One of the future challenges will be to adapt the wine legislation accordingly.

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22 The topic will be further explored in Section 4 of this chapter: 'The Protection of the Barolo Reputation'. For an analysis of the peculiarities of each area of the Barolo denomination and the disputes that arose between producers, see also: K. O'KEEFE, 'The Barolo Wars and Their Effect on both Denominations' in K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 42.

23 One peculiar characteristic of viticulture in the Langhe is when compared to other Italian wine-growing areas, the high number of small farmers who have owned land, often of tiny dimensions, since the end of the nineteenth century. On the contrary, in most wine growing areas of Italy, the land was almost exclusively owned by a class of noble landowners who had sharecroppers; K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 36.

24 In 2014, the 'Vineyard Landscape of Piedmont: Langhe-Roero and Monferrato', located in Italy, has been inscribed on the Unesco World Heritage Site List. In particular, it is stated in the Criterion (iii) that*: 'The cultural landscapes of the Piedmont vineyards provide outstanding living testimony to winegrowing and winemaking traditions that stem from a long history, and that have been continuously improved and adapted up to the present day. They bear witness to an extremely comprehensive social, rural and urban realm, and to sustainable economic structures. They include a multitude of harmonious built elements that bear witness to its history and its professional practices.'* See: Inscriptions on the World Heritage List in the 38th session of the World Heritage Committee (38 COM), Decision: 38 COM 8B.41. The decision is available online at: <https://whc.unesco.org/en/decisions/6127> last accessed 8 April 2020.

25 M. R.MOZELL, and L. THACH, 'The Impact of Climate Change on the Global Wine Industry: Challenges & Solutions', *Wine Economics and Policy* Volume 3, Issue 2, (2014) 88, <https://reader.elsevier.com/reader/sd/pii/S2212977414000222?token=5871740E9975DDBF498C9E5834A304BEEEF335B4C889EC1AE12B496CAF3D1090BE0B937E52CD168D41E022B49A354423> accessed 3 April 2020.

2 History of the Laws Protecting Barolo

The history of the legislation on the protection of Barolo, one of Piedmont's acknowledged red wines, dates back centuries. The importance of wine in the area is shown in many orders and laws that regulated the harvest since at least the 13th century.[26] In the 14th century, the ancestor of the Nebbiolo grape was mentioned in the manuscript of the Bolognese Pier de 'Crescenzi who refers to a wine called "Nubiola", described as "*delightful to handle and … excellent to be conserved …*".[27] A 1674 decree imposed severe penalties, firstly for those who damaged crops or stole grapes within this territory, and secondly for grower-producers on when to harvest the Nebbiolo grape, due to its delicate nature.[28]

The turning point for international fame for this wine was at the beginning of the 19th century. The Marquesses Juliette Colbert and Tancredi Falletti of Barolo played a prominent role and improved the production techniques and introduced this wine to the most powerful European courts of the time.[29] The couple died without heirs, but thanks to the foresight of Juliette Colbert, in 1864 the activities continued through the Opera Pia Barolo[30] charitable trust.[31]

The pride to produce a wine event influenced the King of Piedmont; in the 19th century King Charles Albert ordered the construction of his winery in the Langhe region to be listed as the wine producer of Barolo.[32] Furthermore, Count Camillo Benso of Cavour, one of the greatest political minds of

26 See the article: 'Piemonte e l'orgoglio del vino da re', <https://www.taccuinigastrosofici.it/ita/news/medioevale/vini-vitigni/Piemonte-e-lorgoglio-del-vino-da-re.html> accessed 8 January 2020.

27 See the article: 'Piemonte e l'orgoglio del vino da re', cit. (n. 26).

28 See the article: 'Barolo di Barolo', <https://www.barolodibarolo.com/it/la-storia.html≥ accessed 8 January 2020.

29 Especially Juliette Colbert, a descendant of the former Finance Minister Jean Baptiste Colbert, who served for King Louis XIV, played a fundamental role; see: D. MASSE', 'Il Paese del Barolo', Paoline (ed.), (1928), 48.

30 The Barolo of the Opera Pia Barolo distinguished itself internationally and was awarded with gold medals at the Vienna Universal Exposition in 1873, the Italian General Exposition of Turin in 1884, the Brussels International Exposition of 1910, the Cuneo Wine Exhibition of 1914 and the Turin International Exhibition of 1928; interview with the CEO of Marchesi di Barolo S.p.A. and President of the Unione Vini Italiani, Mr. Ernesto Abbona.

31 K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 36.

32 S. CASTRIOTA and M. DELMASTRO, 'Individual and Collective Reputation: Lessons from the Wine Market' (2008) 9, <https://ssrn.com/abstract=1349992> accessed 14 January 2020.

the time and the most influential minister in the Italian unification process, is acknowledged as one of the main people responsible for the international fame of this wine.[33] There are several versions of the tale that relate to the involvement of Camillo Benso Conte di Cavour in the history of Barolo. According to a theory formulated for the first time in a 1937 publication,[34] such was the interest of the Count of Cavour for this wine that he planted two hundred thousand Nebbiolo vines at the nearby Castle of Grinzane, and sought to improve cultivation and winemaking techniques by hiring the famous French winemaker Alexandre-Pierre Oudart.[35] It cannot be ruled out that the contribution of the Count of Cavour may be overstated. What is certain is that Cavour used Barolo for diplomatic purposes during his meetings with aristocrats and ministers in helping to boost its reputation internationally. It is during this period that Barolo started to be referred to as "the wine of kings, the king of wines".[36]

Barolo, like many other Italian agri-food products, is the fruit of the union between an autochthonous grape variety, Nebbiolo,[37] and territory, bound to a tiny strip of a hilly region of the Langhe, where the quality of the soils of marine sedimentary origin (an extremely variable amalgamation of calcareous, clayey lands, with equally variable layers of fine sand and silt) matches the character of this grape variety.[38] Given that this grape requires demanding conditions to succeed, it is not surprising that Nebbiolo is one of the least planted grape varieties. Out of the 5,992 hectares of Nebbiolo planted in the world in 2010, 4.477 hectares were planted in Piedmont, 811 hectares in the Lombard Valtellina and 44 hectares in the Aosta Valley. In comparison 456 hectares of Nebbiolo were planted in the rest of the world, 75 hectares in the United States, 180 hectares in Mexico, 48 hectares in Argentina, 98 hectares in Australia, and 26 hectares

33 More recent theories tend to underrate the role of Cavour in the development of Barolo, see for instance, K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 31.

34 A. MARESCALCHI, and G. DALMASSO, 'Storia della Vite e del Vino in Italia', (Arti Grafiche Gualdoni, 1937).

35 See the article 'Piemonte e l'orgoglio del vino da re', cit. (n. 26).

36 See the article 'Notes on Cavour's "Enological Crusade" to make Barolo one of the world's greatest wines', <https://www.tenutacarretta.it/en/2016/02/12/barolo-grinzane-cavour-castello-castle/> accessed 8 April 2020.

37 One peculiarity of this grape variety is that, when measured against the annual growth cycle of other grape varieties of the region, Nebbiolo is one of the first grape to bud and last one to ripen with harvest taking place in the second half of October. See: C. OZ, and M. RAND, *Oz Clarke's Encyclopedia of Grapes* (Harcourt, 2001) 155–162.

38 M. SOSTER and A. CELLINO, 'La Zonazione del Barolo', cit. (n. 16), 244.

in Uruguay.[39] The above data suggests that, Nebbiolo is strongly linked to Piedmont, which accounts for 80% of the total Nebbiolo vineyards worldwide.[40]

The qualities of this area were already famous during the Roman Empire; for instance, the famous Roman author Pliny the Elder mentioned the area as a favorable agricultural center.[41] Due to the microclimate of the Barolo area, conducive to the growth of the grape, the maturation of clusters is rich in extract. A consequence being that to achieve balance and harmony, a longer aging is required in comparison to the average time needed in other territories, guaranteeing exceptional longevity.[42]

In other words, such a wine requires a longer time and higher investment during production than most of the wines available, but in return, it guarantees supreme quality. This has made it necessary to put in place strong legal protection to defend not only local wine producers, but the development of the area as a whole.[43] These two factors are inexorably intertwined. A wine that would take unfair advantage of the Barolo reputation by being falsely labelled as being of Barolo denomination, when in fact it is produced in a different place and under different conditions, would undermine the economic system of the entire area.

It can be seen how the development of the area is strictly connected to the evolution in the production of the wine and the development of clear and precise legal protection. The refinement of production techniques has increased the quality of Barolo, and the possibility to the benefit of an increasing legal framework has avoided significant free-riding and counterfeiting experiences fostering its reputation.[44]

As well observed in literature: "*In the wine market, asymmetric information problems dominate economic interactions in such a way that multiple responses have been developed in order to prevent market failures caused, for instance,*

39 C. SALARIS, 'La diffusione del vitigno nebbiolo nel mondo', (Quaderni di viticoltura e enologia dell'Università degli studi di Torino, Ed. 2012), 28.

40 Despite that, in Piedmont, Nebbiolo represents only 9% of total wine production in the region, and most of it is found in the Langhe. Of these, over 2,600 hectares, is cultivated for the production of Barolo and Barbaresco. K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 18.

41 See: J. HUTCHINSON and E. LESSER, 'A Home for Future Gastronomes,' <https://www.sciencemag.org/careers/2003/12/home-future-gastronomes> accessed 13 January 2019.

42 B. SMITH, 'Solving the Puzzle of Barolo and Barbaresco', (2005) 5 Gastronomica: The Journal of Food and Culture, California Univeristy Press, 89.

43 For an interesting work on this topic, see: G. SEGRE, 'DOC, Exit e Innovazione. Property Rights nel distretto culturale del vino nelle Langhe', (2003) 4, Working Paper Series, Università di Torino.

44 K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 40.

by wine frauds. Indeed, we can define at least three different sources of reputation: institutional (*provided by international, national, regional and local institutions*)*, collective* (*provided by coalitions of producers*)*, and individual* (*provided by single wineries*)*".*[45]

All these three sources of reputation (institutional, collective and individual) played an essential role in the development of Barolo wine. Understandably, at the start, the individual level has been prominent.[46] Oddly enough, the collective source has been active before the institutional one: as early as the beginning of the last century, Barolo winemakers felt the need to come together to protect their wine production, and in 1908 they requested the creation of a "certificate of origin" issued by an association that operated under the control of a regional wine union.[47] The institutional source of reputation took a bit longer as the first Italian law only protected 'typical wines' and specifying the main characteristics of Barolo was only approved in 1924.[48]

This legal framework led to the forming of the 'Consortium for the Protection of Quality of Local Wines Barolo and Barbaresco',[49] which was officially founded in 1934 to define areas of origin, grape varieties, and characteristics of the wine. Another important goal of the Consortium was to protect the wines from fraudulent counterfeiters and unfair competition, and therefore defending the reputation of Barolo. In 1963 there was an important step forward at the institutional level: finally, a new national law[50] created the Controlled Designation of Origin (DOC) and defined the precise role of the Wine Consortia and in 1966 DOC was granted to Barolo.[51]

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45 S. CASTRIOTA and M. DELMASTRO, 'Individual and Collective Reputation: Lessons from the Wine Market' (2008) 3, cit. (n. 32).

46 As underlined above regarding the role of the Marquesses of Barolo and the Count of Cavour in the development of this wine.

47 See: 'History and Activity of the Consortium of Barolo and Barbaresco,' <https://www.langhevini.it/en/barolo-and-barbaresco-consortium/history-and-activity/> accessed 8 January 2020.

48 See: 'History and Activity of the Consortium of Barolo and Barbaresco,' cit. (n. 47).

49 Barbaresco is the other "noble" wine of the region, it is also produced with Nebbiolo grapes, and the main difference lies in the soil: Barbaresco's soil is recognised for its presence of nutrients, however, this wine has a lower level of tannin when compared to Barolo. Furthermore, Barolo has to be stored for a minimum of 3 years, while Barbaresco requires a minimum of 2 years; see: 'The Difference Between Barolo vs. Barbaresco,' <https://winefolly.com/review/difference-barolo-vs-barbaresco/> accessed 8 January 2020.

50 Law n. 930 of 12 July 1963, cit. (n. 12).

51 At the EU level, Barolo is a registered as Protected Designation of Origin (PDI) since the 18 September 1973, see <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register//pdf/ec_wine_33808.pdf> accessed 8 January 2020.

The next legal step, arguably the most relevant for the protection of top-quality wine, was introduced by the creation of the Controlled and Guaranteed Designation of Origin (DOCG)[52] in 1980. DOCG, similar to DOC, is based on the concept of *terroir*; however, the former has a higher threshold and is subject to more accurate controls. In concrete terms, the difference between DOC and DOCG lies in quality. Both appellations of origin are subject to strict regulations, but only DOCG wines have an additional "guarantee" from the Italian government. In particular, before bottling, each batch undergoes a DOCG tasting and a chemical-physical analysis.[53] The bottles are easily recognisable by their State seals, *i.e.* numbered markings applied to the cork. Moreover, unlike DOC, which can also be sold in demijohns or baskets, DOCG must be bottled in vessels of no more than 5 litres.[54]

In 1992, the Italian legislator clarified the difference between DOC and DOCG on one side, and on the other, the new category of Typical Geographical Indication (IGT).[55] In the case of IGTs, the required *terroir* is subject to a lower threshold since DOC and DOCG means the geographical name of a particularly suitable wine-growing area used to designate a product of quality. While IGT wines include a large wine-growing area with environmental uniformity[56]

In the following years, the EU played a fundamental role at the institutional level in the development of common wine legislation; Regulation (EC) No 479/2008[57] reformed the organization of the wine sector Common Market

52 Decree of the President of the Italian Republic of 1 July 1980, cit. (n. 13).

53 L. POLLINI, 'Tutto Vino: guida completa ai vini d'Italia', (Giunti Demetra, 2010) 36.

54 Decree of the President of the Italian Republic of 1 July 1980, cit. (n. 13) art. 4.

55 Law n. 164 of 10 February 1992, <https://www.tuttocamere.it/files/camcom/1992_164.pdf> accessed 8 January 2020.

56 In particular, Art. 1, par. 1, of the Law n. 164/1992 specifies that DOC and DOCG shall mean the geographical name of a *particularly suitable wine-growing area* used to designate a product of quality and renowned, whose characteristics are related both to the natural environment and human factors. In contrast, Art. 7, par. 1, of the Law n. 164/1992 clarifies that the production area of an IGT wine must include a *large wine-growing area* with environmental uniformity and for which there is a collective interest in recognition of the wine produced in it.

57 Later incorporated into the Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) in OJ L 299, 16.11.2007; repealed by the Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, in OJ L 347, 20.12.2013.

Organization (CMO) by introducing Community protection of wines as a protected designation of origin (PDO) or protected geographical indication (PGI).

This evolution was reflected at the national level by the Legislative Decree 81/2010, in which Italy adapted Law 164/1992 on wine designations of origin, establishing that at EU level, DOCG and DOC should be protected as PDO while IGT should be categorised as PGI.

Once more, evolution at the institutional level allowed the advancement of a collective source of reputation: the Consortium for the Protection of Quality of Local Wines Barolo, and Barbaresco widened its jurisdiction and began to cover all the geographical denominations produced in the Langhe area and broadened its range of activities. Today, the activities of the Consortium, which changed its name to "Consorzio di Tutela Barolo Barbaresco Langhe Alba e Dogliani", included the protection and registration of collective trademarks; market surveillance activities; management of the denominations; data collection; prices and market statistics; promotion; chemical-physical analysis, and certification of Denominations.[58]

Recently, the Consortium has established stricter regulations regarding the location of vineyards for the Barolo wine. In fact, according to the DOCG, the suitable vineyards were planted exclusively on hilly slopes with suitable orientation and mainly clayey-calcareous soils.[59] This created room for confusion about what constituted hilly slopes and suitable exposure, which resulted in growth of newly planted Nebbiolo vineyards.[60] For this reason, in 2010 the Consortium expressly prohibited the planting of vines on the valley floor, on damp or wet soil or in areas that were not sufficiently sunny. Furthermore, any exposure to the north has been prohibited, as well as any height outside of the established range between 170 meters and 540 metres.[61] Furthermore, since

58 See 'History and Activity of the Consortium of Barolo and Barbaresco', cit. (n. 47).

59 Decree of the President of the Italian Republic of 1 July 1980, cit. (n. 13), art. 4: "*Environmental and growing conditions of vineyards intended for production of the "Barolo" must be the traditional ones of the area and in any case only those that give the grapes and the derived wine the specific quality characteristics. Therefore, only hilly vineyards of suitable location and orientation and whose soils are predominantly clayey-calcareous are to be considered suitable* (…)" (our translation).

60 For instance, in Barolo in 1980, there were 1,111 hectares of Nebbiolo vineyards allocated to Barolo production, and by 2013, this figure increased to 1,984 hectares. K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 53.

61 See the new version of art. 4 of the Decree of the President of the Italian Republic of 1 July 1980, amended by the Ministerial Decree of 26 October 2010, (GU 293 – 16 December 2010, S.O. 279): "*Environmental and growing conditions of vineyards intended for production of the "Barolo" must be the traditional ones of the area and in any case only those that give the grapes and the derived wine the specific quality characteristics. In particular, the*

2011, only 10 hectares of new vineyards may be planted each year throughout the Barolo area, and producers looking to expand production must obtain prior approval from the Consortium.[62]

Lastly, it is worth pointing out that the impact of climate change has been reflected in the Italian wine legislation. In 2016, a new national law clarified that producers are allowed, even those in denominations like Barolo that are by law dry-farmed, to make use of emergency irrigation to overcome the state of water shortages and thus ensure the survival of their vineyards.[63]

To sum up, the history of the laws protecting Barolo reveals the importance of a clear legal framework and close cooperation between the three sources of reputation, as mentioned above. The individual source that has been fundamental at the start to gather interest and resources around Barolo, and the institutional source that made possible the creation of a collective sound source that became the true protector of its reputation.

3 The Individual and the Collective Source of Reputation

Section 2 pointed out the role of the three different sources of reputation (institutional, collective and individual)[64] in the international fame of Barolo.

To take a closer look at this ecosystem, we have interviewed Mr. Ernesto Abbona, owner of the Marchesi di Barolo[65] winery and President of the Unione Italiana Vini[66] having therefore the chance to obtain a direct perspective at both a collective and individual level.

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growing conditions of the vineyards must meet the requirements set out in the following points: – soils: clayey, calcareous and any combinations thereof; – location: exclusively hilly; the soil at the bottom of the valley, humid, flat and not sufficiently sunny, must be categorically excluded; – altitude: no lower than 170 metres above sea level and no higher than 540 metres above sea level; – exposure: suitable to ensure suitable ripening and to give the grapes and the wine made from them the specific quality characteristics, but excluding, for new vineyards, the northern slope from – 45° to +45° sexagesimal".

62 K. O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 56.

63 Art. 35, Law 238 of 28 December 2016 (G.U. 302), <https://www.ccpb.it/wp-content/uploads/2018/01/Legge_121216_n_238_coltivaz_vite_prod_comm_vino-GU-302-281216.pdf> accessed 10 April 2020.

64 S. CASTRIOTA and M. DELMASTRO, 'Individual and Collective Reputation: Lessons from the Wine Market' cit. (n. 32), 3.

65 One of the most historical Barolo wineries, being located in the ancient cellars of the Marquesses of Barolo estate acquired in the year 1929 from the Opera Pia Barolo founded by Juliette Colbert; see Section 1.

66 The Unione Italiana Vini was created in 1895 and it is the largest Italian wine association of producers with 500 member companies, more than 150,000 winegrowers, representing

We have inquired whether the evolution of norms protecting Barolo had an influence in the daily life of producers and what are the legal challenges that Barolo producers are facing nowadays.

Mr. Abbona underlined that the rules of the Barolo specifications[67] have been proposed and discussed by conferences of producers and they reflect their demands and needs.

Further, he explained that at the institutional level the crucial legal step has been the introduction of the DOCG because it established the conditions to create a healthy competition between producers and provided an incentive to excel. Indeed, the obligation to affix the State government seal on each bottle produced on the basis of the grape yields in order to demonstrate that it is genuine, is defined in the specification in relation to the areas of authorized vineyards, has proved to be a very important tool to make the controls extremely effective and comprehensive. Given the shortcomings of the regulations of the DOC until the early 80s, producers who used Nebbiolo grapes from vineyards within the defined area and borne the high costs of production, were facing unfair competition from those who were trying to avoid these controls, with obvious disparities in costs and burdens. Today, thanks to the obligation to affix on every bottle the State seal introduced with the DOCG, the value created on the bottles has spilled over to the production area. In addition, it developed increasingly attentive and respectful agronomic practices in vineyards and techniques of production.[68]

With regard to the current challenges, Mr. Abbona underlined that the definition of the wine-growing areas of Piedmont, both from a morphological and climatic point of view, could be better shaped in order to make it more understandable to worldwide consumers. For these reasons, Mr. Abbona's view is that an all-round verification process with the aim of evaluating the possibility of revising the designations and their names may be beneficial. As a working method, he would go back to the historical tradition that identifies the name of a wine, which reaches excellence in a large portion of a given territory, exclusively under the geographical name of a specific place[69] in order to create

around 50% of Italian wine turnover and 85% of Italian wine export. See the report <https://www.unioneitalianavini.it/wp-content/uploads/2018/09/UIV-istituzionale.pdf> accessed 14 January 2020.

67 The document is available online at <https://www.langhevini.it/wp-content/uploads/2019/05/DOCG-Barolo.pdf> accessed 14 January 2020.

68 Interview with Mr. Ernesto Abbona, President of Unione Italiana Vini and CEO of Cantine dei Marchesi di Barolo S.p.A.

69 This would follow the example of Barolo and Barbaresco and several other denominations in the region: such as Albugnano, Boca, Caluso, Carema, Dogliani, Gattinara, Gavi, Ghemme, Lessona, Nice, Sizzano, Verduno which are names of local towns.

a unique combination of wines and local identities. For the selection of the denomination, he suggested to go for a name, among the historical places of production, of a town taking into consideration also its phonetical appeal.

These would make it easier, especially for consumers that have no knowledge of the region, to become aware of a denomination and to remember it.[70] In addition, it would be beneficial especially taking into consideration that the major legal challenges arise from non-EU countries where protection relies on the presence of bilateral agreements and whose consumers are often not familiar with current denominations.[71]

4 The Protection of the Barolo Reputation

Having discussed how Barolo obtained its reputation (Section 2) and the perspective of winemakers and collective associations (Section 3), this section will explore the mechanisms in place to protect this reputation.

To this end, we have assessed both internal and external legal issues that arose in the past years.[72] Regarding the former, we have focused on a recent legal dispute between producers right to use the indication "Cannubi"[73] that ended up before the Italian Supreme Court.[74] Concerning the latter, we have

70 In Piedmont there are 17 DOCG and 42 DOC (out of 73 DOCG and 332 national DOC at the national level), see the data published by the Regional government available online at <https://www.regione.piemonte.it/web/temi/agricoltura/viticoltura-enologia/vini-denominazione-origine-docg-doc> accessed 14 January 2020.

71 When looking at the data relating to worldwide exports of Italian wines, it can be argued that there is a potential growth of extra UE exports. For instance, in the period 2003–2009, the averages of the ratios between the annual exports of Italian quality wines towards each world region and the total of quality wines exports from the country was: West Europe 56.14%; Anglo-Saxon (extra-European) 35.46%; East Asia and Pacific, high-income 4.37%; East Europe and Central Asia 2.43%; Latin America and Caribbean 0.95%; East Asia and Pacific, excl. High-income 0.49%; Sub-Saharan Africa 0.12%; South Asia 0.06%; Middle East and North Africa 0.03%. M. AGOSTINO, F. TRIVERI, 'Geographical indication and wine exports. An empirical investigation considering the major European producers', (2014) 46 Food Policy Volume, 34.

72 With "internal legal issues" we refer to disputes among Barolo producers while with "external legal issues" we refer to problems arisen with third parties.

73 Cannubi is one of the most historic cru in the Barolo zones. For a detailed account about the history of this cru, see: O'KEEFE, 'Barolo and Barbaresco, the King and Queen of Italian Wine', cit. (n. 18), 69.

74 Italian Supreme Court, Decision n. 23395 of 17 November 2016 (Case n. 8796/2014). For the the decision, together with a commentary and an english summary, see: D. CORTASSA, 'Modifiche del disciplinare di produzione dei vini DOC. Il caso "Cannubi"', (2017) 1,

analysed the entries in the trademark register[75] that contain the word "Barolo" in order to gather some insights on the filing strategy and the monitoring systems.[76]

The internal legal issue under analysis in this section started in 2010. It related to the boundaries of the Cannubi cru and, consequently, the entitlement of producers to use this denomination. In particular, the dispute concerned the inclusion of the additional geographical indications 'Cannubi Boschis', 'Cannubi Muscatel', 'Cannubi San Lorenzo and 'Cannubi Valletta' in the regulation of the Barolo DOCG.[77] According to producers in the 'Cannubi' area', the extension of the term 'Cannubi' to include 'Boschis' and 'Muscatel' should have not been permitted since these are areas that do not overlap with the area known as 'Cannubi'.[78]

The problem arose mainly because the use of the additional geographical indication "Cannubi Muscatel" for wines produced in that specific area of the Cannubi hill. According to the producers with vineyards located in the Muscatel area of the Cannubi hill, this term 'Muscatel' could have caused confusion for the consumer.[79]

Since the Court found no appreciable differences between the areas covered in the various additional geographical indications, they proposed the

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Rivista di Diritto Alimentare, 55, <http://www.rivistadirittoalimentare.it/rivista/2017-01/CORTASSA.pdf> last accessed 8 April 2020.

75 We have used TMview, a database containing data from all EU Member States in addition to the information available from the EUIPO and WIPO, <https://www.tmdn.org/tmview/welcome.html?lang=en> accessed 14 January 2020.

76 The relationship between trademarks and Geographical Indication has been often turbulent. For an interesting article on the topic, see: D. S. GANGJEE, 'Quibbling Siblings: Conflicts between Trademarks and Geographical Indications', (2007) 82(2) Chicago-Kent Law Review, <https://ssrn.com/abstract=1000467> accessed 14 January 2020. See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178.

77 Ministerial Decree of 30 Setptember 2010, (GU 241 – 11 October 2010). This decree amended the annex on the geographical indications of the Barolo specification by providing for the possibility of using the term "Cannubi" also with reference to areas other than the historical one.

78 For an interesting commentary about the previous instance of the case, with a summary of the positions of both parties, see: E. FERRERO, 'Le menzioni geografiche nella disciplina dei vini: osservazioni a margine della vicenda Cannubi', (Il Piemonte delle Autonomie, 2019), <http://piemonteautonomie.cr.piemonte.it/cms/images/pdf/numero2_2017/ferrero.pdf> accessed 8 April 2020.

79 Muscatel in common parlance, is associated with muscatel wine, known to be very different from Barolo.

following solution. Without preventing other producers from being able to add additional geographical indications (among those identified), the Court allowed the interested parties to use the name 'Cannubi' (as an alternative to the name 'Cannubi Muscatel'). In particular, the Court allowed, the additional geographical indications 'Cannubi Boschis or Cannubi', 'Cannubi Muscatel or Cannubi', 'Cannubi San Lorenzo or Cannubi' and 'Cannubi Valletta or Cannubi', to be used.[80]

This case shows the potential downside of the reputation of a given denomination or sub-denomination; it can raise tensions, and even disputes among producers. Ultimately, these disputes can negatively affect the reputation of the entire denomination. To minimise this risk, the collective source of reputation should have a more prominent role, by setting alternative dispute resolution systems.

On the other hand, in the case of Barolo, the collective source of reputation, the Consorzio, is already playing a pivotal role in the protection of Barolo's reputation from external legal issues. This is evident when assessing trademarks containing the word "Barolo", the filing strategy and the monitoring systems in place.

In particular, the database listed 221 trademarks worldwide comprising the sign "Barolo" and approximately one-third of these have ended or expired. Regarding the applicants, it is worth underlining that the majority of these marks belong to local winemakers and to the Consorzio di Tutela Barolo Barbaresco Langhe Alba e Dogliani.[81] There are also marks that have been filed directly by Italian institutions, such as the local Chamber of Commerce[82] and the Italian Ministry of Agricultural, Food and Forestry Policies.[83]

Among the signs retrieved in the database, there are also trademark applications that do not belong to one of the stakeholders entitled to register. Hence, we have chosen a practical case to show how the monitoring of the market functions and how the responses were established in order to protect the reputation of "the wine of kings, the king of wines". On 26 September 2006, a EUTM (European Union Trademark) for the sign "BAROLO" was filed for classes 20, 35

80 E. FERRERO, 'Le menzioni geografiche nella disciplina dei vini: osservazioni a margine della vicenda Cannubi', cit. (n. 78).

81 With registration in Albania, Argentina, Australia, Azerbaijan, Bosnia Herzegovina, Brazil, Canada, Chile, China, Costa Rica, European Union, Georgia, Japan, India, Israel, Kirgizstan, Kazakhstan, Mexico, Moldova, Montenegro, Mongolia, Norway, North Macedonia, Russia, Serbia, South Korea, Switzerland, Turkmenistan, United States, Ukraine.

82 With registrations in Australia, European Union, Japan, United States.

83 With two registrations in Canada: one for "Barolo" and another one for "Grappa di Barolo".

and 40 by a company not located in the area.[84] This application received three oppositions; one from the Consorzio di Tutela Barolo Barbaresco Langhe Alba e Dogliani, one from the local Chamber of Commerce, and one from a cooperative of producers, Cantina Terre del Barolo. The trademark application was withdrawn in May 2009 before EUIPO (European Union Intellectual Property Office, in Alicante, Spain) could render a decision.

A similar case happened in 2002 when another party filed a EUTM Trademark application for the sign "BAROLO" in classes 10 and 12.[85] Again, the reaction was quick. Two oppositions and one third party observations were filed by the Consorzio di Tutela Barolo Barbaresco Langhe Alba e Dogliani, and the cooperative of producers (Cantina Terre del Barolo) before the registration of the mark, and as a result the application was withdrawn before the decision.

Hence, it can be said that monitoring the market and the reactions towards free-riding are quite efficient if the problem arises within the EU.

When the issue happens outside the EU, its solution is less predictable as it depends on the legal norms of each jurisdiction and of the existence of bilateral agreements.[86] For instance, in 2015 the sign "Barbarolo" was registered in class 33 for Alcoholic Beverages in Norway. The Consorzio di Tutela Barolo Barbaresco Langhe Alba e Dogliani successfully opposed this registration.[87]

84 See EUTM application n. 5339619: Class 20: Office furniture, home furniture, armchairs, chairs, tables, rows of chairs, benches, cabinets, furniture and parts thereof, stools, seats; class 35: Agency services related to retail and wholesale of furniture for others, advertising, trade consultancy related to sales development, marketing and Class 40: Metal treating, plastic processing, foam processing, textile treating, leatherworking; finishing, trimming; precision working of metal surfaces; surface treatment of materials, mechanical and chemical treatment, woodworking for furniture.

85 Application n. 002705358, in class 10 for: Mobility apparatus and equipment for the disabled and those with mobility difficulties; apparatus and equipment for lifting, handling and transporting patients and invalids; invalid hoists and slings; standing aids; moving aids; furniture adapted for use by those with mobility difficulties; beds, chairs and tables adapted for use by those with mobility difficulties; back rests; mattress elevators; trolley walkers; perching stools; foot and leg rests; toilet aids; pressure relief pads and cushions and in class 12 for: Mobility vehicles; recreational vehicles; mobility products (vehicles); motorised scooters, buggies and wheelchairs for the disabled and those with mobility difficulties; manual wheelchairs; electrically-powered wheelchairs.

86 For an interesting work on the topic see: D. FRIEDMANN, 'Geographical Indications in the EU, China and Australia, WTO Case Bottling Up Over Prosecco', in J. CHAISSE (ed.), *European Integration and Global Power Shifts: What Lessons for Asia?*, <https://ssrn.com/abstract=3218810> accessed 28 January 2020.

87 The opposition was based on both the word mark "Barolo". n. 1022062 and the Geographical Indication "Barolo", see: Opposition n. 286/2015 rendered by the Norwegian Trademark Office on 4 April 2016.

In conclusion, the examples of this section testify to the importance of the relevant stakeholders in the preservation of the reputation of Barolo. It is crucial that especially the collective source of reputation plays an active role in both internal and external legal issues so that winemakers can focus on what, in the end, is the real source of reputation – the quality of their wine.

5 The Evolution of the Region

Section 4 pointed out the critical role of local institutions, as well as winemakers and associations of producers, in the protection of the reputation of Barolo. This proactive role of local institutions can be easily explained when taking into consideration the direct link between the reputation of Barolo and the development of the area.

The increasing success of wine production of the area, guaranteed by a well-established legal framework and attentive legal protection, has gradually fostered other sectors such as gastronomy and hospitality.

Development of the Langhe as a whole is inextricably connected to the reputation of its wines. This process also fostered creation in the area of associations, such as Slowfood.[88] Furthermore, the protection of local food cultures and traditions were also the foundation of a gastronomic university, the University of Gastronomic Sciences.[89] The synergy between this land and the reputation of its products also made possible the creation of cultural and artistic events that became important on an international scale. The Collisioni Agrirock Festival[90] organised every summer in Barolo is an example of this.

88 Slow Food was started in the 1980s. The movement embraces a comprehensive approach to food that emphatizes the link between food, wine, politics and culture focusing on the protection of ancient traditions. Nowadays Slow Food is a global movement with thousands of projects and millions of people associated in over 160 countries. See <https://www.slowfood.com/> accessed 14 January 2020. See also: V. SINISCHALCHI, 'Environment, regulation and the moral economy of food in the Slow Food movement', (2013) 20, Journal of Political Ecology.

89 The University of Gastronomic Sciences is a ministerially recognized, private non-profit institution. It was founded in 2004 by Slow Food in cooperation with the Italian regions of Piedmont and Emilia-Romagna. It is an international research and education center focused on the study of farming methods, biodiversity and healty relationship between gastronomy and agricultural science. See <https://www.unisg.it/en/administration/history-mission/> accessed 14 January 2020.

90 Without the reputation gained by its wine, it would have been quite difficult for a town with around 750 inhabitants, such as Barolo, to attract international singers (such as Bob Dylan, Patti Smith, Jamiroquai, Deep Purple, Neil Young and writers and literature guests such as José Saramago, Vidia Naipaul, David Grossman, Roberto Saviano, Suzanne Vega,

In addition, this synergy became ever more visible in 2014 when the Langhe area was listed in the Unesco World Heritage Site List "*the vineyards of Langhe-Roero and Monferrato constitute an outstanding example of man's interaction with his natural environment. Following a long and slow evolution of winegrowing expertise, the best possible adaptation of grape varieties to land with specific soil and climatic components has been carried out, which in itself is related to winemaking expertise, thereby becoming an international benchmark. The winegrowing landscape also expresses great aesthetic qualities, making it into an archetype of European vineyards*".[91]

It is therefore clear how the wine reputation of the area became the incentive for its social and economic development, and it is undeniable that the legal framework played a significant role for the protection of the source of this reputation.

6 Conclusion

The reputation of Barolo is the result of generations of refinements and improvements over centuries in the techniques of vine cultivation and wine aging. With ancient vine varieties, the Nebbiolo grape has found its precise position on the slopes of the Langhe hills.

The collaboration between the highlighted sources of reputation (individual, collective and institutional) managed to preserve the Barolo heritage and, thanks also to the establishment of a comprehensive legal framework, it boosted the economy of the entire area.

In 1924 the first Italian law on 'typical wines' was enacted specifying the main characteristics of Barolo and this law is regarded as the precursor to the later DOCG regulations – a guaranteed designation of origin for the protection of wine consumers, which is a distinction against counterfeits. Since then, the legislation regulating Barolo became more and more fine-tuned.

This could suggest that nowadays famous Nebbiolo growers can command higher prices because of its substantial qualities and that the clarity of the naming system makes it easier to identify it as a fine wine. But we should not forget there are still challenges producers face in wine-growing areas of Piedmont, as outlined by Mr Abbona, and having the possibility

Jonathan Coe, Svetlana Aleksievic etc.), see: <http://www.collisioni.it/en/barolo-e-il-festival> accessed 14 January 2020.

91 See: Inscriptions on the World Heritage List in the 38th session of the World Heritage Committee (38 COM), Decision: 38 COM 8B.41, cit. (n. 24).

of going back to historical naming criteria is an idea that should not be written off.

The bottom line is that "*fine wine has never been more expensive and counterfeiting wine has never been more lucrative*".[92]

Thus, it is crucial that especially the collective source of reputation plays an active role in protecting the reputation so that winemakers can focus on what, in the end, is the real source of reputation – the quality of their wine.

92 H. JOHNSON and J. ROBINSON, *The World Atlas of Wine*, cit. (n. 8), 46.

CHAPTER 14

"Pure Michigan" and "Napa Valley 100%"

Is Protection of American Origin Wines as Geographic Indications on Fertile Ground?

Rebeccah Gan

1 Introduction[1]

In the global battle over protection for geographic indications (GI), the United States (U.S.) is often pitted against France and Italy in a clash of New World vs.[2] Old World food cultures. However, such reductionism does not accurately reflect the complex nature of U.S.[3] agricultural producers: while large, agro-business entities and their respective lobbies fight against public law remedies for GI protection; value-added agriculturists, particularly in the wine sector, are seeking new, creative strategies under both public and private law to protect the fruits of domestic *terroir*.[4] This chapter analyzes multilateral treatment of GIs, the history of GI protection in the U.S., the growth of the American Origin Products (AOP) movement in the agricultural sector, and efforts by U.S. vintners to forge a new path to GI protection through, *inter alia*, stricter standards of identity for American Viticultural Area(s) (AVA)(s) and state business laws. However, recent U.S. case law suggests that favoring homegrown grapes could run afoul of the Commerce Clause of the U.S. Constitution.

1 RR Zimdahl. *Agriculture's Ethical Horizon*. 2nd ed. Waltham, MA: Elsevier; 2012.

2 Antonio Gramsci (1975), "Americanismo e fordismo" (1934) in Quaderni del carcere, vol. 3, ed. V. Gerratana, Torino, Einaudi, pp. 2137-2181 (discussing whether the intensification and rationalization of labor/creation of middle class laborer brought about by Detroiter Henry Ford could exist in a Europe which wanted *la botte piena e la moglie ubriaca* (a full barrel (of alcohol) and a drunken wife).

3 Macdonald J. *et al*, "Three Decades of Consolidation in U.S. Agriculture" USDA Eco. Info. Bull. No. 189 (March 2018), < https://www.ers.usda.gov/webdocs/publications/88057/eib-189.pdf>, accessed on April 12, 2020.

4 Roni C. Rabin, "What Foods Are Banned in Europe but Not Banned in the U.S.? *New York Times* (Dec. 28, 2013), < https://www.nytimes.com/2018/12/28/well/eat/food-additives-banned-europe-united-states.html>, accessed on April 12, 2020.

2 Multilateral Treatment of Geographical Indications

A brief overview of the U.S. complicated participation on multilateral agreements governing GIs is necessary to understand how greater protection for wine GIs might be reimagined.

2.1 *Paris Convention*

The Paris Convention for the Protection of Industrial Property of 1883, one of the first multilateral treaties on intellectual property, is administered by the World Intellectual Property Organization (WIPO) and has 177 member states, including several European countries and the U.S. Notably, the Paris Convention made a passing tacit reference to GIs by noting that "indications of source" and "appellations of origin" must be protected as areas of intellectual property, but did not lay out the scope and mode of protection.[5] The Paris Convention further mandated that member states confiscate goods that present a "direct or indirect use of a false indication of the source of the goods."[6]

2.2 *Madrid Agreement*

The 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, with members comprised of the Paris Convention signatories, picks up where the Paris Convention left off. The Madrid Agreement is the first multilateral agreement to enumerate the circumstances for seizure of products marketed under indications that deceive the public as to the source of the goods. Thus, the Madrid Agreement added protection against "deceptive" indications of source as opposed to mere protection for "false" indications.[7] Notably, under Article 4 of the Madrid Agreement, each country can decide which appellations may be generic, *with the exception of wine appellations*. Thus, wine appellations have historically been subject to higher standards of protection.[8]

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5 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (last amended Sept. 28, 1979). Article 1(2) of the Paris Convention notes: "The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, *indications of source or appellations of origin*, and the repression of unfair competition" (emphasis added).

6 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (last amended Sept. 28, 1979), art. 10(1).

7 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods art. 1(1), Apr. 14, 1891, 828 U.N.T.S. 389 [hereinafter Madrid Agreement]; *see* Christine Haight Farley, 'The Protection of Geographical Indications in the Inter-American Convention on Trademarks', (2014) 6 WIPO J. 68, 69.

8 Madrid Agreement (n 4), at art. 4; Haight Farley (n 4) 70.

2.3 *Inter-American Convention*

The 1929 General Inter-American Convention for Trade Mark and Commercial Protection, between the U.S. and nine of its Latin American trading partners, was the first multilateral treaty to address GIs by name, and to institute specific unfair competition enforcement provisions. The treaty mandates: "Every indication of geographical origin or source which does not actually correspond to the place in which the article, product or merchandise was fabricated, manufactured, produced, or harvested, shall be considered fraudulent and illegal, and therefore prohibited."[9]

Under the Inter-American Convention, both direct and indirect usage of a GI can constitute a prohibited use of the GI if the "geographical name serves as a basis for or is the dominant element of the sentences, words or expressions used" on the goods themselves or their packaging.[10]

Protection for generic geographical place names is excluded unless these indications are "regional indications of origin of industrial or agricultural products the quality and reputation of which to the consuming public depend on the place of production or origin."[11] *That is, protection of generic place names is expressly allowed where the quality of the product depends on its place of production.*[12] As to unfair competition, in the absence of "special remedies," the contracting state's "domestic sanitary laws, laws dealing with misbranding and the laws relating to trade marks or trade names, shall be applicable."[13] Accordingly, the U.S. pledged to make a variety of different federal protections to the GIs of its cosignatories and trading partners. Of course, the U.S. objective under this Agreement was to ensure that U.S. GIs were vigorously protected abroad – and not to force the U.S. to recognize European regional specialties.[14]

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9 General Inter-American Convention for Trade Mark and Commercial Protection art. 23, Feb. 20, 1929, 46 Stat. 2907, 2918, 124 L.N.T.S. 357 [hereinafter Inter-American Convention]; Haight Farley (n 4) 74.

10 Inter-American Convention (n 6), at art. 24; Haight Farley (n 4) 74.

11 Inter-American Convention (n 6), at art. 27; Haight Farley (n 4) 75.

12 Haight Farley (n 4) 75.

13 Inter-American Convention (n 6), at art. 28.

14 Although a purely European initiative, the 1951 Stresa International Convention on the Use of Appellations of Origin and Denominations of Cheeses, between France, Italy, the Netherlands, and Switzerland, is interesting as the first international treaty on cheese names. The signatories "committed themselves to prohibiting the use of false designations of origin on their territory." Cheeses considered to have AOs (Gorgonzola, Parmigiano Reggiano, Pecorino Romano, and Roquefort) were accorded higher protection, and could only be produced in the specific place of origin, regardless of "whether they are used alone or accompanied by a qualifying or even corrective term such as 'type,' 'kind,' 'imitation' or other term." Other cheeses, like Camembert, Danablu, Edam, and Emmenthal,

2.4 *Lisbon Agreement*

The 1958 Lisbon Agreement for the Protection of Appellations of Origin (AO) and Their International Registration as drafted covered AO s.[15] In 2015, The Geneva Act of the Lisbon Agreement entered into force (against fierce objection by the U.S., a non-signatory) to include all types of GI s.[16] The Lisbon Agreement does not allow for genericide of a protected GI. Once an AO or GI is registered, fellow Lisbon members must protect it in their countries.[17]

2.5 *TRIPS Agreement*

The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the largest multilateral instrument that deals with GI s. Its signatories are committed to minimum standards of protection for GI s, by agreeing to protect GI s for foodstuffs through existing trademark regimes or, alternatively, through *sui generis* protection regimes.[18] Specifically, Article 22 expressly mandates that members make available legal means to prevent the use of a GI that indicates or suggests that a good originates in a geographical area other than

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were deemed quasi-generic, and could be produced under certain production criteria, *e.g.*, fat content. The Stresa Convention was later supplanted by EU GI regulations, but at the core of Stresa is the principle that one must look at the country of origin to determine genericness. If a term is not generic in the country of origin, then all EU member states must extend and protect the term as a GI. Conversely, if a term is generic in the country of origin, a foodstuff name can be freely used outside the country of origin.

15 Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration art. 2, Oct. 31, 1958, 923 U.N.T.S. 205 (last amended Sept. 28, 1979) [hereinafter Lisbon Agreement].

16 Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications art. 2(1), WIPO Doc. LI/DC/19 (adopted May 20, 2015) [hereinafter Geneva Act]. In the Lisbon Agreement as amended by the Geneva Act, AO s are defined as "the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which *are due exclusively or essentially to the geographical environment*, including natural and human factors." (Emphasis added). In contrast, GI s do not require that the quality or characteristic of a product is exclusively or essentially related to the environment – rather it is sufficient that "a given quality, reputation or other characteristic of the good is *essentially attributable* to its geographical origin." (Emphasis added).

17 Geneva Act (n 11), at art. 12.

18 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). See Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178. See also Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p.

the true place of origin, or in a manner misleading the public as to the geographical origin.[19] Permissible GI use under TRIPS can include when the GI is used as part of a compound phrase that identifies the true origin of the goods, like "Wisconsin Roquefort" or "Prosciutto Parma-style."

Article 23 grants wine and spirit GIs a higher level of protection under TRIPS.[20] Subject to a number of exceptions, wines and spirits have to be protected even if misuse would *not* cause the public to be misled, and use of expressions such as ""kind," "type," "style," "imitation" or the like that are not permitted.[21]

2.6 *Wine Trade Agreement*

As a corollary to TRIPS, in 2006, the Agreement between the European Community and the United States of America on Trade in Wine (Wine Trade Agreement) prohibited the use of 17 of what the U.S. previously considered to be semi-generic wine names on new U.S. labels, while grandfathering such use for pre-2006 trademarked labels.[22] New labels for any of the 17 semi-generic names, such as Champagne, are no longer approved by the Alcohol and Tobacco Tax and Trade Bureau (TTB), which enforces labeling requirements for alcoholic beverages in the U.S.[23] More particularly, subject to a number of exceptions, wines and spirits have to be protected even if misuse would not cause the public to be misled, and use of expressions such as "like," "kind," or "style" is not permitted. In pertinent part, new vintners of sparkling wine post-2006 could not use the wording "California Champagne" in connection with their bubbly.[24]

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19 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), at art. 22.

20 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), at art. 23.

21 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), at art. 23.

22 Agreement between the European Community and the United States of America on Trade in Wine, U.S.-E.C., 2006 O.J. (L 87/2); 2 J.THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 14:19 (4th ed. 2007) (discussing legislative changes that will prohibit new uses of semi-generic names on non-European wines).

23 2 MCCARTHY (n 18), § 14:19.

24 2 MCCARTHY (n 18), § 14:19; 27 C.F.R. § 4.24 (2018); TTB Labeling Chart, https://www.ttb.gov/images/pdfs/wine_bam/c5-class-and-type-designation.pdf, accessed April 12, 2020.

3 Protection of GIs in the U.S.

Unlike the EU, the U.S. currently provides no *sui generis* protection for GIs. Instead, domestic and foreign GIs are chiefly protected through private law regimes, most notably the federal trademark system.[25] Specifically, rights holders can register GIs as trademarks, certification marks, or collective marks.[26]

Trademarks protect, *inter alia*, non-generic words, names, and symbols that distinguish goods manufactured and services provided by one party from another for a term renewable as long as the marks are in use.[27] Certification marks protect, *e.g.*, non-generic words, names, and symbols which are used by someone other than the owner of the certification mark – in order to "certify" compliance with, *inter alia*, geographic origin standards.[28] Collective marks protect, *e.g.*, non-generic words, names, and symbols used by members of a collective group (*inter alia*, an agricultural collective) to indicate membership in a given organization.[29]

Rights holders can enforce both registered and unregistered GIs at the United States Patent and Trademark Office (USPTO) by opposing or canceling a mark likely to cause confusion at the Trademark Trial and Appeal Board (TTAB).[30] Additionally, the U.S. Trademark Act provides a civil cause action for trademark infringement and unfair competition within the federal courts.[31] In the U.S. system, plaintiffs in trademark actions have the burden of proof. To succeed on a claim of infringement requires, in part, a showing that the marks at issue are confusingly similar.[32] Each of the federal circuits (of which there are thirteen) applies their own myriad-factor

25 Lanham Act, 15 U.S.C. §§ 1054 (2015) (providing for the registration of certification and collective marks including indications of regional origin), 1127 (defining certification and collective marks); *see* Bernard O'Connor, 'The European Union and the United States: Conflicting Agendas on Geographical Indications – What's Happening in Asia?', (2014) 9 GLOBAL TRADE & CUSTOMS J. 66, 66.

26 15 U.S.C. §§ 1054, 1127; *Geographical Indication Protection in the United States*, U.S. PAT. & TRADEMARK OFF., 1–2, <http://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf> accessed January 20, 2020.

27 15 U.S.C. § 1127.

28 15 U.S.C. § 1054.

29 15 U.S.C. § 1054.

30 *Geographical Indication Protection in the United States* (n 15) 1.

31 15 U.S.C. § 1125(a)(1)(A), Amanda Romenesko, 'Glass Half Full or Half Empty: An Analysis of *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC'*, (2017) 18 Wake Forest J. Bus. & Intell. Prop. L. 164.

32 E. Deborah Jay, 'He Who Steals my Good Name: Likelihood-of-Confusion Surveys in TTAB Proceedings', (2014) 104 TRADEMARK REP. 1141, 1141, Romenesko (n 27) 174.

balancing test – the most primary components being the similarity of the marks, similarity of the goods/services, and the market strength of the plaintiff's mark.[33]

Enforcement of foreign GIs as trademarks is imperfect, with the fact-finder sitting in judgment on complex issues of food composition identity and who exactly has standing to bring suit.[34] Similarly, determining whether or not a likelihood of confusion exists can be a messy affair. For example, the TTAB and the circuit courts can and do routinely hold one factor in its multi-factor balancing test to be dispositive on the issue of likelihood of confusion.[35] A recent TTAB wine mark case which was affirmed by its reviewing court illustrates this point. In *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*,[36] Oakville Hills, the registrant of "MAYA" for wines, argued that Georgallis' planned usage of "MAYARI" in connection with its wine was likely to engender consumer confusion, given, *e.g.*, that the parties' marks shared a common prefix, were used on identical goods, and would be offered via similar, if not identical, trade channels. Georgallis successfully argued at the TTAB and in front of the Federal Circuit that the marks were distinguishable, chiefly because they could be pronounced differently.[37]

In addition to trademark regulations, alcoholic beverages are also regulated through sundry federal labeling requirements at the Alcohol and Tobacco Tax

33 Barton Beebe, 'An Empirical Study of the Multifactor Tests for Trademark Infringement', (2006) 94 CALIF. L. REV. 1581, 1582, Romenesko (n 27) 174–175.

34 *See, Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981) (finding "BRIE" to be generic term in the United States); *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930 (TTAB 2013) [precedential] (U.S. Trademark Trial and Appeal Board concludes that there is insufficient evidence that "CHATEAUNEUF DU PAPE" functions as a common law regional certification mark for wine, or that Opposer (one of multiple wine syndicates for the appellation) was the rightful owner of that mark; *cf. Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477 (TTAB 2017) [precedential] (Opposer did not meet burden of establishing "TEQUILA" is a generic term; Mexican syndicate had standing to bring suit as was authorized by the Mexican Institute of Intellectual Property to register TEQUILA as a certification mark because CRT is the organization that verifies compliance with the Official Mexican Standard for Tequila. The Board therefore concluded that CRT has the right and authority to control the use of the term Tequila as a certification mark in Mexico and in the United States).

35 *See, e.g., Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, L.L.C.*, 600 F.3d 1343, 1346–47 (Fed. Cir. 2010)).

36 No. 91211612, 2015 WL 4573202, at *8 (TTAB 2015), *aff'd*, 826 F.3d 1376 (Fed. Cir. 2016) (finding MAYA and MAYARI not confusingly similar even though used on identical goods offered via identical channels of trade).

37 *Oakville Hills Cellar*, 826 F.3d at 1381–1382.

and Trade Bureau (TTB).[38] The TTB is responsible for recognizing and regulating American Viticultural Areas – "designated wine grape-growing region in the United States distinguishable by geographic features, with boundaries defined by the Alcohol and Tobacco Tax and Trade Bureau (TTB) of the United States Department of the Treasury."[39]

Without a Certificate of Label Approval (COLA) from the TTB, a wine or spirit cannot be sold in interstate commerce.[40] Interestingly, while place of bottling is required on the label, the disclosure of GIs is currently optional information.[41] Regulation of purely intrastate (*e.g.*, sold exclusively within the state of Michigan) is currently not subject to the COLA regime.[42] Rather, intrastate commerce is regulated by state law, as a result of post-Prohibition Era regulations retroceding of governance of alcohol back to individual states.[43]

Increased protection for other GIs could, *arguendo*, be provided through other U.S. consumer protection regimes, notably the inclusion of geographical criteria under marketing claims enforcement through the Federal Trade Commission (FTC) could be used to combat misuse of GIs within the U.S.[44] For

38 27 C.F.R. §§ 4.25(a)(1) (noting that "[a]t least 75 percent of the wine [must be] derived from fruit or agricultural products grown in the area indicated by the appellation of origin"(e)(1) (noting that for AVAs "[n]ot less than 85 percent of the wine [must be] derived from grapes grown within the boundaries of the viticultural area"), *See* Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of Treasury, Wine Laws and Regulations, <https://www.ttb.gov/wine/laws-regulations-and-public-guidance> accessed January 20, 2020 (outlining U.S. wine laws and regulations).

39 Public Law 74–401, 49 Stat. 977 (Aug. 29, 1935), 27 C.F.R. § 4.25(e), 27 CFR § 9 (American Viticultural Areas), *See* Alcohol and Tobacco Tax and Trade Bureau, U.S. Dep't of Treasury, Wine Laws and Regulations, <https://www.ttb.gov/wine/laws-regulations-and-public-guidance> accessed January 20, 2020 (outlining U.S. wine laws and regulations).

40 27 C.F.R. § 24.257(a)(4)(ii)(A) (2018), Deborah Soh, 'Something to Wine About: What Proposed Revisions to Wine Labelling Requirements Mean for Browers, Producers, and Consumers', (2019) 13 Brook J. Corp. Fin. & Com. L. 491 (discussing proposal by TTB to end COLA-exemption).

41 *See generally* 27 C.F.R. § 4.25(e), Soh (n 36) 491 (noting that source of wine grapes is currently optional information).

42 *See generally* 27 C.F.R. § 4.25(e), Soh (n 36) 491 (noting that source of wine grapes is currently optional information).

43 Section 2 of the Twenty-first Amendment repealing national Prohibition provides as follows: "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited" (italics added). U.S. Const. amend. XXI, § 2.

44 15 U.S.C. § 45 (granting the Federal Trade Commission broad authority to prohibit "unfair or deceptive acts or practices"), Deception Policy Statement, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), *cited with approval in Kraft, Inc. v. FTC*, 970 F.2d 314 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) (noting that an advertisement is "deceptive

example, the FTC, which polices the use of "Made in USA" and similar marketing claims, requires all products with such a label be "all or virtually all" made in the U.S.[45] Similarly, the federal Food and Drug Administration (FDA) governs the safety of "adulterated" food products, including alcoholic beverages.[46] More particularly, the FDA regulates low alcoholic content wines including ciders, sake, and fruit wines.[47] The FDA also regulates wineries as food facilities.[48]

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if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment").

45 Shinola was started by non-Detroiters (Fossil watches co-founder and Swiss movements manufacturer Ronda AG) in Detroit in 2011, and intentionally aligned itself with Detroit as synecdoche for U.S. manufacturing. Stacy Perman, 'The Real History of America's Most Authentic Fake Brand', *Inc.com* (April 2016), <https://www.inc.com/magazine/201604/stacy-perman/shinola-watch-history-manufacturing-heritage-brand.html> accessed January 20, 2020. While deciding where to locate Shinola, the company commissioned a focus group and asked people if they preferred a $5 pen from China, a $10 pen made in the U.S or a $15 pen made in Detroit. People picked the Chinese pen over the USA pen because it was cheaper, but were willing to pay the premium for a Detroit-made product. *Id.* Shinola employees assemble pieces for all Shinola watches and bikes at its Detroit factory, in its flagship Detroit retail store. The company has over 500 employees, the majority of whom work in Detroit. JC Reindl, 'Shinola to Keep Built in Detroit Slogan Despite Flak', *Detroit Free Press* (December 2, 2015), <https://www.freep.com/story/money/business/michigan/2015/12/02/shinola-watches-built-in-detroit-slogan-ftc/76564976/> accessed January 20, 2020. The FTC, which polices the use of "Made in USA" and similar marketing claims, requires all products with such a label be "all or virtually all" made in the U.S. An FTC spokeswoman said that "Built in Detroit" is tantamount to a "Made in USA" claim. Shinola changed its marketing materials to clarify sourcing of timepiece parts given that crucial components used to assemble its timepiece movements were actually manufactured in Switzerland and Thailand, and the watches' dials, hands, and crystals are made in China. *June 16, 2016 Federal Trade Commission, Bureau of Consumer Protection Closing Letter,* at <https://www.ftc.gov/system/files/documents/closing_letters/nid/160616musabedrockletter.pdf> accessed January 20, 2020.

46 21 U.S.C. §§ 301, *et seq*. (Federal Food, Drug, and Cosmetic Act of 1938, as amended).

47 FDA Compliance Policy Guide (CPG) Sec. 510.450, <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/manual-compliance-policy-guides/chapter-5-food-colors-and-cosmetics> (content current as of August 24, 2018) accessed January 20, 2020.

48 Deborah M. Gray, *The Exporter's Handbook to the U.S. Wine Market* (Board and Bench Publish. 2015), 75 (discussing requirements for foreign wineries sending samples into the United States); March 22, 2016 FDA Warning Letter to Post Winery, <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/post-winery-inc-489253-03222016> accessed January 20, 2020 (noting health and safety violations manufacturing facility), June 10, 2015 FDA Warning Letter to Royal Wine Corporation, <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/royal-wine-corporation-449249-06102015> accessed January 20, 2020 (noting health and safety violations in, *e.g.*, cooking wine manufacturing).

Currently, the FDA's ambit extends only to food which is mislabeled, *e.g.*, as to geographic origin.[49] As to food products, the FDA has stringent "standards of identity" provisions which allow the FDA to enforce against product names where the product name is inconsistent with what the product purports to be.[50] The TTB is charged with regulating labeling standards for most alcoholic beverages, to limited impact, as discussed below.

4 The Growth of the American Products Movement

While it is a fair statement that the U.S. "Big Dairy" industry is largely responsible for U.S. intransigence on the supranational level for GIs,[51] it is not the only market actor in the GI space. Indeed, value-added agriculture producers, including NAPA VALLEY Wines, banded together in 2012 to form their own pressure group to advocate for new public and private law remedies to protect "distinctive product names."[52] Additionally, domestic wine producers from Walla Walla to Long Island have joined a global movement of wine producers dedicated to stricter labeling standards for wine GIs, called the Wine Origins Alliance ("Origins"). Origins' manifesto, the "Joint Declaration to Protect Wine Place & Origin," was annouced in 2005 to call for a clearer global legal framework for protection of geographic location in wine names, including the creation of an international registry for wine and spirit place names.[53] However, a tension exists in the wine community between larger, more powerful wine

49 21 U.S.C. § 343 (providing reasons for which food is deemed mislabeled, including if advertising is false or misleading in a material respect).

50 21 U.S.C. § 343 (providing reasons for which food is deemed mislabeled, including if advertising is false or misleading in a material respect). August 12, 2015 FDA Warning Letter to Hampton Creek Foods, <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/hampton-creek-foods-08122015> accessed January 20, 2020 (finding that a vegan "mayonnaise" manufacturer was mislabeling its product as mayonnaise when the federal standards of identity provide that mayonnaise is egg-based under 21 C.F.R. 169.140(c) (standard of identity for mayonnaise)).

51 K. William Watson, 'Geographical Indications in TTIP: An Impossible Task', *CATO INST.* (Oct. 2015), <https://www.cato.org/publications/cato-online-forum/geographical-indications-ttip-impossible-task> accessed January 20, 2020.

52 March 21, 2017 "Geographical Indications (GIs) in the U.S. Food and Agriculture Trade" Congressional Research Service, <https://fas.org/sgp/crs/misc/R44556.pdf> accessed January 20, 2020.

53 Joint Declaration to Protect Wine Place & Origin, <https://origins.wine/wp-content/uploads/sites/2/2014/10/Declaration-to-Protect-Place-Press-Kit-October-2011.pdf> accessed January 20, 2020.

producing areas (*e.g.*, Napa Valley and Washington State) and smaller, niche craft wine communities, such as Michigan or Virginia, where crop yield often requires supplementing local grapes with grapes from other regions.[54]

As a practical matter, only a small number of states in the U.S. have the proper environmental conditions necessary to farm high-quality grapes, and yet, there is at least one winery in all fifty states.[55] Wineries that have limited access to good fruit from their own vineyards frequently source from the major grape-growing areas to supply or supplement fruit in order to make wine. Thus, there is an inborn tension between states with the most wine-friendly growing seasons, and those in climes more inhospitable to viticulture. Diehard *terriorists* uphold AVAs as sacrosanct; smaller winegrowers argue that, particularly in a large country like the U.S., the actual vinting forum is irrelevant.[56]

In some states, such as New York, to obtain a farm winery license, the produced wine must comprise entirely state-grown grapes (or other fruits or agricultural products grown within the state).[57] In other states, such as Michigan, in-state grape composition requirements are much lower, in part because harsh weather conditions may require supplementation of out-of-state grapes to keep business afloat.[58] However, even low composition requirements have faced recent legal challenges. For example, some Minnesota wine producers recently challenged a state law that required a mere 51% of grapes in a given

54 Crystal Chen, 'Wineries Rise in Michigan, But More Grapes Needed', *The Holland Sentinel* (January 29, 2018), <https://www.hollandsentinel.com/news/20180129/wineries-rise-in-michigan-but-more-grapes-needed> accessed January 20, 2020, (Danny Wood, 'The Grape Debate: Making Local Wine from Imported Fruit', *Midwest W NE Press* (November 21, 2013), <https://midwestwinepress.com/2013/11/21/gragrape-brokers-help-hindrance-midwest-wine-industry/> accessed January 20, 2020, Ana Campoy, 'Texas Farmers Turn to Grapes as State's Wine Industry Grows', *The Wall Street Journal* (March 16, 2015), <https://www.wsj.com/articles/texas-farmers-turn-to-grapes-as-states-wine-industry-grows-1426547526> accessed January 20, 2020, Gregory B. Hladky, 'Connecticut Wine Makers Hunting for Grapes to Match Our Harsh Climate', *Courant* (October 19, 2015), <https://www.courant.com/news/connecticut/hc-connecticut-grape-hunt-20151019-story.html> accessed January 20, 2020.

55 Robert Sechrist, *Planet of the Grapes: A Geography of Wine* ABC-CLIO (2017) 219.

56 Renee Johnson, 'Geographical Indications (GIs) in U.S. Food and Agriculture Trade', *Congressional Research Service*, <https://fas.org/sgp/crs/misc/R44556.pdf> January 20, 2020.

57 N.Y. ABC § 76-a(5)(a). If NY declares a natural disaster due to inclement weather – this requirement is waived. N.Y. ABC § 76-a(5)(b).

58 Dianna Stampfler, 'Defining 'Pure' Michigan Wine', *Michigan Uncorked, Michigan Craft Beverage Council* (February 2019), <https://promotemichigan.com/wordpress/wp-content/uploads/2019/02/Defining-Pure-Michigan-Wine.pdf>.

wine be Minnesota-grown, subject to a liberal waiver process for weather-related crop shortages.[59] A federal circuit appeals court upheld the right of the wine producers to challenge such provisions on constitutional grounds, and remanded back to the lower court to determine whether, *e.g.*, discriminating against out-of-state grapes served a legitimate legal purpose under the commerce clause of the U.S. Constitution.[60] Other in-state wine producers declined to participate in the lawsuit, asserting that "[w]ithout the law, grape prices could drop and we would lose talented growers."[61]

4.1 *Michigan Wine: Not So "Pure Michigan"*

The State of Michigan spends millions of annual dollars promoting tourism, particularly in the food and wine space, under a much-touted advertising campaign called "Pure Michigan."[62] Michigan itself has a long wine tradition: in the 1600s, French explorers made wine from wild grapes along the Detroit River, and an organized wine industry was born in the mid-1880s.[63] Michigan has more than 13,000 vineyard acres, historically devoted to juice-making grapes like Niagara and Concord. However, Michigan also has over 3,000 acres that are devoted to more than 30 varieties of wine grapes, both old-world grapes like Riesling, Pinot Noir, Merlot, and Pinot Grigio; and hybrids of old-world and native Michigan grapes.[64] The vast majority of the state's wine grapes are grown within 25 miles of Lake Michigan, one of the world's largest glacial lakes.[65] Wine growers argue that the lake effect *terroir* provides a favorable

59 In *Alexis Bailly Vineyard, Inc. v. Harrington*, No. 18–1846 (8th Cir. 2019) (remanding case to District Court on issue of standing).

60 In *Alexis Bailly Vineyard, Inc. v. Harrington*, No. 18–1846 (8th Cir. 2019) (remanding case to District Court on issue of standing).

61 Neal St. Anthony, 'Two Winemakers Fight on in Appellate Court Against Minnesota Grape-Law', *Star Tribune*, <http://www.startribune.com/two-winemakers-fight-on-in-appellate-court-against-minnesota-grape-law/507217182/> accessed January 20, 2020.

62 Trevor Bach, 'Is Pure Michigan A Success', *U.S. News and World Report* (October 22, 2018), <https://www.usnews.com/news/best-states/articles/2018-10-22/the-impact-of-the-pure-michigan-tourism-campaign> accessed January 20, 2020.

63 J. Robinson and L. Murphy, *American Wine The Ultimate Companion to the Wines and Wineries of the United States* (U. of Cal. Press 2013) 222 (describing growth of Michigan wine industry).

64 Greg Tasker, 'Michigan's Wine Business on the Grow', *Crain's Detroit* (October 13, 2019), <https://www.crainsdetroit.com/special-report/michigans-wine-business-grow> accessed January 20, 2020.

65 Maggie Hennessy, 'Michigan's Wine Scene is Full of Potential', *Wine Enthusiast Magazine* (June 17, 2019) <https://www.winemag.com/2019/06/17/michigan-wine-potential/> accessed January 20, 2020.

microclimate for vintners.[66] Indeed, Michigan vintners bottle more than 3 million gallons of wine each year, ranking the state 4th among top producers in the U.S.[67] A recent study by the Michigan Craft Beverage Council showed the wine industry has had a $5.4 billion economic impact on the state – a figure that includes business with wholesalers, retailers, restaurants and bars, and tourism spending.[68] About 1.7 million people visit the state's wineries each year, contributing more than $252 million in tourism dollars.[69] Michigan possesses five AVA s: 1) Fennville AVA (established in 1981); 2) Leelanau Peninsula AVA (established in 1982); 3) Lake Michigan Shore AVA (established in 1983, amended in 1987); 4) Old Mission Peninsula AVA (established in 1987); and 5) Tip of the Mitt AVA (established in 2016).[70] However, Michigan does not currently enforce composition requirements on grapes, rather it defers to federal TTB requirements as to the five state AVA s.[71] As a result, wine producers can import out-of-state grapes for blending its "Michigan" wine, which necessarily results in a not-so-pure product for wine consumers within the state.[72] Similarly, to use 'Michigan' as the appellation on the front of the label, only 75 percent of the grapes in that wine must come from Michigan grapes; which comes from the federal law, not the state law.[73] Thus, Michigan represents the lower end of state protection for wine GI s.[74]

66 Maggie Hennessy, 'Michigan's Wine Scene is Full of Potential', *Wine Enthusiast Magazine* (June 17, 2019) <https://www.winemag.com/2019/06/17/michigan-wine-potential/> accessed January 20, 2020.

67 *See generally* 27 C.F.R. § 4.25(e), Soh (n 36) 491 (noting that source of wine grapes is currently optional information).

68 *See generally* 27 C.F.R. § 4.25(e), Soh (n 36) 491 (noting that source of wine grapes is currently optional information).

69 *See generally* 27 C.F.R. § 4.25(e), Soh (n 36) 491 (noting that source of wine grapes is currently optional information).

70 'Establishment of the Tip of the Mitt Viticultural Area', 81 FR 47289 (July 21, 2016), <https://www.federalregister.gov/documents/2016/07/21/2016–17274/establishment-of-the-tip-of-the-mitt-viticultural-area> accessed January 20, 2020; G.S. Howell et al, 'Back to the Future: A Historical Viticulture Perspective on the Michigan Grape Industry', *Wines Vines Analytics* (June 2017), <https://winesvinesanalytics.com/features/article/185273/Back-to-the-Future> accessed January 20, 2020.

71 Stampfler (n 54).

72 Greg Tasker, 'Cold, Wet Seasons A Bad Mix for Michigan Wineries' Grape Harvest', *Detroit News* (November 22, 2019), <https://www.detroitnews.com/story/news/local/michigan/2019/11/22/cold-wet-seasons-bad-mix-michigan-wineries-grape-harvest/4273444002/> accessed January 20, 2020.

73 27 C.F.R. § 4.25(a)(1) (noting that "[a]t least 75 percent of the wine [must be] derived from fruit or agricultural products grown in the area indicated by the appellation of origin").

74 *See,* Stamfler (n 54) (noting that the then governor of the State of Michigan, Jennifer Granholm, served wine sourced from West Coast grapes at the gubernatorial Christmas

4.2 *California and Oregon: Strict Standards Regimes*

In contrast, other states, including California and Oregon, have ever-increasing state-level protections for wine composition.[75]

Besides its weather, California owes its wine industry to Franciscan priests who planted grapevines at each missionary outpost founded beginning in 1769, and immigrant Gold Rushers who flooded the state in 1849.[76]

California has regulated wine purity since the 1860s.[77] An earlier adopter of wine composition standards, California asked the U.S. Congress to "enact nationwide legislation to curb the marketing of "spurious" and "imitation" wines and alcohols."[78] Currently, California state law provides that any wine with a California appellation of any kind must be made from 100% California fruit.[79] For wines claiming the famed "Napa Valley" appellation, the grapes must originate from an AVA entirely within Napa County.[80] Indeed, the term "Napa" cannot appear on a wine label unless the wine would qualify for the term under federal labeling requirements.[81] Similarly, California law forbids false written representation as to where a wine is produced, *inter alia*, in print advertising.[82]

In *Bronco Wine Co. v. Jolly*[83], the Supreme Court of California upheld the regulation of "Napa" against a vintner who sourced and bottled its wines in California counties outside Napa's boundaries, largely for sale outside the state.[84] Although the vintner had approved COLAs, the Court held that California state law was not preempted by TTB regulations, and that California "as a preeminent producer of wine, and the geographic source of its wines – reflecting

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party and was surprised that the wine chosen for the party was not actually "Pure Michigan" wine).

75 Troy Brynelson, 'Oregon Winemakers Push Bills to Clamp Down on Out-of-State Competition', *Salem Reporter* (March 19, 2019), <https://www.salemreporter.com/posts/610/oregon-winemakers-push-bills-to-clamp-down-on-out-of-state-competition> accessed January 20, 2020 (discussing new legislation giving state power to punish wineries for "mislabeling" origin).

76 *See* Robinson (n 59) 18 (describing growth of California wine industry).

77 Cal Stats. 1860, ch. 223, § 2, p. 186, currently Pen.Code, § 382.

78 Cal. Sen. Conc. Res. No. 36, Stats. 1866 (approved Apr. 2, 1866) 908.

79 Cal. Code Regs., tit. 17, § 17015.

80 Cal. Bus. & Prof. Code 25240.

81 Cal. Bus. & Prof. Code 25241 and 27 C.F.R. 4.25.

82 Cal. Bus. & Prof. Code 25237.

83 33 Cal.4th 943, 17 Cal.Rptr.3d 180, 95 P.3d 422 (S. Ct. Cal. 2004).

84 *Bronco Wine Co. v. Jolly*, 129 Cal.App.4th 988, 999 (Cal. Ct. App. 2005), *cert. denied*, 126 S. Ct. 1169 (Mem)(2006) (noting that "*Bronco* sells its wine bottled outside Napa Valley to wholesalers, [much] of it is destined for interstate commerce").

the attributes of distinctive locales, particularly the Napa Valley – forms a very significant basis upon which consumers worldwide evaluate expected quality when making a purchase."[85]

Oregon's wine tradition is built on Pinot: early vintners moved to Oregon to forge a new source for Pinot Noir; Pinot Grigio is the state's top white wine.[86] Oregon, like California, has some of the most restrictive wine labeling laws in the country. To label a wine from an Oregon AVA, it must be made with at least 95% grapes from that area. Federal law requires 85%, and that the wine must be "fully finished," or fermented, in the state of origin,[87] but bills have been recently introduced to make Oregon's tight composition requirements even tighter by mandating that licensees, for example, out-of-state vintners who blend their state's grapes with Oregon grapes, "may not use or allow the use of any mark or label on a container of wine that the licensee keeps for sale, if the container in any way might deceive any customer as to the origin or geographic designation of the wine."[88]

The Oregon Winegrowers Association ("OWA") has championed new legislation[89] and has skirmished with, *e.g.*, vintners in California for getting too close to Oregon AVA's in marketing language. More particularly, the Copper Cane California winery uses Oregon grapes to vint and bottle its wines, which it labeled, *e.g.*, "Oregon Pinot Noit" and festooned with a map showing the Willamette, Umpqua, and Rogue AVA s and the legend "The Coastal Standard.

85 *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 997 (S. Ct. Cal. 2004); *Bronco Wine Co. v. Jolly*, 129 Cal.App.4th 988, 999 (Cal. Ct. App. 2005) at 1001 (quoting legislative history for Cal. Bus. & Prof. § 25241).

86 *See Robinson* (n 59) 146.

87 ORS 471.445 and ORS 471.446; ORS 471.446 currently speaks to seals on wine and cider containers, and its second provision states the "Oregon Liquor Control Commission may refuse to sell, or may prohibit any licensee from selling, any brand of alcoholic liquor which in its judgment is deceptively labeled or branded as to content, or contains injurious or adulterated ingredients."

88 George Plaven, 'Oregon's Wine Industry Split Over Legislative Proposals', *Statesman Journal* (July 31, 2019), <https://www.statesmanjournal.com/story/news/politics/2019/07/31/oregons-wine-industry-split-over-legislative-proposals-willamette-valley/1877183001/> accessed January 20, 2020.

89 George Plaven, 'Oregon's Wine Industry Split Over Legislative Proposals', *Statesman Journal* (July 31, 2019), <https://www.statesmanjournal.com/story/news/politics/2019/07/31/oregons-wine-industry-split-over-legislative-proposals-willamette-valley/1877183001/> accessed January 20, 2020, Pete Danko, 'Labelling Bill Splits Oregon Wine Industry', *Portland Business Journal* (March 20, 2019), <https://www.bizjournals.com/portland/news/2019/03/20/labeling-bill-splits-oregon-wine-industry.html> accessed January 20, 2020.

Purely Oregon, Always Coastal."[90] The OWA complained to the TTB that Copper Cane's labels (which had previously been approved by the TTB without issue) were materially deceptive because the Copper Cane wines are fully finished within California.[91] The TTB agreed and forced Copper Cane to change its labels.[92]

4.3 *State GI Regulations: Still Permissible under U.S. Constitution?*

A recent Supreme Court decision suggests that state-level protections for wine GIs may run afoul of federal law. More particularly, in *Tennessee Wine and Spirits Retailers Association v. Thomas*, the Supreme Court took up the case of whether a state has the right to impose residency requirements for entities wishing to sell alcohol within the state. The Court held that "a state law that discriminates against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to "advanc[e] a legitimate local purpose" and "protectionism" is not a legitimate state purpose."[93] The Court reasoned that the "Commerce Clause"[94] was designed to prevent individual States from adopting protectionist measures in order to preserve a national market for goods.[95] The Court had previously held in *Granholm v. Heald*,[96] that the Commerce Clause of the Constitution required that in-state wine producers must be treated the same as out-of-state wine producers.[97] *Granholm* was a consolidation of two separate lawsuits dealing with

90 Joseph V. Micallef, 'Oregon's Pinot War Is the Beginning of a Trend', *Forbes* (January 7, 2019), <https://www.forbes.com/sites/joemicallef/2019/01/07/oregons-pinot-war-is-the-beginning-of-a-trend/#66f1369c1b16> accessed January 20, 2020.

91 27 CFR 4.25(e)(3)(iv) requires that the wine be fully finished within the State (or one of the States, in the case of multi-state AVAs) within which the labeled AVA is located to be labelled as a product of the AVA.

92 Augustus Weed, 'Joe Wagner Ordered to Change His Oregon Wine Labels', *Wine Spectator* (November 1, 2018) <https://www.winespectator.com/articles/joe-wagner-ordered-to-change-his-oregon-wine-labels> accessed January 20, 2020.

93 588 U.S. ___ (2019) (internal citations omitted).

94 Article 1, Section 8, Clause 3 of the U.S. Constitution, Congress the power "to regulate commerce with foreign nations, and *among the several states*, and with the Indian." (italics added) U.S. CONST. art. I, § 8, cl. 3.

95 Article 1, Section 8, Clause 3 of the U.S. Constitution, Congress the power "to regulate commerce with foreign nations, and *among the several states*, and with the Indian." (italics added) U.S. CONST. art. I, § 8, cl. 3.

96 544 U.S. 460 (2005).

97 *Granholm v. Heald*, 544 U.S. 460, 489 (2005). Granholm was the same Michigan governor duped by the faux Michigan wine, *see* n 70. *Granholm v. Heald* also struck down New York's scheme which allowed in-state, but not out-of-state, wineries to make direct sales to consumers. *Granholm* stands for the proposition that state legislation cannot

the Dormant Commerce Clause (or "DCC"), a legal doctrine derived from the Commerce Clause. In essence, the DCC provides that states do not have the power to enact anticompetitive laws that discriminate against sellers in other states without the permission of Congress.[98] *Granholm* was one in a series[99] of lawsuits brought around the country to limit state regulation of alcoholic beverages. Michigan's then prohibition against direct shipment of alcoholic beverages from out-of-state alcohol producers to Michigan residents, guaranteed that alcoholic beverages were sold and delivered to Michigan consumers in transactions by parties who are licensed by or operating under the direction of the Michigan Liquor Control Commission.[100] Following *Granholm*, several lower federal courts struck down various restrictions on interstate commerce for wine.[101]

"deprive citizens of their right to have access to the markets of other States on equal terms." *Granholm*, at 473.

98 Brian Galle, 'Kill Quill, Keep the Dormant Commerce Clause', (2018) 70 Stanford Law Review, <https://www.stanfordlawreview.org/online/kill-quill-keep-dormant-commerce-clause/> accessed January 20, 2020.

99 *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D. Fla. 2001), *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (striking down North Carolina's Alcoholic Beverage Control laws prohibiting direct shipment of out-of-state wines to consumers); *Bolick, et al. v. Roberts, et al.*, 199 F. Supp. 2d 397 (E.D. Va. 2002) (finding in-state preference for the Virginia wine and beer industry to be impermissible as violative of the Dormant Commerce Clause); *Swedenburg v. Kelly*, 232 F. Supp. 2d 135 (S.D.N.Y. 2002) (concluding that the New York ban on the direct shipment of out-of-state wine was unconstitutional); *Dickerson v. Bailey*, 212 F. Supp. 2d 673 (S.D. Tex. 2002) (finding provision of the Texas Alcoholic Beverage Code which allowed consumers to purchase wines from Texas wineries and to have the wines shipped to their homes, but expressly forbade such activity with respect to out-of-state wineries, to be improper "economic protectionism"); *c.s.*, *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848 (7th Cir. 2000) (upholding Indiana law prohibiting the direct shipment of alcohol to Indiana consumers by anyone in the business of selling alcohol in another state or country).

100 *Granholm v. Heald*, 544 U.S. 460 (2005).

101 *See, e.g., Freeman v. Corzine*, 629 F.3d 146, 160 (3d Cir. 2010) (striking down "one-gallon cap on the importation of out-of-state wine"); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008) (striking down state law exempting on-the premises sales at small wineries from direct shipment ban); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *see also Siesta Vill. Mkt., LLC v. Granholm,* 596 F. Supp. 2d 1035 (E.D. Mich. 2008) (striking down a state law prohibiting direct shipping by retailers without an instate presence); *cf.*, *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227 (9th Cir. 2010) (upholding in-person requirements and small-winery exemption from direct-shipment ban); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30–31 (1st Cir. 2007) (rejecting challenge to Maine law requiring a face-to-face transaction before a winery may sell wine directly to customers); *Brooks v. Vassar*, 462 F.3d 341, 349 (4th Cir. 2006) (upholding a Virginia statute limiting the amount of alcohol that consumers could personally carry into the state for their own use).

Taken together, these cases suggest that the hostility of GI protection on the national level could prevent individual states from stringent grape composition requirements on the state level. Were such regulations challenged on the federal level, it is dubious whether a federal court would actually deem GI protection to be a "legitimate state interest," regardless of the tourism dollars at stake.

4.4 *Enforcement at the Federal Level of AVA s*

Under the Federal Alcohol Administration Act of 1935 as amended, the TTB is tasked with, *inter alia*, enforcing identity and quality standards in wines sold into the U.S.[102] In the U.S., an appellation of origin may be the "United States" or "American"; a state or no more than three states, all of which must be contiguous; a county or no more than three counties in the same state; or an American Viticultural Area.[103] Part of the TTB's regulation of wine involves the establishment and modification of AVA s, and the enforcement of the use of AVA names on wine labels and wine advertising.[104] Minimum composition percentage requirements were fixed as a " 'reasoned and amply elucidated' application of a statutory standard" to avoid misleading wine consumers. If the broad United States or American appellation is used, at least 75 percent of the grapes must be sourced in the U.S., and the wine must be fully finished within the U.S. If a single state (*e.g.,* California or Michigan) appellation is used, 75 percent of the grapes must be sourced from the labeled state, and the wine must be fully finished in the labeled or an adjacent state.[105] If labeled with a county appellation, the minimum composition requirement is 75 percent from the county indicated (*e.g.*, Napa Valley), and the wine must be fully finished within the state in which the labeled county is located.[106] If a multistate appellation is used, all the grapes must originate in the states indicated, the percentage of the wine's grapes derived from each state must be shown on the label, and the wine must be fully finished in one of the labeled states.[107]

Appellations of origin, including AVA s, identify the essence of wine origin – the grape provenance and the forum of vinting.[108] Meanwhile, an "identification

102 27 C.F.R. §§ 4.32, 24.257 (detailing mandatory labeling information); Richard Mendelson, 'U.S. Wine Law: An Overview', in Richard Mendelson (ed.), *WINE IN AMERICA: LAW AND POLICY* (2011) 1, 11; *see also* Carol Robertson, *THE LITTLE RED BOOK OF WINE LAW: A CASE OF LEGAL ISSUES* (2008) 138–39 (describing wine labeling requirements).

103 27 C.F.R. § 4.25; Soh (n 36) 491–493.

104 Soh (n 36) 497.

105 Soh (n 36) 496.

106 Soh (n 36) 493.

107 Soh (n 36) 493.

108 Soh (n 36) 495.

of grape sources" indicate where the grapes were grown, which may be distinct from where the wine was ultimately finished."[109] Identifying grapes sourced from an AVA but not complying with the terms of the AVA necessarily creates fertile ground for consumer confusion. For example, a COLA-exempt wine sold solely within one state could use the "NAPA VALLEY AVA" on the label if some small percentage of the grapes were sourced from the AVA – if the wine was 99% sourced from non-Napa Valley grapes and finished well outside the AVA, so long as the producer notes on the bottle that the wine will not enter into interstate commerce and also marks the bottle as "for sale in state only."[110] Thus, the COLA exemption seems entirely at odds with traditional norms of both consumer protection, and regulation of wine designed to reduce transaction costs for producers.[111] And yet, with respect to the U.S. marketplace, where unwieldy weather patterns means few states are ideally situated for consistent production, killing the COLA exemption could harm producers who primarily sell their grapes to out-of-state producers for that state's "domestic" wine industry.

As of late 2019, there are 246 recognized AVA s.[112] As noted previously, AVA labeled wines must be made from at least 85 percent of the grapes grown within the boundaries of the viticultural area.[113] Wines labeled with an appellation of origin of a country, state, county or foreign equivalent, must be made from at least 75 percent of the grapes grown from those areas.[114] Part of the application process requires AVA-aspirants to clearly define the distinctive geology, physical features, soil, and climate that define the

109 Soh (n 36) 495.

110 Soh (n 36) 495.

111 Kevin Fandl, 'Regulatory Policy and Innovation in the Wine Industry: A Comparative Analysis of Old and New World Wine Regulations', (2018) 34 Am. U. Int'l Rev. 279, 281 (discussing how governments enacted regulations to reduce transaction costs for producers in a marketplace prone to boom and bust tendencies).

112 List of established U.S. Viticultural Areas (last updated November 25, 2019). Alcohol and Tobacco Tax and Trade Bureau. U.S. Treasury, <https://www.ttb.gov/wine/established-avas> accessed January 20, 2020. Code of Federal Regulations, 27 C.F.R. § 9.22, 27 C.F.R. § 9.22.

113 List of established U.S. Viticultural Areas (last updated November 25, 2019). Alcohol and Tobacco Tax and Trade Bureau. U.S. Treasury, <https://www.ttb.gov/wine/established-avas> accessed January 20, 2020. Code of Federal Regulations, 27 C.F.R. § 9.22, 27 C.F.R. § 9.22, at 498.

114 List of established U.S. Viticultural Areas (last updated November 25, 2019). Alcohol and Tobacco Tax and Trade Bureau. U.S. Treasury, <https://www.ttb.gov/wine/established-avas> accessed January 20, 2020. Code of Federal Regulations, 27 C.F.R. § 9.22, 27 C.F.R. § 9.22, at 493.

AVA – though the TTB does not independently verify the claims made in the AVA application.[115]

In June 2016, the TTB under the Obama Administration proposed amending the CFR to bring all wines, whether COLA-exempt or not, or whether to be sold interstate or only intrastate, under the federal standards regarding the use of appellations of origin on wine labels. At the time of the writing of this chapter, the proposed amendments have not been implemented.[116]

If this amendment were to eventually be enacted, any wine that indicates an appellation of origin on its label would have to meet the minimum composition percentage and the vinting requirements as necessitated by the level of appellation invoked.[117] Supporters of eliminating the exemption hope that the amendment would stop COLA-exempt producers from "unfairly benefit[ing] from the goodwill and brand recognition" that are attached to certain AVAs, and to increase consumer confidence that the wine meets the production standards and regulations of the named AVA.[118] However, opponents, many smaller scale producers, assert that eliminating the exception would destabilize the industry by killing off growers who sell primarily to out-of-state wine producers who rely on AVA grapes to supplement instable "in-state" grape supply.[119]

Interestingly, the TTB's authority over the labeling of exempt wines, which are not introduced in interstate commerce, comes not from the Federal Alcohol Administration Act, but rather from the Internal Revenue Code (IRC).[120] Under the IRC, irrespective of where the wine is sold (*i.e.*, in-state or interstate commerce), wine must be labeled with "proper designation as to kind and

115 27 C.F.R. § 9.12(a)(3), So (n 36), at n. 72.

116 The Trump Administration has backed away from several Obama-era trade and market regulations. However, it is notable that the United States-Mexico-Canada Agreement (USMCA), which purports to modernize the North American Free Trade Agreement, has strong protection of GIs. USMCA, December 13, 2019 text, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf> accessed January 20, 2020 (Article 20.29 provides that "geographical indications may be protected through a trademark or a *sui generis* system or other legal means" and 20.31 at n. 17 notes that parties to the agreement do not need to provide a mechanism for denying, opposing, or cancelling, geographical indications for wines and spirits).

117 USMCA, December 13, 2019 text, at 494, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf> accessed January 20, 2020.

118 USMCA, December 13, 2019 text, at 494, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf> accessed January 20, 2020.

119 USMCA, December 13, 2019 text, at 494, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20-Intellectual-Property-Rights.pdf> accessed January 20, 2020.

120 Soh (n 36) 503.

origin, or, if there is no such designation known to the trade or consumers, then under a truthful and adequate statement of composition."[121] Thus, the IRC empowers the TTB "to issue regulations requiring truthful and accurate information on all wine … labels regarding the identity and origin of the wine."[122]

As noted in *Bronco Wine Co. v. Jolly*, consumers believe that wine marketed with the name "Napa Valley" is made from grapes actually grown in Napa Valley, California.[123] The Court held that *Bronco* had attempted to exploit Napa Valley wines' superior reputation, and to imply that its mislabeled wine was of the same character and quality.[124] The court further concluded that it was not an infringement on Bronco's right to free speech to prohibit misleading wine labels that would engender consumer confusion as to origin.[125] Bringing both intrastate and interstate wine labels under TTB regulation would streamline the labeling process and empower true consumer choice.[126] Consumers could exercise informed consent – knowing that the wine they purchase "meets specific characteristics and exhibits specific qualities."[127]

However, for many smaller grape growers in AVA s, sourcing grapes for out-of-state producers is primary.[128] Thus, the value of the AVA is not only for wines native to the AVA, but also the value of the AVA as a grape source for secondary producers. This "value-added" AVA grape allows smaller producers premium pricing in the secondary marketplace (*e.g.*, as an ingredient in a "Pure Michigan" wine "blend").[129] Out-of-state vintners pay a premium, in part, because they can pass these costs through to in-state consumers who see the out-of-state AVA on the label. Eradicating the COLA exemption would prevent out-of-state producers from indicating the provenance of some of the grapes used in their wines. Without the AVA on the label, out-of-state producers might stop sourcing grapes from smaller AVA producers, which could depress the very value of the AVA.[130]

121 Soh (n 36) 503.
122 Soh (n 36) 503.
123 *Bronco Wine Company v. Jolly,* 129 Cal. Appl. 4th 989 (3rd Dist. 2005), Soh (n 36) 507.
124 *Bronco Wine*, 29 Cal. Rptr. 3d at 480–81, Soh (n 36) 507.
125 *Bronco Wine*, 29 Cal. Rptr. 3d at 480–81, Soh (n 36) 507.
126 Soh (n 36) 507.
127 Soh (n 36) 507.
128 Soh (n 36) 508.
129 Soh (n 36) 508–509.
130 Soh (n 36) 509.

5 Conclusion

The U.S. consumes more wine than any country the world-over.[131] Regulation of wine GIs straddles myriad American industrial narratives: traditional wine-growing regions vs. niche, value-added agriculture initiatives in newer state wine economies, and attendant tourism dollars; free-market principles vs. protectionism at the state level; and the teetering balance beam between the federal commerce clause granting Congress the power to regulate interstate commerce, and the rights of states as the engines of regional growth to regulate the literal fruits of their labor. There is a growing American consciousness clamoring for a more ethical marketplace for clearly-labeled value-added goods.[132] This new consciousness could aid in the protection of U.S. domestic wine GIs on a regional and international level. Reimagining the stream of commerce would allow vintners to be compensated for the quality of their product, and allow buyers to give truly informed consent as wine purchasers.[133] Given the tortured history of GI protection within the U.S., *sui generis* protection for all GIs seems unlikely. The U.S. has always been more keen to protecting GIs outside U.S. borders – remember that the Inter-American Convention allowed for the protection of even "generic" geographical place names, so long as the quality and reputation of which to the consuming public depend on the place

131 J. Thornton, *American Wine Economic An Exploration of the U.S. Wine Industry* (U. of Cal. Press 2013) at xiii.

132 Cara Rosenbloom, '9 Ways Millennials are Changing the Way We Eat', *Washington Post* (February 21, 2018), <https://www.washingtonpost.com/lifestyle/wellness/9-ways-millennials-are-changing-the-way-we-eat/2018/02/20/6bb2fe60-11eb-11e8-8ea1-c1d91fcec3fe_story.html> accessed January 20, 2020 (discussing February 2017 report on marketing to millennials) Jeff Fromm, 'Why Label Transparency Matters When It Comes To Millennial Brand Loyalty', *Forbes* (December 13, 2017), <https://www.forbes.com/sites/jefffromm/2017/12/13/why-label-transparency-matters-when-it-comes-to-millennial-brand-loyalty/#65290b603dac> accessed January 20, 2020 (noting that Millennials are the largest generation and extremely label-conscious), *Cf.* K. Fandl, 'Regulatory Policy and Innovation in the Wine Industry: A Comparative Analysis of Old and New World Wine Regulations', 34 Am. U. Int'l Rev. 279, 338 (arguing that millennials are less influenced by *terroir* and more influenced by external factors such as label design, wine producer reputation, non-*terroir* information on the label).

133 *See* J. Thornton (n 125) 104 (noting that current wine labelling could result in a wine labelled "2008 Sonoma County Chardonnay Produced and Bottled by Z Winery" that could legally comprise 75% Sonoma grapes, 85% harvested in 2008, 75% fermented by Z Winery, but may contain 15% of non-Chardonnay grapes purchased on the bulk wine market from grapes harvested outside Sonoma in a different year). In other words, the consumer cannot tell from the label the complete provenance of its wine prior to purchase.

of production or origin.[134] In light of recent Supreme Court jurisprudence,[135] it is an open question whether state regulation of wine composition and labeling would survive constitutional challenge in federal court. The current trademark system is insufficient in protecting growers from unfair competition and brand misuse, and, *arguendo*, consumers from material confusion. More robust enforcement at the TTB and the FTC might serve as a stop-gap measure, but in the current U.S. political climate, there may not be the palate for increasing federal regulation.

134 J. Thornton (n 125) 104. The United States is the world's fourth-largest producer and seventh-largest exporter of wine, primarily to the European Union and China. *See* J. Thornton (n 125) 286–287.

135 *Tennessee Wine and Spirits Retailers Association v. Thomas*, 588 U.S. ___ (2019).

CHAPTER 15

Australia Corked Its Champagne and So Should We

Enforcing Stricter Protection for Semi-Generic Wines in the United States

Lindsey A. Zahn

1 Introduction

Some commentators say World War I was a war over Champagne: the Germans and the French battled for control over the Champagne region of France, spawning countless casualties, but the eminent, eponymous sparkling wine survived the unprecedented conflict and became even more popular in the war's aftermath.[1] The war itself may be long over, but the international dispute continues over the legal right to use the term "Champagne" on wine products.[2] Accordingly, in the context of international trade and consumerism, one of the most significant legal problems of the international wine industry is non-European winemakers' use of long-established European names to label wines that do not originate in Europe.[3] In September 2010, the disparity between non-European and European winemakers gained additional attention when Australia ratified an agreement that enforces stricter legal protection of European wines and prohibits Australian wine producers from using semi-generic names originating in the European Union ("EU"), including Champagne.[4] Although

1 *See, e.g.*, DONALD KLADSTRUP and PETIE KLADSTRUP, *CHAMPAGNE: HOW THE WORLD'S MOST GLAMOROUS WINE TRIUMPHED OVER WAR AND HARD TIMES* (Harper Collins 2005) 10–14; W. Blake Gray, 'Champagne Hosts Ghosts of War', *S.F. CHRON.* (Dec. 22, 2005), <http://articles.sfgate.com/2005-12-22/wine/17404439_1_champagne-region-petie-kladstrup-champagne-house>.

2 *See, e.g.*, THE COMITÉ INTERPROFESSIONNEL DU VIN DE CHAMPAGNE, <http://www.champagne.fr/en/default.aspx> accessed Apr. 11, 2012; OFFICE OF CHAMPAGNE, USA, <http://www.champagne.us/index.php> accessed Apr. 11, 2012.

3 *See generally* Kal Raustiala and Stephen R. Munzer, 'The Global Struggle Over Geographical Indications', (2007) 18 EUR. J. INT'L L. 337 (discussing the major changes in economic value of GIs in a global market and the use of GIs by non-European winemakers).

4 *See generally Trade Agreements*, WINE AUSTL., <http://www.wineaustralia.com/australia/Default.aspx?tabid=279> accessed Feb. 9, 2012 (documenting the wine trade agreements to which Australia is a party). While Russian producers recently agreed to cease use of the term "Champagne" on sparkling wine products, the context of this chapter will not focus the change in Russian standards. *See* Richard Woodard, 'Russia to Stop Using 'Soviet

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federal laws regulate the intellectual property ("IP") of wines, the United States presently does not provide adequate legal protection for semi- generic wine product names originating in the EU.[5]

Geographical indications ("GIs"),[6] a type of intellectual property right, are distinctive signs[7] that identify a product based on the geographical territory or region[8] where the product originates. Consumers may therefore associate GIs with a certain quality[9] or discrete reputation due to the product's geographical origin or practices and customs followed in that geographical region.[10] Unlike

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Champagne' Name', *DECANTER.COM* (Oct. 28, 2011) <http://www.decanter.com/news/wine-news/529463/russia-to-stop-using- soviet-champagne-name>. See Stewart KM Wong (1992) Registration of Chinese Characters as Trade Marks in Australia, Asia Pacific Law Review, 1:1, 95–103.

5 The seventeen wine product names recognized as semi-generic under U.S. law are Angelica, Burgundy, Chablis, Champagne, Chianti, Claret, Madeira, Malaga, Marsala, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne, Sherry, and Tokay. Distilled Spirits, Wine, and Beer Act, 26 U.S.C. § 5388(c)(2)(B) (2006).

6 The European system for the protection of geographical indications defines GIs as "the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or foodstuff: originating in that region, specific place or country, and; which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which take place in the defined geographical area." Council Regulation (EC) 2081/92, art. 2, ¶ 2; *see also* Michael Blakeney, 'Geographical Indications and TRIPS', in Meir Perez Pugatch (ed.), *THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY* (2006) 293, 295–99 (noting that, for geographical indications, it is sufficient that the production, processing, or preparation of the food product occur in the area specificied by the geographical indication).

7 *See generally* BERNARD O'CONNOR, *THE LAW OF GEOGRAPHICAL INDICATIONS* (2004) 21–23 (discussing the term "geographical indication"). For a discussion on the history and economic impact of geographical indications, see Blakeney (n 7) 295–99; *see also* Phil Evans, 'Geographical Indications, Trade and the Functioning of Markets', in *THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW,ECONOMICS AND POLITICAL ECONOMY* (n 7) 345, 345–51 (discussing a general background on where Gis come from, exemptions, and the history of exceptions).

8 *See* O'CONNOR (n 8) 22–23; *see ALSO* CAROL ROBERTSON, *THE LITTLE RED BOOK OF WINE LAW: A CASE OF LEGAL ISSUES* (2008) 148–49 (explaining the naming of wines based on the geographic area).

9 "There are three factors, or clusters of factors, that affect the quality of wine, namely (a) grapes (variety); (b) soil and climate; and (c) wine-making ability (knowhow and technique)." Daniel J. Gervais, 'Reinventing Lisbon: The Case for a Protocol to the Lisbon Agreement (Geographical Indications)', (2010) 11 CHI. J. INT'L L. 67, 117 (citing DAVID BIRD, *UNDERSTANDING WINE TECHNOLOGY* (2005) 8–16).

10 *See, e.g.*, Jose Manuel Cortes Martin, 'TRIPS Agreement: Towards a Better Protection for Geographical Indications', (2004) 30 BROOK. J. INT'L L. 117, 117–18; *see also* ROBERTSON (n 9) 161 ("[Geographical indications] can convey to consumers some of the important or

a trademark, a GI is "prescriptively embedded in a particular geographical locale" and cannot be privately owned.[11] In recent years, GIs have become effective marketing tools in a global economy,[12] especially with respect to wine products.[13]

European winemakers classify their wines using appellations of origin,[14] a system that establishes nomenclature according to the geographical location where the grapes of each wine product originate.[15] Examples include the white wine Chablis from north of the Burgundy region of France and the sparkling white wine Champagne produced in the Champagne region of France.[16] Accordingly, the EU advocates strong protection for GIs of wine,[17] believing that

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desirable characteristics of the goods or services that are attributable to their geographic origin.").

11 Dev Gangjee, 'Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications', (2007) 82 CHI.-KENT L. REV. 1253, 1255–57.

12 *See* Irene Calboli, 'Expanding the Protection of Geographic Indications of Origin Under TRIPS: "Old" Debate or"New" Opportunity?', (2006) 10 MARQ. INTELL. PROP. L. REV. 181, 187.

13 *See* ROBERTSON (n 9) 161 ("Geographic indications have become so important today because, like trademarks, they are valuable marketing tools in a global economy.").

14 For general discussion, see RICHARD MENDELSON, *FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA* (2009) 138, 141–43; ROBERTSON (n 9) 148–52; Brian Rose, Comment, 'No More Whining About Geographical Indications: Assessing the 2005 Agreement Between the United States and the European Community on the Trade in Wine', (2007) 29 HOUS. J. INT'L L. 731, 742–44.

15 "This is the idea of terroir: that the particular geography produces particular product characteristics that cannot be imitated by other regions." Justin Hughes, 'Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications', (2007) 58 HASTINGS L.J. 299, 304; *see* MENDELSON (n 15) 141.

16 ROBERTSON (n 9) 147 ("These wines are all what they are because of where the grapes from which they are produced are grown, and their names, whether Chablis, Bordeaux or Champagne, tell us what to expect from the wine.").

17 The EU set forth specific regulations and conditions regarding wine growing zones, specifications as per type of grapevine products, restrictions on blending wine, planting vines, etc. with respect to naming wine products. *See* Council Regulation 1234/2007, Establishing a Common Organisation of Agricultural Markets and on Specific Provisions for Certain Agricultural Products, 2007 J.O. (L 299) 1, <http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2007R1234:20100501:EN:PDF>; *see also* Tomer Broude, 'Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO LAW', (2005) 26 U. PA. J. INT'L ECON. L. 623, 629, 631 ("The main proponent of this cultural rationale is the European Union, which has also broadened the cultural argument to apply to developing countries, claiming that GIs 'are key to EU and developing countries cultural heritage, traditional methods of production and natural resources.' " (quoting Delegation of the European Commission to Japan, Why Do Geographical Indications Matter to Us?, EU Background Note 01/04, Feb 10, 2004, <http://www.deljpn.ec.europa.eu/home/news_en_newsobj553.php>).

"wine is more than an ordinary agricultural product made from grapes,"[18] and denounces wine products labeled with GIs that do not correspond with their geographical origin.[19] Conversely, the United States[20] and other New World wine-producing countries[21] have stubbornly taken a less rigid[22] posture towards global and national GI protection of wines.[23]

Non-European wine producers' use of European GIs has long been contentious in the global wine market,[24] and thus the EU is the strongest advocate of multilateral, global GI protection.[25] This policy prompts the EU to vigorously pursue exclusive dominion over GIs – specifically those of wine

18 Rose (n 15) 733; *see also* Linda Murphy, 'Recognizing Wine's Taste of Place', *S.F. CHRON.* (Aug. 4, 2005), <http://articles.sfgate.com/2005-08-04/wine/17385128_1_inglenook-california-chablis-dry-creek-valley-zinfandel-california-champagne> (noting that "it galls European vintners" to see wines produced and labeled in conflict with their geographical region of origin).

19 *See* Justin M. Waggoner, Note, 'Acquiring a European Taste for Geographical Indications', (2008) 33 BROOK. J. INT'L L. 569, 570.

20 The United States protects GIs through trademarks, which are part of the country's unfair competition law. *See* GEOGRAPHICAL INDICATION PROTECTION IN THE UNITED STATES, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf>. The Lanham Act is the general statute that controls GI protection of foodstuffs. *See* Lanham Act, 15 U.S.C. § 1052(e) (2006).

21 *See generally* Philippe Zylberg, 'Geographical Indications v. Trademarks: The Lisbon Agreement: A Violation of TRIPS?', (2002) 11 U. BALT. INTELL. PROP. L.J. 1 (noting that countries such as the United States, Canada, Australia, and New Zealand have traditionally regulated GIs of wine products in a "less vigorous" fashion than the protection provided by the Old World wine country producers and specifically pointing out that a review of U.S. legislation "show[s] a consistent opposition to the European position").

22 For example, the widely-known California sparkling wine producer, Korbel Champagne Cellars, argues that its company has produced sparkling wines in California since 1882 and always called such products "Champagne," or "California Champagne." ROBERTSON (n 9) 149–50. Additionally, Korbel claims that the particular method for producing these sparkling wines – "*méthode champenoise*" – is the method for making sparkling wine that commenced in the Champagne region in France and is not an actual *terroir*. ROBERTSON (n 9) 149–50.; *see also* Leigh Ann Lindquist, 'Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement', (1999) 27 GA. J. INT'L & COMP. L. 309, 313 (noting that America's earliest wine producers devalued the geographical indications system that was notable of their European counterparts).

23 *See* Blakeney (n 7) 300.

24 For example, Californian "champagne" or Australian "sparkling burgundy." Barton Beebe, 'Intellectual Property Law and the Sumptuary Code', (2010) 123 HARV. L. REV. 809, 871.

25 *See* Blakeney (n 7) 295–99 (noting that the EU's strong advocacy for a wider global protection of GIs has been "attributed to those Mediterranean states, such as France, Italy, Portugal, and Spain").

products – through both bilateral agreements with major wine-producing countries[26] and multilateral agreements.[27] Notwithstanding the stipulations set forth in these agreements, the United States stubbornly opposes the extension of legal protection of GIs for non-generic wine product names because it seeks to preserve its differing system of IP regulation.[28] The fashioning of both multilateral and bilateral wine trade agreements between the EU and the United States reflects this attitude.

The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") is the first multilateral agreement organized by the World Trade Organization ("WTO") that explicitly establishes global protection for GIs of wines produced throughout the world and is the predominant agreement that governs successive bilateral trade agreements.[29] The WTO is an "international organization dealing with the rules of trade between nations."[30]

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26 *See* Calboli (n 13) 187–94; *see also* Rose (n 15) 756–59 (discussing the bilateral agreement in wine trade between the United States and the EU). The United States is not the only nation to have a bilateral agreement with the EU. Many other countries (e.g., Canada, Chile, and South Africa) have wine trade agreements with the EU, the difference simply is that these countries agreed to "phase out" the wines deemed semi-generic under U.S. law and grant heightened protection to these wine names. *See* Agreement Between the European Community and Canada on Trade in Wines and Spirit Drinks, 2004 O.J. (L 35) (EC), <http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:035:0003:0093:EN:PDF>; Agreement Establishing the Association Between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part, 2002 O.J. (L 352) (EC), <http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:352:0003:1439:EN:PDF>; Agreement Between the European Community and the Republic of South Africa on Trade in Spirits, 2002 O.J. (L 28) (EC), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:028:0113:0125:EN:PDF>; *see also* 'GEOGRAPHICAL INDICATIONS AND TRIPS: 10 YEARS LATER ... A ROADMAP FOR EU GI HOLDERS TO GET PROTECTION IN OTHER WTO MEMBERS', O'CONNOR & COMP. 8–11, <http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135088.pdf> (sketching the bilateral agreements between the EU and other countries for the protection of GIs).

27 *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 22–24, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement], <http://www.wto.org/english/docs_e/legal_e/27-trips.pdf>; *see also* Hughes (n 16) 311–31 (discussing the background of the TRIPS Agreement and its applicable articles to transnational wine trade).

28 *See* Zylberg (n 22) 30–39.

29 *See* Mark Silva, Note, 'Sour Grapes: The Compromising Effect of the United States' Failure to Protect Foreign Geographic Indications of Wines', (2005) 28 B.C. INT'L & COMP. L. REV. 197, 200. See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178.

30 'What is the WTO?', *WORLD TRADE ORG.*, <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> accessed Apr. 11, 2012. See also Julien Chaisse and Kung Chung

The WTO promulgates legal agreements, including the TRIPS Agreement, which manage international commerce and trade policy.[31] Generally speaking, the TRIPS Agreement creates standards of IP regulation among WTO members.[32] The TRIPS Agreement recognizes appellations of origin and provides for future U.S. federal legislation that will comply with IP protection of items in international commerce, including legislation that regulates wine.[33] Advocates promote many reasons for recognizing GI protection internationally, but the dominant arguments stress preserving wine quality or reputation and reducing wine fraud.[34] Numerous countries are parties to the TRIPS Agreement, but this chapter will discuss only the United States, Australia, and the EU.[35]

Recently, Australia entered into a new bilateral wine trade agreement with the EU that more thoroughly complies with the TRIPS Agreement and adopts the EU's system of GI regulation.[36] This agreement, titled The Agreement Between Australia and the European Community on Trade in Wine (2008) ("2008 Agreement"),[37] replaced an earlier wine trade agreement, the Agreement

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Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p. and Julien Chaisse and Puneeth Nagaraj 'Changing Lanes – Trade, investment and intellectual property rights' (2014) 36(1) *Hastings International and Comparative Law Review* 223–270.

31 For more information, see 'What is the WTO?', *WORLD TRADE ORG.*, <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> accessed Apr. 11, 2012. See Chaisse J (2015) Deconstructing the WTO conformity obligation: A theory of compliance as a process 38(1) *Fordham Journal of International Law* 57–98.

32 *See generally* Silva (n 30) 198–99, 202–06 (discussing the general background of the TRIPS Agreement and the articles applicable to international wine trade).

33 This includes the Distilled Spirits, Wine, and Beer Act. *See* 26 U.S.C. § 5388.

34 *See* Waggoner (n 20) 589–92; *see also* Hughes (n 16) 355 ("[T]he rise of appellations for wine and cheese was the result of contingent events like the widespread wine labeling fraud that France experienced in the late nineteenth century.").

35 During the drafting of the TRIPS Agreement, "[n]egotiations regarding the protection of geographical indications were among the most difficult. Unlike other issues in the Agreement … it was the Europeans against North America and Australia." Zylberg (n 22) 30–39 (acknowledging that "the common goal of the developed countries … was to provide high minimum standards of protection for intellectual property rights. In the negotiations for geographical indications, however, the European wine sector strived to achieve additional protection beyond the general standards that were already established, while the North American countries were interested in limiting intellectual property rights rather than extending them.").

36 *See* Agreement Between the European Community and Australia on Trade in Wine, Dec. 1, 2008, 2009 O.J. (L 28) 3 (EC) [hereinafter 2008 Wine Trade Agreement], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:028:0003:0087:en:PDF>.

37 The 2008 Wine Trade Agreement was signed on December 1, 2008 and became actionable on September 1, 2010. Agreement Between the European Community and Australia on Trade in Wine, Dec. 1, 2008, 2009 O.J. (L 28) 3 (EC) [hereinafter 2008 Wine Trade

Between Australia and the European Community on Trade in Wine (1994) ("1994 Agreement"),[38] between the two wine powers and protects eleven of the EU drink labels and 112 of the Australian GIs.[39] The 2008 Agreement sets clear dates for phasing out the GIs named in Article 8 of the 1994 Agreement and thus confirms that many Australian wine products previously labeled using European names, such as sherry and tokay,[40] will no longer be labeled under these names.[41] Accordingly, such provisions aid in the geographic protection of wine products while simultaneously enforcing an agreeable multilateral system of GI protection and intellectual property regulation.

Presently, the United States does not have a wine trade agreement with the EU that sufficiently protects the semi-generic wine names of foreign wine products from production in the United States. Accordingly, American vintners have bottled and continue to bottle wine products labeled with European wine product names but which may not produced from grapes grown in their respective European regions.[42] American vintners' use of semi-generic wine names lacking legal protection further dilutes these names into generic terms. This dilution is particularly disheartening to winemakers who assert that *terroir*, or the regional qualities, contributes to wine production

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Agreement], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:028:0003:0087:en:PDF>.

38 Although Article 8 of the 1994 Wine Trade Agreement named specific wine GIs and prevented Australia from producing wine labeled under Article 8 GIs, Article 9 of the 1994 Agreement failed to portray a date by which Australia would transition from using some of the GIs. *See* Agreement Between Australia and the European Community on Trade in Wine, 1994 O.J. (L 86) 3 (EC), [hereinafter 1994 Wine Trade Agreement], <http://ec.europa.eu/agriculture/markets/wine/third/austr_en.pdf>.

39 'Australia Confirms it's a World Wine Power and Agrees Labeling with the EU', *MERCOPRESS* (Sept. 2, 2010), <http://en.mercopress.com/2010/09/02/australia-confirms-it-s-a-world-wine-power-and-agrees-labelling-with-the-eu/> [hereinafter *Australia Confirms It's a World Wine Power*] ("Australian producers will not be able to use 11 prestigious European drink labels. Australia also gets protection for 112 of its 'geographical indicators' (GIs), including Barossa and Coonawarra.").

40 *See* Article 15 of the 2008 Wine Trade Agreement (n 37); Article 8 § (1)(c) of the 1994 Wine Trade Agreement (n 39), art. 8 § 1(c).

41 1994 Wine Trade Agreement, *supra* note 39.

42 Specifically, winemakers in California blended red wine products as early as the 1860s or 1870s with "no relation at all to the red wines made from Pinot Noir grapes in France's Burgundy region" and called such products "California Burgundy" or "Burgundy" wines. ROBERTSON (n 9) 148. Accordingly, "[t]he EU finds terms such as 'California Champagne' to be deceptive and confusing to consumers as well as harmful to the image and value of wines produced in regions that rightfully claim the name of that particular place." ROBERTSON (n 9) 151.

by shaping the wine product's specific characteristics.[43] Given that the Australian government now recognizes the European system of GI protection for wine product names that U.S. legislation categorizes as semi-generic[44] – and considering the history of wine trade between Australia and the United States with the EU[45] – one can imagine that the EU will increasingly pressure the United States to comply with heightened protections of semi-generic wine product names.

This chapter argues that the United States should adopt a heightened system of GI protection for semi-generic wine products to halt the continued dilution of semi-generic wine product names in the international consumer wine market. Part I provides a brief background on the development of GIs and American wine products and their connection to corresponding articles of the TRIPS Agreement. Part II examines the legal protection of wine products in the recent wine trade agreement between Australia and the EU with respect to appellation of origin for wine nomenclature. Part III outlines the current agreement between the United States and the EU regarding wine trade. Part IV suggests the United States should adopt a wine trade agreement similar to the agreement the EU signed with Australia and examines how the United States could benefit from such compliance. Part V outlines the steps that the United States must take to further such heightened protection and suggests a comprehensive framework for such changes. Finally, this chapter concludes that the United States must alter its level of protection for semi-generic wine products to prevent further dilution of non-generic wine products' GIs.

43 *See generally* ROBERTSON (n 9) 149–51 (discussing the viewpoints of many French winemakers that wines not produced in their respected geographical region "do not possess the character or quality" of the wines grown in that region).

44 *See* 26 U.S.C. § 5388.

45 This specifically refers to the separate complaints filed by both Australia and the United States before the WTO against the EU, alleging that the EU did not provide adequate protection for pre-existing trademarks that were either homogenous or indistinguishable from that of a European GI. Considering Australia's prior position with respect to GI protection (i.e., a similar perspective to that of the United States, preserving intellectual property through trademark registration), it is understandable that Australia's shift from supporting trademark protection to adapting a European GI system of protection is likely to pressure the United States to comply with a similar, if not identical, wine trade agreement advocating the GI system. For further information, see Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005); Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff*, WT/DS290/R (Mar. 15, 2005).

2 Background

U.S. IP law encourages individualism and technological advancement by rewarding innovation and autonomy.[46] Conversely, European IP regulations preserve culture and history, as well as honor traditional practices.[47] The legal regulatory systems for wine production in both the EU and various New World wine-producing countries reflect these differing philosophies.[48] These philosophies can be found in the legal regulatory system of wine production and operations in the United States and serve to promote American wines in international markets.[49]

2.1 *Legal Protection of Wine in the United States*

Pre-Prohibition American wine producers did not possess an individual wine culture.[50] Instead, early American vintners emulated wine methodology of and borrowed wine denominations from European wine producers of Old World wines.[51] These Old World wine producers encouraged New World[52]

46 *See* Mary Ross, 'Pros and Cons of Both New and Old World Wine Making', *DAILY HERALD* (July 28, 2010), <http://saxo.dailyherald.com/article/20100728/entlife/307289990>; *see generally* O'CONNOR (n 8) 245–58 (discussing the legal history of protection of GIs in the United States).

47 *See generally* O'CONNOR (n 8) 123–28, 153–63 (discussing the protection of GIs in Europe for foodstuffs, wines, and spirits). For further information on the protection of GIs and designations of origin for agricultural products and foodstuffs within Europe, see Council Regulation 2081/92, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 1992 O.J. (L 208) 1 (EC).

48 More specifically, product trademark registration allows for exclusive right of production whereas protection of GIs and designation of origin for agricultural products and foodstuffs (including wine) does not ensure exclusive right and is instead available to all producers of that region. *See generally* Gangjee (n 12) (discussing the relationship between trademark protection and GIs).

49 *See generally* O'CONNOR (n 8) 153–63, 245–58 (discussing the legal history of protection of geographical indications in Europe and the United States).

50 *See* MENDELSON (n 15) 140–41.

51 *See* MENDELSON (n 15) 140–43.

52 The general distinction between Old World and New World wine products is the country from which the wine product originates. *See* Randy Kemner, 'The Old World and New World Approach to Wine', *THE WINE COUNTRY*, <http://www.thewinecountry.com/mm5/merchant.mvc?Screen=Z1_5world&Store_Code=TWC> accessed Feb. 9, 2012. Old World wines are those from Europe, whereas New World wines are those from North America, South America, Australia, South Africa, and New Zealand. Randy Kemner, 'The Old World and New World Approach to Wine', *THE WINE COUNTRY*, <http://www.thewinecountry.com/mm5/merchant.mvc?Screen=Z1_5world&Store_Code=TWC> accessed Feb. 9, 2012 The wine products of both Old World and New World countries may also exhibit different balance and acidity, and utilize different methods of production, types

wine producers to adopt the Old World appellation system, so that New World wine products would have labels that agreed with the Old World wine labels.[53] Americans, however, have refused, and instead embraced their individualist philosophy in wine production, continuing to employ many wine names on wine products that did not correspond with the traditional European geographical origin system.[54] American laws governing wine products developed in tandem with this individualistic approach to American wine production.

American protection of wine GIs predominantly derives from the Lanham Trademark Act of 1946,[55] as well as from wine and spirits regulations of the Alcohol and Tobacco Tax and Trade Bureau ("TTB").[56] Whereas Section 2(e)(2) of the Lanham Act prohibits the trademark registration of marks that are "primarily geographically descriptive,"[57] it does not forbid the usage of such marks. For wines and spirits specifically, the TTB polices the use of wine names and requires that producers obtain a Certificate of Label Approval ("COLA")[58] "to bottle and remove alcoholic beverages from the bonded area of the domestic plants where the beverage was bottled or packed."[59]

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of grapes, and, among others, blends or varietals. *See* Randy Kemner, 'The Old World and New World Approach to Wine', *THE WINE COUNTRY*, <http://www.thewinecountry.com/mm5/merchant.mvc?Screen=Z1_5world&Store_Code=TWC> accessed Feb. 9, 2012; *see also Wine Regions*, WINE AUSTL., <http://www.wineaustralia.com/usa/Default.aspx?tabid=2602> accessed Feb. 9, 2012 (discussing the different philosophies and production methods of Old World and New World winemakers).

53 *See* MENDELSON (n 15) 143 ("The Old World, for its part, urged American grape growers and winemakers to adopt their own appellation system The growing recognition of American wines around the world heightened the significance of this debate.").

54 These semi-generic wine names include Angelica, Burgundy, Chablis, Champagne, Chianti, Claret, Madeira, Malaga, Marsala, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne, Sherry, and Tokay. MENDELSON (n 15) 143 (citing 26 U.S.C. § 5388(c)(2)(B)).

55 15 U.S.C. § 1052(e) (2006); *see* O'CONNOR (n 8) 245–65 ("Protection of geographical indications in the United States primarily derives from the common law principle that no person can obtain an exclusive right to use a geographical name.").

56 *See* ALCOHOL & TOBACCO TAX & TRADE BUREAU, <http://www.ttb.gov/> accessed Feb. 9, 2012.

57 15 U.S.C. § 1052(e) (2006).

58 For additional information on COLAs and registration, see *COLAs Online*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, <https://www.ttbonline.gov/colasonline/publicSearchColasBasic.do> accessed Feb. 9, 2012.

59 O'CONNOR (n 8) 256. Additionally, the United States Codified Regulation on Labeling of Wines requires labeling of all wines that are produced domestically or imported. O'CONNOR (n 8) 256 (citing 27 C.F.R. § 4.30).

Accordingly, the TTB created a list of GIs that have geographical significance, "including those that are distinctive of specific grape wines, and appellations of origin as applied to wines," and places the wine names in particular categories that amount to different levels of legal protection.[60] The TTB recognizes four categories with respect to wines and geographical names as follows: generic names;[61] semi-generic names;[62] non-generic, non-distinctive names;[63] and non-generic, distinctive names.[64] Under these regulations, wine producers may use generic names without restriction as long as the TTB has found the wine name to be generic.[65] Wine producers may use non-generic, distinctive names on wine produced in other areas as long as the product is "similar to the original and words such as 'type' or 'American' are directly conjoined to the geographical name."[66] TTB regulations restrict, but do not forbid, the use of semi-generic names when the wine product originates in a region other than that denoted by the wine name.[67] In such an instance, the label must denominate the wine's actual place of origin, and the wine product itself must express the traits and attributes typically associated with the semi-generic name.[68] Finally, wine producers may only use non-generic, non-distinctive names for wine products produced in the specified region or place.[69] The current U.S. legal system for protection of wine products, however, causes much distress in an international wine market where the taste for American wines persistently expands but where legal disputes over wine names leave acrimonious aftertastes.[70]

60 O'CONNOR (n 8) 257.

61 O'CONNOR (n 8) 257.; *see* 27 C.F.R. § 12.

62 *See* n. 6 and accompanying text.

63 Non-generic, non-distinctive wine names include, but are not limited to, names such as American, California, Lake Erie, and Napa Valley, and "may be used without registration for wines originating in the named place." O'CONNOR (n 8) 257.

64 Non-generic, distinctive wine names include, but are not limited to, names such as Bordeaux Blanc, Medox, Saint-Julien, Chateau Yquem, Chateau Margaux, Rhone, and Lagrima, and "may be used only for wines from that place." O'CONNOR (n 8) 257.

65 O'CONNOR (n 8) 258.

66 O'CONNOR (n 8) 258, n 46 (noting that this American regulation is "exactly" what Article 23.1 of the TRIPS Agreement seeks to thwart and that, "therefore, this provision is inconsistent with the TRIPS Agreement").

67 *See* 27 C.F.R. § 4.24(b)(1).

68 *See* 27 C.F.R. § 4.24(b)(1).

69 *See* O'CONNOR (n 8) 258.

70 *See generally* Rose (n 15) 733–34, 737–38 (discussing the expansion of the American wine market and the viewpoints of Old World producers).

2.2 *Geographical Indications and the TRIPS Agreement*

The TRIPS Agreement[71] is the principal agreement that governs the protection of international intellectual property and is the overarching reference for any subsequent bilateral agreements, including those regulating wine trade. With respect to GIs, "TRIPS was intended to prevent three specific abuses of GIs: (1) the use of false or misleading GIs; (2) the registration of GIs as trademarks; and (3) the degeneration of GIs into generic terms."[72] The TRIPS Agreement contains three articles – Articles 22, 23, and 24 – that exclusively deal with GI protections.[73] The Agreement represents an important movement toward global recognition of GI protection.[74] Article 22, titled "Protection of Geographical Indications," provides general protection to GIs not limited to wine products.[75] Article 23, titled "Additional Protection for Geographical Indications for Wines and Spirits," creates a protection specifically for the GIs of wines and spirits.[76] Article 24, titled "International Negotiations; Exceptions," establishes a duty for countries that are parties to the Agreement to continually negotiate to

71 Whereas the international wine trade market and its regulatory agreements have an exceptionally rich legal history, this Note will discuss only the TRIPS Agreement and subsequent agreements applicable to the United States, EU, and Australia. For a more comprehensive understanding of the legal background on international wine regulations with respect to intellectual property regulation, see generally Richard Mendelson and Scott Gerien, 'Wine Brands and Appellations of Origin', in *WINE IN AMERICA: LAW AND POLICY* (2011) 217, 217–80 (sketching the background of intellectual property in the American wine industry); Jacques Audier, 'International Institutions and Accords', in *WINE IN AMERICA: LAW AND POLICY* (2011) 395, 419–39 (discussing the various international agreements governing intellectual property); Stacy D. Goldberg, Comment, 'Who Will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications', (2001) 22 U. PA. J. INT'L ECON. L. 107 (discussing the international framework for the legal protection of geographical indications).

72 Waggoner (n 20) 575 (citing GRAEME B. DINWOODIE ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* (2001) 317, 329).

73 *See* TRIPS Agreement (n 28).

74 For additional commentary on the protection of GIs and the TRIPS Agreement, as well as subsequent bilateral agreements between the EU and other countries, see David Vivas Eugui and Christoph Spennemann, 'The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements', in *THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY* (n 7) 305, 305–44. For a more comprehensive discussion on the history of composing the TRIPS Agreement, see Rose (n 15) 748–55.

75 *See* TRIPS Agreement (n 28), art. 22.

76 TRIPS Agreement (n 28), art. 23.

expand protection for GIs of wines and spirits and creates exceptions to the general prohibitions.[77]

In summary, Article 22 defines GIs within the context of the TRIPS Agreement and requires countries that are parties to the TRIPS Agreement to legally prohibit the use of false GIs on products that would mislead the public with respect to the product's true geographical origin.[78] Article 22 defines 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."[79] Article 22 additionally requires parties of the TRIPS Agreement to either refuse or invalidate registration of any trademark that employs a GI "in a manner which misleads the public" as to the product's true geographical origin or that "constitutes an act of unfair competition."[80] Accordingly, this provision permits signatories to require a showing of consumer confusion as to the source, which "restates perfectly conventional and progressive intellectual property law."[81]

Article 23 requires parties to the Agreement to create laws that prohibit the use of false GIs on wines and spirits, even if the label indicates the true geographical origin of the wine or spirits product.[82] Unlike its predecessor, Article 23's purpose is not to minimize consumer search costs or encourage consistent levels of product quality, and … it is far from conventional intellectual property law. Rather, its purpose is to help traditional producers of wines and spirits to promote the authenticity of their products by establishing an absolute prohibition … against the use of traditional terms by any other producers of wines and spirits.[83]

Specifically, the purpose of Article 23 is to prevent GIs of wines from becoming generic.[84] Accordingly, Article 23 prohibits the use of false GIs on wine and spirits products that use expressions such as "kind," "type," "style,"

77 TRIPS Agreement (n 28), art. 24.

78 *See* TRIPS Agreement (n 28), art. 22. For a more thorough discussion of Article 22, see Hughes (n 16) 314–17.

79 *See* TRIPS Agreement (n 28), art. 22. For a more thorough discussion of Article 22, see Hughes (n 16) 314–17.

80 *See* TRIPS Agreement (n 28), art. 22. For a more thorough discussion of Article 22, see Hughes (n 16) 314–17.

81 Beebe (n 25) 872 (citing Hughes (n 16) 316–17).

82 *See* TRIPS Agreement (n 28), art. 23. For a more thorough discussion of Article 23, see Hughes (n 16) 317–23.

83 Beebe (n 25) 872.

84 Albrecht Conrad, 'The Protection of Geographical Indications in the TRIPS Agreement', (1996) 86 TRADEMARK REP. 11, 39; *see also* Rose (n 15) 750 ("When the geographical name is so widely used that the public comes to understand it as the name for a category of all

or "imitation"[85] to indicate that the wine or spirits product is not the same as that wine or spirits product with the true GI and thus eliminates any potential for the weakening of a non-generic GI.[86] The Article additionally calls for countries to refuse or invalidate trademarks that employ a GI identifying wines or spirits that do not originate in the indicated geographic region.[87]

The key to Article 23 that separates it from its predecessor Article 22 is that invoking Article 23 does not require a trademark to be "misleading."[88] It is only when wine and spirits have homonymous GIs that the products may be misleading to the public.[89] Finally, Article 23 requires the Council of TRIPS to undertake additional negotiations to create a "multilateral system of notification and registration" with respect to GIs for wines.[90]

Article 24 obligates parties to the Agreement to enter into negotiations with the goal of increasing protection for GIs of wines and spirits, thus furthering the objective of Article 23.[91] Section 1 of Article 24 specifically provides that countries that are parties to the Agreement may not use the exceptions outlined in further provisions of Article 24 to avoid ensuing negotiations.[92] Section 2 of Article 24 allows the Council of TRIPS to review applications for provisions outlined under Article 24 and to also promote and advance the objectives of Article 24.[93] Additionally, Article 24 prohibits countries that are parties to the Agreement from reducing protection for GIs that existed prior to the enforcement of the TRIPS Agreement, which serves to further Article 23's purpose of providing greater protection for GIs.[94]

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the products of the same type but not necessarily of a certain origin, the name is not and cannot be protected anymore as a geographical indication.").

85 For further discussion on the expressions used in Article 23, see Beebe (n 25) 872.

86 *See* TRIPS Agreement (n 28), art. 23.

87 TRIPS Agreement (n 28), art. 23.

88 *See* Calboli (n 13) 191–93 ("Unlike the general protection awarded to all GI[s] by Article 22, … Article 23 provides that GI[s] that refer to wines and spirits are protected regardless of whether their use misleads the public or represents an act of unfair competition "); Silva (n 30) 202–03 ("Article 23, however, is significantly different from Article 22 because it does not require that the trademark be misleading for the provision to be invoked. Rather, it is only in the case of homonymous GIs for wines or spirits that misconception in the public eye is considered.").

89 Silva (n 30) 202–03.

90 *See* TRIPS Agreement (n 28), art. 23.

91 *See* TRIPS Agreement (n 28), art 24. For a more thorough discussion of Article 24, see Hughes (n 16) 319–23.

92 *See* TRIPS Agreement (n 28), art. 24.

93 *See* TRIPS Agreement (n 28), art. 24.

94 *See* TRIPS Agreement (n 28), art. 24.

Article 24 of the Agreement contains a grandfather provision that maintains "a country does not have to invalidate any trademark containing a GI if rights in that trademark (including under the common law) developed prior to (a) the date of TRIPS coming into force in that country, or (b) the protection of the GI in its country of origin, whichever comes later."[95]

Additionally, Subsection (6) of Article 24 serves as an exception, indicating that if a geographic word has become generic in a WTO country, the requirements set forth under Articles 22 and 23 are inapplicable if "the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member."[96]

The essential link between TRIPS and the legal protection of wine products under subsequent bilateral agreements is the concern that non-generic wine product names will be diluted in a market without adequate legal protection.[97] The aforementioned articles of the TRIPS Agreement represent the outcome of a "hard-fought compromise that [left] many issues unresolved,"[98] during which both the United States and EU were unwilling to alter their positions regarding the debate about GI s.[99] With respect to intellectual property protection of wine products, a continuing battle between the United States and EU ensues, leaving a gap in adequate legal protection between semi-generic and non-generic wine products.[100] This gap is particularly daunting because federal regulation of semi-generic wine products – which receive greater legal protection than generic wine product names, but less protection than non-generic

95 Hughes (n 16) 319 (citing TRIPS Agreement (n 28), art. 24(5)(a)–(b)).

96 TRIPS Agreement (n 28), art. 24(6). European producers very much dislike the grandfather provision. Hughes, *supra* note 16, at 319. "The grandfathering of pre-existing trademarks allows a Canadian producer to continue to use its PARMA ham trademark in Canada … The limitation on generic words allows Argentine vintners to continue to make 'Champagne' sparkling wine and South African farmers to continue to sell 'Camembert' cheese." TRIPS Agreement (n 28), art. 24(6).

97 *See, e.g.*, Michael Maher, 'On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels', (2001) 89 CALIF. L. REV. 1881, 1908–10.

98 Waggoner (n 20) 578. "In order to overcome disagreements and enact TRIPS, these parties agreed to several statements in the GI provisions that obligate members to negotiate certain matters in the future." Waggoner (n 20) 578.

99 Waggoner (n 20) 578 (citing Calboli (n 13) 182–83).

100 "Culture may be highly valued collectively, but if aggregate individual consumer demand cannot independently sustain the cultural widget in the face of non-cultural but otherwise functionally substitutable products, the widget's economic survival requires regulatory protection for its preservation." Broude (n 18) 646 (discussing the relevance of "economic cultural-protectionist measures").

wine product names – encourages the degeneration of semi-generic GIs. What remains is a substandard protocol for the protection of wine products categorized as less than non-generic but more than generic. Whereas subsection (6) of Article 24 recognizes generic wine product names as exceptions to the subsequent sections of TRIPS, subsection (6) does not grant exceptions to wine product names deemed semi-generic or non-generic. Accordingly, this legal predicament is an essential reason for enhanced protection of semi-generic wine product names.

3 The Agreement between Australia and the European Community on Trade in Wine

On September 1, 2010, the 2008 Wine Trade Agreement Between Australia and the European Community, which requires Australia to comply with the European GI system with respect to wine products, went into effect.[101] The new agreement replaces a wine trade agreement signed in 1994[102] and protects eleven of the EU drink labels[103] and 112 of the Australian GIs.[104] Specifically, many of the Australian wine products previously labeled with European names, such as sherry and tokay, may no longer use these names under this Agreement. Wine producers in Australia have three years to phase out wine labels with the names outlined in the Agreement.[105]

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101 *Australia Confirms it's a World Wine Power* (n 40); Gabrielle Dunlevy, 'Naming Bubble Pops for Aussie Drops', *SYDNEY MORNING HERALD* (Aug. 31, 2010), <http://news.smh.com.au/breaking-news-national/naming-bubble-pops-for-aussie-drops-20100831-14fb7.html/>.

102 Under the 1994 Agreement, Australia agreed to phase out the usage of certain European geographical indications of wine products in exchange for better access to the EU market. O'CONNOR (n 8) 341–43. The Agreement created three separate transitional periods by which Australia was to stop producing certain wines: December 31, 1993, December 31, 1997, and a transitional period "determined in accordance with Article 9." *See* 1994 Wine Trade Agreement (n 39), art. 9. Although the 1994 Agreement prevented Australia from producing wine of particular GIs, the Agreement did not portray a date by which Australia would transition from the use of such GIs. *See* 1994 Wine Trade Agreement (n 39), art. 9. Burgundy, Chablis, Champagne, Claret, Graves, Marsala, Moselle, Port, Saurternes, Sherry, and White Burgundy were the wine names whose transitional period was to be determined by Article 9 of the Agreement Between the European Community and Australia on Trade in Wine. 1994 Wine Trade Agreement (n 39), art. 9.

103 *See* 2008 Wine Trade Agreement (n 37), art. 15.

104 *Trade Agreements*, WINE AUSTL., <http://www.wineaustralia.com/australia/Default.aspx?tabid=279> accessed Feb. 9, 2012.

105 *See* 2008 Wine Trade Agreement (n 37), art. 8.

3.1 *The 2008 Wine Trade Agreement*

The 2008 Agreement provides additional protections for wines originating in both the EU reciprocal protection of the geographical indications" listed by country in the text of the new Agreement.[106] The 2008 Agreement, which was signed on December 1, 2008 in Brussels and became actionable on September 1, 2010, sets clear dates for the transition of the GIs named in Section (1)(c) of Article 8 in the 1994 Agreement.[107] Additionally, the 2008 Wine Trade Agreement names the additional protection for the GIs Manzanilla and Tokay.[108]

Title II of the 2008 Agreement contains the most pertinent provision with respect to this chapter. The stipulation verifies that "[t]he Contracting Parties shall take all necessary measures to prevent, in cases where wines originating in the Contracting Parties are exported and marketed outside of their territories, the use of protected names of one Contracting Party … to describe and present a wine originating in the other Contracting Party …"[109] Whereas the Agreement allows for Australian wine producers to use *traditional expressions*[110] of the EU if Australian producers and Australia. The Agreement instructs the parties to "take the measures necessary … for the register such expressions in good faith,[111] the Agreement prohibits the usage[112] of wine GI s protected under Annex II of the Agreement.[113] This provision further establishes recognition of cultural and regional wine production and processes, as separated by provisions in the 2008 Wine Trade Agreement, by restricting appropriate GI s to be reserved to the specific country or region of registration.[114]

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106 2008 Wine Trade Agreement (n 37), art. 13.

107 *See* 2008 Wine Trade Agreement (n 37), art. 15.

108 2008 Wine Trade Agreement (n 37), art. 15.

109 2008 Wine Trade Agreement (n 37), art. 12.

110 2008 Wine Trade Agreement (n 37), Annex II.

111 2008 Wine Trade Agreement (n 37), art. 16 (noting that traditional expressions are exceptions and can be used if they are "legally registered in good faith in Australia, or that have legitimately acquired rights in Australia by being used in good faith").

112 The Agreement does allow for several exceptions, including: "if a vine variety or its synonym contains or consists of a geographical indication listed in Annex II Australia may use the vine variety or synonym for the description or presentation of a wine originating in the territory of Australia if the vine variety or synonym is listed in Annex VII" and "where a single geographical indication is used, at least 85% of the wine shall be obtained from grapes harvested in this geographical unit." *See* 2008 Wine Trade Agreement (n 37), arts. 22, 24.

113 2008 Wine Trade Agreement (n 37), Annex II.

114 There are many additional benefits to the Australian community, as set out by the 2008 Agreement, but for the context of this chapter, only the legal aspects will be discussed. Some of the benefits include the recognition of oenological practices for wines originating in Australia, legal protection of 112 geographical indications of wines produced in

Significantly, in contrast to current U.S. legal standards, the 2008 Agreement between Australia and the EU completely prohibits Australian vintners from labeling wine using long–established European wine product names that are recognized as non-generic in their corresponding countries of origin.[115] Thus, Australia, a New World wine country much like the United States, recognizes that wine products categorized as less than non-generic but more than generic merit heightened legal protection. Additionally, by restricting production and usage of these GIs to their appropriate geographical regions, this Agreement further maintains that GIs recognized as non-generic should only be produced or used by their corresponding regions of origin.[116] This provision is especially striking in light of U.S. regulations, which currently do not enforce or recognize such protections.[117]

3.2 *Additional Benefits from the 2008 Wine Trade Agreement*

Australian government officials state that the new agreement creates more flexible rules on blending alcohol content[118] and a simpler labeling system[119] for wine producers exporting their products to the EU, which is an asset to an industry that exports a considerable amount of its commodities.[120] Additionally, the Agreement allows for "easier access"[121] to the European wine market for Australian wineries.[122] This is sensible because, in 2009, Australia exported a total of

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Australia, the protection of traditional expressions used in wine production and labeling, and the protection of quality wine terms of Australia. For additional information on the terms and conditions of the 2008 Agreement, see 2008 Wine Trade Agreement (n 37), Annex I, Annex II, and Annex III.

115 *See* 2008 Wine Trade Agreement (n 37), art. 13.

116 2008 Wine Trade Agreement (n 37), art. 13.

117 *See, e.g.*, 26 U.S.C. § 5388.

118 *Australia Confirms it's a World Wine Power* (n 40).

119 *See, e.g.*, Dunlevy (n 102).

120 Previously, the EU banned importation of any wine product made under methods not approved by the EU, including reverse osmosis and the adding of oak chips. *See, e.g.*, Dan Oakes, 'Fresh Drinks for a Night at the Apera', *THE AGE MELBOURNE* (Sept. 1, 2010) <http://www.theage.com.au/entertainment/restaurants-and-bars/fresh-drinks-for-a-night-at-the-apera-20100831-14fka.html/>. Under the 2008 Agreement, Australian winemakers will not have to create different blends for wines originating in Australia and exported to the EU. Dan Oakes, 'Fresh Drinks for a Night at the Apera', *THE AGE MELBOURNE* (Sept. 1, 2010) <http://www.theage.com.au/entertainment/restaurants-and-bars/fresh-drinks-for-a-night-at-the-apera-20100831-14fka.html/>.

121 Christopher Werth, 'Australia Corks its Use of "Champagne"', *MARKETPLACE*, (Sept. 1, 2010), <http://marketplace.publicradio.org/display/web/2010/09/01/am-australia-corks-its-use-of-champagne/>.

122 *See Trade Agreements* (n 105) ("Australian winemakers will have better access to European markets through: European recognition of an additional 16 Australian winemaking

€643 million worth of wine to the EU.[123] Europe is the largest market for Australian wine products[124] and will likely remain so given the favorable outcome of this new agreement to both powers. The European Commission reported that the EU exported a total of €68 million worth of wine to Australia in 2009.[125] Such conditions as outlined by the 2008 Agreement suggest that, in complying with EU regulations governing geographical indications, Australia substantially strengthened its wine trade relations with the EU and positioned itself favorably with respect to continual wine trade to Europe. The EU Agriculture Commissioner described the Agreement as a "win-win outcome" for both the EU and Australia.[126]

The United States should consider the 2008 Agreement as a model for future wine trade negotiations with the EU. The Agreement maintains four notable elements essential to preserving domestic wine production while simultaneously constructing an international wine market among world wine powers: (1) it establishes GI protection for domestic wine products of Australia; (2) it recognizes domestic wine processes and terminology; (3) it creates a transitional stage during which Australian wine producers will phase out previously-used GIs; and (4) it allows for future alterations among the two global wine powers. Most notably, Annex II of the 2008 Agreement recognizes a date by which Australian vintners may no longer produce wines with European GIs.[127] These revisions are strong ideas for the United States to consider in future drafts of a wine trade agreement, as the current wine trade agreement between the United States and the EU does not contain some of the strongest elements outlined in the 2008 Agreement.

4 The Agreement between the United States and the European Community on Trade in Wine

On March 10, 2006,[128] the United States signed the Agreement Between the United States of America and the European Community on Trade in Wine ("U.S.–EU

techniques; Protection within Europe for Australia's 112 registered GI s; Wholesalers will have five years to sell stock labelled with an EC GI and retailers will be able to sell all their stock.").

123 *Australia Confirms it's a World Wine Power* (n 40).

124 *Australia Confirms it's a World Wine Power* (n 40).

125 *Australia Confirms it's a World Wine Power* (n 40).

126 *Australia Confirms it's a World Wine Power* (n 40). (quoting EU Agriculture Commissioner Dacian Ciolos).

127 *See* 2008 Wine Trade Agreement (n 37), Annex II.

128 For a more comprehensive discussion on prior wine agreements between the U.S. and EU, see Rose (n 15) 756–59.

Agreement").[129] Essentially, the U.S.–EU Agreement allows for the sale of American wines within the European market through a variety of nontraditional winemaking methods forbidden to European winemakers.[130] The U.S.–EU Agreement provides that, in exchange for European recognition of U.S. wine GIs and winemaking procedures, the United States shall restrict use of the seventeen semi-generic wine GIs by its wine producers.[131]

The first provision of the U.S.–EU Agreement recognizes winemaking practices.[132] Like the Australia Agreement, the U.S.–EU Agreement "provides that neither party shall block the importation of wine on the basis of the other's winemaking practices."[133] Accordingly, this provision recognizes American wine production techniques in Europe, such as enhanced oak flavor, and benefits American vintners who export wine products to Europe.[134]

The second, and perhaps more significant, provision outlined by Articles 6 through Article 9 is entitled "Special Provisions."[135] Under Article 6.1, the United States agreed to change the legal status for seventeen of the semi-generic

129 Agreement Between the European Community and the United States of America on Trade in Wine, 2006 O.J. (L 87) 2 (EC) [hereinafter U.S.–EU Agreement], <http://www.ecolex.org/server2.php/libcat/docs/TRE/Bilateral/Other/bi-62675.pdf>.

130 U.S.–EU Agreement, arts. 4.1, 5.

131 U.S.–EU Agreement art. 6.1 (n 130), provides the following: "With respect to wine that is sold in the territory of the United States, the United States shall seek to challenge the legal status of the terms in Annex II to restrict the use of the terms on wine labels solely to wine originating in the Community. Labels for such wines may use the terms in Annex II in a manner consistent with the US wine labeling regulations in force as of 14 September 2005." *See also* U.S.–EU Agreement art. 6.1 (n 130). Annex II, identifying GI s as Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry, and Tokay. For additional background discussion on the U.S.–EU Agreement, see Scott Danner, 'Not Confused? Don't be Troubled: Meeting the First Amendment Attack on Protection of "Generic" Foreign Geographical Indications', (2009) 30 CARDOZO L. REV. 2257, 2264–66.

132 *See* U.S.–EU Agreement (n 130), art. 5.

133 Rose (n 15) 760 (citing the U.S.–EU Agreement (n 130); 'Signing of US-EC Trade Agreement Expands Opportunities for Wine', *THE WINE INST.*, (Mar. 10, 2006), <http://www.wineinstitute.org/resources/exports/article61>.

134 Thomas Fuller, 'U.S. and EU Reconcile Over Glass of Wine', *N.Y. TIMES* (Sept. 16, 2005), <http://www.nytimes.com/2005/09/15/business/worldbusiness/15iht-wine.html>. *See also* 'U.S.–Europe Wine Trade Agreement Initialed', *THE WINE INST.*, (Sept. 14, 2005), <http://www.wineinstitute.org/resources/exports/article64> [hereinafter *U.S.–Europe Wine Trade Agreement Initialed*] ("Among the key provisions of the new agreement of interest to California wine exporters is full recognition of U.S. winemaking practices which previously required renewed approval or 'derogations' on a regular basis in order for U.S. producers to ship to Europe.").

135 U.S.–EU Agreement (n 130).

terms named in the U.S.–EU Agreement.[136] Under the U.S.–EU Agreement, European wine producers can only use these wine names on wine products produced in the corresponding region of the GI.[137] American wines that do not conform to these regulations may not enter the European market.[138] Article 6.2, however, is a grandfather clause[139] that makes Section 1 inapplicable to winemakers using one of the seventeen GIs, "where such use has occurred in the United States" before December 13, 2005, or the signing of the U.S.–EU Agreement.[140] Consequently, this provision of the U.S.–EU Agreement essentially fails to curtail the production of wine labeled under any of the seventeen named GIs of the U.S.–EU Agreement *unless* such production occurred after the signing of the Agreement. Thus, wine producers in the United States can still legally produce wine with wine names the EU sought to protect under the U.S.–EU Agreement without facing consequences or fearing that the European market might block their wines.

As a result of the U.S.–EU Agreement and to promote change of the legal status of the seventeen GIs named in the U.S.–EU Agreement, Congress enacted Section 422 of the Tax Reform and Health Care Act of 2006.[141] Prior to the U.S.–EU Agreement and this Act, U.S. wine producers could use the seventeen named GIs on labels of their wine products unlimitedly.[142] Section 422 creates a much higher barrier for wine producers seeking to use semi-generic GIs by requiring producers to meet three specific conditions[143] before receiving a COLA for wines labeled under any of the seventeen GIs.[144]

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136 *See* U.S.–EU Agreement (n 130), art. 6.1; *see also* Annex II (identifying the seventeen semi-generic wines).

137 *See* U.S.–EU Agreement (n 130), art. 6.1.

138 *See* U.S.–EU Agreement (n 130), art. 6.4.

139 *See, e.g.*, Rose (n 15) 760 (noting Section 2 is a grandfather clause "whereby Section 1 does not apply to winemakers using a prohibited term as defined by Annex II 'where such use has occurred in the United States' before the later of December 13, 2005, or the signing of the Wine Agreement.") (citation omitted).

140 *See* U.S.–EU Agreement (n 130), art. 6.2; *see also U.S.–Europe Wine Trade Agreement Initialed* (n 135) ("The new agreement allows for the continued use of these terms on existing brands but not new brands, thereby addressing European concerns without diminishing the rights and investments that current U.S. brand owners have made in these terms over many decades.").

141 Danner (n 132) 2265.

142 Danner (n 132) 2265 (citing Rose (n 15) 745–47).

143 26 U.S.C. § 5388(c)(3)(B). For further discussion, see Danner (n 132) 2265.

144 Of the seventeen GIs reflected in the 2006 Agreement between the United States and EC, nine were also named in the 2008 Agreement between Australia and the EU. *See* 2008 Wine Trade Agreement (n 37); U.S.–EU Agreement (n 130). Whereas both agreements prohibit the two New World wine powers from producing wine under European GIs, the

In using a semi-generic GI, a wine producer must indicate the "appropriate appellation of origin disclosing the true place of origin," and the wine product must meet the required benchmarks for wine produced in the geographic region distinguished by the semi-generic wine name.[145] Of particular significance:

> The effect of [Section 422] is to allow all producers who had used the terms before to keep using them, so long as they are used in the same way; by allowing a user's successor in interest to continue the use, the law avoids depriving the continuing user of the value of his use.[146]

Accordingly, under Section 422, wine producers that have not previously used the seventeen named GIs may neither use them in the future nor receive a COLA for their wine products.[147] Although the U.S.–EU Agreement creates additional barriers to U.S. vintners using any of the seventeen semi-generic names, the U.S.–EU Agreement and subsequent U.S. federal legislation conflict with Articles 23 and 24 of the TRIPS Agreement. The problem is that Article 24 of the TRIPS Agreement obligates its contracting parties to enter into further negotiations to increase protection for GIs of wines and spirits.[148] While the U.S.–EU Agreement does protect non-generic wine product names, it does not protect semi-generic wine product names. Instead, the U.S.–EU Agreement grants U.S. producers a loophole through which producers may legally continue to use semi-generic EU wine product names that require stronger legal protection under the TRIPS Agreement. Additionally, the U.S.–EU Agreement contradicts Article 23 of the TRIPS Agreement, which requires an "absolute prohibition … against the use of traditional terms by any other producers of

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U.S. Agreement contains a grandfather clause that allows U.S. wine producers to continue using these seventeen GIs whereas the Australian Agreement does not. *See* 2008 Wine Trade Agreement (n 37), art. 6.2. The U.S. Agreement establishes that these GIs are semi-generic, and thus U.S. wine producers can still use them, as long as the producers meet the more stringent restrictions under U.S. law. 2008 Wine Trade Agreement (n 37), art. 6.2.

145 26 U.S.C. § 5388(c)(1)(A); *see also* Jacques Audier, 'International Institutions and Accords', in *WINE IN AMERICA: LAW AND POLICY* (n 72) 395, 434 (noting that wine with semi-generic names in the United States that used a COLA before March 10, 2006 can continue to use the semi-generic name).

146 Danner (n 132) 2265 (citing 26 U.S.C. § 5388(c)(3)(B)(iii)).

147 This is specifically noted by the "grandfathering provision" (protection of prior uses of the GIs) of 26 U.S.C. § 5388(c)(2)(B)(iii).

148 *See* TRIPS Agreement (n 28), art. 24; *see also* Audier (n 72) 431 (noting that the U.S.–EU Agreement is "not a complete success").

wines and spirits."[149] The U.S.–EU Agreement, however, does not establish an "absolute prohibition" against the use of traditional, semi-generic wine product names of the EU countries.

While some commentators may view the U.S.–EU Agreement as *lex specialis* that overrides the *lex generalis* of the WTO Agreement, Article 12 of the U.S.–EU Agreement explicitly denies such a contention. Article 12 of the U.S.–EU Agreement states that nothing in the U.S.–EU Agreement "shall affect the rights and obligations of the Parties under the WTO Agreement."[150] Unmistakably, this provision asserts the governance and power of Articles 22, 23, and 24 of the TRIPS Agreement, including the obligations set forth under Article 24 for each member to "agree to enter into negotiations aimed at increasing the protection of individual geographical indications "[151] Apparently, both contracting parties to the U.S.–EU Agreement "forgot the TRIPS Agreement" when drafting the U.S.–EU Agreement.[152] The 2008 Agreement between Australia and the EU accounts for the imbalance conditioned under the U.S.–EU Agreement and provides adequate legal protection for semi-generic EU wine product names. Therefore, the 2008 Agreement serves as an adequate model for future U.S. and EU wine trade negotiations.

5 Authorizing a United States Wine Trade Agreement in Compliance with the European GI System

The 2008 Agreement between Australia and the EU named nine of the seventeen GIs reflected in the U.S.–EU Agreement.[153] The two wine trade agreements function with the same overall purpose: to prohibit the two New World wine powers from producing wine products under the names of European GIs and to further the objective of the TRIPS Agreement.[154] These agreements, however, differ in their implementation: whereas the Australian Agreement strictly prohibits Australian producers from producing wine products under

149 Beebe (n 25) 872; *see also* TRIPS Agreement (n 28), art. 23 (outlining the protections for geographical indications of wines and spirits).

150 U.S–EU Agreement (n 130), art. 12.1(a).

151 TRIPS Agreement (n 28), art. 24.1.

152 Audier (n 72) 438.

153 The nine GIs that were named in both the 2006 U.S.–EU Agreement and the 2008 Agreement between Australia and the EU are Burgundy, Chablis, Champagne, Claret, Marsala, Moselle, Port, Sautrene, and Sherry. *See* 2008 Wine Trade Agreement (n 37), art. 15; U.S.–EU Agreement (n 130), Annex II.

154 *See* Waggoner (n 20) 575.

any of the eleven named GIs in its Agreement, the U.S.–EU Agreement does not provide such legal protection. The grandfather clause of the U.S.–EU Agreement (Article 6.2) still allows wine producers in the United States to use these seventeen GIs in wine production, whereas the Australian Agreement does not contain a similar provision.[155] The U.S. Agreement maintains that these GIs are semi-generic and, because of this categorization, can still be used by U.S. wine producers – as long as they meet the additional requirements established by federal law.[156]

This provision certainly enhances the position of American wine producers from an international standpoint, as well as furnishes significant power to American vintners with respect to those of the EU, but is not compliant with the TRIPS Agreement. The provision enhances market dilution of semi-generic wine product names and creates a substantial impediment to GI protections. The purpose of the U.S.–EU Agreement is to curtail the use of any non-generic European GIs by American wine producers. Whereas the U.S.–EU Agreement prohibits future producers from using the seventeen named GIs, and whereas Congress enacted legislation that creates a higher barrier to use semi-generic GIs, the Agreement does not forbid prior producers from labeling bottles under such GIs. The legal specifications outlined by the 2008 Agreement between Australia and the EU are a more appropriate model for the United States. Accordingly, this section discusses the adaptability of a similar agreement for the United States.

5.1 *The 2008 Wine Trade Agreement between Australia and the EU and Its Adaptability for the United States*

The United States does not comply with the legal purpose of Articles 23 and 24 of the TRIPS Agreement because of the United States' inadequate protection of semi-generic wine product names.[157] The United States follows a policy of disclosure of true appellation on wine products.[158] Extending GI protection

155 *See* U.S.–EU Agreement (n 130), art. 6.4.

156 This requires the issuance of a Certificate of Label Approval (COLA) before September 14, 2005 to produce and label the semi-generic wine in question. U.S.–EU Agreement (n 130), art. 6.4.

157 *See generally* Vicki Waye, 'Assessing Multilateral vs. Bilateral Agreements and Geographic Indications Through International Food and Wine', (2005) CURRENTS INT'L TRADE L.J. 56 (examining the relationship between multilateral protection of geographical indications through the TRIPS Agreement and subsequent bilateral treaties).

158 *See* Maher (n 98) 1911 (noting that the ATF currently requires "a true appellation appear on the label of a grandfathered brand name and on the label of a semi-generic type wine disclaims the false origin indicated by such brand names and wine types. This disclaimer,

of wine products to correspond with EU practices will ensure that the United States conforms to the regulations of Articles 23 and 24 of the TRIPS Agreement.[159] Adoption of a wine trade agreement similar to that adopted by Australia ensures Article 23 compliance by "prevent[ing] use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question . …"[160] Additionally, adopting an agreement that exclusively preserves European GIs will catalyze wine trade, allowing the United States to gain recognition in other aspects of international trade and legal protection of its products.[161] For these reasons, the 2008 Agreement between Australia and the EU serves as an appropriate model.

Accordingly, a subsequent wine trade agreement between the United States and EU should grant enhanced legal protection to the seventeen GIs that are presently considered semi-generic wine product names under the U.S.–EU Agreement. Like the 2008 Agreement between Australia and the EU, an ensuing agreement should replace the seventeen GIs currently designated as semi-generic wine product names and designate them as non-generic, distinctive names that correspond to the wine product's true origin. A subsequent wine trade agreement between the United States and EU should additionally grant semi-generic wine names legal protection equivalent to that of non-generic wine names. This protection should be based on the 2008 Agreement between Australia and the EU, which requires that the contracting parties "take the measures necessary … [to] provide the legal means for interested parties to prevent the use of a geographical indication

given labeling regulations that allow the appellation to appear inconspicuously on a label, is insufficient" and arguing that "disclaimers do not address the nonconfusion problem of dilution. Furthermore, disclaimers are only effective in preventing confusion if used in a highly conspicuous manner").

159 *See* TRIPS Agreement (n 28), art. 23–24. Article 24 obligates parties to the TRIPS Agreement to negotiate with the goal of increasing protections for GIs of wines and spirits; the contemporary wine trade agreement between the United States and EU does not increase protections for semi-generic wines and instead allows loopholes in the protection of such wines. TRIPS Agreement (n 28), art. 24. If the United States were to establish a more stringent legal protectionist system with respect to these wines, it would comply with the purpose of Article 24. TRIPS Agreement (n 28); *see also* Audier (n 72) 430–38 (discussing the United States and EU wine trade agreement with respect to requirements under the TRIPS Agreement).

160 *See* TRIPS Agreement (n 28), art. 23.

161 *See generally* Rose (n 15) (discussing the pattern of U.S. wine products in international trade).

... to identify wines not originating in the place indicated by the geographical indication in question."[162] This provision applies to instances where a wine produced under a protected name is accompanied by "the true origin of the wine," "the geographical indication is used in translation," or "the indications used are accompanied by expressions such as 'kind,' 'type,' 'style,' 'imitation,' 'method,' or the like."[163] The present U.S. agreement, as well as domestic law, allows wine products to be labeled under such exceptions, and allowing such exceptions dilutes the market for distinguishable GI wine product names.[164]

The "phase out" allowance is perhaps the most important economic aspect of the 2008 Agreement; it allows Australian wine producers to continue using EU-protected GIs until a specific date, to reduce losses and additional costs of labeling and other procedural details. The United States should particularly consider the terms outlined by the 2008 Agreement and establish those semi-generic GIs that should be discontinued in name usage within a shorter period of time and those within a longer time frame.[165] The problem most likely to arise out of the "phase out" amendment is the disparate economic impact it could have on American wine producers. While large-scale U.S. wine producers might easily absorb relabeling costs, many smaller producers might suffer financial hardship if forced to relabel their wines and if production and labeling costs are not given serious consideration. Additionally, this "phase out" time period allows vintners to create new brand names for those wine product names that will be discontinued under the agreement.[166] The 2008 Agreement accurately reflects the different types of wines and corresponding "phase out" periods that best attend to the smaller-scale producers of the Australian wine industry, and serves as a practicable model for a future wine trade agreement between the United States and the EU.

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162 2008 Wine Trade Agreement (n 37), art. 13.2.

163 2008 Wine Trade Agreement (n 37), art. 13.3.

164 *See* O'CONNOR (n 8) 258, n 46 (noting that certain aspects of the current classification system established by the TTB are "inconsistent with the TRIPS Agreement" and "exactly" what Article 23.1 strives to prohibit).

165 *See* Maher (n 98) 1915–17 (arguing that the ten-year phase out period originally addressed in the 1994 Wine Trade Agreement between Australia and the EU is "feasible" in the United States and recognizing that Australia's wine market had a "similarly entrenched use of European place names such as Champagne and Chablis on its domestically produced wines" to that of the wine market in the United States).

166 Maher (n 98) 1917 (arguing that the "phase out" period "provide[s] an additional reasonable period of time, as well as strong incentives, for producers to discontinue any misleading labeling practices and to develop new nongeographic brands if necessary").

Another important aspect of the Australian and EU Agreement is its recognition of future alterations. Article 6.1 of the 2008 Agreement allows either of the contracting parties to propose a "new, or modify an existing, oenological practice, process or a compositional requirement for commercial use … which is not authorised by the other Contracting Party …."[167] This provision is particularly applicable to the United States because American winemakers have a reputation for less traditional wine producing methods.[168] These wine producers are also more likely to develop or seek new wine production procedures and practices. Any future wine agreement must recognize the possibility of alterations in practices and procedures between either of the wine powers.

5.2 *The Benefits of Forming a New Wine Trade Agreement*

While the benefits of establishing enhanced protection for GIs are boundless, reduced consumer confusion and accurate projection of value to appropriate place of origin are among the main arguments in favor of heightened regulations. Supporters of enacting enhanced protections argue that implementing such a system will significantly reduce consumer confusion – without compromising consumer satisfaction of a wine product[169] – as to a wine product's origin and quality or "at least in unfair free riding on the reputation" of wine products from the original country of origin that have established quality and/or prestige.[170] Furthermore, as many scholars contemplate, a GI model that eliminates the use of semi-generic wine GIs will reduce consumer confusion and promote the purposes[171] of the geographical indication system. One of the strongest reasons for adapting robust GI regulations is "that the local product can be imitated and consumers cannot by themselves, at least not enough of

167 2008 Wine Trade Agreement (n 37), art. 6.1.

168 *See generally* Jon Bonné, 'Waiter! There's a Pinot in my Syrah!', *TODAY FOOD*, <http://today.msnbc.msn.com/id/7259035/ns/today-food/t/waiter-theres-pinot-my-syrah/#.TxShQ2NAb-I> accessed Mar. 24, 2005 (noting that "[m]ore and more, American vintners are using non-traditional grape blends"); 'EU, US Sign Off Wine Deal', *BEVERAGE DAILY.COM* (Mar. 14, 2006), <http://www.beveragedaily.com/Markets/EU-US-sign-off-wine-deal> ("A number of European producers have long been against certain 'non-traditional' US winemaking practices, such as putting wood shavings into wine vats to help the wine's taste reach maturity faster, and the addition of certain flavour aromas.").

169 *See* Waggoner, *supra* note 20, at 592.

170 Calboli (n 13) 197; *see also* Gangjee (n 12) 1258 (citing 2 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* (4th ed. 2006), § 14:12).

171 The use of geographical words in product labeling have three general purposes: "(1) to communicate geographic source, (2) to communicate (non-geographic) product qualities, and (3) to create evocative value." Hughes (n 16) 303.

them, distinguish the imitations."[172] As a result, producers of original products in rightful regions face strict competition from products that are labeled as "sufficiently convincing counterfeits" and can face loss of revenue or market share to imitation products from disapproved or unregulated regions.[173] The loophole that currently exists in American federal law allows winemakers to profit by exploiting the goodwill, quality, and reputation that consumers associate with the region of origin, even when wine products do not originate from those regions.[174] Prohibiting the use of semi-generic wine GIs will eliminate the potential for consumer confusion and project value to the wine products of accurate name origin, thus demanding truth in labeling.

In addition to reducing consumer confusion, adapting a universal system of GIs among top wine-producing countries could significantly curtail wine fraud.[175] Such fraud recently gained attention – such as the Brunello scandal in Montalcino,[176] the Pinot Noir fraud originating in France,[177] and the expansion of fraudulent imported wine in the Chinese market.[178] The United States is not

172 Hughes (n 16) 356.

173 Hughes (n 16) 356 (noting in the last few decades, competition between the original producers "and imitators for intermediate – processed foodstuffs" has occurred for three reasons: (1) Transportation has opened new, distant markets and made international trade with respect to foodstuffs more practicable; (2) Consumers in distant markets have become "significantly wealthier" in multiple countries; and (3) "[F]ood preparation and processing techniques are being carefully studied and widely shared").

174 Hughes (n 16) 368 (noting that a winemaker in the Champagne region of France contended that sales of "counterfeit" Champagne in the United States are "probably … three to four times those of 'authentic Champagne' ") (quoting Lyn Farmer, 'Abusing the C-Word', *WINE NEWS* (Dec./Jan 2002/2003), 8).

175 "It must be emphasized that the first function of GIs … is not the restriction of international trade with a view towards the safeguarding of culture. Rather, GI mechanisms have been founded on a combined quasi-intellectual property/consumer protection platform. Their initial justification is the prevention of fraud, of 'passing off' a good as if it has been sourced from where it has not, ostensibly preventing the dilution of a geographical production area's reputation by low quality – or simply different-quality – produce from another region." Broude (n 18) 647.

176 The Brunello di Montalcino scandal involved Brunello di Montalcino wines originating in the Montalcino region of Italy; certain producers allegedly adulterated their wine bouquets by using grape varietals other than Sangiovese to produce Brunello. *See* Elisabetta Povoledo, ' "Bolt from the Blue" on a Tuscan Red', *N.Y. TIMES* (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/dining/23brunello.html>.

177 *See* Chie Akiba, 'Wine Maker Sells 'Fake' Pinot Noir, Class Says', *COURT HOUSE NEWS SERV.* (Aug. 12, 2010), <http://www.courthousenews.com/2010/08/12/29546.htm>.

178 China, one of the largest importers of wines worldwide, has been a major source of wine fraud. Jeni Port, 'Chinese Fake it with Counterfeits of Australian Wines', *SYDNEY MORNING HERALD* (Aug. 24, 2010), <http://www.smh.com.au/executive-style/top-drop/chinese-fake-it-with-counterfeits-of-australian-wines-20100823- 13im7.html>.

the only country vulnerable to international wine fraud. For example, wine exporting countries such as Canada[179] and France[180] were victims in the Chinese market. Wine fraud impacts both large- and small-scale wine producers in the States.[181] Combating wine fraud is especially important to an industry that grew and continues to grow exponentially in an international market.[182] Establishing a multilateral wine trade agreement that protects wine origins, wine names, and production can only help mitigate increased fraud and preserve authenticity of wine products.

The economic advantages to U.S. producers in the international market are unlikely to diminish if such a system is adopted,[183] as evidenced by the positive effects Australia experienced from the 1994 Agreement between Australia and

179 In 2006, Canadian ice wines fell victim to the Chinese counterfeit wines. Brendan Coffey, 'Château Faux', *FORBES* (June 19, 2006), <http://www.forbes.com/global/2006/0619/086.html>.

180 In February 2010, 400,000 bottles of the French Fitou wine were found to be counterfeit. Jozef Schildermans, 'Chinese Counterfeit 400,000 Bottles Fitou Wine', *WIJNIDEE* (Feb. 11, 2010), <http://www.wijnidee.com/en/2010/02/11/chinezen-vervalsen-400-000-flessen-fitou-wijn>. In August of 2010, it was estimated that over 70 percent of bottles of the French Lafite wine in China were counterfeit. Paul Kedrosky, 'China's Lafite Wine Bubble: 70% of Wine is Fake?', *INFECTIOUS GREED* (Aug. 17, 2010), <http://paul.kedrosky.com/archives/2010/08/chinas_lafite_w.html>.

181 *See* Schildermans (n 181) (noting that "one of the major companies in the wine appellation of Fitou" had been victim to wine fraud); *see also* Jason Om, 'Winemakers See Red Over Bogus Bottles', *ABC NEWS* (Aug. 26, 2010), <http://www.abc.net.au/news/2010-08-26/winemakers-see-red-over-bogus-bottles/959368> (noting that several smaller wine producers who export products had fallen victim to wine fraud).

182 Additionally, "[f]ree trade brings new imported products, services, and production methods to the domestic market; each potentially a cultural influence that alters local tradition. Clearly, those who feel that their culture is at risk because of exposure to such global influences will protest and confront the international law that facilitates it." Broude (n 18) 636.

183 A concern is that increased GI protection would result in unauthorized EU monopolization of certain goods. *See* Waggoner (n 20) 588–89. This fear is unreasonable, as "[a]lthough a region's producers would gain an oligopoly over the name embodied in a GI, non-regional producers could continue producing the same products they now offer." Waggoner (n 20) 588 ((citing David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, (2000) 25 COLUM. J. ENVTL. L. 253, 271 and Calboli (n 13) 199–200). This situation allows for healthy competition, compelling the best-quality producers to survive, and allows consumers the freedom to choose wine products from a given GI name or wine products of similar compose with different, regional GI names. Waggoner (n 20) 589 (citing Lina Montén, Comment, 'Geographical Indications of Origin: Should they Be Protected and Why? – An Analysis of the Issue from the U.S. and EU Perspectives', (2006) 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 315, 344).

the EU.[184] U.S. vintners that mass produce wine for an international market will still benefit from economies of scale and the accompanying price advantages over GI-protected wines of EU producers.[185] Whereas many commentators fear that if the United States recognizes the EU GI system, acceptance of the EU GI system could severely weaken the United States' position in the international wine market – especially U.S. exports to the EU – no direct evidence supports a correlation between GI protection and increased market share.[186] Additional economic harm that might result from adapting the EU GI system would "be limited because the re-naming of a product would only occur once. After producers adjusted to the enhanced protection for GIs, the costs would not recur."[187] While some argue the extra administrative costs for implementing the EU GI system are excessive, the administrative costs "would be negligible .... [and] are normal for any multilateralization of IP rights and are no different from what the United States expects many other countries to spend on IP enforcement matters."[188]

Some of the greatest benefits of adapting a more thorough GI model are the enhancement of consumer selection and the increase in consumer wine education. Currently, federal legislation allows using an EU GI on a wine bottle that merely discloses the product's origin.[189] More accurate wine labeling

184 Australia's export market boomed after the signing of the 1994 Agreement. Additionally, Australia's wine products became increasingly competitive and recognized in the international wine market. *See* Waggoner (n 20) 590 (citing Calboli (n 13) 200–201; and 'Protecting Names', *ECONOMIST* (Aug. 2, 2003) 49).

185 *See* Waggoner (n 20) 587–88 (citing Raustiala & Munzer (n 4) 348).

186 "For example, despite the fact that eighty-five percent of French wine exports incorporate protectable GIs, in the past few years, French wines have lost market share in North America and the United Kingdom to countries with much weaker GI protection." Waggoner (n 20) 588 (citing Hughes (n 16) 346).

187 Waggoner (n 20) 587. However, proposals and alterations to agreements that adapt an EU GI model should certainly be sensitive to the needs of and effects upon U.S. wine products. Waggoner (n 20) (citing Aaron C. Lang, Note, 'On the Need to Expand Article 23 of the TRIPS Agreement', (2006) 16 DUKE J. COMP. & INT'L L. 487, 509) (arguing that although the adjustment costs of adapting the EU GI model would be significant, this would not necessarily account to a loss in market share for U.S. wine producers).

188 Waggoner (n 20) 588 (quoting Felix Addor and Alexandra Grazioli, 'Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Inidications of Origin in the WTO TRIPS Agreement', (2002) 5 J. WORLD INTELL. PROP. 865, 887) (internal quotations omitted).

189 For example, a Champagne produced in the Champagne region of France would have a label that designates Champagne, France, as the wine product's origin; however, a champagne-like product produced in California would be appropriately named if the word "California" preceded the word "Champagne" on the label. *See, e.g.*, Cyril Penn, 'Trade Agreement Preserves

allows consumers to make an educated decision with respect to their wine purchases and reflects the wine product's true origin.[190] Many wine products that are either non-generic or semi-generic contain qualities and elements unique to the product's geographic origin and that cannot be reproduced or emulated if the wine product is manufactured in a surrogate region.[191] The TRIPS Agreement grandfather clause allows winemakers to use semi-generic wine names for products not produced in their respective regions.[192] These labels mislead or are deceptive as to the wine product's true origin and may suggest a presumptive quality to the consumer depending upon the respective region's reputation. A GI system that preserves non-generic and semi-generic wine names enforces enlightened sophistication of truth in labeling upon the palates of patrons of wine, and allots profit margins to appropriate wine producers of respective regions.

Establishing a wine trade agreement that respects the EU GI system would help promote the IP system of the United States on an international level. Currently, the TRIPS Agreement allows, "but does not expressly mandate, the application of the 'first in time, first in right' principle. A WTO member might award priority to an appellation over a preexisting trademark."[193] Adapting an extended model of EU GI protection, however, will help recognize the United States' IP system internationally.[194] Ironically, the world recognizes the United States as one of the strongest advocates for "the development and enforcement of international IP rights protection," yet the United States resists expansion of

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"California Champagne"', *S.F. CHRON.* (Sept. 22, 2005), <http://articles.sfgate.com/2005-09-22/wine/17391618_1_winemaking-practices-decanter-magazine-thekla-sanford>.

190 *See* Waggoner (n 20) 592 (citing Ivy Doster, 'A Cheese by Any Other Name: A Palatable Compromise to the Conflict Over Geographical Indications', (2006) 59 VAND. L. REV. 873, 898).

191 *See* Hughes (n 16) 357 ("If the product's non-geographic qualities arise only from the product's geographic origins, then imitators of the technique still cannot truly reproduce the product. And if this essential land/qualities connection is real, it justifies extending the intellectual property control to include all quality descriptive uses of a protected geographic word [I]f the terroir is actually needed for the process, then 'Chianti-style wine' and 'méthode champenoise' (for sparkling wine) make no sense for products produced outside those respective regions.").

192 *See* Carol Robertson, 'The Sparkling Wine Wars: Pitting Trademark Rights Against Geographical Indications', (2009) 18 BUS. L. TODAY 19, 22, <http://apps.americanbar.org/buslaw/blt/2009-05-06/robertson.shtml>.

193 Gervais (n 10) 120.

194 *See generally* David Snyder, 'Enhanced Protections For Geographical Indications Under TRIPs: Potential Conflicts Under the U.S. Constitutional and Statutory Regimes', (2008) 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1297.

GI protection of wine and other food products.[195] Developing and less-developed countries may deem the international expansion of such national interests with respect to IP disreputable or acquisitive if the United States does not support enhanced GI protection of foodstuffs.[196]

6 Establishing a Framework for GI Adaptation

When adapting the European system of GIs for the United States, wine producers must consider certain precautions and develop a suitable framework to recognize the interests of U.S. wine producers. Producers should consider the interests of the large- and small-scale wine producers when designing a new system of protection. Without an appropriate model accounting for the stake of individual wine producers and the effects of eliminating the use of European GIs, a new system could severely harm or disadvantage the United States wine industry.

6.1 *Constructing a New Wine Trade Agreement between the United States and the European Community*

The most important issue to consider in creating a new wine trade agreement between the United States and the EU is removing the grandfather clause in the U.S.–EU Agreement.[197] A clause that allows a wine producer to bottle wines labeled as any of the seventeen semi-generic wine named should not exist in a subsequent wine trade agreement.[198] The law must treat all wine producers within the United States equally, regardless of whether the vintner produced

195 Waggoner (n 20) 591 (citing Michelle Agdomar, 'Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law', (2008) 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 541, 553–54).

196 Waggoner (n 20) 592 (arguing that the United States may "seek to multilateralize and enforce IP rights that protect its own economic interests" and that, if the U.S. were more supportive of the GI system, it could enhance its credibility and gain support for its IP system with other nations).

197 "[T]he United States should portray GIs as a viable form of IP that must be protected. In doing so, the United States should attempt to garner support from other countries, especially current GI expansion opponents … to join in the shift to the pro-GI expansion group. The United States should provide a reasonable and accurate summary of losses that would be likely to arise from expanded GI protection, rather than the exaggerated claims which have typically been advanced." Waggoner (n 20) 593.

198 Some suggest that the grandfather clauses of Article 24 of the TRIPS Agreement should be eliminated, otherwise TRIPS "would be authorizing a form of IP adverse possession in which some of the most exploited GIs would not be covered." Waggoner (n 20) 593.

wine bottled as the named GIs prior to the U.S.–EU Agreement or prior to the construction of a new agreement. Even if current provisions could eventually diminish the usage of semi-generic names, this possibility has minimal immediate effect. A pragmatic and more effective approach is to prohibit wine production of European GIs outside of their respective geographic regions to confer protection for the international wine trade market.

The 2008 Agreement between Australia and the EU is a model for removing the grandfather clause in future negotiations between the United States and the EU. Future wine trade agreements involving the United States must embrace the strict separation between non-generic wine products and generic wine products, eliminating the grounds and regulations for semi-generic wine products. To give semi-generic wine products stricter protection, a wine trade agreement must promote them to non-generic status, as is reflected in the 2008 Agreement between Australia and the EU.

In addition, a new trade agreement should consider how to discipline violators. Imposing strict sanctions on any wine producer in the United States that violates or disrespects the GI system of protection is a strong enforcement mechanism. Possible penalties include a ban from the European market for a defined period, prohibiting the producer from making such wine, or banning the wine entirely from the international market. Additionally, the federal or state government could impose disciplinary measures on wine producers that disobey such protections through fines, case restrictions on out-of-state shipments, and even elimination of direct shipment to customers (if the state law of the producer allows for direct shipment).

6.2 *Establishing a Transitional Period for All Named GIs*

The 2008 Agreement outlines specific dates by which named wine GIs must be phased out of production by the non-EU country.[199] A transitional period must allow current producers of wine products to alter the names of their bouquets[200] and reduce costs and losses associated with labeling and other manufacturing and administrative processes. Much like the 2008 Australia

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Given that Australia already supports a similar standpoint, the United States and Australia should seek additional support through other countries (e.g., Argentina, Brazil, and Canada) that currently do not support the expansion of GI protection. Waggoner (n 20) 593. Additionally, if a more universal standpoint is pursued in terms of GI protection of wine products, commentators also suggest that Article 23 of the TRIPS Agreement should be expanded "so that the extra protection of wines and spirits receive would be provided to all other GIs." Waggoner (n 20) 594.

199 2008 Wine Trade Agreement (n 37), art. 15.

200 *See, e.g.*, 2008 Wine Trade Agreement (n 37), art. 15.

Wine Trade Agreement, a three-year transition period would be most appropriate for the United States to segue from the usage of EU GIs. This transition period will allow current wine producers in the United States to alter labels used for wine bottles and to find alternative names for their wine products that do not conflict with those of the EU. A future wine trade agreement could consider a longer transition period for wineries that will be significantly impacted by the heightened restrictions, such that the cost manufacturing and administrative processes are particularly burdensome to the winemaker's business.

Upon phasing out the usage of European GIs, wine regions must contemplate the production and labeling of wines under new, GI-compatible names. A national wine producer conference could be held within the United States to certify that wine producers comply with the adaptation of the GI model of the EU, as well as to ensure the naming of the wine products is compliant under TTB regulations and regional legislative measures. This national conference could also instruct vintners of the environment in the transnational wine trade market and inform wine producers of domestic and international sanctions for violating the international GI protections of wine.

6.3 *Creating a Multilateral Register for Wines*

As previously suggested by several scholars and provisions,[201] the largest step in the long run is to create a multilateral register for wines to expand GI protection.[202] Creating a multilateral register for wines is the optimal method to preserve domestic originality of wine origins and production while encouraging international wine trade and exportation. This step is attainable because

201 In June 2005, the EU submitted a proposal that requested an amendment to the TRIPS Agreement through an annex to Article 23(4). Waggoner (n 20) 579. The proposal recommended "a presumption of GI protection for registered products .... [but] would not exist in countries that lodged a registration based on permitted grounds and within a specified period." Waggoner (n 20) 579; *see also* WTO, *Geographical Indications: Communication from the European Communities*, TN/IP/W/11 (June 14, 2005) (proposing the creation of a multilateral register for geographical indications of all products, with specific reference to wines and spirits); Council for Trade-Related Aspects of Intellectual Property Rights, *Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits Based on Article 23.4 of the TRIPS Agreement*, TN/IP/W/5 (Oct. 23, 2002) (proposing a multilateral system for registration for wines and spirits, as requires by Article 23.4 of the TRIPS Agreement).

202 This multilateral register, however, would require the assistance and patronage of wine-producing countries that presently do not support the expansion of GI protection with respect to wine products. *See* Waggoner (n 20) 593.

the multilateral register for wines is "expressly provided for"[203] by the TRIPS Agreement and would not require an amendment or additional agreement between wine powers.[204] In January 2011, intellectual property negotiators at the WTO started a draft to establish a multilateral register for GIs for wines and spirits,[205] however, a multilateral register for wines and spirits does not currently exist despite the obligation the TRIPS Agreement imposes on all WTO Members to "negotiate the establishment of a GI register."[206] Several bilateral registers exist, such as that defined by the Australian and EU Agreement,[207] but a multilateral register for wines does not currently exist.

Scholars also recognize that, in order to institute a forceful and secure GI system, lawmakers must alter Article 24 of the TRIPS Agreement so as to "pare[] down" exceptions and limitations in effect under Article 24.[208] The provisions within Article 24 that allow for exclusions using European GIs on U.S. wine products contradict the objective of TRIPS by allowing the use of semi-generic wine products to further dilute legal protection of these wine products. Trimming the exceptions in Article 24 provides international GI protection and should be one of the first stipulations negotiated "in order to provide substance to the wine register and the subsequent enhancements of GI protection."[209] While the United States remains forceful in its position in wine trade negotiations, this will likely involve difficult negotiations with the EU.[210] If the member states consider the essence of wine production and international protection and the potential benefits to the United States, however, complying with such a negotiation should be both reasonable and beneficial.

Once the United States establishes a comprehensive system of GI protection, creating such a register will be a long-term goal of international wine

203 Waggoner (n 20) 593.

204 *See* TRIPS Agreement (n 28), art. 23(4) ("[T]he establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.").

205 *See* Press Release, Geographical Indications Talks Produce First Single Draft (Jan. 13, 2011), <http://www.wto.org/english/news_e/news11_e/trip_ss_13jan11_e.htm>; *see also* Press Release, Emerging Text on Geographical Indications Register: Four Down, Two to Go (Feb. 11, 2011), <http://www.wto.org/english/news_e/news11_e/trip_ss_11feb11_e.htm>.

206 Gervais (n 10) 70.

207 *Register of Protected Geographical Indications and Other Terms*, WINE AUSTRL., <http://www.wineaustralia.com/australia/Default.aspx?tabid=275> accessed Feb. 9, 2012 (including a full list of Europe's Geographical Indications and Traditional Expressions).

208 Waggoner (n 20) 593.

209 Waggoner (n 20).

210 *See* Waggoner (n 20).

trade. Other wine-producing countries[211] should support international protection of wine names through GIs. Australia, for example, already reached an agreement with the EU that is most gainful to GI protection; this is a model for what other wine-producing countries should do.

A final consideration in establishing a multilateral register for all GIs is creating a transitional period for all affected producers. This period, much like the phase-out allowance suggested above for the United States, must focus on granting affected wine-producing countries appropriate time to alter the names of their products and to enact the additional provisions of the agreement.[212] "[A] five to fifteen-year transitional adjustment period would be [an] appropriate" period for affected countries if a multilateral register were to be enacted.[213] Additionally, as contemplated above for vintners with substantial economic impact, developing or less-developed countries that are part of the multilateral register should be furnished with a longer transition period to assuage adjustment and administrative costs.[214]

6.4 *Monitoring the Environment through Trade Organizations and Initiating Conferences to Support GI Protection*

A bilateral agreement between the United States and the EU should implement a vigorous system to monitor the environment of wine exports, to curtail the illicit usage of registered and protected GIs, and to curb the growing wine fraud in the international market. Violators could face sanctions such as increased duty rates and taxes or a ban on imports of their wines. States should also schedule transnational conferences to discuss the development of GI and intellectual property protection in the wine segment of the international consumer market and general foodstuffs.[215] Similar to the wine agreement between Australia and the EU, these conferences should also discuss the development of new GIs.

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211 I.e., predominantly those of New World wine producers that do not recognize GIs of the EU. *See generally* Protection of Geographical Indications in 160 Countries Around the World, EUROPEAN COMM'N, <http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135089.pdf> accessed Feb. 5, 2012 (discussing information on the protection of geographical indications throughout the world); *see also* n 199 and accompanying text (discussing other countries that are resistant to expanding GI protection); Waggoner (n 20) 579, (n 107), 593.

212 *See* Waggoner (n 20) 586–87.

213 Waggoner (n 20) 594 (citing Council Regulation No. 692/2003, 2003 O.J. (L 099) 1 (EC) (amending Regulation 2081/92)).

214 Waggoner (n 20) 594.

215 For an overview of multilateral negotiations and conferences previously conducted, see Hughes (n 16) 321–32.

7 Conclusion

The United States does not provide adequate legal protection for semi-generic wine product names originating in the EU. Whereas history paints an ongoing battle between European and non-European winemakers over the protection of non-generic and semi-generic wine names, inadequacy of U.S. regulation creates means of evasion in both wine production and law. Australia's recent ratification of a wine trade agreement protecting semi-generic wine products originating in the EU and prohibiting Australian winemakers from producing EU semi-generic wine names marks a significant change for a non-European wine producer. This also strengthens the argument that other non-European winemakers need to recognize and protect semi-generic wine product names originating in the EU. Accordingly, after the new Australian wine trade agreement, there is increased pressure for the United States to comply with heightened legal protections of semi-generic wine products. Whereas some commentators fear that adopting a European-friendly wine model will hinder U.S. winemakers financially, these arguments are shortsighted. Stricter protections of semi-generic wines can attribute to greater success in the international wine market, as well as provide opportunities for additional U.S. products to receive international protection and the expansion of the United States' IP system. If the United States wishes to remain successful in the international market, it must execute a wine regulatory model that matches the protections of its Australian counterpart.

CHAPTER 16

Integrating the Protection of Foreign Geographical Indications in Federal States

Transsystemic Study of GI Protection in Canada, the USA, and Germany

Nicolas Charest

1 Introduction

The law of geographical indications (hereafter, "GIs") has been fraught with controversies since the moment of its inception, some culminating in complaints at the World Trade Organization (hereafter, "WTO"), others in conciliatory clauses in trade agreements. It remains nonetheless that membership to the WTO required countries to accede to and abide by the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs"). Section 3 of Part II sets up the minimal standards of legal protection for geographical indications.[1] The earlier Paris Convention for the Protection of Industrial Property also addressed geographical indications (albeit indirectly) by prohibiting the use of false indications on products as to the source or identity of their producer at its Article 10, 10*bis* (through unfair competition), and 10*ter*.[2] Furthermore, in the last decade, a plethora of multilateral and bilateral free trade agreements have been entered into by countries all across the globe, the more recent of which also include provisions regarding the recognition and enforcement of protection for geographical indications.[3] This supra-normative framework

1 *TRIPs: Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

2 *Paris Convention for the Protection of Industrial Property*, as last revised at the Stockholm Revision Conference on July 14 1967, Mar. 20, 1883 21 U.S.T. 1583; 828 U.N.T.S. 305 [hereinafter *Paris Convention*].

3 *E.g.*, Canada-European Union Comprehensive Economic and Trade Agreement, Articles 20.16–20.23, Oct. 30, 2016 [hereinafter CETA]; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Articles 18.30–18.36, Mar. 8, 2018 [hereinafter "CPTPP"]; *Canada – United States – Mexico Agreement*, Articles 20.29–20.35, Nov. 30, 2018 [hereinafter "CUSMA"]; *See also*, European Union, *Draft Chapter on Trade in Wine and Spirit Drinks* (Mar. 21, 2016) Articles 7–9 (submitted for the EU-US Transatlantic Trade and Investment Partnership [hereinafter "TTIP"] negotiations (negotiations were abandoned in 2017 upon withdrawal of the US)). *See generally*, Filippo Arfini et al. (eds.), *Intellectual Property Rights*

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imposed on a myriad of member states does not, however, illustrate nor specify how any of these countries must implement these obligations with regards to GIs, and much less those related to wine and spirits.[4] Since the aims of these agreements is to secure protection and legal remedies for foreign GIs within these countries, the internal organization of each specific state directly affects the ways in which the mechanics of the implementation of these international obligations and the channels of enforcement for the rights created and granted to GI holder.

One of these forms of internal or administrative organization which is inherently perplexing is federalism. With its specific attribution of competences yet ridden with overlapping areas of concurring jurisdiction between the federal and local governments, an examination of how federalism affects the regimes of recognition and later enforcement of GIs is a fertile ground of inquiry. Yet, the particular dynamics of federalism has been left aside by most of the authors that discussed GI law over the last twenty years. This chapter hypothesizes that given the shared tensions between central and local governments, the models of GI regime adopted by federal states must generally be similar regardless of their historical legal traditions. In other words, this chapter examine different legal regimes to assess whether exists an identical set of legal imperatives, which would allow to discern a "common federal law of geographical indications." To do so, the chapter focuses on the federal states of Canada, the United States, and Germany.

These three countries were specifically selected because, first, they are all constitutionally formed under a federal system of state administration, with a centralized federal government and local governments in each of their States (US), provinces (Canada), and Länder (Germany). Furthermore, as will become evident in the pages below, they all embody varied responses to international obligations to protect GIs, whether because of a particular membership to a supranational order (Germany and the EU), out of concern for protecting the freedom of the internal industry (US), or a hybrid of the two given extensive ties with a variety of legal traditions (Canada). Other federal countries could have been selected, including Australia and Switzerland: a broader investigation would definitely include these two countries.

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for Geographical Indications: What is at Stake in the TTIP (Cambridge Scholars Publishing 2016) (for in-depth discussion of the issues pertaining to geographical indications in the envisioned TTIP).

4 For a concise review of the different approaches adopted by different countries, *see e.g.* Bernard O'Connor, 'Approaches to the Protection of Geographical Indications in National Laws', in *THE LAW OF GEOGRAPHICAL INDICATIONS* (Cameron May, 2004).

Before we dive into the substantive examination, we have to set out some premises that the reader must be aware are assumed for the purposes of our discussion. First, though we acknowledge the doctrinal debate surrounding the subject matter of GIs, we assume that they are properly understood as intellectual property rights and are validly regulated by states as such. We further assume that there is a distinctly marked difference between a North American understanding of GIs, as integrated into the law of trademarks and unfair competition; in contrast with a European Union understanding of GIs, which inherits from the French appellations of origin/*sui generis* system. The artificiality of this distinction will be challenged through our discussion of the legal landscape in Germany, where the structure of protection of foreign GIs provided by the federal statutes might be evidence of an understanding of GIs that moves away from this EU-centric definition and towards a North American definition. Finally, the last assumption concerns vocabulary. It is true that there are doctrinal if not technical differences amongst the numerous variations of systems used to protect the name of the location of origin of a product, whether it be indications of origin, protected designations of origin, indications of source, appellations of origin, appellations contrôlées, etc., but for the purposes of our discussion, we will use the all-encompassing terms "geographical indications" or GIs and "appellations" to refer to all of these, and where specific reference to one of these variation is warranted, terminology will be clarified.

The first part of this chapter examines the web of international agreements that impose obligations on countries to recognize and offer means of legal protection for geographical indications. The second part exposes in more details the specific American, Canadian, and German frameworks. The third and final part draws the conclusion that a common threat in justifying intellectual property protection for GIs in federal states can be found in concerns for unfair competition and consumer protection as well as in the flexibility that these two policies offer when adopting specific regulations that implements international obligations.

2 Supra-Normative Commitments to Protect GIs: Paris Convention, TRIPs, and Free Trade Agreements

The first part of our endeavour requires that we flesh out the various obligations that are imposed on the federal states used as case studies. Canada and the US, have demonstrated only but a sparse interest in developing a system of IP protection for designated geographical indications on certain products

as based on the sometimes esoteric notions of *terroir* and *typicité*. Such familiarity with these concepts on the part of these countries would presumably facilitate the recognition and protection of appellations from other countries. But in the absence of which, the obligation to provide legal protection for appellations must come from some other external sources. As Dev Ganjee eloquently puts it:

> The international legal rules associated with the protection of geographical indications do not derive their authority from long-standing or widespread presence of analogous rules within national laws prior to signature of the TRIPS Agreement in 1994, such that these international rules could be considered to reflect the general principles of law.[5]

Given the lack of consistent domestic laws which could provide the starting point for this analysis, we turn to the international instruments that brought about the creation of such domestic regimes for GIs.[6]

2.1 *Paris Convention for the Protection of Industrial Property* (*"Paris Convention"*)

The first and oldest of the instruments that impose the obligation on the three countries studied to set up a system of protection for GIs is the Paris Convention of 1883. The general aim of the Convention is to secure national treatment for the protection of industrial property assets by Contracting States, that is, ensuring that the protection afforded to them is identical to that given to nationals. The Convention further guarantees a right of priority for patents, trademarks, and industrial designs. Article 1, paragraph 2 states that "the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, *indications of source or appellations of origin*, and the repression of unfair competition".[7] Given that the

5 Dev Ganjee, *Relocating the Law of Geographical Indications* (Cambridge University Press 2012) 22. See also WIPO, 'The Definition of Geographical Indications', 1 October 2002 (SCT/9/4); World Intellectual Property Organization, *Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications: Definition of Geographical Indications*, SCT/9/4 (Oct. 1, 2002).

6 *See generally*, Antony Taubman, '*The Variable Geometry of Geography : Multilateral Rules and Bilateral Deals on Geographical Indications*', in Jacques de Werra (ed.), *GEOGRAPHICAL INDICATIONS : GLOBAL AND LOCAL PERSPECTIVES* (Schulthess, 2016) (on the synergy between bilateral and multilateral instruments and the inherent complexities that a patchwork of agreements tend to cause in the protection of geographical indications).

7 *Paris Convention* (n 2) at art. 1 (emphasis added).

heading of the Article states that it defines the "scope of industrial property", it is safe to assume that for the purposes of the Paris Convention, GIs as indications of source are covered in the more specific provisions of the Convention. In further narrowing that scope, Article 1(3) mentions that industrial property also encompasses "agricultural and extractive industries and to all manufactured or natural products", which then states, amongst others, wines and beers.

Article 10 and following are also relevant. Article 10 provides the right to request seizure on imports which bear a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant. Article 10bis(3)(iii) further provides that "indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods" shall be prohibited by member-states.[8] Finally, Article 10*ter* provides the right of federations and associations representing "interested industrialists, producers, or merchants" to take action in courts or before administrative authorities to repress the acts mentioned at article 10 and 10bis.[9]

The Paris Convention, the influence of which is often shadowed by the mightier TRIPS and other subsequent agreements,[10] was a crucial starting point because it was the first time that indications of source, and what will be later coined as "geographical indications", was recognized as a distinct and stand-alone form of industrial property.[11]

2.2 *Agreement on Trade-Related Aspects of Intellectual Property Rights*

Emerging from the Uruguay Round of negotiations for the General Agreement on Tariffs and Trade (GATT), which lasted for almost a decade, Section 3 ("Geographical Indications") of Part 2 ("Standards Concerning the Availability,

8 *Paris Convention* (n 2) at art. 10bis.

9 *Paris Convention* (n 2) at art. 10ter.

10 *See generally*, Christopher Heath, 'Geographical Indications: International, Bilateral and Regional Agreements', in Christopher Heath and Ansel Kamperman Sanders (eds.), *STUDIES IN INDUSTRIAL PROPERTY AND COPYRIGHT LAW: NEW FRONTIERS OF INTELLECTUAL PROPERTY LAW: IP AND CULTURAL HERITAGE, GEOGRAPHICAL INDICATIONS, ENFORCEMENT AND OVERPROTECTION* (Vol. 25, Hart Publishing, 2005) 96. (where the author explains that both the Madrid Arrangement 1891 and the Lisbon Agreement for the Protection of Appellations of Origin 1958 were adopted to strengthen the protection offered to geographical indications, namely by adopting amendments to the Paris Convention and Madrid Arrangement that prohibited the use of misleading indications in commerce).

11 Ganjee (n 5) 24; (Ganjee makes a formidable and well-documented attempt at unpacking the ramifications of the Paris Convention in the establishment of the law of GIs).

Scope and Use of Intellectual Property Rights") establishes the regime for GIs. First and foremost, Article 22(1) provides a definition of GI:

> Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.[12]

Unpacking the definition, we note that there are very few limits on what a GI is and could encompass within its ambit of protection. As long as it is (i) a sign, (ii) used to identify, (iii) a good, (iv) coming from a specific location, (v) having a given quality, reputation, or other characteristics, (vi) due to that geographical origin, it seems that any goods could be covered.[13]

Article 22(2), at subparagraphs (2) to (4) further states the remedies that must be implemented in local laws to allow GI holders to police and enforce their GI right in the territory of the member-state. In short, paragraph (2) provides for both, (a) protection against uses of GI that mislead the public as to the geographical origin of the good by suggesting that it originates from an area other than its true place of origin and, (b) protection against any use that constitutes an act of unfair competition as per Article 10^{bis} of the Paris Convention (1967).[14] Article 22(3) adds that a party must ensure that during trademark prosecution, the examiner or a requesting interested party must be able to refuse or invalidate the registration of a trademark which consists of a geographical indication with respects to goods originating in the territory indicated, if the use of the indication in the mark would mislead the public as to the true place of origin.

Article 23 provides an additional layer of protection specially tailored for GIs used for wines and spirits. Often qualified as an "absolute" form of protection, Article 23 does not require the extensive protection it affords to be premised on the use of a GI that misleads the public or would amount to unfair

12 *TRIPS Agreement* (n 1) at art 22(1).

13 World Trade Organization, *A Handbook on the WTO TRIPS Agreement* (Antony Taubman, Hannu Wager & Jayashree Wata, eds., Cambridge University Press 2012) 79. See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178 and Julien Chaisse and Puneeth Nagaraj 'Changing Lanes – Trade, investment and intellectual property rights' (2014) 36(1) *Hastings International and Comparative Law Review* 223–270.

14 Recall the prohibition mentioned above provided in 10bis(3)(3).

competition.[15] Paragraph (1) provides the general obligation for member states to provide either through judicial or administrative apparatus:

> [...] the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, 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.[16]

Paragraph (2) adds that a trademark for wine or spirits which contains or consist of a GI and identify that wine or spirit shall be refused or invalidated if that wine or spirit does not originate from that area of origin. Again, this remedy is not conditioned on a demonstration that the public would be misled as to the origin of the wine or spirit or that doing so would amount to some passing-off.[17]

Finally, Article 23(4) provides for the idiosyncratic situation where two distinct and different wine regions use the same geographical name, identical in sound (*i.e.* homonyms). The common example is "Rioja" used for both a wine region in Spain and another in Argentina. In such case, coexistence of the GI s is warranted, provided that that there is no false representation to the public as to the true origin of the wine or spirit, in conformity with Article 22(4).[18]

While there would be much more to say on these two articles,[19] the above is sufficient to provide the building blocks that are needed to assert one of

15 World Trade Organization, *A Handbook on the WTO TRIPS Agreement* (Antony Taubman, Hannu Wager & Jayashree Wata, eds., Cambridge University Press 2012) 89. See also Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p and Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178.

16 *TRIPS Agreement* (n 1).

17 Taubman wt al. (eds.) (n 13) 90.

18 Michael Blakeney, *The Protection of Geographical Indications: Law & Practice* (Edward Elgar Publishing, 2014) paras 2.67–2.70.

19 Further accounts delve more precisely on this topic, *see generally*: P-T. Stoll, J. Busche and K. Arend, eds., *WTO – Trade-Related Aspects of Intellectual Property Rights* (Martinus Nijhoff, Leiden and Boston 2009) 351–431; D. Gervais, *The TRIPS Agreement. Drafting History and Analysis* (Sweet & Maxwell, 3rd ed., 2008) 290–324; C. M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007) 209–56; UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (Cambridge University Press 2005) 267–321; Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement*

the major premises of this chapter: countries that adhered to the TRIPS when entering into the WTO have a uniform obligation to provide for the protection of GIs within their national system of IP law, though they remain free to implement it in whatever way they deem appropriate, as long as it fulfills their obligations under the agreement.

2.3 *Canada-European Union Comprehensive Economic and Trade Agreement* (*"CETA"*)

After eight years of negotiations, which started in 2009, the joint efforts of both Canada and the EU culminated in the official signature of the CETA on October 30, 2016. It entered into force in Canada in September 2017, which marked the beginning of the provisional application of the agreement in Canada. Though the CETA includes a whole sub-section on geographical indications, it specifically seeks to extend GI protection to foodstuff, such as meats, cheeses, fruits, oils, pasta and many others.[20] A Statement on Implementation from the Canadian government informs us that IP rights with regards to wines and spirits are dealt with in Chapter 30 of the Agreement, the "Final Provisions", by incorporating and amending existing treaties that deal with those products.[21]

The CETA notably incorporates and makes part of the Agreement the *Agreement between the European Economic Community and Canada Concerning Trade and Commerce in Alcoholic Beverages* signed in 1989 and the *Agreement between the European Community and Canada on Trade in Wines and Spirit Drinks*, entered into in 2003 (thereafter the "2003 Agreement").[22] The 2003 Agreement, in Article 10, created a special prohibition for the use of a GI on a

(Sweet & Maxwell, London 1996), David Vivas-Eugui and Christoph Spennemann, '*The Evolving Regime for Geographical Indications in TWO and Free Trade Agreements*', in Carlos M. Correa and Abdulqawi A. Yusuf (eds.), *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* (Wolters Kluwer, 2008) 163–213, Dev Ganjee (n 4) 183–264, Heath (n 8) 119–121.

20 Government of Canada, *Canada-European Union Comprehensive Economic and Trade Agreement – Canadian Statement on Implementation* Chapter Twenty, "Geographical Indications" (where it states that: "Article 20.17 provides that only geographical indications (GIs) for listed products falling in the product categories as set out in Annex 20-C are covered by the obligations in this section."); see CETA (n 3) at Annex 20-C.

21 CETA (n 3) at Annex 30-B "Amendments to the *1989 Alcoholic Beverages Agreement* and the *2003 Wines and Spirit Drinks Agreement*."

22 *Agreement Between Canada and the European Community Concerning Trade and Commerce in Alcoholic Beverages*, Feb. 28, 1989; *Agreement Between the European Community and Canada on Trade In Wines and Spirits Drinks*, Sept. 16, 2003 [hereinafter 2003 Wine Agreement].

wine that does not originate from the place indicated by said GI.[23] It further provided for a number of wine related GIs to be eligible for GI protection in Canada through the application process laid down in the *Trademarks Act* at sections 11.11ff for entry into the *List of Protected Geographical Indications*.

In that sense, the CETA brought very little change when it comes to the protection of foreign GIs relating to wines and spirits. In fact, looking at the recent additions to the *List of Protected Geographical Indications* in Canada following the implementation of the CETA, none of the GIs added in 2017 relates to wines or spirits. A recent report from the Wines and Spirits Committee for the CETA which met in late September 2019 does highlight that there has been some issues in Canada with products bearing terms such as "Champagne," "méthode champenoise," "cidre champagne," "Irish Cream," and "Chablis." The report also highlights some confusion on the part of EU stakeholders with regards to the Canadian labelling practices and the role of the Canadian Food Inspection Agency in the review of labels for wines and spirits in cases regarding false, misleading, and deceptive labelling.[24]

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23 2003 Wine Agreement (n 22) at Art. 10(2) : "A protected geographical indication may not be used to describe or present a wine not originating in the place indicated by the protected geographical indication in question, including translations, whether or not accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like, and whether or not the protected geographical indication is accompanied by a reference to the true place of origin."

24 *See* European Commission, CETA – Wines and Spirits Committee, *Report of the Second Meeting of the Wines and Spirits Committee, Ottawa, 24 September 2019*. Canada has three main instruments which prohibits misleading claims in labelling and advertising and are administered by the Canadian Food Inspection Agency: *The Food and Drugs Act* (R.S.C., 1985, c. F-27, last amended on 2019-06-21) states at subsection 5(1) that "No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety"; the *Safe Food for Canadians Act* (S.C. 2012, c. 24, last amended on 2019-06-17) at subsection 6(1) which states: "It is prohibited for a person to manufacture, prepare, package, label, sell, import or advertise a food commodity in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, quality, value, quantity, composition, merit, safety or origin or the method of its manufacture or preparation", and subsection 199(1) of the *Safe Food for Canadians Regulations* (S.O.R. 2018–108, last amended on 2019-06-17) which states that:

> For the purposes of subsection 6(1) of the Act [Safe Food for Canadians], labelling a food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression includes labelling a food with
>
> (a) any representation in which expressions, words, figures, depictions or symbols are used, arranged or shown in a manner that may reasonably be considered to qualify the declared net quantity of a consumer prepackaged food or that is

2.4 *Canada-United States of America-United Mexican States Agreement (a.k.a. "NAFTA 2.0")("CUSMA")*

This NAFTA 2.0 was marked by significant turmoil, both during the negotiation stage, which began in August 2017, and during the domestic ratification process in each of the three countries.[25] In the end, the CUSMA addresses very sparingly issues related to GI protection amongst the three countries and appears mainly concerned with the formal administrative process for the recognition of said GIs. The CUSMA's Chapter on Intellectual Property merely enumerates some ways in which to facilitate administrative procedures for the protection or recognition of GIs at its Section E "Geographical Indications" of Chapter 20 on Intellectual Property.[26] Article 20.35(4) does not require a Party to make available grounds for denial, opposition or cancellation of applications for wines and spirits and those geographical indications. Another section of the CUSMA on Agriculture, and more specifically the Annex 3-C on "Distilled Spirits, Wine, Beer, and Other Alcohol Beverages" does contain some additional considerations for GI protection. It provides most notably that a Party may require that a wine or spirit label be "clear, specific, truthful, accurate, and not misleading to the consumer"[27] and may require that a wine be certified

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likely to deceive with respect to the net quantity of a consumer prepackaged food; or

(b) any expression, word, figure, depiction or symbol that may reasonably be considered to imply that a consumer prepackaged food contains any matter that it does not in fact contain or that it does not contain any matter that it does in fact contain.

(2) For the purposes of subsection 6(1) of the Act, selling, importing or advertising a food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression includes selling, importing or advertising a consumer prepackaged food that is labelled in the manner set out in paragraph (1)(a) or (b).

25 *See e.g.*, *An Act to Implement the Agreement between Canada, the United States of American and the United Mexican States*, Bill C-100, which received royal assent on March 13, 2020, almost sixteen months after the signature of the agreement by the three countries; *See also*, Ronald Orol, *What Stands in the Way of Ratifying CUSMA?* (Centre for International Governance Innovation, June 13, 2019), Sabrina Rodriguez, 'USMCA is far from a done deal' *Politico* (Jan. 24, 2020), Accessed on Jan. 26, 2020.

26 *See*., CUSMA (n 3) at Art.20.30 "Administrative Procedures for the Protection or Recognition of Geographical Indications" where, for instance, at 20.30(a) where it states that a Party shall "accept those applications or petitions without requiring intercession by a Party on behalf of its nationals […]" or at 20.30(c) "a Party shall […] ensure that its laws and regulations governing the filing of those applications or petitions are readily available to the public and clearly set out the procedures for these actions […]".

27 *See*., CUSMA (n 3) at Article 3.C.3.(4)(a).

regarding appellation of origin if the party from where the wine is imported so requires or if the importing party has a reasonable and legitimate concern about the appellation of origin claim for wine.[28] The previous NAFTA also had prohibitions on the use of designation that would mislead the public as to the geographical origin of goods[29] and specifically afforded protection for Tequila, Mezcal, Bourbon Whiskey, Tennessee Whiskey, and Canadian Whisky.[30] These were carried over into the CUSMA at Article 3.C.2.[31]

3 Response to Implementing GI Obligations in Federal States

Now that we have a better idea of the kind of international obligations that Canada, the US, and Germany have when it comes to ensuring the protection of foreign GIs within their territory, we can delve in more detail in their respective response to these obligations.

3.1 *Trademark Law as the Panacea for the US and Canada?*

It is true that there are some debates surrounding the proper allocation of competencies when it comes to trademark law and claims under delictual or

28 CUSMA (n 3) at Article 3.C.3(22).

29 North American Free Trade Agreement, Art. 1712, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993).

30 North American Free Trade Agreement at Annex 313 "Distinctive Products.":

1. Canada and Mexico shall recognize Bourbon Whiskey and Tennessee Whiskey, which is a straight Bourbon Whiskey authorized to be produced only in the State of Tennessee, as distinctive products of the United States. **Accordingly, Canada and Mexico shall not permit the sale of any product as Bourbon Whiskey or Tennessee Whiskey, unless it has been manufactured in the United States in accordance with the laws and regulations of the United States** governing the manufacture of Bourbon Whiskey and Tennessee Whiskey.
2. Mexico and the United States shall recognize Canadian Whisky as a distinctive product of Canada. Accordingly, Mexico and the United States shall not permit the sale of any product as Canadian Whisky, unless it has been manufactured in Canada in accordance with the laws and regulations of Canada governing the manufacture of Canadian Whisky for consumption in Canada.
3. Canada and the United States shall recognize Tequila and Mezcal as distinctive products of Mexico. Accordingly, Canada and the United States shall not permit the sale of any product as Tequila or Mezcal, unless it has been manufactured in Mexico in accordance with the laws and regulations of Mexico governing the manufacture of Tequila and Mezcal. This provision shall apply to Mezcal, either on the date of entry into force of this Agreement, or 90 days after the date when the official standard for this product is made obligatory by the Government of Mexico, whichever is later. (Our emphasis).

31 North American Free Trade Agreement at Art. 3.C.2.

tortious unfair competition in the US and Canada. The prevailing view suggests that federal and local law on trademarks and unfair competition usually co-exist harmoniously, where both levels of government can regulate under the appropriate head of power, without conflict.[32] As these countries have elected to integrate GIs to their existing trademark law, it therefore seems that both federal and local governments are free to adopt legislation on geographical indications.

The US and Canada have enacted various provisions and/or adapted existing provisions to accommodate obligations to recognize foreign GIs. As we shall see, Canada's response is more akin to a "transplant" of GI law into its *Trademarks Act*, following a recent round of amendments; whereas the US seem to have confirmed that claims by GI holders under already existing types of trademarks would sufficiently accommodate GIs in its domestic law.

3.1.1 US

As the United States Patent and Trademark Office itself announces, the starting point of our analysis is the "administrative trademark structures already in place", where "the same governmental authority [the USPTO] processes applications for both trademarks and GIs."[33] Some commentators have premised this integration of GIs into trademark law as based on the common law tradition of the US.[34] But Canada is also a common law country (for the most part, and with arguably an historical sensibility for continental civil law) and it has seamlessly integrated GIs within its trademark regime. The latter might be evidence that such premise, though perhaps necessary, is not sufficient to explain this policy choice. Another explanation lies rather in the need to provide to GI holders a uniform framework of protection for the recognition of foreign GIs in the US while also providing for national treatment to these foreign GIs. Recourse to the existing regime of trademark

32 *McCarthy on Trademarks and Unfair Competition*, §22.2 : Relationship between federal law and state trademark law – No federal preemption but state law cannot limit federal rights; Hughes G. Richard, "Provincial Trade Marks : Some Constitutional Thoughts", 1989, Uploaded May 2017, URL : https://www.robic.ca/wp-content/uploads/2017/05/026-HGR.pdf.

33 United States Patent and Trademark Office, Department of Commerce, *Geographical Indication Protection in the United States*.

34 Gail E. Evans, 'A Comparative Analysis of the Protection of Geographical Indications in the European Union and the United States under Sui Generis and Trademark Systems' in Toshiko Takenaka (ed.), *INTELLECTUAL PROPERTY IN COMMON LAW AND CIVIL LAW* (Edward Elgar Publishing 2013) 250.

law is reassuring given the unfamiliarity that US regulators have been known to manifest in dealing with the grant of rights premised on the notion of *terroir*.[35]

Terroir as a legal concept requires legislators to make broad assumptions about the value and nature of what is protected. This leap of faith consists in accepting the premise that a common geographical name used on a given product is distinctive of a specific geographical origin and an ensemble of human and environmental factors that affect the production of that product, which are sufficiently consistent so that a common profile of taste and flavour can be distinguished across a variety of products from that location. The US have historically been reluctant to make that leap of faith, especially with regards to appellations which they perceived as generic for a style of wine and not as referring to a specific origin, such as "Champagne" (for sparkling wines). This rudimentary understanding, or reluctance to acclimate the esotericism of terroir is coupled with protectionist imperatives to protect the flourishing wine industry. As they continue to recover from the depletion the industry suffered during the Prohibition era, some American producers capitalize on the use of what they considered "generic" appellations to commercialize their products. This attitude further highlights why the doctrine of "geographical indications" as a term and a concept has found minimal ground upon which to grow and was confined to doctrines of trademark law, rather than a full-fledged state-administered *sui generis* system.

Before examining the particular characteristics of US law, it is worth briefly reminding the reader of its constitutional underpinnings. As per Section 8(3) of the US Constitution, also known as the "Commerce Clause," Congress, that is the legislative branch of the federal government of the US, is granted the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[36] Given that the purpose of trademark law is to

35 It is true, however, that the US does have a system of protection appellations for the wine industry called American Viticultural Areas (AVAs). These AVAs differ greatly from *sui generis* GIs because they focus on the geographical and climatic features of an area from which originate the distinctive features of a wine : https://www.ttb.gov/index.php/wine/applying-to-establish-or-modify-an-ava. A petition for an AVA does not include considerations of the know-how, methods of production, or other human factors that could be involved in developing these distinctive features. In contrast, human factors are typically understood as being part and parcel of a *sui generis* GI system founded on the notion of *terroir* and *typicité*, as found in France : https://www.inao.gouv.fr/Les-signes-officiels-de-la-qualite-et-de-l-origine-SIQO/Appellation-d-origine-protegee-controlee-AOP-AOC.

36 U.S. Const. art. I, §8 cl. 3.

preserve the integrity of the marketplace by preventing consumer confusion and misattribution of the sources of goods, and thus the expectation of quality from the consumers,[37] for goods that do travel through channels of commerce that cross state lines, the legitimacy of the federal government to regulate trademark law has rarely been questioned.[38] However, given that these same constitutional clauses do not specifically exclude states from regulating some aspects of trademarks, there has been a constant interplay of concurrent and parallel, but never competing, jurisdiction between state and federal government in that area.[39] Certain states even go as far as providing their own state trademarks statute, with a registration process and remedies,[40] but it seems that federal law generally pre-empts state law with regards to federally registered marks.[41] In that sense, one author describes the dynamics of US IP law as "not so much a set of separate spheres as it is a heartily swirled marble cake."[42]

Zooming in on the federal law of trademarks, the specific provisions of the United States Code (§1051–1141) offer protection for GIs in three possible forms: as a certification mark, as a collective mark, and as a regular trademark. Certification marks, as a specific type of trademark, certainly come closest to how "geographical indications" are understood under TRIPS, as a separate and autonomous kind of industrial property. They are signs, whether a word, name, symbol, or device, used by a third party other than the owner of the mark to certify some aspects of the goods and services to be commercialized by the third party.[43] One of these aspects that can be certified is provenance, that is,

37 *McCarthy on Trademarks and Unfair Competition*, §2:2: Author's Opinion: Modern Trademark Law Has Two Goals and §2:4: *The Quality Encouragement Function of Trademarks* (5th ed.).

38 Jane C. Ginsburg, 'U.S. Federalism and Intellectual Property', (1996) 2 Colum. J. Eur. L. 463, 465; *See also*, James M. Wetzel, 'Federal Preemption Under the Lanham Act 76 Trademark Rep. 243 (1986), Mark P. McKenna, Trademark Law's Faux Federalism' in Shyamkrishna Balganesh (ed.), *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Cambridge University Press, 2013); *Trademark Cases* 100 U.S. 82, 25 L. Ed. 550 (1879) (where the Supreme Court ruled that Congress could only legislate trademarks under the Commerce power and not under the patent and copyright clause because trademarks plays no role in promoting progress of science and the useful arts as trademarks are only founded on priority of appropriation).

39 Jane C. Ginsburg, 'U.S. Federalism and Intellectual Property', (1996) 2 Colum. J. Eur. L. 465.

40 N.Y., Gen. Bus., Article XXIV, §360.

41 Ginsburg (n 38).

42 Joseph Scott Miller, 'Brandeis's IP Federalism: Thoughts on Erie at Eighty', (2018) 52 Akron L. Rev. 367, 369.

43 Lynne Beresford, 'Geographical Indications: The Current Landscape', (2007) 17 Fordham Intell. Prop. Media & Ent. L.J. 979, 983; *See also*, Jeanne C. Fromer, 'The Unregulated Certification Mark(et)', (2017) 69 Stan. L. Rev. 121 (for a complete discussion of the issues surrounding certification marks in the U.S.).

regional origin of the goods, but it can also certify the mode of manufacture, quality, accuracy, or other characteristics, as well as the manufacturer's membership to a given union or organization.[44] This membership affiliation can in and of itself be sufficient to indicate abidance of the goods to some industry standards that may include requirements regarding provenance and methods of production.[45]

GI holders will most commonly seek to register their GI as a "regional certification mark." The provision for which is found at 15 USC §1054. Use of regional certification will indicate the regional origin of the goods and attest that the good is in fact from that region.[46] The certification mark owner is not only charged with submitting the application to the USPTO for registration but is also responsible for policing the use of the mark by others. Such policing is typically vested in a governmental entity or an entity authorized by government to control such use of the certification mark. Examples include the Consorzio Vino Chianti Classico,[47] the Canadian Vintners Association,[48] or the Deutscher Weinfonds.[49] As such, the certification mark, contrary to an ordinary trademark, does not indicate a specific source of goods such as a distinct producer within an association of producers, and rather attest that the good bearing the mark complies with certain standards and that it offers the level of quality that consumers can rightfully expect from the product bearing the mark as well as the given characteristics specific to that product.[50] In other words, "the message conveyed by a certification mark is that goods or services

44 United States Patent and Trademark Office, Department of Commerce, *Trademark Manual of Examining Procedure*, October 2018, §1306.01 – Types of Certification Marks [hereinafter the TMEP].

45 TMEP at §1306.05(a) – Geographical Certification Marks – Generally.

46 1 Anne Gilson LaLonde, *GILSON ON TRADEMARKS* § 2.03 (Matthew Bender).

47 CHIANTI CLASSICO, U.S. TM. Reg. No. 0877636: "The certification mark, as intended to be used by authorized persons, certifies that wines bearing the mark originate from the Chianti Classico region of Tuscany, Italy, that the grapes used to create the wine meet strict cultivation standards, and that the wines conform to set standards of grape varietals used, alcohol content, clarity, color and aging, as set forth in the Production Code of Chianti Classico DOCG."

48 VINTNERS QUALITY ALLIANCE VQA, U.S. TM. Reg. No. 2117174: "The mark certifies that the goods are produced from specified grape varieties grown in the Province of Ontario, Canada and that they meet the certifier's standards as to taste, color and smell."

49 See e.g. SACHSEN, U.S. TM. Reg. No. 2000221, WÜRTTEMBERG, U.S. TM. Reg. No. 1014461, MOSEL, U.S. TM. Reg. No. 1008252, for which the certification generally states: "The mark certifies origin in a geographical region in Germany and characteristics of quality as most recently defined by the German Wine Law of July 14, 1971 (BGBL I S. 893)."

50 *Gilson on Trademarks* (n 46) at § 11.03, note 99.13.

have been examined, tested, inspected, or in some way checked by a person who is not their producer, using methods determined by the certifier/owner."[51] The ultimate effect is to help the consumer in distinguishing the source of the goods or services of one undertaking with a certificate from those other similar undertakings without the certificate.

In the case of wine and spirits, such standards are usually selected to reflect the terroir from which the products originate and to suggest the typicality/typicity/*typicité* of a region that should be reflected in the beverage upon consumption. In that sense, certification is therefore an exception to the general law of trademark which is typically opposed to the monopolization of a geographical name believed to be part of a general public domain. The rationale that allows such circumvention is based on the idea that a geographical name registered as a certification mark is based on the public's understanding "that goods bearing the mark come only from the region named in the mark."[52] This in turn signifies that the product bearing the mark "belongs to a group of products that share particular characteristics."[53] Therefore, the application unsurprisingly must include details about the physical boundaries of the region certified by the mark along with the standards that a prospective user of the mark must meet in order to validly (and not unfairly) use the mark.[54] Contrary to Canada and other European countries, the US does not keep a distinct list of the certification marks or the GI s protected under certification that the USPTO has authorized for registration. Finally, aside from the formal registration process in the federal trademark registrar, the Trademark Trial and Appeal Board concluded that certification marks can be acquired through use, as long as the consumers understand that the goods bearing the regional certification mark come only from the region named in the mark: the Board found that such was the case with the term "Cognac."[55]

51 TMEP (n 39) at §1306.01(b) – *Purpose Is to Certify, Not to Indicate Source*.

52 *Gilson on Trademarks* (n 46) at § 2.03 & §1.02[4].

53 *1 TRADEMARK AND UNFAIR COMPETITION LAW* (Carolina Academic Press, 2015) 2C.

54 *See*, TMEP (n 39) at §1306.05(b) – *Additional Considerations in Geographical Certification Mark Applications*: "When a geographic term is being used as a certification mark to indicate regional origin, the application must define the regional origin that the mark certifies. The identified region might be as large as a country or as small as a village, and an applicant may define it in general terms in the certification statement."; *See generally*, Mark R. Barron, 'Creating Consumer Confidence or Confusion? The Role of Product Certification in the Market Today', (2007) 11 Intellectual Property L. Rev. 413 (for a more detailed discussion of certification marks in the U.S.).

55 *Institut Nat'l Des Appellations D'Origine v. Brown-Forman Corp*., 1998 TTAB LEXIS 122, 47 U.S.P.Q.2D (BNA) 1875 (Trademark Trial & App. Bd. May 29, 1998) at para 28.

Aside from the certification mark which, again, is considered as the closest North American conceptual equivalent to EU GIs, *collective* marks are also secured for purposes of enforcement of an indication of origin in the US. Examples (although now expired) included FRANKFURTER APFELWEIN and BAYERISCHE HEIDELBEERWEIN.[56] Contrary to certification marks which indicate that the goods bearing the mark have met certain standards and therefore embody certain characteristics, the collective mark merely indicates that the goods come from a member of a given collectivity.[57] In addition to the formal registration process, enforcement rights of collective marks can be acquired through extended use of the mark which allowed the mark to acquire secondary meaning as an indicator of quality (and not source) for US consumers.[58]

Finally, registration of conventional work trademark could be obtained. However, given that GIs are often based on a geographical term, the trademark applicant will have to demonstrate that the mark has acquired sufficient secondary meaning to establish distinctiveness of the mark. Otherwise, the application is likely to be rejected on grounds of descriptiveness of the mark.[59]

3.1.2 Canada

As we have mentioned above, Canada has had over the years, a response similar to what the US propose with regards to the accommodation of GIs. Recent trade agreements with Europe, and other historical sensibilities tend to show that Canada seem more willing to incorporate European-like doctrines of geographical indications within their existing regime of trademark law, without,

56 FRANKFÜRTER ÄPFELWEIN, U.S. TM. Reg. No. 109779 for "Apple Wine" and where "The mark certifies origin in the city of Frankfurt in The Federal Republic of Germany" (TM now expired); BAYERISHE HEIDELBEERWEIN, U.S. TM. Reg. No. 1098427 for "Blueberry Wine" and where "The mark certifies origin in the region of Bavaria in The Federal Republic of Germany" (TM now expired).

57 *Gilson on Trademarks* (n 46) at § 2.03.

58 TMEP (n 39) at *§1212 – Acquired Distinctiveness or Secondary Meaning*: "The legal principles pertaining to evidence of acquired distinctiveness discussed in this section and below with respect to trademarks and service marks apply generally to collective marks and certification marks as well."

59 *See also*, at Dev Gangjee, 'Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications', (2007) 82 Chi.-Kent. L. Rev. 438 (for a comparative, though Europe-centric, discussion of the wider issues in the interplay of geographical indications and trademark law); *See contra*, Amy P. Cotton, '123 Years at the Negotiating Table and Still No Dessert? The Case in Support of TRIPS Geographical Indication Protections', (2007) 82 Chi.-Kent L. Rev. 1295 (response piece to Ganjee).

however, going as far as creating a *sui generis* system of protection.[60] Canada, while not a country known to be a major consumer of wine, in comparison to its beer consumption, remains nonetheless a major commercial partner for both the EU and the US. In addition, it offers interesting opportunities for foreign wine makers for greater market presence in Canada in the wake of these free trade agreements, by capitalizing on name recognition and reputation.[61]

Like the US, Canada has incorporated the TRIPS obligations to protect GIs through its existing structure provided for trademarks. Canada's overall response is more akin to the German model of protection, which also integrated provisions in its trademarks statute, as we will review below. But before delving into the particulars, a note on the distribution of powers in the area is warranted.

The Constitution Act of 1867 specifically attributes competencies in matters of IP law, specifically for patents and copyrights, to the federal government, at paragraphs 91(22) and 91(23).[62] It also assigns jurisdiction to provinces over matters related to "property and civil rights in the Province" at 92(13).[63] The Supreme Court of Canada has, in a seminal decision, long dissipated doubts about the distribution of competence between the federal and provincial governments with regards to trademarks. The case of *Kirby AG v Gestion Ritvik inc.* in a similar ruling as the *Trademarks Case* of 1879 in the US[64] confirmed that jurisdiction over trademarks fell under the federal head of power to regulate commerce as per 91(2) of the same Constitution.[65] Again, the need for a uniform and harmonized national system of registration for trademarks justified the attribution to the federal legislature.

However, one commentator highlights that with regards to the protection of indicators of origin/geographical indications for local entities, provincial legislatures could be justified in reclaiming some power over the regulation

60 *See e.g.,* Dianne Daley, 'Canada's Treatment Of Geographical Indications: Compliant or Defiant?' in Ysolde GENDREAU (ed.), *AN INTERNATIONAL PERSPECTIVE IN AN EMERGING INTELLECTUAL PROPERTY PARADIGM: PERSPECTIVES FROM CANADA* (Edward Elgar Publishing, 2009) 61; *See also*, Daniel Bereskin, *Legal Protection of Geographical Indications in Canada* (Intellectual property Institute of Canada Annual Meeting on September 18, 2003, Halifax 2003).

61 Richard Mendelson et al., 'Wine Trade with Canada : A Case Study in Trade Deregulation', (1989) 7 Int'l Tax & Bus. Law. 91, 92 & 108.

62 *Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

63 *Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

64 *See*, (n 38).

65 *See*, Teresa Scassa, '1.2.1 Division of Powers – (i) Constitutionality of Section of the TradeMarks Act', in *CANADIAN TRADEMARK LAW* (LexisNexis, 2nd ed., 2015) at §§1.27–1.34.

of certification or collective marks. He alludes to the highly localized nature of the specifications that must be stipulated in an application for a certification, along with the highly localized para-public organization that will control the use of the mark. To do so, provinces could invoke section 92(13) of the Constitution that grants jurisdiction to provinces over "Property and Civil Rights in the Province" or the fall-back section of 92(16) which leaves to the provinces "Generally all Matters of a merely local or private Nature in the Province."[66]

One typology for marks used to indicate geographical origins has been proposed by Professor Moyse, in which the term collective marks is used to refer to collective use of a mark, which is then subdivided into four types or marks, (1) certification marks, (2) official marks, (3) geographical indications, and (4) the reserved appellations created by Quebec statutes and other provinces.[67] Of particular interest for the purposes of our study are certification marks and the newly incorporated geographical indications, which are predominantly responsible for the protection of foreign GIs in Canada.

Sections 23ff of the *Trademarks Act* sets up the regime of protection for certification mark which are defined at Section 2 as:

> [...] a sign or combination of signs that is used or proposed to be used for the purpose of distinguishing or so as to distinguish goods or services that **are of a defined standard from those that are not of that defined standard**, with respect to
> (*a*) the **character or quality** of the goods or services,
> (*b*) the working conditions under which the goods are produced or the services performed,
> (*c*) the class of persons by whom the goods are produced or the services performed, or

66 *Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *See generally*, Teresa Scassa, 'The Challenge of Trademark Law in Canada's Federal and Bijural System', in Ysolde Gendreau (ed.), *AN INTERNATIONAL PERSPECTIVE IN AN EMERGING INTELLECTUAL PROPERTY PARADIGM: PERSPECTIVES FROM CANADA* (Edward Elgar Publishing, 2009) 61 (for a complete discussion of the tension between federal and provincial levels of government and common and civil law traditions).

67 Gouvernent of Quebec, *ACT RESPECTING RESERVED DESIGNATIONS AND ADDED-VALUE CLAIMS*, chapter A-20.03, September 10, 1997 ; Pierre-Emmanuel Moyse and Claudette Van Zyl, '111. Absence d'un Régime d'Exception: Marque de Certification et Gouvernance de la Marque Collective' in *Fascicule 19: Les Marques Collective of JURISCLASSEUR QUÉBEC – PROPRIÉTÉ INTELLECTUELLE, JPRI-19.4* (LexisNexis, 2018) para 80.

> (*d*) the **area within which the goods are produced** or the services performed [...].[68]

Section 25 makes an exception to the general prohibition against the registration of a descriptive mark (Section 10), by requiring the applicant for the mark to be an administrative authority of that country or a commercial association with an office in the region or other representative in that area.[69] That way, registration of a GI through a certification mark by a GI holder avoids rejection of the mark because it is otherwise descriptive of the location of origin of the goods.

Despite this elaborate system, much fewer wine and spirits related certification marks have been registered in Canada, since the need for it was minimal, at least for the foreign GI holders that had the most stakes in protecting their GI abroad. Canada had already made amendments to its *Trademarks Act* in the aftermaths of the TRIPS in 1996 by providing some recognition to GIs relating to wine and spirits, at sections 11.11ff. Almost ten years later, this protection was bolstered after Canada and the EU entered into the *Agreement Between Canada and the European Community on Trade in Wines and Spirit Drinks,* in 2003. This Agreement set out (at Title III "Geographical Indications of Wine") specific protections for European GIs and namely obligated Canada to protect a list of GIs (at Article 10 and Annex III(a)). This protection was afforded only upon proper application to the Canadian Intellectual Property Office.[70] Article 25 further provided some requirements for use of Icewine/Vin de Glace/Eiswine.[71] Article 12 also obligated Canada to stop using certain terms such as "Champagne", "Porto", "Chablis", or "Rhin" as generic or customary in the common language of Canada as a common name for wines.[72] So it seems that seeking protection through certification marks appeared, at least for wines and spirits, as somewhat superfluous since specific protection for these goods was set up through other provisions. Nevertheless, some foreign GI holders registered certification marks, examples of which include CHIANTI

68 Canada, *Trademarks Act*, R.S.C., 1985, C. T-13 [Hereinafter *Canadian Trademarks Law*]. (Our emphasis).

69 *Canadian Trademarks Law* at ss. 10 & 25.

70 *Canadian Trademarks Law* at ss. 10 & 25.
ef30943039 \h * MERGEFORMAT 19), European Commission, CETA Market Access Programme for EU Business, *Guide to Geographical Indications in Canada: A Practical Business Guide* (2019).

71 2003 Wine Agreement (n 22) at art. 25.

72 2003 Wine Agreement (n 22) at art. 12.

CLASSICO,[73] PELEE ISLAND,[74] BRUNELLO DI MONTALCINO,[75] TOPAQUE,[76] VQA (for wines of the British Columbia and Ontario provinces of Canada)[77] and ICEWINE.[78]

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73 CHIANTI CLASSICO, Can. TM. Reg. No. TMA873779, where: "Wines bearing the subject mark must originate from the Chianti Classico region of Tuscany, Italy."

74 PELEE ISLANDS, Can. TM. Reg. No. TMA336204, where: "The words PELEE ISLAND indicate to purchasers of wine that the grapes from which the wine is produced are grapes grown on Pelee Island, and that the production and bottling of the wine from the aforementioned grapes meets or exceeds the owner's established controls and standards concerning same."

75 BRUNELLO DI MONTALCINO, Can. TM. Reg. No. TMA564434, where: "The use of the certification mark is intended to indicate that the specific wares listed above in association with which it is used are of the following defined standard: use of the certification mark defines a red wine which is obtained using grapes of the Sangiovese vine (known in Montalcino, as Brunello), and such grapes must be produced in the territory of the Municipality of Montalcino in the Province of Siena, Italy. Such grapes must also be grown and the vinification, conservation and maturing operations must take place in accordance with specific standards controlled by the applicant. […]".

76 TOPAQUE, Can. TM. Reg. No. TMA804143, where: "The use of the certification mark is intended to indicate that the specific wares listed above in association with which it is used are of the following defined standard: That such wares are made by licensees of the Applicant and are: i) produced exclusively from grapes harvested in Australia and at least 850ml/L of which must be obtained from vine variety muscadelle; ii) made with the addition of Australian grape spirit or brandy; and iii) that contains no less than 150ml/L and no more than 220ml/L of ethanol at 20 degrees centigrade. The certification standard is set out in more detail in the Australian Wine Industry Fortified Wine Code of Practice as amended from time to time and available on the website of the Winemakers' Federation of Australia Inc."

77 VQA, Can. TM. Reg. No. TMA999621, where: "That such wines are made from (1) 100% provincially grown grapes (no concentrates are permitted) that meet a quality standard for each variety (measured by natural sugar content in the ripe grapes), (2) without water added in the winemaking process, (3) that bear truthful and accurate labels that represent the wine in the bottle, (3) that, with the exception of sparkling wine, fortified wine, liqueur wine, and wine that bears a private label, are vintage dated and meet vintage requirements, and (4) are evaluated through laboratory analysis for compliance with the Canada Food and Drugs Act and regulations, the British Columbia Wines of Marked Quality Regulation, and the Vintners Quality Alliance of Ontario Act and regulations, as amended from time to time, and such other similar provincial statutes and regulations that meet or exceed the standards established under these laws and that are deposited with the Registrar at the time of enactment. […]"

78 ICEWINE, Can. TM. Reg. No. TMA788411, where: "That such wares are made by licensees of the applicant and are made in whole or in part using methods, equipment, supplies, ingredients, qualities of care and packaging and in such provincial and geographical areas and from such grape varieties, blends, vintages, vineyards and estates and having such characteristics as to taste, colour, smell or otherwise as may be approved by the applicant [Vintners Quality Alliance of Canada] and which wares are subject to regular inspection by the applicant to ensure the maintenance of such standards."

We turn now to the "protected geographical indications", now fully integrated in the *Trademarks Act* at sections 11.11ff, which covers wines, spirits, and foodstuff.[79] Given that this regime has been substantially altered in the wake of the implementation of the CETA agreement, we will briefly review the three stages that foreign GI protection went through, culminating in the current regime.[80] Canada has adopted the following definition of GI, set out in section 2 of the *Trademarks Act*:

> An indication that identifies a wine or spirit, or an agricultural product or food of a category set out in the schedule, as originating in the territory of a WTO Member, or a region or locality of that territory, if a quality, reputation or other characteristic of the wine or spirit or the agricultural product or food is essentially attributable to its geographical origin.[81]

This is a helpful reminder that, despite the slow but steady evolution of Canadian jurisprudence on GIs, Canada was willing, contrary to its cousin to the south of the border, to recognize GIs as a standalone form of industrial property.

3.1.3 Before the Conclusion of the TRIPS

Canada merely afforded protection under delictual law of unfair competition and the tort of passing off,[82] in contrast to other countries that provided for *sui generis* systems of registration and reinforced protection for GIs in their domestic laws.[83] Canada was also a party to the Paris Convention, so it had to comply with art. 6quinquies(B)(2)(ii) and arts. 10, 10bis, 10ter, that provided

79 *See*, Scassa, CANADIAN TRADEMARK LAW (n 65) at Chapter 4 – Prohibited Marks, 4. Geographical Indications, §§ 4.107–4.114 (for an exhaustive description of the regime set out at section 11.11ff.).

80 *See generally*, Isabelle Jomphe, 'Un nouveau paysage à l'horizon: les indication géographiques', (2017) 29(1) Cahiers de Propriété Intellectuelle 75.

81 *Canadian Trademarks Law* (n 68).

82 Association Internationale pour la Protection de la Propriété Industrielle, *Annuaire 1975/III,* San Francisco Congress (May, 3–10, 1975); *See*, Pierre-Emmanuel Moyse and Claudette Van Zyl (n 17) para 218 of "VII. Indications Géographiques" (JPRI-19.8) in Fascicule 19 of JurisClasseur Québec – Propriété Intellectuelle.

83 Association Internationale pour la Protection de la Propriété Industrielle, *Annuaire 1975/III,* San Francisco Congress (May, 3–10, 1975); *See*, Pierre-Emmanuel Moyse and Claudette Van Zyl (n 17) para 218 of "VII. Indications Géographiques" (JPRI-19.8) in Fascicule 19 of JurisClasseur Québec – Propriété Intellectuelle.

some protection against registration of a trademark that consists of signs serving to designate a place of origin and against a false indication of source.[84]

3.1.4 Following Conclusion of the TRIPS

Canada joined WTO and signed the TRIPS agreement and was obligated to provide protection for GIs as per articles 22–24 of TRIPS. It did so by adding sections 11.11ff, which afforded a limited recognition and legal protection for GIs *per se*, i.e. not as certification marks or collective marks, and which was limited only to wine and spirits. "Geographical indication" was narrowly defined as "in respect of a wine or spirit, an indication that (a) identifies the wine or spirit as originating in the territory of a WTO member, or a region or locality of that territory, where a quality, reputation, or other characteristics of the wine or spirit is essentially attributable to its geographical origin [...]."[85] This meant that protected GIs as applied to wines could be used for unrelated goods or services, which allowed the use of the term BORDEAUX for cookies,[86] and MARGAUX for bathtubs.[87] Foreign GI holders could also take recourse through the traditional tort law remedies of passing off, both at common law, under 1457 of the Quebec Civil Code, and provided for at section 7 of the *Trademarks Act*.

3.1.5 Following Conclusion of the CETA

The same regime that was enacted following the TRIPS has been amended in the aftermath of entering into CETA to accommodate further European interests. Canada now has a list of protected geographical indications, the majority of which incorporates those mentioned at Annex 20-A, parts A and B of the CETA. Part A covers European GIs, while part B includes Canadian GIs, which is none at the moment of drafting, though there is a process to add new GIs to this annex.[88] European wines and spirits GIs were integrated to the federal trademark registry because the CETA incorporated the Wine Agreements into the trade deal. As a result, other GIs that were listed in the annexes to the Wine Agreement, but which had not secured GI protection as per the Canadian application process, were integrated to the registry. After cross-referencing the list of protected GIs and the Wine Agreement, it appeared that most regional

84 Scassa, *CANADIAN TRADEMARK LAW* (n 65) at Chapter 4 – Prohibited Marks, 4. Geographical Indications, §4.86.

85 *Canadian Trademarks Law* (n 68).

86 *L'Institut National des Appellations d'Origine v. Pepperidge Farm, Incorporated*, 1997 CanLII 15732 (CA TMOB).

87 *L'Institut National des Appellations d'Origine v. Kohler Co.*, 2010 TMOB 162.

88 *See*, CETA (n 3) at Article 20.22 – *Amendments to Annex 20-A*.

associations using the most prominent GIs had already secured GI protection in Canada, after the Wine Agreement was ratified.[89] As it currently stands, this list includes, naturally, GIs related to wines and spirits, but now extends protection to other food stuff and agricultural products, cheeses (Pecorino Romano, Gouda Holland), meat (Nürnberger Bratwürste, Prosciutto di Parma, Szegedi szalámi), and all kinds of oils and other fruits (Cítricos Valencianos, Kiwi Latina, Kalamata olive oils).

Section 11.12(2) and (3) of the *Trademarks Act* provides the administrative process through which a requesting party can present an application to the Canadian Intellectual Property Office for addition of a new GI to the *List of Protected GIs in Canada*. The application must include, amongst others, the following information: (1) the indication and its translation in all languages for which protection is sought, (2) the name of the product or food for which the GI is sought, (3) territory, region, or locality in which the wine or spirit is identified as originating, (4) a description of the quality, reputation or other characteristics of the wine or spirit that is essentially attributable to its geographic origin, and (5) name of the responsible authority and evidence.[90] A GI holder can also submit an application for protection of a GI without requesting addition to the list: an application for an ordinary trademark can be filed to Trademark Registrar and will be reviewed by a trademark examiner, like any other ordinary trademark. Of course, it remains possible to register a certification mark or a collective mark for a GI. Despite the fact that the current Canadian system for protection of foreign GIs emerged out of a bilateral trade agreement, all of the new provisions described above are available to a GI holder from any other country.[91]

89 Canada, Canadian Intellectual Property Office, *List of Geographical Indications* (Looking at the registration for PFALF, BADEN, COGNAC, BEAUJOLAIS, NUITS SAINT GEORGES, and others all date to as early as 2005).

90 Canadian Trademarks Act (n 68) at s. 11.12; Canada, Canadian Intellectual Property Office, *Request for Protection of a Geographical Indication for a Wine or Spirit*, see also, Canada, Canadian Intellectual Property Office, *Request for Protection of a Geographical Indication for a Wine or Spirit* at note ii: "A responsible authority is, in relation to an agricultural product or food, a person, firm, or other entity that is, in the opinion of the Minister, by reason of state or commercial interest, sufficiently connected with and knowledgeable of that agricultural product or food to be a party to any proceedings under the Trademarks Act in respect of the request. The responsible authority is responsible for providing the information required in the request and responding to any questions or correspondence."

91 *See e.g.*, DEMERARA RUM, GI File No. 1863806, entered on Oct. 26, 2018 by Guyana; *See generally*, Bernard O.Connor, *Geographical Indications in CETA, The Comprehensive Economic and Trade Agreement Between Canada and the EU* (OriGin, 2014) (for a more detailed review of GI law in the CETA).

3.2 *EU Law with a Dash of Local Trademark Law for Germany?*

In Germany, it appears that membership of the country to the European Union is more influential in providing protection for foreign GIs than its domestic federalism.[92] In that sense, there are two levels of legislative orders that must be examined to provide a complete picture of the framework of protection for foreign GIs in Germany, (1) the pertinent EU regulations and (2) the German national statutory laws as enacted in the Trademark Act and the Wine Law Act, and the law of unfair competition, though this last part will be specifically addressed in a distinct section below.[93]

The set of EU regulations that ensure direct protection for foreign GIs is not transposed into national law, and other national laws do not cover (or at least are not supposed to) what these regulations encompass.[94] As such, a foreign GI holder should turn towards the EU registration process should it seek protection for the appellation within the EU. Once registered, the responsibility to establish and maintain routine inspections for compliance with the product specifications set out in the application for registration rests with national authorities, whether from Member-States or non-EU countries.[95]

Foreign GI holders should be aware of two aspects of the EU protection for GIs. First, most foreign GIs are protected by the EU under obligations set out in free trade agreements entered into with non-EU countries, such as the CETA, or other ongoing agreements such as between the EU and Australia,[96] and the

92 *See e.g.*, Wolfgang Haupt, 'Les contrôles viti-vinicoles en Allemagne', in *LES CONTRÔLE VITI-VINICOLES, SYSTÈME ET PRATIQUES: ACTES DU DEUXIÈME SYMPOSIUM INTERNATIONAL DU DROIT DE LA VIGNE ET DU VIN* (Presses universitaires d'Aix-Marseilles, 1994)(where the local government in the Länder are more involved when it comes to control and enforcement actions in application of the federal laws relating to the local production of German wines).

93 *See generally*, O'Connor (n 4) 201–213 (for a general overview of the regulatory framework around GIs in Germany).

94 Vadim Mantrov, 'Interrelations Between European Union Protection and National Protection', in *EU LAW ON INDICATIONS OF GEOGRAPHICAL ORIGIN: THEORY AND PRACTICE* (Springer, 2014) 308.

95 Evans (n 34) 260.

96 *See*, European Commission, *European Union's Proposal for the EU-Australia FTA: Chapter* [*XX*] *Intellectual Property* (2018) (the text is not finalized and there is no list of GIs to be protected by the countries, but article X.34 sets out an obligation to protect GIs listed in the annexes to the chapter [hereinafter the *EU-Australia Free Trade Agreement*]; *See also*, European Commission, *Report of the 5th Round f Negotiations for a Free Trade Agreement between the European Union and Australia* (2019) Canberra (The latest report on the negotiations mentioned that: "On Geographical Indications, discussions were text based and covered principles and rules, as well as issues relating to the on-going opposition procedure of the EU GIs list in Australia.")

EU and Japan.[97] A specific agreement in which the EU and China agreed to mutually recognize lists of 100 GIs was recently entered into:[98] several Chinese wines were included along with a few spirits.[99] Second, when a GI for which protection is sought is not covered by said trade agreements, then the regular application and registration administrative process used for EU GIs from Member-States will be used by non-EU countries, which are referred to in EU regulations as "third country", or, as alluded above, if not available, then foreign GI holder can still have recourse to the national laws of the Member States.

While the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US failed, and with it any likelihood to see an instrument that would show a coexistence of US trademark law and EU *sui generis* system for GIs,[100] another instrument concomitant to the EU and US may shed some lights on the treatment of GIs for wine in both countries.[101] The *Agreement between the European Community and the United States of America on trade in Wine*[102] provides for the protection of certain names of origins used in and applied on labels of wine commercialized in the US or EU (Articles 6 and 7).

This Agreement, however, was narrow in scope, and is mainly concerned with labelling practices. It does not create "intellectual property rights" in the same nature as registered trademarks, and rather, the protection afforded to GI holders is more akin to unfair competition than IP law, and which takes place

97 *See*, *Agreement Between the European Union and Japan for an Economic Partnership*, Jul. 17, 2018, art. 14.22, &14.24 (on the mutual recognition of GIs for EU and Japanese products); *See also*, Annex 14-B of the EU-Japan Agreement for the list of GIs that were recognised.

98 *See*, *Agreement between the European Union and the Government of the People's Republic of China on Cooperation on, and Protection of, Geographical Indications*, Nov.11, 2019 (Final text is not yet available, but a press release was circulated).

99 *See e.g.*, *List of European Geographical Indications Protected* and *List of Chinese Geographical Indications Protected* (among which, the Shacheng Wine, Huanren Icewine, and the Yantai Wine, and the spirits included Jian Nan Chun Liquor, Ban Dao Jing Liquor, Moutai Liquor, and the Wuliangye).

100 *See notably,* Bernard O'Connor, 'The Legal Protection of GIs in TTIP : Is There an Alternative to the CETA Outcome', in Arfini et al. (eds.) (n 3), Alan Matthews, 'What Outcome to Expect on Geographical Indications in the TTIP Free Trade Agreement Negotiations with the United States?', in Arfini et al. (eds.) (n 3).

101 *See contra*, European Commission, *Draft Chapter on Trade in Wine and Spirit Drinks in TTIP* (2016) (The draft of a proposal by the EU for a chapter devoted to wine and spirits, the content of which is highly similar to the *Wine Agreement* ; *See also*, European Commission, *Paper on Geographical Indications (GIs) in the EU – U.S. Transatlantic Trade and Investment Partnership*, (2016) (Position paper on GIs in the TTIP, which also refers to the *Wine Agreement*).

102 *Agreement between the European Community and the United States of American on Trade in Wine*, 2006 O.J. (L 87) 24.3 [hereinafter the *US-EU Wine Agreement*].

in the context of an administrative revision of the labels used for wine. For instance, article 7 states that "The Community shall provide that the names of vinicultural significance listed in Annex V may be used as names of origin for wine only to designate wines of the origin indicated by such name" or at article 8(1) where it obliges parties to "provide that labels of wine sold in its territory shall not contain false or misleading information in particular as to character, composition or origin." This Agreement hence provided recognition in the EU for American significant terms for geographical origin of wine. These include amongst others: Los Carneros, Martha's Vineyard, Mendocino, and Finger Lakes. They were not GIs *per se*, but, as per article 12(a), they could become GI upon application and registration of any of these terms as either protected designation of origin (PDO) or protected geographical indication (PGI). To this day, NAPA VALLEY and WILLAMETTE VALLEY have applied for GI protection in the EU, where the former has been registered as a PDO and the latter's application for PGI is still pending.[103] On the other hand, this instrument incorporated obligations on the part of the US TTB to ensure that some EU indications of origins would not be used in misleading and false ways in labels of wine sold in the US.[104]

While the Annex 20A to CETA, which lists the GIs to be protected by the other party, at its Part B does not contain any Canadian GIs to be protected by the EU and its Member States,[105] CETA nonetheless imposes specific obligations with regards to GIs on both parties:

> 2. Each Party shall provide the legal means for interested parties **to prevent**:
> a. the **use of a geographical indication of the other Party** listed in Annex 20-A for a product that falls within the product class specified in Annex 20-A for that geographical indication and **that either**:
> i. **does not originate in the place of origin specified** in Annex 20-A for that geographical indication;
> [...]
> b. **the use of any means in the designation or presentation of a good** that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner w**hich misleads the public as to the geographical origin of the good**; an

103 NAPA VALLEY, PDO-US-17738, May, 10, 2007 (Registered); WILLAMETTE VALLEY, PGI-US-02439, Oct. 14, 2018 (Applied).

104 *See*, *US-EU Wine Agreement* (n 102) at art. 6 & 7; *See* n. 140 on the US TTB.

105 Nor does eAmbrosia.

c. **any other use which constitutes an act of unfair competition within the meaning of Article 10bis** of the *Paris Convention for the Protection of Industrial Property* (1967) done at Stockholm on 14 July 1967.[106]

Almost all of these agreements contain provisions to the effect that the agreement does not limit the ability of an interested party to secure protection for a given GI by any other available legal means such as trademarks, certifications marks, or registered GI.[107] Protection other than through GI is also available in Europe, especially when GI protection is not available through the EU system or was secured prior to obtaining an EU GI.[108]

A separate web of regulations regarding geographical indications for wine is in place in the EU, in parallel to that for general foodstuff.[109] The process of registration of GIs in the EU is set up by a myriad of regulations, the most important of which for wine products[110] are: Council Regulation 479/2008 on the common organization of the market in wine[111] (amending the earlier Council Regulation (EC) No 1493/1999[112]); Council Regulation (EEC) No 1576/89 laying

106 CETA (n 3) at art. 20.19. (Our emphasis).

107 *See*, CETA (n 3) at art. 20.23 – Other Protections: "the provisions of this Sub-section are without prejudice to the right to seek recognition and protection of a geographical indication under the relevant law of a Part"; *See also*, *EU-Australia Free Trade Agreement* (n 96) at Article X.2(3).

108 *See*, Council Regulation (EC) No 510/2006 (n 97) at art. 14, Annette Kur and Sam Cocks, 'Nothing but a GI Thing: Geographical Indications under EU Law.', (2007) 17 Fordham Intell. Prop. Media & Ent. L.J. 999, at 1000 (note 5); *See also*, Lionel Bently and Brad Sherman, 'The Impact of European Geographical Indications on National Rights in Member States', (2006) 96 TMR 850 at 852–853 who describe that the Consorzio del Prosciutto di Parma secured a Protected Designation of Origin (PDO) under EU law, a community collective mark CTM No 1116201, and a UK certification mark for Prosciutto di Parma TM UK TM 1457951 and an individual mark for Prosciutto di Parma: UK TM No 224349241.

109 *See*, G.E. Evans, 'The simplification and codification of European Legislation for the Protection of Geographical Indications', in Christophe Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar Publishing, 2013) 181; European Commission, *Green Paper: On Agricultural Product Quality : Product Standards, Farming Requirements and Quality Schemes* (2018) 15.

110 For general foodstuff, excluding wines & spirits, *see*: Council Regulation (EC) No 510/2006, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 2006 OJ (L 93) 12.

111 Council Regulation (EC) No 479/2008, On the Common Organization of the Market in Wine, 2008 OJ (L 148) 1.

112 Council Regulation (EC) No 1493/1999, On the Common Organization of the Market in Wine, 1999 OJ (L179) 1; *See also*, Commission Regulation (EC) No 753/2002, Laying Down Certain Rules for Applying Council Regulation (EC) No 1493/1999 as Regards the

down general rules in the definition, description and presentation of spirit drinks;[113] and Commission Regulation No 607/2009 which amends Council Regulation 479/2008 with regards to procedures for application, opposition, alteration, and cancellation of a GI.[114]

Focusing on Council Regulation 479/2008, its Article 36 provides that designation of origin and GIs relating to geographical areas in third countries are, naturally, eligible for protection, upon submission of an application for said designation, according to the rules set out in Chapter IV of the 479/2008, and namely must include a technical file containing the information enumerated in article 35.[115] It is a one-stop process, where this application, along with the registration of the concerned GI, is administered by the European Commission, and not national offices of the Member States, an exception to the otherwise two-step process for GIs which originate in Member States which are subject to a preliminary national procedure.[116] It is therefore a single

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Description, Designation, Presentation and Protection of Certain Wine Sector Products, 2002 OJ (L 118) 1, Commission Regulation (EC) No 423/2008 On Laying Down Certain Detailed Rules for Implementing Council Regulation (EC) No 1493/1999 and Establishing a Community Code of Oenological Practices and Processes, 2008 OLJ (L 127) 13.

113 Council Regulation (EEC) No 1576/89, Laying Down General Rules on the Definition, Description, and Presentation of Spirit Drinks, 1989 OJ (L 160) 1.

114 Commission Regulation (EC) No 607/2009, laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, 2009 OJ (L 193) 60; *See generally*, Blakeney (n 18) at Chapter 4: Protection of Geographical Indications and Designations of Origin and Traditional Terms for Wines in Europe (for a detailed overview and descriptive account of the EU regulations with regards to wines).

115 Council Regulation (EC) No 479/2008 (n 111) at art. 36.

116 *See*, Council Regulation (EC) No 479/2008 (n 111) at art. 38; This method emerged from a WTO case brought by the US and Australia against the EU, where the WTO panel ruled that the not allowing direct application for GI registration from a third country to the EU Commission treated parties from third countries less favourably than EU Members, which violated the obligation of national treatment of WTO member: Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WTO Doc. WT/DS174/R (adopted Mar. 15, 2005) (Complaint by the U.S.), Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WTO Doc. WT/DS290\R (adopted Mar. 15, 2015) (Complaint by Australia); *See also*, Adriano Profeta et al., Protected Geographical Indications and Designations of Origin: An Overview of the Status Quo and the Development of the Use of Regulation (EC) 510/06 in Europe, With Special Consideration of the German Situation, (2010) 22 J. of Int'l Food & Agri. Bus. Marketing 179, at 188, Dorothée Franjus-Guigues, *Nature et Protection Juridiques des Indications Géographiques: L'Avènement d'un Droit à l'épreuve de sa Mise en Oeuvre* (May 19, 2012) (unpublished Ph.D. dissertation, Aix-Marseille

application that is submitted, which will culminate in protection throughout the twenty-seven Member States of the EU.[117] Application must be submitted by the competent authorities in the third country or by the applicant directly, who can be a sole producer or a group of producers. The application must confirm that the GI is protected in the country of origin, and the applicant can only submit an application for wines which it produces. In addition, the applicant must provide, amongst other things, the following information: the name to be protected, the type of GI, a description of the wine or wines, categories of grapevine products, maximum yield per hectare, a concise definition of the demarcated geographical area, a description of the link between the quality and characteristics of the products as essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, etc.[118]

Upon satisfaction that the application meets all of the conditions laid down in Chapter IV of Council Regulation 479/2008, the Commission will publish in the Official Journal of the European Union the designation for which protection is sought and reference to the product specifications; if the application does not meet these conditions, the application will be rejected.[119] Publication in the journal marks the beginning of the two-month opposition procedure.[120] Assuming that there is no opposition, the designation will be entered into the register, and retroactive to the date of the application, the GI will be afforded

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Université) (one file with the École Doctorale Science Juridiques et Politiques (Aix-en-Provence)) at 82.

117 G.E. Evans, 'The Comparative Advantages of Geographical Indications and Community Trade Marks for the Marketing of Agricultural Products in the European Union', (2010) 41 IIC 645 at 649.

118 *See*, Regulation (EU) No 1308/2013 pf the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/69, (EC) No 1037/2001 and (EC) No 1234/2007, 2013 OJ (L 347) 1, at Art. 93(1)(a)(i) and 93(1)(b)(i), Commission Implementing Regulation (EU) 2019/34 of 17 October 2018 laying down rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector, 2019 OJ (L9) 2, Commission Regulation (EC) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, 2009 OJ (L 193) 60, at art. 5(1)(i), 6 & 7.

119 Council Regulation (EC) No 479/2008 (n 111) at arts. 39 & 41; Marsha A. Nichols, 'Making a Geographical Indications System Work', in *GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS* (Kluwer Law International, 2nd, 2016) 131.

120 Council Regulation (EC) No 479/2008 (n 111) at art. 40.

the protection provided in Article 19 of 607/2009[121] which refers to Article 45(2) of Council Regulation 479/2008, which reads as follows:

> 2. Protected designations of origins and geographical indications and the wines using those protected names in conformity with the product specification shall be protected against:
> (a) any direct or indirect commercial use of a protected name:
> (i) by comparable products not complying with the product specification of the protected name; or
> (ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;
> (b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation', 'flavour', 'like' or similar;
> (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
> (d) any other practice liable to mislead the consumer as to the true origin of the product.[122]

Upon grant of the protection, annual verification of compliance with the product specifications must be conducted by a public authority designated by the third country or a certification body. Furthermore, additional protection against genericness of the GI is ensured: registration prevents the appellation from becoming generic and thus enter a public domain that would otherwise permit legitimate use of the term as an indicator of quality or source. Finally, Article 44 of Council Regulation 479/2008 prohibits registration of a trademark that includes part of or the entirety of the registered GI for the same goods.[123] All in all, this means that, in addition to ensuring protection against the misuse of a GI for wine products, the above provision is formulated in such a way that the same protection is also enforceable against products that infringe on the GI but which are not necessarily related to wines, "as far as the use

121 Commission Regulation (EC) No 607/2009 (n 118).
122 Council Regulation (EC) No 479/2008 (n 111).
123 Council Regulation (EC) No 479/2008 (n 111) at art. 44; *See generally*, Guigues (n 116) 86–91 (for a concise summary of the applicable regulatory framework for wine products).

of the designations in those products exploits the reputation of a designation of origin or a GI."[124]

Prior to the entry into force of the *Act on the Protection of Trade Marks and other Signs* (the German trademark statute, hereafter, "MarkenG"), the provisions in the UWG were deemed sufficient to prevent the illegitimate use of a foreign GI. Now, in addition to the protection afforded to foreign GIs by EU law, Germany, in its MarkenG and through some references to the Wine Act (thereafter "WeinG"), also creates a framework of protection for local and foreign GI terms. The nature of which is however slightly different than what EU law established. In effect, the MarkenG along with the WeinG each provide in their respective sections on the protection of geographical indications some claims with regards to misleading statements to the consumers as to the geographical origin of the product, rather than a *sui generis* system of recognition and administrative protection and supervision. While Chapter 2 of Part 6 on "Indications of Geographical Origins" deals with the proper role for the federal government and that of each of the Länder in the prosecution of GI applications at the EU level under EU Regulation 1151/2012; the first chapter of that part is no so circumscribed and rather sets out a general regime of protection for all "names, indications or signs protected as indications of geographical origins." In doing so, Section 126 at subsection 1 provides an all-encompassing definition: "Indications of geographical origin within the meaning of this Act shall be the names of places, areas, territories or countries as well as other indications or signs which are used in trade to identify the geographical origin of goods or services." This definition, in addition to GIs per se, also opens protection to any other signs that may indicate geographical provenance, such as labels or packaging.[125] The WeinG also provides a definition for GI at 22b(1), which refers to the definitions in article 93 of EU Regulation No 1308/2013 for agricultural products and wines. It also further specifies that names of vineyards and names of municipalities or part thereof may be protected as GIs under the Act.[126]

124 Paulo Monteverde, 'Enforcement of Geographical Indications', (2012) 7 J. Intell. Prop. & Prac. 291 at 292; *See also*, *Comité Interprofessionnel du Vin de Champagne v Unilever Nederland B.V.*, KG ZA 10–1065, as commented in Monteverde at 295 (where the District Court of the Hague ruled that the use of ANDRÉLON CHAMPAGNE infringed on the 'Champagne' GI as prohibited by 118m(2)(a)(ii) of Council Regulation (EC) No 491/2009, 2009 OJ (L 154) 1).

125 Thomas Schmitz, 'Wine Law in Germany', in Matt Harvey and Vicki Waye (eds.), *GLOBAL WINE REGULATIONS* (Thomson Reuters Australia, 2014) 412.

126 Germany, *Weingesetz* (BGBl. I S. 66), at art. 22b(2) & (3) [hereinafter WeinG].

The range of acts which would infringe an indication in Germany are enumerated at Section 127 of the MarkenG. Subsection1 prohibits the use of indications of geographical origin for goods or services which do not originate from the place, area, territory or country which is designated by the indications if it is likely to mislead consumers concerning the geographical origin of said goods or services. Subsection 2 reserves the use of an indication of geographical origin for goods or services which have special properties or quality of goods of this origin that *actually* have these characteristics or quality. Subsection 3 seeks to prevent the usurpation of reputation by preventing the use of an indication of goods not of that origin and despite not being likely to mislead the consumer regarding provenance, but rather if it takes unfair advantage of or is detrimental to the reputation of the indication of geographical origin. Finally, subsection 4 guarantees the above protection for an indication of origin despite the use of deviation or additions to the geographical origins if it remains likely that consumers will be misled regarding geographical origin of the product or if the use of the indication continues to usurp/take unfair advantage of the reputation or the distinctive character of the indication.

The WeinG provides for a similar standard in subsection 2 of section 22b on the "protection of geographical designations" when it mentions that geographical names may not be used where the use of such names may mislead the consumer as to the geographical origin of the goods or services: it then proceeds to refer at subsection 3 to the specific remedies of the MarkenG at section 128 for enforcement of this prohibition.

Finally, remedies for an act committed and enumerated at Section 127 include the issuance of an injunction if there is a likelihood that the act of infringement would reoccur (subsection 1 of Section 128). Injunctive relief is also available against a risk of infringement, in contrast to actual infringement. Of course, monetary damages are available to compensate for losses that occurred because of the infringement (subsection 2 of Section 128).[127] These remedies are further detailed in the Act Against Unfair Competition.

Similar to its American and Canadian counterparts, geographical indications can be protected in Germany as collective trademarks, following the same administrative registration process as for conventional trademarks, and which regime is provided for at sections 98–105 of the MarkenG.

127 Germany, *Act on the Protection of Trade Marks and other Signs* [Trademark Act] (translation of *Gesetz über den Schutz von Marken und sonstigen Kennzeichen*), (BGBl. I S. 2541).

3.3 *Unfair Competition Claims as the Roots and True Common Law for Federal States?*

We can summarise the discussion above in the following way: all three countries are bound by obligations which are imposed by international agreements, ranging from the TRIPS to comprehensive free trade agreements, to specific agreements on the trade of wine. These obligations, and the general framework of protection that they mandate the States to implement have been incorporated into the existing framework of intellectual property rights. All three countries had recourse to their respective framework of protection for trademarks and unfair competition. While the ways in which provisions setting protection for GIs have been enacted into the trademark statute of each of these countries vary considerably, it remains nonetheless that all three refer to doctrines of unfair competition, consumer confusion, and passing off or *concurrence déloyale* as the underlying rationale for GI protection.

To some extent, all three countries have shown some reluctance in granting actual "intellectual property rights" to GIs, or to deem GIs equivalent to trademark rights, on the basis of an initial act of acquisition on the part of the GI holder. GI protection is not based on use of the term on the market (first-to-use) or on being the first to file a registration at some state agency (first-to-file). Remedies for GI enforcement seem to be rather available on the basis of unfair competition law, irrespective of the moment at which rights in the GI where first acquired.[128]

The preliminary remarks above raise two questions. First, when it comes to foreign GIs, could it be the case that federal states have no other option but to have recourse to tort law/civil liability doctrines to ensure the uniform protection of GIs within their territory, with minimal intervention from local governments in providing the mandated protection? And second, contrary to other non-federal states, can the law of unfair competition, in all its glorious generality, be the hallmark of GI protection in federal states?

A positive answer to these questions can find some traction in the historical underpinnings of the current legislative provisions of the MarkenG. The German authorities have themselves reported that GIs are "traditionally protected by case law based on the general clause prohibiting any misleading of consumers in section 3 of the German Unfair Competition Act (UWG)."[129] It added

128 Dr. Reinhard Ingerl and Dr. Christian Rohnke, *MARKENGESETZ: MARKENG* (C.H. Beck, 3rd ed., 2010).

129 International Association for the Protection of Industrial Property, *Yearbook 1998/1: Groups Reports Q62: Appellations of Origin, Indications of Source and Geographical Indications* (37th Congress in Rio de Janeiro 1998) 99 [hereinafter IAPIP 1998 Congress Report]; *See also*, Friedrich-Karl Beier, *The Protection of Indications of Geographical Origin*

that this section has been supplemented by additional protection by sections 126–129 of the MarkenG, in accordance with TRIPs and the preceding caselaw under section 3 UWG. Section 3 reads as follows:

> (1) Unfair commercial practices shall be illegal **if they are suited to tangible impairment of the interests of competitors, consumers or other market participants**.
>
> (2) Commercial practices towards consumers shall be illegal **in any case where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumers ability to make an information-based decision, thus inducing him to make a transactional decision which he would not otherwise have made**. Here reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Reference shall be made to the perspective of the average member of a group of consumers who are particularly vulnerable and clearly identifiable because of their mental or physical infirmity, age or credulity, if it is foreseeable for the entrepreneur that his commercial practice will affect the latter group only. […][130]

Sections 3 and 5 of the UWG provided a general, though indirect, protection for GIs by prohibiting the use of indication that would be misleading, which was said to occur when such indication contained untruthful information or other information suited to deception regarding:

> […] the essential characteristics of the goods or services, such as availability, nature, execution, benefits, risks, composition, accessories, method or date of manufacture, delivery or provision, fitness for purpose, uses, quantity, specification, after-sale customer assistance, complaint handling, **geographical or commercial origin**, the results to be expected from their use, or the results or material features of tests carried out on the goods or services […][131]

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in the Federal Republic of Germany (Herman Cohen Jehoram ed., Sijthoff & Noordhoff, 1980) 11–14, 30–33.

130 *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition) in the version published on 3 March 2010 (Federal Law Gazette [BGBl.]) Part I, at 254 <https://germanlawarchive.iuscomp.org/?p=822#3>). [hereinafter UWG] (Our emphasis).

131 *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition) in the version published on 3 March 2010 (Federal Law Gazette [BGBl.]) Part I, at s. 5. <https://germanlawarchive.iuscomp.org/?p=822#3>). [hereinafter UWG] (Our emphasis).

As such, when the MarkenG came into being, during the mid-1990s, its regime was described as a *lex specialis* for a protection that used to be found under competition law.[132] Under the UWG, GIs, local or foreign, were only afforded an indirect protection, by prohibiting false or misleading use of indications of source. It only indirectly amounted to protecting the GI itself and rights of the GI holders in that indication, where the main goal of the protection supplied by the UWG was to protect the public interest against being misled.[133]

While the MarkenG takes up a similar spirit, entering into the TRIPS agreement along with other EU commitments forced upon its national law a specific recognition of GIs as a specific kind of intangible asset. It is therefore the case now that claims associated with the enforcement of foreign GIs against infringement of such in Germany are under the jurisdiction of the Federal Court of Justice (BGH).[134] This Court, and the subsequent appellate tribunals, will apply the provisions of the MarkenG, following the doctrine of *lex specialis*, to claims relating to unfair use of a GI, in precedence to the UWG, which continues to apply in cases that are not covered by sections 126 and following or EU law.[135]

The new MarkenG codifies similar principles as those found in the UWG. The MarkenG reinforces some aspects more specifically tied to the nature of GIs, such as special reputation (see section 127(3) MarkenG) and exploitation or detriment to reputation and distinctive character (see section 127(4) Marken G).[136] As such, these provisions can be seen as an extension of the UWG,[137] rather than a replacement of it, though, as we have explained, the mechanics of *lex specialis* would beg to differ. In addition, the cemented position of GI in unfair competition law, rather than in trademark law, is further substantiated by the position of the Federal Court of Justice who confirmed that the caselaw under sections 3 and 5 UWG is directly relevant to the applications of sections 126–129 MarkenG for GIs.[138] The relevant caselaw under that provision includes cases where the get-up/trade dress of a bottle of Bocksbeutel

132 Paul Lange, *MARKEN UND KENNZEICHENRECHT: HANDBUCH ZUM DEUTSCHEN UND EUROPÄISCHEN RECHT* (C.H. Beck., 2nd ed., 2012) para 4717.

133 Dr. Helmut Köhler and Dr. Joachim Bornkamm, *BAUMBACH & HEFERMEHL: WETTBEWERBSRECHT: GESEZT GEGEN DEN UNLAUTEREN WETTBEWERB PREISANGABENVERORDNUNG* (C.H. Beck., 23rd ed. 2004) s 3 UWG, note 186.

134 Lange (n 132) at para 4753.

135 Dr. Karl-Heinz Fezer, *MARKENRECHT* (C.H. Beck., 5th ed., 2020).

136 Dr. Karl-Heinz Fezer, *MARKENRECHT* (C.H. Beck., 5th ed., 2020).

137 Lange (n 132).

138 *See*, *Stich den Buben*, I ZR 126/98, Aug. 10., 2000 (where the name of a well-known vineyard location can be an indirect indication of origin: see, Schmitz (n 121) 413).

German wine was considered as an indirect indication of geographical origin for wine from Franken, and where use of that bottle for wine produced outside of the regions where the bottle is traditionally used might mislead consumers.[139] Also, the name of a well-known vineyard location can be an indirect indication of origin, if used as part of a company name, as long as a considerable part of the relevant public understands the name to indicate the geographical origin of the products bearing it.[140]

If it was not entirely clear up to now, one commentator indicated that, for the purposes of the MarkenG, articles 126–128 do apply to all geographical indications, irrespective of their local or non-EU/international nature since the public policy objective is to generally avoid consumer confusion or any form of misleading act that would disrupt market integrity.[141] Indeed, both the MarkenG and the UWG applies to foreigners, irrespective of whether these appellations are protected as such in their home country.[142] This rule is particularly relevant for non-EU countries, especially if protection for a given GI has not been provided for in a specific bilateral agreement.[143] They can fall back on national German law. The national law should technically also be available to curtail consumer confusion, even for GIs from EU countries for which a registration was obtained. But, a recent decision from the CJEU in a case referred to by the Federal Court of Justice of Germany seems to suggest otherwise.[144] The Court determined that the scope of protection of a registered GI (PGI), in this case "Aceto Balsamico di Modena" can legitimately be restricted by the act of registering this name. It held that the compound name was protected, but the registration does not extend to "aceto" and "balsamico" and their translations, which were held to be generic and to have no specific standalone reputation. As a result, German companies were free to use the generic term "balsamico" even if it may suggests, misleadingly, that their products are of Italian origin, without risk of a claim under German unfair competition or trademark law or EU regulations.

What we do not see in the above regime is a need for foreign GI holder to enter into a formal process of registration for the GI(s) it controls: the mere

139 *See*, *Bocksbeutel*, ZR 115/69, Mar. 12.,1971; O'Connor (n 4) 202.

140 *See*, *Stich den Buben* (n 138).

141 Ingerl and Rohnke (n 111) at MarkenG § 126 Rn. 12; *See also*, the *Cambridge Institute*, BGH 28.6.2007, I ZR 49/04, *Elsässer Nudeln* BGH, 29.04.1982 – I ZR 111/80 -.

142 Beier (n 129) 15 (though the author goes on with a discussion about the need for foreigners to have an establishment in Germany to be able to claim the benefit of the MarkenG).

143 European Commission, *GIs from Non-European Countries in the EU*.

144 CJEU, C-432/18, Dec. 4., 2019.

act of causing consumer deception or risk therefore is sufficient for protection stemming from both the UWG and the MarkenG to be accrued to the GI holder and offer remedies to prevent continued infringement. It therefore seems that, before the EU and the TRIPS agreement, the German national law was sufficient to provide remedies for GI enforcement, which as its authorities have themselves declared, "The standard of this protection [referring to §3 of the German Unfair Competition Act (UWG)] fulfills the conditions of articles 22 to 24 of the TRIPS Agreement."[145]

Turning now to the US, the controversial issues regarding the implementation of legal protection for foreign GIS seem less to gravitate around the fundamental nature of the protection afforded than in the substantive mechanics through which to integrate the notion of GI within the existing trademark law. As we have seen, Germany has had little issue to afford some recognition to the notion of reputation and quality tied to a specific geographical location, the reputation of which could be usurped and misused so as to cause consumer confusion.

In contrast, the US has been historically reluctant to grant such recognition to the connection between a product and its land of origin, except perhaps for advocates of the Napa Valley region.[146] This reluctance would justify circumventing the grant of monopolistic rights in the designation of origin to the benefit of use of that geographical term by others. Geographical terms are typically believed to be part of a larger public domain of "generic" terms. The fear is therefore that reserving the right to use and control such a term through the grant of a GI would impede free competition in the marketplace.[147]

The majority of the conversation so far has been monopolized by the willingness of the U.S to provide a system of protection to EU GI that would be modeled somewhat closely after the EU's *sui generis* system. Though these aspirations may have failed, the *enforcement* of foreign GIS in the US finds exponentially more resonance into the traditional American legal system. The infringement of a GI can be characterized organically under the familiar

145 IAPIP 1998 Congress Report (n 112).

146 See notably instances where NAPA VALLEY was registered by the Napa Valley Vintners as a GI abroad, namely in Canada, India, Thailand, China, and the European Union.

147 Benjamin Robert-Hopper, 'Whither (Wither?) Geographical Indications? The Case against Geographical Indications and for Appellations of Origin', (2016) 16 Chi. -Kent J. Intell. Prop. 210 at 237; Lee Bendekgey and Caroline H. Mead, 'International Protection of Appellations of Origin', (1982) 82 TMR 765 at 768.

doctrines of trademark law, unfair competition law, false advertising, or passing-off, all of which seek to prevent deceptive trade practices.[148]

Turning back again to the Lanham Act, §43 (15 USC §1125) on "false designations of origin: false description or representation" codifies the heart of the whole public policy consideration behind the trademark regime in use. This provision states the simultaneous cause of action against the infringement of common-law-based trademarks or unregistered trademark (subsection A) and a claim against acts of unfair competition (subsection B).[149] Sub-§(1) tells us that:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, **uses in commerce any word, term, name**, symbol, or device, or any combination thereof, **or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact**, 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, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[150]

This provision not only offers a sword for foreign GI holders against the unfair use of their appellations in the US but it also provides for a shield by which the USPTO can refuse registration of a trademark that misleads consumers based on the use of a GI designation.[151] For certification marks which would have obtained a federal registration, §34 (15 USC §1114) sets up the remedies for infringement:

148 Michelle Agdomar, 'Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law', (2007) 18 Fordham Intell. Prop. Media & Ent. L.J. 541 at 580.

149 *See*, *Gilson on Trademarks* (n 46) at § 11.03 (Matthew Bender).

150 15 USC §1125 – *False designations of origin, false descriptions, and dilution forbidden.* (Our emphasis).

151 *See*, Molly Torsen, 'Apples and Oranges (and Wine): Why the International Conversation regarding Geographic Indications Is at a Standstill', (2005) 87 J. Pat. & Trademark Off. Soc'y 31 at 48; Jim Chen, 'A Sober Second Look at Appellation of Origin: How the United States Will Crach France's Wine and Cheese Party' (1996) 5 Minn J. Global Trade 29.

(1) Any person who shall, **without the consent of the registrant** –
   (a) use **in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark** in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection **with which such use is likely to cause confusion, or to cause mistake, or to deceive**; or
   (b) reproduce, counterfeit, copy, or colorably imitate a registered mark **and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages**, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. (Our emphasis)

Based on the language taken from the American statute, the parallels to be found with the German legislation are striking. A deeper historical inquiry into their respective trademark statutes could provide additional insights about how that came to be, but for the purposes of this study, one thing becomes clear. The notion of *terroir*, used to justify an intricate system of registration based on the submission of detailed specifications does not play a direct role for the establishment of enforceable legal protection for foreign GIs in these two countries. Rather, public recognition by the relevant consumers occupies the whole of the analysis and sets the standard as to whether remedies can be issued against the (mis)use of a given appellation.[152]

Both the US and Germany find federal jurisdiction over trademark law and unfair competition on the basis of a specific constitutional attribution.[153] Given the imperative for a uniform legislation that could be applied by all courts throughout the respective country, the broad language of unfair competition appears as most suited to implement appropriate protections for foreign GIs, in accordance with TRIPS obligations, without the need for a federal registry

152 Criteria for the evaluation of the likelihood of confusion in a trademark infringement claim include : strength of the mark, proximity of the goods, similarity of the marks, evidence of actual confusion, marketing channels used, type of goods and the degree of care likely to be exercised by the purchased; *See e.g.*, *AMF Incorporated v Sleekcraft Boats*, 599 F.2d 341, *Application of E.I. DuPont DeNemours & Co.* (*Assignee of Horizon Industries Corporation*), 476 F.2d 1357.

153 *Basic Law for the Federal Republic of Germany* (BGBI. L S. 404) at art. 23(1)(9), U.S. Const. art. I, §8 cl. 3.

of GIs. The administration of a general and federal register for geographical indications would be a cumbersome endeavour and would not be a guarantee of additional and strengthened protection for foreign GIs entered into that registry without the addition of specific provisions for protected GIs like Canada added, first for wine and spirits and then for foodstuff generally in the aftermaths of entering into the CETA (as discussed below).

In addition, the same regime of federal registration for GIs would likely necessarily extend protection to local GIs, which in Germany can already and only be secured through the process set out in EU directives, since Member-States are prohibited from implementing an identical regime of protection into national laws as the EU system for GI protection of EU GIs is an exhaustive one.[154] As such, if the foreign GI fails to meet the required EU qualifications for registration of a foreign GI in the Union, recourse to unfair competition seems the only viable alternative to comply with TRIPs.

The US, for its part, remains highly unfamiliar with a process of registration based on specifications emerging from a land-product connection, and for the states that are more inclined to protect their local GIs, state laws, given concurrent jurisdiction, are free to provide additional protection for these indications and to thereby extend it to foreign GIs. These particularities in US and German administration therefore help to explain why the law of unfair competition, in all its flexibility, has been the legal doctrine to which federal states have turned to protect foreign GIs. Given the similarity in the US and German statutes, the public policies behind them, and the driving force of TRIPs, the principles of unfair competition could therefore ultimately be understood as offering an air of a "common law"/*droit commun* for foreign GIs.

Our last comments will address Canada's position which has proven to be a regime of accommodations between its profound Anglo-Saxons roots and its French-European sensibilities. The balance of these mixed origins are also reflected in the bijuralism and bilingualism that characterizes Canadian law and GIs appear to be no exception. In fact, Canada's *Trademarks Act* contains provisions for all three regimes of protection which would be available to foreign GI holders to enforce their GIs in the country, that is: registered trademark infringement, unfair competition claims, and specific prohibitions on the unauthorized use of protected geographical indications.

The Canadian *Trademarks Act*, following submission and adoption of the proposed amendments to it to implement CETA obligations, was qualified as

154 *See e.g.*: Monteverde (n 124) 291, Mantrov (n 94) 309, 321–322.

an "attempt to strike a balance between trademarks and GIs […]."[155] The overall effect of Canada's multifaceted system is to blur the connection we have attempted to draw between federalism and unfair competition in the protection of foreign GIs in Canada. Indeed, Canada did set up a faint version of a federal registry for GIs, which it calls the "List of Protected Geographical Indications." GIs appear on the list at the end of an application process, which we have described above. Once entered into the list and having secured the status of "*protected* geographical indications", section 11.14, which specifically addresses indications for wines and spirits, prohibits the use with a business, as a trademark, or otherwise a protected GI in respect of product that does not originate in the territory indicated or if the product originating in that territory was not produced or manufactured in accordance with the law applicable in that territory, except if authorized by the responsible authority (see section 11.16(1)). The provisions read as follows:

> (2) No person shall use in connection with a business, as a trademark or otherwise,
> (a) a protected geographical indication identifying a wine in respect of a wine **not originating in the territory indicated** by the protected geographical indication or adopted contrary to subsection (1)
> (3) No person shall use in connection with a business, as a trademark or otherwise,
> (a) a protected geographical indication identifying a wine in respect of a wine that originates in the territory indicated by the protected geographical indication **if that wine was not produced or manufactured in accordance with the law applicable** to that territory […]
> (4) No person shall adopt in connection with a business, as a trademark or otherwise,
> (a) a protected geographical indication identifying a spirit in respect of a spirit **not originating in the territory indicated** by the protected geographical indication […]
> (5) No person shall use in connection with a business, as a trademark or otherwise,
> (a) a protected geographical indication identifying a spirit in respect of a spirit **not originating in the territory indicated** by the protected geographical indication or **adopted contrary to subsection (4)** […]

155 Bassem Awad and Marsha S. Cadogan, 'CETA and the Future of Geographical Indications Protection in Canada', *CIGI Papers No 131* (2017) 10.

> (6) No person shall use in connection with a business, as a trademark or otherwise,
> (a) a protected geographical indication identifying a spirit in respect of a spirit that originates in the territory indicated by the protected geographical indication **if that spirit was not produced or manufactured in accordance with the law applicable** to that territory [...] (Our emphasis)

There is little language in these provisions which echoes the unfair competition provision of the German MarkenG or the WeinG or the US §43/§/1125. There is no notion of consumers being misled or being confused by the use of a protected GI. It sure seems to provide a more absolute protection, although likely narrower in scope, especially for foreign GIs which, as per 11.12(3)(f), must first be protected by the law applicable to the territory from which the product originates. Although innovative for a North American country with historically little concerns for products emerging from its own terroir, these provisions are not without their issues. Some commentators have gone as far as saying that outside these provisions, the protection offered elsewhere in the *Trademarks Act* is likely to be inadequate to protect foreign GIs;[156] others have said that this specific regime of protected GIs could even be insufficient or at least pose additional uncertainty to protect Canadian-based local GIs.[157]

More specifically, Canada also offers other forms of protection that could be used to protect foreign GIs such as the certification marks and the regular trademarks, the registration of which triggers the protection of section 20 against trademark infringement, and section 23(3) against the unauthorized/unlicensed use of a certification mark.[158] The Act also provides for a claim under unfair competition at section 10:

> If any sign or combination of signs has by ordinary and *bona fide* commercial usage become recognized in Canada **as designating the kind, quality, quantity, destination, value, place of origin or date of production of any goods or services**, no person shall adopt it as a trademark in

156 Awad and Cadogan (n 155) 11.

157 *See*, Renata Watkin, 'Placing Canadian Geographical Indications on the Map', 30 I.P.J. 271 at 287 (pointing the issue of concurrent jurisdiction with regards to the notion of "responsible authority" which could very well secure protection for a local GI directly under federal law and circumvent provincial schemes of protections for local appellations).

158 *Canadian Trademarks Act* (n 68).

> association with the goods or services or others of the same general class or **use it in a way likely to mislead, nor shall any person so adopt or so use any sign or combination of signs so nearly resembling that sign or combination as to be likely to be mistaken for it.**[159]

In addition to this codification of the tort of passing-off, Section 7 generally prohibits the use of any description that is likely to mislead the public:

> No person shall
> [...]
> (d) make use, in association with goods or services, of a**ny description that is false** in a material respect **and likely to mislead the public** as to
> (i) the **character, quality**, quantity or composition,
> (ii) **the geographical origin**, or
> (iii) the **mode of the manufacture**, production or performance of the goods or services. (Our Emphasis)

This last provision is much closer to its American and German counterparts, and generally reflects the aim of trademark law in protecting the general public against misuse of designation of origin and quality. Given the organization of the Act, this provision is often perceived as a fall-back provision, providing for a claim to be raised in conjunction with the other regimes (protected GIs, certification marks, registered trademarks) when available, or alone when they are not. Finally, other remedies under the common law torts of passing off and unfair competition available and enforceable in the respective provinces, and in Quebec under the general duty of due diligence in extra-contractual obligations under Section 1457 of the Quebec Civil Code, are available to curtail the use of foreign GIs in ways that would mislead consumers.[160] In contrast, the local Länder do not typically provide for such remedies when it comes to the interaction between IP rights and unfair competition, as federal statutes occupy the field of IP law in Germany.

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159 *Canadian Trademarks Law* (n 68) (Our emphasis).

160 *See*, Bereskin (n 60) 7 (where he reviews caselaw where claims based on the misleading use of Gis were enforced by courts in favour of the GI holders, which proved that "it is clear from these cases that the common law is fully effective to protect geographical indications, provided it can be established that the geographical indication has acquired goodwill, and that the defendant is making use of a false description that is likely to damage the goodwill.").

In short, it is clear from the US and German models that the underlying concerns for protecting the public interest against false or misleading claims of origin for goods and services can retraced in their respective constitutional separation of power. In the US, it is found in the federal responsibility to oversee general commercial exchange. In Germany, it is found in the federal responsibility to police industrial property rights. Concerns with the specific geographical origin of wines and spirits are clearly distinguishable from both the MarkenG and the WeinG, where misleading or false claims in this regard is specifically prohibited and sanctioned for GIs that are beyond the scope of protection offered by EU law. The US is not as clear in its intention to protect GIs applicable for wines and spirits, but the broad language of the Lanham Act is thought to be sufficient to encompass TRIPS level protection for these foreign GIs for wines through the general prohibition against false designation and the certification marks and claims of trademark infringement.[161]

The ultimate conclusion that the text above humbly submits is the following: the long-standing US reluctance to recognize GI as a standalone form of industrial property rights, distinct from trademark rights, is not as justified as it might have initially been assumed. The discussion above of the Canadian approach is eloquent on that point. Canada only affords but a narrow protection to protected GIs, whose holders are free to invoke other remedies found elsewhere in the *Trademarks Act*, alone or in conjunction with those for protected GIs. The possibility to fall back on the general provisions for signs and registered trademarks therefore indicates that the protection of foreign GIs as a distinct entitlement is not as

161 In addition, and though we have not addressed this aspect in our inquiry, the US TTB also supervises the use of said appellations during the labelling process of any alcoholic products that is sought to be commercialized in the US, which provides an additional and important administrative level of protection to foreign GIs for wines and spirits, defined under this particular scheme as "appellations of origin": 27 CFR §4.25 (2020), TTB, 'Wine Appellations of Origin', <https://www.ttb.gov/appellations-of-origin>. In effect, the TTB has an approval process for labels to be put on wines commercialized in the US, during which it polices compliance of the label to US laws, which includes the accurate and truthful use of appellations of origins: 27 CFR Part 4 – *Labelling and Advertising of Wine* (2020). Foreign GI holders are free to petition the TTB for recognition by it of a specific appellation: 27 CFR §12.3 (2020). Again, the TTB is a federal agency under the Department of Treasury, which reserves all prerogative to the federal level of government; *See also*, Leigh Ann Lindquist, 'Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement', (1999) 27 Ga. J. Int'L & Comp. L. 309 at 324–332.

irreconcilable with traditional trademark law as it would first appear to an American lawyer.

4 Conclusion

What the above inquiry demonstrates is that the United States, Canada, and Germany alike ground their respective local system of protection for foreign GIs in principles taken from unfair competition law and concerns for consumer protection. This is unsurprising given their historical familiarity with such jurisprudence that predated their entry into international agreements.

Canada, quite uniquely, hybridizes the solutions presented by the other two countries with regards to its trademarks law, and the variety of remedies that could be claimed by foreign GI holders to enforce against the misuse of their GI locally. The recent amendments to the *Trademarks Act*, following entry into the CETA, and which created a federal list of protected GIs, opened to both local and foreign designations of origins, and for wines, spirits, and other foodstuff alike, breached the otherwise uniform use of unfair competition law as a reconciling doctrine to protect GIs within trademark law. It created what could otherwise be perceived to be an entirely new form of IP rights, distinct from trademark rights, and which would bring this regime closer to the EU *sui generis* system of appellations. It seems to be relying less on notions of misleading designations than on a formal registration process as the initiating force for triggering legal protection for qualifying GIs. The grounds for complaint on the part of the GI holder, however, remain centred on consumer protection and prohibition of misleading statements.

This chapter hopefully managed to demonstrate a few things. First, that federal states have yet to deploy such a full-fledge apparatus of administration as we can find for sui-generis systems administerd by centralized governments, in order to offer TRIPs-level protection for foreign GIs for wine and spirits. Second, that Germany's membership to the EU and its exhaustive system for geographical indications did not prevent this country from adopting provisions in its MarkenG and WeinG on claims that can be brought by foreign GI holders in cases of misuse of their GI. These provisions appear to be more in-line with the history of trademark law and unfair competition in Germany than with EU law. Third, that Canada now has a system of registration, but the remedies it provides still use a language firmly grounded in an unfair competition law discourse. So does the US, most of the international agreements that we reviewed, and to some extent, even laws from countries firmly grounded in

AOC systems.[162] This chapter opens up a further discussion: are geographical indications a *sui generis* form of industrial property law, a distinct kind of mark within trademark law doctrines, or as it seems like it may always have been, entitlements based on extra-contractual liability/tort law/*droit délictuel*?

162 *See e.g.*, France, *Code la propriété intellectuelle*, Article L721-8: "[…] les dénominations enregistrées sont protégées contre:

1 Toute utilisation commerciale directe ou indirecte d'une dénomination enregistrée à l'égard des produits non couverts par l'enregistrement, lorsque ces produits sont comparables à ceux enregistrés sous cette dénomination ou lorsque cette utilisation **permet de profiter de la réputation** de la dénomination protégée;

2 **Toute usurpation, imitation ou évocation**, même si l'origine véritable des produits ou des services est indiquée ou si la dénomination protégée est traduite ou accompagnée d'une expression telle que " genre ", " type ", " méthode ", "façon", " imitation " ou d'une expression similaire;

3 Toute **autre indication fausse ou fallacieuse quant à la provenance, l'origine**, la nature ou les qualités essentielles du produit qui figure sur le conditionnement ou l'emballage, sur la publicité ou sur des documents afférents au produit concerné, ainsi que contre l'utilisation pour le conditionnement d'un récipient **de nature à créer une impression erronée sur l'origine du produit**;

4 Toute autre **pratique susceptible d'induire le consommateur en erreur** quant à la véritable origine du produit. […] (Our Emphasis).

CHAPTER 17

The Protection of Vines, Grapes and Wine under Plant Variety Rights Law, with a Particular Focus on the EU

Philippe de Jong

1 Introductory Comments

Plant breeding can be described as the art of altering the physiological, morphological or genetic characteristics of plants to the benefit of mankind by combining their genetic composition (either through traditional crossing or more advanced techniques of genetic engineering) and eventually selecting the progeny that displays the best combination of traits. In viticulture, new grape varieties may be developed that are, for instance, resistant to drought or to certain diseases, give higher yields or contain larger amounts of antioxidants.

According to one of the basic principles of the TRIPS Agreement,[1] members of the World Trade Organization (WTO) "shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof". Since patent protection is not always available for new plant varieties, such as in the EU[2] (where attempts are ongoing to make it

1 This Agreement, whose full name is the "Agreement on Trade-Related Aspects of Intellectual Property Rights" (TRIPS – https://www.wto.org/english/docs_e/legal_e/27-trips.pdf), is the most important multilateral international convention on intellectual property concluded between all the member nations of the World Trade Organization (WTO). TRIPS sets out minimum standards for the regulation of (most forms) of intellectual property by those member nations. For a commentary of TRIPS, see Peter van den Bossche and Zdouc Werner '*The Law and Policy of the World Trade Organization: Text, Cases and Materials*' (Fourth ed., Cambridge University Press, 2017). See also Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178; and Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p.

2 Article 4(1)(b) of Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30.7.1998 (the so-called "Biotech Patent Directive"). See also Article 53(b) of the European Patent Convention.

unavailable for *all* plant innovations resulting from a process of crossing and selection[3]), the *sui generis* route for plant variety protection has gained significant importance.

The plant variety *sui generis* protection mechanism was created by the International Union for the Protection of New Varieties of Plants (UPOV[4]), an intergovernmental organization with headquarters in Geneva (Switzerland) and established by the International Convention for the Protection of New Varieties of Plants, adopted in Paris in 1961.[5] UPOV's mission is to "provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society". The Convention was revised a number of times in 1972, 1978 and, most importantly, in 1991 (which has ever since become known as "UPOV 1991") when the rights of breeders were significantly strengthened. In the EU, UPOV 1991 was implemented through EU Regulation 2100/94 on the Community Plant Variety Right ("the EU Regulation").[6]

Both under UPOV 1991[7] and the EU Regulation,[8] the proprietor of a plant variety right has been given an exclusive right to prevent third parties who have not obtained his authorization (*i.e.* consent) from performing certain activities in relation to propagating material and harvested material of his protected variety, as well as, in some jurisdictions, in relation to products directly made/obtained from such harvested material.

In respect of propagating material of a protected variety, Article 14(1) UPOV 1991 (the content of which is, with some minor differences, mirrored in Article 13(2) of the EU Regulation) provides more particularly that the following acts shall require the authorization of the right holder, with this authorization potentially being subject to further conditions and limitations:

3 See the Commission Notice of 3 November 2016 on certain articles of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions (2016C 411/03 – OJ C 411, 8.11.2016), and the resulting discussions at the level of the European Patent Office ("*EPO*") which have culminated in yet another reference on this point to the EPO's Enlarged Board of Appeal (Case G 3/19 – which, at the time of writing this article, was still undecided).

4 From the French name "Union internationale pour la Protection des Obtentions Végétales".

5 International Convention for the Protection of New Varieties of Plants, adopted in Paris on 2 December 1961 and in force since 10 August 1968.

6 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994.

7 Article 14.

8 Article 13.

(a) production or reproduction (multiplication);
(b) conditioning for the purpose of propagation;
(c) offering for sale;
(d) selling or other marketing;
(e) exporting;
(f) importing;
(g) stocking for any of the above purposes.

In respect of harvested material, Article 14(2) UPOV 1991 (mirrored in Article 13(2) and (3) of the EU Regulation) provides that the right holder enjoys the same exclusive rights as for propagating material provided, however, the harvested material was obtained through the unauthorized use of propagating material of the protected variety, and the right holder did not have reasonable opportunity to already exercise his right in relation to that propagating material.

Similar conditions are imposed in respect of products directly made/obtained from harvested material (Article 14(3) UPOV 1991, implemented in Article 14(3) of the EU Regulation). Although protection for such products is optional for UPOV members (including the EU), if and when it is provided, the product in question is only protected if it was obtained through the unauthorized use of harvested material of the protected variety, and the right holder did not have a reasonable opportunity to already exercise his right in relation to that harvested material.

It follows from these provisions that the protection of harvested material and products directly obtained therefrom is subject to more conditions than that of propagating material, as will be further explained below. It is therefore important, in the enforcement of plant variety rights, to properly qualify the material in question.

This chapter first examines whether grapes could potentially qualify as propagating material despite their having been harvested from a vine and thus instinctively qualifying as harvested material. Furthermore, it questions whether wine is a product directly made from grapes and therefore equally falls under the scope of protection of the plant variety right covering those grapes. Finally, the chapter offers an attempt to interpret the terms of the said conditional protection for harvested material and products directly made therefrom. In that context, this chapter voices some concerns that have arisen from recent case law of the Court of Justice of the European Union ("CJEU") in the area of harvested material and the UPOV guidance documents it is partly based on.

2 Vines are Propagating Material, Grapes are Harvested Material

UPOV 1991 does not define the term "propagating material". The EU Regulation does but uses the term "variety constituents" instead. It is acknowledged that both terms cover the same subject matter.[9] Article 5(3) of the EU Regulation defines "variety constituents" as "entire plants or parts of plants as far as such parts are capable of producing entire plants". Based on this definition, it is clear that vines are propagating material and will therefore enjoy absolute protection under the plant variety right granted for the variety they belong to.

In relation to harvested material, the situation is less straightforward. In many cases a harvested crop can just as well function as propagating material. Consumption potatoes can (and do[10]) serve as seed potatoes, cut roses can be used for further rose propagation, *etc*.

Neither UPOV nor the EU Regulation define the term "harvested material". In literature, the term is said to refer to "all products of the harvest; dependent on the variety in question, it includes fruit, vegetables, mushrooms, flowers, cereals, fodder, and fibres".[11] Article 14(2) UPOV 1991 furthermore provides that harvested material includes "entire plants and parts of plants, obtained through the … use of propagating material". The legal value of this phrase is not entirely clear. It appears that it is more a factual clarification than a legal classification or definition. The EU legislator, when implementing UPOV 1991 in the EU Regulation, has chosen not to include any such clarification.

With that in mind and looking at the above definition of "variety constituents" under the EU Regulation, it is clear that, based on the text of that definition alone, even grapes could potentially qualify as propagating material. While they are not "entire plants", they (and more precisely their seeds) are arguably "parts of plants capable of producing entire plants". This is also confirmed by the UPOV Explanatory Notes on Acts in relation to Harvested Material under the 1991 Act of the UPOV Convention (hereinafter the "UPOV Explanatory Notes on Harvested Material"),[12] according to which "at least

9 P.A.C.E. van der Kooij, *Introduction to the EC Regulation on Plant Variety Protection* (Kluwer Law International, 1997) 13; G. WÜRTENBERGER et al., *EU Plant Variety Protection* (OUP, 2015) § 6.11.

10 E.g. under the so-called "farm saved seed" exemptions under Articles 15(2) UPOV 1991 or 14 of the EU Regulation.

11 G. WÜRTENBERGER et al., *EU Plant Variety Protection* (OUP, 2015) § 6.13.

12 UPOV Explanatory Notes on Acts in relation to Harvested Material under the 1991 Act of the UPOV Convention, 24 October 2013 (UPOV/EXN/HRV/1).

some forms of harvested material have the potential to be used as propagating material".[13]

However, while grapes are arguably capable of producing entire plants, the law seems to require something more in order for harvested material to qualify as propagating material under the scope of the relevant plant variety right, *i.e.*, that material only amounts to such propagating material if it is capable of producing entire plants *of the protected variety*. This conclusion is supported both in literature,[14] the UPOV "Explanatory Notes on Propagating Material under the UPOV Convention",[15] and recent case law from the CJEU and the Chinese Supreme People's Court.

The CJEU case[16] (which will be further addressed below) concerned the alleged infringement of the EU plant variety right for the famous *Nadorcott* mandarin variety. The CJEU, in assessing whether the fruit harvested from a mandarin tree should be considered as propagating or harvested material, acknowledged that mandarins are the latter, because for material to have the status of protected propagating material under the EU Regulation it needs to be able to result in material of the same variety, *i.e.* with the specific characteristics of that variety (see *e.g.* paragraph 20 of the decision: "In addition, it should be observed that, as is consistently apparent from the written observations submitted to the Court, the fruit harvested from the mandarin trees of the Nadorcott variety, at issue in the main proceedings, is not liable to be used as plant propagating material *for that plant variety*").

13 UPOV/EXN/HRV/1, 24 October 2013.

14 G. WÜRTENBERGER et al, *EU Plant Variety Protection* (OUP, 2015) § 6.11: "*Propagating material is the common term … to specify those parts of plants that are used* (*or at least could be used*) *for the production of the* ***protected variety***".

15 In this Note (UPOV/EXN/PPM/1, 6 April 2017), the following factors are said to be typically considered in UPOV member states in the assessment of whether material is propagating material or not, whereby the emphasis is clearly on the ability of propagating material to replicate material *of the protected variety*: "(*i*) *whether the plant or part of plants are used for* ***the variety*** *reproduction;* (*ii*) *whether the material has been or may be used to propagate* ***the variety;*** (*iii*) *whether the material is capable of producing entire plants* ***of the variety;*** (*iv*) *whether there has been a custom/practice of using the material for propagating purposes or, as a result of new developments, there is a new custom/practice of using the material for that purpose;* (*v*) *the intention on the part of those concerned* (*producer, seller, supplier, buyer, recipient, user*); (*vi*) *if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is "propagating material"; or* (*vii*) *the variety material where conditions and mode of its production meet the purpose of reproduction of new plants* ***of the variety*** *but not of final consumption*" (emphasis added).

16 CJEU, 19 December 2019, *CVVP/Adolfo Martinez Sanchis* (Case C-176/18), ECLI:EU:C:2019:1131.

In the Chinese case about a pomelo variety, as reported by CIOPORA,[17] the court held that, in addition to the requirements that the material be living and has propagating ability, material is only propagating material if it is "able to propagate a plant which possesses the same traits and characteristics as *the protected variety* (i.e. propagate the variety true-to type)".

Since, according to the author's technical understanding, it is not possible to reproduce a grape variety that is true-to-type of the protected variety from a grape or its seeds (just like, pursuant to the abovementioned case law, it is not possible to create a true-to-type mandarin tree from pips of *Nadorcott* mandarins or a true-to-type pomelo variety based on pomelo seeds), grapes are not to be considered as "propagating material".[18]

3 Wine May Be a Product Made/Obtained Directly from Grapes

As explained above, the UPOV legislator has, in addition to propagating material and harvested material, extended the exclusive rights of the right holder to "*products made directly from harvested material of the protected variety*" (Article 14(3) UPOV 1991). A look at the UPOV Lex database[19] reveals that to date 22 UPOV countries have active protection for such products in place, including 9 EU member states. At the level of the EU itself, this provision has thus far remained a dead letter since the European legislator has never exercised its option to extend the scope of protection of an EU plant variety right to such products. According to Article 13(4) of the EU Regulation: "In the implementing rules pursuant to Article 114, *it may be provided* that in specific cases the provisions of paragraph 2 of this Article shall also apply in respect of products obtained directly from material of the protected variety …".[20] No such implementing

17 Chinese Supreme People's Court, 11 December 2019, *Cai Xin Guang/Guanghzhou Runping*, reported at www.ciopora.org/post/2019/12/19/china-s-spc-clarifies-scope-of-pvr-in-highly-anticipated-decision.

18 As is also confirmed by the literature cited earlier (see G. WÜRTENBERGER et al., *EU Plant Variety Protection* (OUP, 2015) § 6.11: "*As a result, an apple containing seeds should be considered as harvested material, not propagating material, because the seeds inside the apple cannot be used to produce plants with the protected characteristics*").

19 www.upov.int/upovlex/en.

20 The provision in the EU Regulation is arguably broader than its counterpart in UPOV 1991, since it refers to products derived from "material" (defined, in Article 13(2) of the EU Regulation as *both* variety constituents *and* harvested material), instead of from "harvested material" only. However, it should be assumed that the same is meant (particularly since the EU Regulation, according to some case law and literature, should be interpreted, as much as possible, in the light of UPOV 1991 – as also suggested in the Preamble to the

rules have been passed. In those countries that protect processed products, the pivotal question is of course how much processing is needed or allowed for the resulting product to be a product directly made/obtained from harvested material. In terms of the present article: can wine be considered as a product made *directly* from plant variety right protected grapes?

While variations of course exist (such as the differences between red wine and white wine production; whether or not to add sulfur dioxide; whether or not to destem the grape clusters prior to crushing; whether or not to add additional commercial yeast for fermentation purposes; *etc.*), the wine production process ("vinification") can (over)simplistically be subdivided in the following steps: (i) harvesting or "picking" the grapes, (ii) crushing them, (iii) for white wine, extracting and separating the grape juice from skin and seeds,[21] (iv) fermentation of the fruit's sugars into alcohol (either through the naturally occurring yeasts on the grapes' skins or by adding yeast to the fermentation vats), (v) aging the wine in the appropriate barrels, and (vi) bottling the wine, which may involve, in the case of sparkling wines, like champagne, a further fermentation process in the bottle to create the bubbles.

Neither the EU Regulation, UPOV 1991 nor their legislative histories clarify the degree of further processing harvested material must or can undergo for the resulting product to qualify as a "product obtained directly from (harvested) material". It is clear that, just like juice made of oranges or extra virgin oil made from olives ("first (cold) pressed"), the grape juice and the must obtained from the first two steps of the vinification process described above qualify as products obtained directly from the harvested grapes, since they are both chronologically and materially the direct result of the pressing of the grapes. However, from the start of the fermentation process onwards, the situation becomes more complex and will have to be assessed on a case-by-case basis.

Based on a strict, literal reading of the term "directly",[22] any intermediary step beyond the crushing of the grapes would disqualify the resulting product from being a product *directly* obtained from the harvested grapes. Such an interpretation is based on a purely quantitative assessment of the process steps

EU Regulation), as is confirmed by P.A.C.E. van der Kooij, *Introduction to the EC Regulation on Plant Variety Protection* (Kluwer Law International, 1997) 32.

21 Whereas red wine normally ferments with both the grape skins and the juice combined in the vat.

22 It appears from the abovementioned UPOV Lex database that five UPOV countries (Australia, Japan, Kyrgyzstan, Morocco and Tunisia) make no reference to the term "directly" at all and simply require the product in question to have been "made from", "processed" or "transformed" from the harvested material. It goes without saying that, in those cases, the restriction discussed in this paragraph does not apply at all.

(i.e. their number and sequence), regardless of their value or impact on the end product. However, the mere fact *that* fermentation takes place in the wine production process seems insufficient *in itself* for such a disqualification. This is confirmed by the text of UPOV 1991, in the light of which the EU Regulation should be interpreted.[23] While the EU Regulation (and a number of member states laws) use the words "*obtained* directly from" (which appears to be similar in other language versions of the EU Regulation), UPOV 1991 consistently uses the terms "*made* directly from" (in the French version "*fabriqués* directement à partir de"; in German: "unmittelbar aus … *hergestellt* wurden"; in Spanish: "*fabricados* directamente de"). This indicates that there is room for at least some degree of human intervention in the production process because "making" necessarily implies that the resulting product may have undergone more processing steps than just crushing.

Bearing that in mind, the question whether or not a product is directly obtained/made from another should therefore not so much depend on the *amount* of steps that take place between the harvest and the processed product, but on the *impact* those steps have on that product, i.e. on whether the essential characteristics and the value of the resulting product are predominantly determined by the use of the protected harvested material.

In this regard, a parallel can be drawn with patent law where, in the European Patent Convention countries,[24] the general rule is that the protection conferred by a process patent extends to the products "directly obtained by" such process.[25] While this patent law analogy like all analogies necessarily has shortcomings (*e.g.* because the patent law situation is based on the legal connection between a predefined process and a product, whereas in plant variety rights law the legal question is to compare two products regardless of the process used to obtain the downstream product), the discussion in patent law nonetheless offers helpful guidance. Thus, in patent law it is argued that a more downstream product will fall under the scope of the protected process if

23 See e.g. CJEU, 19 December 2019, *CVVP/Adolfo Martinez Sanchis* (Case C-176/18), para. 35, ECLI:EU:C:2019:1131.

24 In the US, the situation is slightly different because Section 271(g) 35 USC (which equally provides that e.g. selling "a product which is made by a process" patented in the United States amounts to an infringement of the patent for that process) does not contain the word "directly". However, contrary to the situation in Europe, this provision does contain further guidance on when a product is (not) considered to be "made by a process". According to section 271(g), a product is not considered to be so made "*after* (*1*) *it is materially changed by subsequent processes; or* (2) *it becomes a trivial and nonessential component of another product*".

25 Article 64(2) European Patent Convention.

it "retains either the essential identity or essential properties" of the product that is the immediate result of the process.[26] Conversely, a product will not be considered directly obtained from the patented process "if the product is submitted to substantial further treatment or further additives are needed for its completion".[27] Thus, it was held by the High Court of Justice in London in a dispute between Monsanto and Cargill that a patent for a method of producing genetically transformed soybean plants was not infringed by soymeal produced further downstream because, chronologically, there were far too many steps between the production of the original genetically modified plant and the soymeal[28] and, substantially, the soybean meal had "no special intrinsic characteristics from one of the generations of plants",[29] *i.e.* had not retained the essential identity or properties of the initially transformed plant.

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26 R. HACON and J. PAGENBERG, *Concise European Patent Law* (Kluwer Law International, 2008) 70.

27 R. HACON and J. PAGENBERG, *Concise European Patent Law* (Kluwer Law International, 2008) 70. See also M. SINGER and D. STAUDER, 'The European Patent Convention. A Commentary', (2003) 1 Heymanns, 2003 213.

28 Ch. Div. 10 October 2007 *EWHC* 2007, 2257 (*Monsanto/Cargill*), para. 37: "*The transformation of this plant was many generations ago. Since then, soybeans have been grown by seedsmen or retained by farmers for planting; the plants have been grown and the new beans harvested; and after some generations the harvested beans have been processed into the meal in the Podhale cargo. I accept that all the Round Up Ready soybean plants in Argentina are lineal descendants of this original plant, and I can see how it can be said that this huge mountain of soybean meal (5000 tonnes on the Podhale alone) can be described as the ultimate product of the original transformation of the parent plant. But I cannot see that it can be properly described as the direct product of that transformation, a phrase I would reserve for the original transformed plant*".

29 Ch. Div. 10 October 2007 *EWHC* 2007, 2257 (*Monsanto/Cargill*), para. 38: "*Monsanto says that the product has retained its essential characteristics. The meal comes from beans produced by a plant which contained the Round Up Ready sequence. It was the sequence that made the invention patentable, and the sequence has survived. Even though the meal comes from beans which are not the beans from the plant which underwent the original transformation, that is enough. I think this has nothing to do with the product of the process at all. It might be extravagant to say that the generation of plants producing the beans from which the Podhale meal was manufactured did not have an atom in common with the original transformed plant, but it must be close to the truth. I think that Monsanto's argument confuses the informational content of what passed between the generations (the Round Up Ready genomic sequence) with the product, which is just soybean meal with no special intrinsic characteristics from one of the generations of plants. Put another way, it is difficult to see how anything has survived into the meal if the sequence has not. It cannot be told apart from non-Round Up Ready meal unless it contains traces of the gene, in which case other claims are relevant. What has not survived is the original transformed plant. I should add that I think it is dangerous to talk of reproductive material having in some way passed between the generations. While no doubt some reproductive material does pass between the first and second generations, the same material does not pass further. Copies pass thereafter*".

Contrary to plant variety rights law, patent law of course does not contain the nuance between "obtained" and "made". It exclusively and consistently uses the word "obtained". However, when transposing this patent law analogy to plant variety rights law, a product would arguably be considered directly made/obtained from harvested material, if the protected variety's characteristics, as expressed in its harvested material, are still sufficiently recognizable in the resulting product. While that is of course not the case for the grapes' morphological properties, the answer may be different for their physiological or functional (*e.g.* organoleptic) traits. If, however, the harvested grapes have undergone such a high degree of processing or blending that the characteristics for which the variety they belong to has been protected have become unrecognizable or if the reason for the choice of the grapes resides more in their "*terroir*" than their genome, then it is fair to conclude that the wine has not *directly* been made/obtained from the harvested grapes. There is no one-size-fits-all answer and it is the nature of the fermentation process that will most likely determine the answer to this combined factual and legal question.

Once the material in question has been legally qualified as propagating material, harvested material or a product directly obtained from harvested material, an assessment needs to be made as to whether all statutory conditions are fulfilled to enforce the plant variety right against such material. The next section focuses primarily on the enforcement of plant variety rights against harvested material, the protection of propagating material being absolute and that of directly obtained products subject to essentially the same conditions as that of harvested material.

4 Conditional Exercise of Exclusive Rights in Respect of Harvested Material (and Products Directly Made/Obtained Therefrom)

As discussed above, the UPOV plant variety rights system only allows a right holder to enforce his exclusive rights in respect of material other than propagating material of the protected variety (i.e. harvested material and products directly obtained therefrom) if (i) such material was obtained through the unauthorized use of the material from which it was obtained (*i.e.* from propagating material or harvested material, respectively), and (ii) if the right holder did not have reasonable opportunity to exercise his right in relation to such "upstream" material. Both conditions are subject to interpretation.

4.1 *"Unauthorized Use"*

The term "use" is a catch-all reference to the activities in Article 14(1) UPOV 1991 (Article 13(2) of the EU Regulation).[30] In other words, grapes will only have been obtained through the unauthorized *use* of a vine if the alleged infringer propagated the vine, conditioned it for such propagation, offered it for sale, sold it, exported it, imported it or stocked it for any of these purposes in an unauthorized manner. The question then immediately arises when such use is *unauthorized*.

There are essentially two possible interpretations of the term "unauthorized". Under the first interpretation, the use of propagating material is only unauthorized if such authorization *was required*, *but not obtained*. In other words, in this interpretation, unauthorized use necessarily amounts to *infringing use*. Under the second interpretation, unauthorized use simply equals use *without consent*, regardless of whether such consent was required. In that case, infringing use is a form of use without consent, but does not coincide with it.

4.1.1 The UPOV Explanatory Notes on Harvested Material and the Doctrine of Exhaustion

Support for the first interpretation can arguably be found in the aforementioned UPOV Explanatory Notes on Harvested Material. According to these Notes, "[u]nauthorized use refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder's right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder's right has been granted and is in force".[31]

This passage from the Explanatory Notes, and particularly its last sentence, is ambiguous. Although its precise interpretation is unclear, it seems to be limited to the situation whereby the allegedly unauthorized use of both the propagating material and the harvested material takes place in a given country under that country's national plant variety right system. If a vine of a specific grape variety is used (*e.g.* propagated or sold for the first time) in Belgium by a third party without the consent of the proprietor of that variety and the grapes harvested from that vine are then sold in Belgium, but there is no plant variety right protection for this grape variety in Belgium, then clearly neither the propagation of the vine or the sale of the grapes will *amount to an infringement*

30 In that sense, see the Opinion of Advocate-General Saugmandsgaard Øe in case C-176/18, *CVVP /Adolfo Martinez Sanchis*, para. 40, ECLI:EU:C:2019:758.

31 UPOV Explanatory Notes on Harvested Material, p. 4.

of any plant variety right in Belgium. In terms of the UPOV Explanatory Notes on Harvested Material, no "unauthorized acts [occurred] in the territory of the member of the Union where a breeder's right has been granted and is in force".[32] However, beyond this very specific and rather obvious example, the UPOV Explanatory Notes on Harvested Material must be applied with some caution, since of course these Notes cannot be generalized without due regard for the UPOV members' existing legislation and case law.

Such a generalized application of the views expressed in the UPOV Explanatory Notes would be particularly difficult to reconcile with the principles of infringement developed under the so-called doctrine of exhaustion (better known in North America as the "first sale doctrine"),[33] which equally hinges upon the notion of "consent" or "authorization" and which, in the EU, was initially created through case law on the free movement of goods, to be later enacted in specific intellectual property laws.[34]

In terms of plant variety rights, the doctrine of exhaustion has been enshrined in Article 16 UPOV 1991. According to the first paragraph of that provision (insofar as relevant for the present article), "the breeder's right shall not extend to acts concerning any material of the protected variety … which has been sold or otherwise marketed by the breeder or *with his consent* in the territory of the Contracting Party concerned, or any material[35] derived from the said material, unless such acts (i) involve further propagation of the variety in question or (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes". The third paragraph of Article 16 UPOV 1991 clarifies that the "territory of the Contracting Party" to which the first paragraph refers can also be broader than just one member state and can thus be a group of member states, like the EU. In the EU, exhaustion is assessed regionally (EU-wide), instead of nationally or globally.[36] Depending on

32 UPOV Explanatory Notes on Harvested Material, p. 4.

33 For further reading on the principle of exhaustion under plant variety rights law, see P. de JONG, 'Uitputting in het kwekersrecht', *IRDI* (2012) 95; P.A.C.E. van der KOOIJ, 'Uitputting in het kwekersrecht', *BIE* (2011) 404.

34 For a historic overview, see e.g. I. GOVAERE, *The Use and Abuse of Intellectual Property Rights in E.C. Law* (Sweet & Maxwell, 1996) 157; T. COOK, *EU Intellectual Property Law* (OUP, 2010) 13.

35 Pursuant to Article 16(2) UPOV 1991, the term "material" refers to propagating material, harvested material and products made directly from harvested material.

36 CJEU, 16 July 1998, *Silhouette/Hartlauer* (Case C-355/96), ECLI:EU:C:1998:374.

whether the plant variety right in question is a national or an EU plant variety right, the issue of exhaustion will thus be dealt with as follows.

Let us first assume the plant variety right is a *national right*. It follows from the principle of exhaustion that – turning back to the example of the Belgian vine, but adding to it that the harvested grapes are subsequently exported to and sold in the Netherlands where national plant variety rights protection is in place – if the vine was initially placed on the Belgian market by the right holder or with his consent, the plant variety rights in respect of any subsequent activity (including the exportation to and sale in the Netherlands) other than reproduction of the variety would be exhausted. In other words: in this scenario, the right holder would *not* have the right to prevent the further commercialization of the grapes in the Netherlands and, by extension, in the whole EU, despite plant variety rights being in place there, because it was the right holder's choice to first put the vine on the market in a country (Belgium) where there was no plant variety right protection in place. In this example, the "use" (*i.e.* the placing on the market) of the vine is not "authorized" because there was no protection in Belgium, but because it was carried out with the consent or the authorization of the right holder.

Conversely, there will be *no* exhaustion if the propagating material (*i.e.* the vine) was first brought on the market in Belgium *without the consent* of the right holder, *e.g.* because a third party took cuttings from a vine in a Dutch field, transported them back to Belgium, started propagating them there, and sold the resulting vines to third parties who planted them in Belgian fields. In that scenario, the right holder *would* maintain its right to object to the importation of the grapes harvested from those vines into the Netherlands, because the vines were propagated and first placed on the market in Belgium *without his consent*. In this scenario, generalizing the rationale of the UPOV Explanatory Notes on Harvested Material in the sense that, for the grapes to be infringing in The Netherlands, plant variety rights protection should have been in place in Belgium, would be irreconcilable with CJEU case law.

In 1968 the CJEU held in the *Parke Davis* case[37] that Parke Davis was entitled to rely on its Dutch patent to prevent the importation of a medicinal product into the Netherlands, when that product had been made and first commercialized by an unauthorized third party in Italy (where, at the time, no patent protection for pharmaceutical products was available). Despite the fact that the drug could obviously not infringe any patent rights in Italy

37 CJEU, 28 February 1968, *Parke Davis/Probel*, (Case 24/67), ECLI:EU:C:1968:11. The case was assessed under the rules of competition law, rather than free movement of goods, but the underlying principle is the same.

(because there were none), the CJEU held that the Dutch patentee could oppose the importation because the initial manufacture and commercialization had taken place without its consent, i.e. authorization. Similarly, in the later *Pharmon/Hoechst* case, the CJEU confirmed that a Dutch patentee could oppose the importation into the Netherlands of a product that was covered by its patent, but had been placed on the market in the UK by a third party under a compulsory licence, because the very nature of such a licence implies that the first marketing of the patented product had not been done with the authorization of the patentee (and could thus not lead to exhaustion of the patent rights). In other words, for exhaustion to take place, the consent must have been *voluntary*.[38]

Since, as said, exhaustion in the EU is assessed on an EU-wide basis regardless of whether the plant variety right is a national or an EU plant variety right, the above conclusion equally applies to acts carried out under an *EU* plant variety right (as opposed to a national one). If the vine was first placed on the market in the EU by the right holder or with his consent, there will be exhaustion and the vine can be freely commercialized across the EU. However, if the vine was initially placed on the market outside the EU and subsequently imported into the EU, the situation is necessarily different.

Under a generalized application of the UPOV Explanatory Notes on Harvested Material, however, the importation into the EU of grapes produced, for instance, in Israel in the absence of any plant variety right would not infringe the EU plant variety right for that grape variety because the vines were grown in a country where no protection is in place. In the EU, however, such an interpretation would run counter to the principle that a national or EU plant variety right is not exhausted if the vines were initially placed on the market outside the EU. Regardless of whether such placing on the market outside the EU took place with or without the right holder's consent and *a fortiori* when the vine was reproduced without the right holder's consent, any subsequent importation into the EU of either the vines or the grapes harvested from such vines would amount to an infringement of the relevant national or EU plant variety right, simply because the first placing on the market in the EU of material protected by a plant variety right requires the prior consent of the right holder and such consent cannot simply be considered to have been implicitly given.[39] In other words, any placing on the market in the EU of propagating material first produced or marketed outside the EU or of harvested material obtained from

38 CJEU, 9 July 1985, *Pharmon/Hoechst* (Case 19/84), ECLI:EU:C:1985:304.

39 CJEU, 20 November 2001, *Zino Davidoff* (Joined cases C-414–416/99), ECLI:EU:C:2001:617.

such material, necessarily amounts to an infringement and thus "unauthorized use" of such material.

It follows that an overzealous interpretation of the UPOV Explanatory Notes on Harvested Material leads to a situation whereby the term "unauthorized" is bestowed with a different meaning depending on the specific context in which it features. While a given use of propagating material would be "unauthorized" as an absolute infringement under Article 14(1) UPOV 1991/Article 13(2) of the EU Regulation, the answer could be different for that same material in the context of Article 14(2) UPOV 1991/Article 13(3) of the EU Regulation). In the above example about the grapes from Israel, the importation into the EU of trees propagated and grown in Israel would amount to unauthorized use of those trees in the EU under Article 14(1) UPOV 1991/Article 13(2). However, if one were to follow the reasoning of a generalized application of the UPOV Explanatory Notes on Harvested Material, the importation into the EU of grapes harvested from those same trees would *not* be an actionable infringement under Article 14(2) UPOV 1991/Article 13(3) of the EU Regulation because there was allegedly *no* unauthorized use of those same trees in Israel (because they were not protected there). That is of course contradictory.

It is therefore submitted that Article 14(2) UPOV 1991/Article 13(3) of the EU Regulation (on the conditional protection of harvested material) should be read in conjunction with the generally established principles of exhaustion. This also appears to have been both the UPOV 1991 and the EU legislator's wish, since the introductory wording of both Article 14(2) UPOV 1991 ("*Subject to Article … 16*") and Article 13(2) of the EU Regulation ("*Without prejudice to the provisions of Article … 16*") emphasize this point. Any interpretation according to which the term "unauthorized" in the provisions on harvested material has a different meaning than under the provisions on propagating material, would thus seem to run counter to UPOV 1991 itself, as is corroborated by the latter's legislative history. It follows from that history that the cumulative enforcement conditions in relation to harvested material were introduced to avoid "double dipping" by the right holder, *i.e.* that he would be able to enforce his rights twice: a first time against the propagating material and a second time against its harvest. The underlying idea appears to have been that if the right holder had unconditionally authorized a third party to use his propagating material, he could not prevent the further production or commercialization by that third party of the resulting harvested material.

This essentially boils down to an application of the very same principle as the one advocated by the aforementioned principle of exhaustion, thus making it clear that the reference to "unauthorized use" in Article 14(2) UPOV 1991 (Article 13(3) of the EU Regulation) was meant to be a concrete reflection of

the same terms (and their content) used in Article 16 UPOV 1991/EU Regulation in respect of harvested material. In other words: the term "unauthorized use" under Article 13(3) of the EU Regulation (Article 14(2) UPOV 1991) cannot have a different meaning than the one that was given to it under Article 16 UPOV 1991/the EU Regulation. The original wording of Article 14(2) UPOV 1991, in the Basic Proposal for UPOV 1991 (where it was still Article 14(1)(b)), was: "…whose use, for the purpose of obtaining harvested material, was not authorized by the breeder".[40] This wording was later substituted by "…unauthorized use of propagating material …", but it strengthens the above interpretation that what was meant was merely a use which is not authorized by the right holder. In the minutes of the UPOV 1991 conference discussions, no reference is made to an additional limitation that plant variety right protection must be in place in the country where the propagating material is used in order for the right holder to be able to act against the harvested material. There is no indication whatsoever that "unauthorized" in the context of harvested material should be interpreted as infringing use.[41]

In view of the foregoing, the application of the UPOV Explanatory Notes on Harvested Material should necessarily be limited to single country infringement situations, *i.e.* where both the allegedly unauthorized use of the propagating material and the allegedly infringing use of the harvested material took place in the same country. If no plant variety right protection subsists in that country, neither the propagation, placing on the market or any other reserved activity carried out in relation to the propagating material will infringe any plant variety right because there is no such right. As a result, it is equally not an infringement to, for example, sell the harvested material in that same country, because there will not have been any unauthorized use of the propagating material. However, beyond that example, the UPOV Explanatory Notes on Harvested Material should be put into perspective. First of all, the perspective that they are not legally binding.[42] Secondly, the perspective that, according to the express introductory wording of Article 14(2) UPOV 1991/Article 13(3) of the EU Regulation, the rules on harvested material should in any event be reconciled

40 The text of the Basic Proposal is available on the UPOV website, at https://www.upov.int/edocs/mdocs/upov/en/upov_dc_91/upov_dc_91_3.pdf.

41 For a further discussion on this point, see T. OVERDIJK, 'Het recht van de kweker op oogstmateriaal van zijn ras: wat heeft het ons gebracht?', *BIE* (2017) (special edition) 23, at 26.

42 In the Preamble of the UPOV Note it is provided that: "*The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned*".

with the principles of exhaustion. And finally, in the same vein, the perspective that UPOV explanatory notes are issued at the international meta-level and are hence not automatically applicable in each and every jurisdiction without taking into account considerations of national or regional law.

4.1.2 Another Layer of Complexity: the CJEU *Nadorcott* Decision

As if the above is not complicated enough, another layer of complexity (at the EU level) was recently added to the discussion by the aforementioned CJEU *Nadorcott* ruling of 19 December 2019,[43] in which the highest EU court seems to have endorsed a generalized application of the UPOV Explanatory Notes on Harvested Material, by equating "unauthorized use" to "infringing use".

In the *Nadorcott* case, the alleged infringer, a Spanish farmer, had purchased a number of mandarin trees from a nursery who had (re)produced the trees without the consent of the right holder. Some trees had been propagated by the nursery and were subsequently purchased and planted by Mr Martinez *after* the application for the EU plant variety right for Nadorcott, but *before* its *grant*. Other trees were propagated, purchased and planted *after grant*. The mandarins harvested from the thus planted trees were also sold after grant. The question arose whether, by commercializing these mandarins of the Nadorcott variety, Mr Martinez violated the Nadorcott plant variety right under article 13(3) of the EU Regulation. To answer that question, the CJEU had to address the issue of whether the propagation and placing on the market of Nadorcott trees by the nursery amounted to "unauthorized use" of propagating material within the meaning of article 13(3) of the EU Regulation.

According to the CJEU, this is clearly the case for those mandarins that were harvested from trees that had been propagated and sold by the nursery to Mr Martinez *after the grant* of the Nadorcott plant variety right.[44] This finding is in

43 CJEU, 19 December 2019, *CVVP/Adolfo Martinez Sanchis* (Case C-176/18), ECLI:EU:C:2019:1131.

44 The court stated that "*…following the grant of Community plant variety rights, effecting one of the unauthorised acts referred to in Article 13(2) of* [*the EU*] *Regulation … in respect of the protected plant variety constitutes an 'unauthorised use' within the meaning of Article 13(3) of* [*the EU*] *Regulation . … Thus, in accordance with Article 94(1)(a) of that regulation, any person who, in those circumstances, effects one of those acts may be sued by the right holder to enjoin such infringement or to pay reasonable compensation or both*" (para 41 of the decision). As a result, "*as regards the plants of the protected plant variety that were propagated and sold to Mr Martínez Sanchís by a nursery after the grant of the Community plant variety right, … both the propagation and sale of such plants may constitute such unauthorised use, since, under Article 13(2)(c) and (d) of* [*the EU*] *Regulation …, offering for sale and selling or other marketing of the fruit of a protected variety is subject to the prior authorisation of the holder of the Community plant variety right. … In those circumstances, the fruit of the plants*

line with the CJEU's earlier case law in the *Kanzi*-case[45] where it was held – in the same spirit of the *Parke Davis* and *Pharmon/Hoechst* decisions discussed above – that, since trees of the *Nicoter* apple variety were placed on the market by a licensee in contravention of the terms of his license agreement, the sale at a Belgian market of the apples harvested from those trees was infringing under Article 13(3) of the EU Regulation because, in view of the said contravention, the trees were considered to have been placed on the market *without* the right holder's *consent*. In other words, there had been "unauthorized use" of the trees. Hence there was no exhaustion and therefore the plant variety right had been infringed.

However, according to the CJEU that conclusion does *not* apply to the mandarins harvested from trees propagated and sold by the nursery to Mr Martinez *before grant*, *i.e.* between the dates of application and grant of the EU plant variety right.[46]

The reasoning of the court on that point is very succinct and is exclusively related to the interpretation of Article 95 of the EU Regulation which deals with the provisional protection afforded to plant variety right applications (*i.e.* prior to their grant) and implemented Article 13 UPOV 1991 into EU law. According to this provision "the holder may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto". The CJEU offsets this provision against Article 94(1) of the EU Regulation pursuant to which "whoseoever (a) effects one of the acts set out in Article 13 (2) without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted … may be sued by the holder to enjoin such infringement or to pay reasonable compensation or both". The CJEU concludes from the combined reading of these provisions that, contrary to the situation under Article 94(1) which allows the owner of a *granted* plant variety right to also seek an injunction ("to enjoin") against any alleged infringement (in addition to reasonable compensation), Article 95 merely allows the owner of a plant

of the protected plant variety referred to in the previous paragraph that was harvested by Mr Martínez Sanchís may be regarded as having been obtained through the unauthorised use of variety constituents of a protected variety within the meaning of Article 13(3) of [*the EU*] *Regulation*" (paras 47–48 of the decision).

45 CJEU, 20 October 2011, *Greenstar-Kanzi Europe/Hustin and Goossens* (Case C-140/10), ECLI:EU:C:2011:677.

46 CJEU, 19 December 2019, *CVVP/Adolfo Martinez Sanchis* (Case C-176/18), paras 42–46, ECLI:EU:C:2019:1131.

variety right *application* to claim a reasonable compensation for such infringement. That conclusion is of course correct.

However, the CJEU then deduces from this conclusion that, under the mechanism of provisional protection, no "prior authorization" from the right holder is *required* so that none of the activities of Article 13(2) of the EU Regulation may be considered to have been "unauthorized" if they are performed by a third party not having the right holder's consent during the period of provisional protection.[47] Although strictly speaking the statement of the CJEU in this context is limited to the specific situation of provisional protection under Article 95 of the EU Regulation, this effectively amounts to equating/limiting "unauthorized use" to "infringing use". It is submitted, with respect, that this reasoning is irreconcilable with both the EU Regulation itself and with the CJEU's own case law.

First, it seems based on the premise that Article 95 of the EU Regulation contains some form of limitation to the exclusive substantive rights of the plant variety right (application) holder. It does not. Article 95 is part of Part Six of the EU Regulation, which is entitled "Civil law claims, infringements, jurisdiction", whereas Article 13 (which is itself entitled "Rights of the holder of a Community plant variety right and prohibited acts") is part of Part Two on "Substantive Law". Article 95, which merely deals with the type of *procedural remedies* available to the (application) right holder, can thus never impinge on the *substance* of the holder's rights, which are enshrined in Article 13 and which presuppose the existence of a prior consent/authorization. This is even expressly stated in Article 13(2) of the EU Regulation (to which Article 95 implicitly, but clearly refers), where it says that "…the following acts … shall require *the authorization* of the holder" and that "the holder may make *his authorization* subject to conditions and limitations". The mere fact that the only remedy available to the holder of a plant variety right application is a claim for

47 Paras 43–44 of the decision: "*43. In so far as Article 95 of that regulation refers only to the possibility for the holder of the Community plant variety right to claim reasonable compensation, it must be held that it does not confer on him or her further rights, such as, inter alia, the right to authorise or prohibit the use of variety constituents of that plant variety for the period stated in Article 95. That protection mechanism is therefore different from that emanating under the prior authorisation mechanism which applies when the acts referred to in Article 13(2) of Regulation No 2100/94 are effected after Community protection has been granted. 44. It follows that, as regards the period of protection referred to in Article 95 of Regulation No 2100/94, the holder of the Community plant variety right may not prohibit performance of any of the acts referred to in Article 13(2) of that regulation on the ground that he or she did not provide authorisation. Therefore, performance of such acts does not constitute 'unauthorised use' within the meaning of Article 13(3) of that regulation*".

reasonable compensation, does not mean that the performance of the activities listed in Article 13(2) of the EU Regulation (*i.e.* an "act that would he would be prohibited from performing subsequent thereto", to put it in terms of Article 95 itself) would suddenly no longer prerequire the consent or authorization of the right holder. On the contrary, the fact that a reasonable compensation is due, necessarily implies that consent was required.

Second, although the CJEU itself does not refer to the UPOV Explanatory Notes on Harvested Material, it is clear that these Notes have predominantly served as inspiration to the court since the CJEU's findings are merely a summary of the more elaborated Opinion of Advocate-General Saugmandsgaard Øe, who stated, in reference to the said Notes, that "the interpretation that I advocate is, moreover, supported by certain explanatory documents adopted by the UPOV Council" and that "the UPOV Council states that the performance of unauthorized acts implies that the breeder's right 'has been granted and is in force".[48] For the reasons outlined above, any attempt to limit "unauthorized

48 Opinion of Advocate-General Saugmandsgaard Øe in Case C-176/18, para 54. Interestingly, in addition to these UPOV Explanatory Notes on Harvested Material (the generalized interpretation of which is contestable, as discussed earlier), the Advocate-General finds justification for his restrictive interpretation of Article 95 in the principles of equity (see paras. 53 and 56–58 of his Opinion). First, the Advocate-General makes a comparison between plant variety right law and patent law. According to the Advocate-General, it is only right for the "scope" (sic) of provisional protection under plant variety right law to be different from that of definitive protection because, contrary to patent law (reference is made to Article 63(1) of the European Patent Convention), the term of protection of an EU plant variety right applies only from the date of grant (as opposed to from the date of application in patent law). This comment is remarkable because it seems to be based on the (wrong) premise that in patent law the rights attached to a granted patent and a patent application are the same. This is not the case: just like in plant variety right law, a patentee will have the right to seek injunctions and claim damages, whereas a patent applicant's remedies are most often limited to claiming a form of reasonable compensation only. Second, the Advocate-General, while admitting that "*…protection may, admittedly, be ineffective if the breeder cannot assert his rights against* [*the nursery*]", stated that although the provisional protection mechanism of Article 95 of the EU Regulation is aimed at encouraging the breeder to make the variety constituents available to third parties following the publication of the application for a Community plant variety right and, if appropriate, to make a commercial profit, "*there is no reason to consider that such a scheme … has the purpose of guaranteeing that the latter does not incur any risk when he chooses to do so*". However, that is exactly the point: in the present case the owner of the variety did *not* choose to bring these mandarin trees on the market; someone else did without his consent. This is very different from the existing CJEU case law where such risk was limited to situations where the right holder *voluntarily* chose to place his products on the market in a country where no protection was in place (see CJEU, *Merck/Stephar*, 14 July 1981, Case 187/80, ECLI:EU:C:1981:180, and all subsequent applications thereof). By seemingly disregarding these principles, it is highly questionable whether

use" to "infringing use" under Article 14(2) UPOV 1991/Article 13(3) of the EU Regulation, seems irreconcilable both with the interpretation given to the same term under the general (absolute) rule of infringement enshrined in Article 14(1) UPOV 1991/Article 13(2) of the EU Regulation, and with the CJEU's own case law on exhaustion of intellectual property rights.

In sum, a tree or vine propagated and placed on the market without the consent of the plant variety right owner should always be a form of "unauthorized use" of that tree or vine. The fact that such propagation took place during the period of provisional protection (or even before that period, by analogy to the basic *Parke Davis* and *Pharmon/Hoechst* principles and all other CJEU case law building on them) does not alter that finding. The only thing it alters is that, contrary to the situation after grant, no injunction is available against this unauthorized use, but only a reasonable compensation.

4.2 *Reasonable Opportunity to Exercise Plant Variety Rights against Propagating Material Further Upstream*

As stated earlier, the second requirement that needs to be met under article 14(2) UPOV 1991/Article 13(3) of the EU Regulation is that the right holder has not already had a "reasonable opportunity" to first "exercise his rights" against the vines from which the grapes were harvested. Again, very little guidance is available. What is "reasonable" will depend on the specific circumstances of each case. However, a number of yardsticks can be derived from case law and literature.

First, the reasonable opportunity to exercise one's right obviously depends on the existence of such a right. In the German *Melanie* case,[49] harvested material of the *calluna vulgaris* variety "Melanie" was imported into Germany, originating from France where it had been propagated and planted without the consent of the right holder. The German Bundesgerichtshof ruled that the holder of the German plant variety right for the variety Melanie had not had an opportunity to enforce his rights at an earlier stage, as the plant material was used in France, and he could not act against acts performed in France (where no plant variety right protection was available) on the basis of his German plant variety right.

More generally, it is submitted that, depending on the territorial scope of the plant variety right, the right holder only has the right to exercise its right

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the interpretation in the *Nadorcott* case that Article 95 effectively limits the substantive rights of the breeder under Article 13 of the EU Regulation, still meets the conditions of UPOV 1991 or TRIPS.

49 Bundesgerichtshof, 14 February 2006, *GRUR* 2006, 575.

within that territory. This is confirmed by the aforementioned UPOV Explanatory Notes which state that: "The term "his right", in Article 14(2) of the 1991 Act, relates to the breeder's right in the territory concerned (...): a breeder can only exercise his right in that territory. Thus, "exercise his right" in relation to the propagating material means to exercise his right in relation to the propagating material in the territory concerned".[50] As a result, if, in the EU, the issue arises whether the sale of grapes infringes an EU plant variety right under Article 13(3) of the EU Regulation, the question whether the right holder had reasonable opportunity to exercise its rights against the vines from which grapes were harvested must necessarily be answered in light of the territorial scope of the EU plant variety right in question. In line with the rules on EU regional exhaustion set out earlier, an EU plant variety right holder cannot be considered to have had reasonable opportunity to exercise his EU plant variety right against those vines where those vines were located *outside* the EU, since the territorial scope of the EU plant variety right does not cover non-EU countries. This is all the more so since neither Article 14(2) UPOV 1991 nor Article 13(3) of the EU Regulation can be interpreted as imposing an obligation upon the owner of a variety to actively apply for plant variety rights protection across the globe. That would not be a reasonable requirement and could hence not amount to *reasonable* opportunity.

Secondly, the requirement that the right holder must have had a "reasonable opportunity" necessarily implies, as is confirmed in literature,[51] that he had knowledge of the alleged unauthorized use of the propagating material. Therefore, a right holder seeking an injunction against, for example, the commercialization of grapes of his protected variety, has not had a reasonable chance to enforce his rights against the vines in question, if he only became aware of the existence of the grapes at the time of their importation, and was not earlier aware of the use of the vine.

Finally, the notion "exercise his right" seems to presuppose the availability of useful enforcement tools. Thus, the mere availability of claiming a reasonable compensation under the provisional protection system of Article 95 of the EU Regulation (Article 13 UPOV 1991) discussed earlier should not be considered as a possibility to exercise one's right under Article 14(2) UPOV 1991/ Article 13(3) of the EU Regulation, because the reasonable compensation can only be claimed retroactively following the grant of the EU plant variety right. This follows from the use of the term "holder" in Articles 13 UPOV 1991 and 95

50 UPOV Explanatory Notes on Harvested Material, § 13.

51 G. WÜRTENBERGER et al., *EU Plant Variety Protection* (Oxford, OUP, 2015) § 6.13.

of the EU Regulation ("The *holder* may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto"), who is defined in Article 13(2) of the EU Regulation as "the holder or holders of the Community plant variety right".[52] The owner of a mere application is therefore not a "holder" in the sense of that provision.

5 Conclusion

When the production of wine involves the use of varieties that are protected by a plant variety right under the UPOV 1991 system, the plant variety right will protect its proprietor (and licensees) against the unauthorized use of the vines, the grapes and – in some cases – the wine.

Whether the scope of the plant variety right extends to wine will depend on a number of factors and, in particular, on the impact of the fermentation process and the use of blends on the final product as compared to the juice that is obtained from the first pressing. What is certain, however, is that even if the wine if protected, its protection is only conditional, as is that of the grapes it was obtained from.

For the plant variety right to be successfully enforced against the production or commercialization of grapes obtained from a protected vine, the law requires that there has been "unauthorized use" of that vine and that the owner of the variety did nothing about it while he could. The same applies to wine: it must be the result of the unauthorized use of the grapes (which, in turn, requires the unauthorized use of the vine) against which no action was reasonably possible further upstream.

The pivotal question here is of course: when was the use of vines (or grapes) "unauthorized"? If it was authorized, the plant variety right cannot be enforced against either and the second cumulative condition (*i.e.* whether the right holder was reasonably able to exercise his rights further upstream) does not even require any separate assessment.

Unfortunately, the interpretation of the term "unauthorized" is unclear. The (non-binding) UPOV Explanatory Note on Harvested Material suggests that use is only unauthorized if it is infringing, *i.e.* if a plant variety right is in place

52 The term "holder" is not defined in UPOV 1991 (which mostly uses "breeder" instead), but Article 13 UPOV 1991 refers to "*the holder of a breeder's right*". The effect is therefore the same as in the EU Regulation.

and can be enforced in the country of use. Recent case law from the CJEU refers to this Note, thus seemingly endorsing the notion of infringing use, albeit in the limited context of the mechanism of provisional protection.

This chapter submitts that, in the EU, such an interpretation runs counter to existing CJEU case law in the area of free movement of goods and the exhaustion of intellectual property rights, whereby unauthorized use simply equals use without consent. Infringing use is a form of use without consent, but use without consent is not limited to infringing use.

The situation in the EU after the *Nadorcott* ruling[53] is undesirable. Not only does it create legal uncertainty by effectively annihilating the value of the provisional protection of a plant variety right application; from a practical point of view, the decision can also be seen as an incentive for rogue third parties to start propagating vines during the period of provisional protection, because their use and hence also the use of their harvest cannot be enjoined after the grant of the plant variety right. Breeders will thus most likely delay the making available of their varieties until the plant variety right has been granted. A delayed access to new germplasm is not to the benefit of good faith growers, wine producers, or society at large.

Because the *Nadorcott* decision, like all CJEU preliminary rulings, only binds the referring court, it will be interesting to see how other European courts (and courts outside Europe) cope with the decision, particularly since the decision ensued from a rather peculiar set of questions from the Spanish Supreme Court and was issued in the very specific context of the provisional protection mechanism.

In the meanwhile, it will hopefully serve as an incentive for UPOV to clarify its Explanatory Notes on Harvested Material.

53 CJEU, 19 December 2019, *CVVP/Adolfo Martinez Sanchis* (Case C-176/18), ECLI:EU:C:2019:1131.

CHAPTER 18

Trade Dress Regulation and Protection Rules Applying to Wine in Turkey

Burak Keskin

1 Introduction

Located on Asia minor, Turkey is one of the oldest lands where vine has been grown and wine has been produced. Historians place the first evidence of viticulture and wine making in Anatolia 7,000 years ago. However, this long wine history has not always been favorable to foster wine growing and production. Turkey's wine history seems to reflect the prevailing politics and social environment of each period.

As a predominantly Muslim country, Turkey's wine production and consumption are not particularly aligned with its aptitude to the production of wine, both in terms of climate and soil. While wine production is a revenue source for many people in rural areas, its consumption is reserved to a narrower portion of the Turkish population, who adhere to a more liberal interpretation of the dietary regimen and do not exclude wine from their dining tables. Although any religious ground may not be reflected onto legal instruments in a secular country like Turkey, it may not be wrong to guess that the religion may serve as an a priori justification of restrictive wine regulation.

In the legislative or regulatory rationale, it is often hard to draw the line between the public health, consumer market, competition regulation or a traditional approach that is fed by religious influences, especially in times when the political power in control of the legislation or regulation derives from conservative circles and the protection of moral and religious values are part of daily political and public discourse.

Notwithstanding, our aim is to provide a comprehensive and detailed review as for where Turkey stands in terms of wine regulation and protection. This chapter examines the wine regulation in Turkey with a specific focus on trade dress as the law stands at the present time. It also addresses non-restrictive trade dress regulation; in other words, the rules pertaining to the protection of trade dress concerning wine in Turkey. We will first lay down an outline

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of the public policy rules in terms of market, consumer health and media and communications regulation followed by the second and third sections on trade dress regulation and protection, respectively. In the first section, the organizational structure of public bodies and their area of competencies will be outlined, along with a summary of the regulatory rules. In the second and third sections, trade dress will be elaborated as to the restrictions applicable and the legal instruments available to protect it from competitors.

2 The Main Regulatory Bodies in Wine Regulation

Similar to any regulatory activity, the regulation of the wine industry and market, its oversight by the public authorities, follow-up of the procedures set forth in the regulation and the administrative workload is ensured and organized through different public bodies. In Turkey, these duties are exercised by the Alcohol Department of the Ministry of Agriculture and Forestry, General Directorate of Public Health of the Ministry of Health and General Directorate of Consumer Protection and Market Supervision of the Ministry of Trade under the Turkish Republic's State legal personality and Radio and Television Supreme Council which has its own legal personality. It must also be noted that wine regulation is not spared to these authorities. Wine is also specifically addressed by tax laws and regulations in Turkey, which are administered by the Turkish Revenue Administration. This section, as well as the entire chapter, excludes taxation of wine.

In this section, their duties and regulatory rules will be outlined and a synchronic picture of the Turkish wine regulation in the fields of market regulation, public health oversight and media and communication will be elaborated.

2.1 *Market Regulation: Alcohol Department of the Ministry of Agriculture and Forestry under the Ministry of Agriculture and Forestry*

The primary regulatory body in the field of wine law is the Tobacco and Alcohol Department (the "Department") under the Ministry of Agriculture and Forestry (the "Ministry").

The Department sets policy goals and administers their implementation with a view to providing for a safe, transparent and competitive market for tobacco and alcoholic beverages. It also assists in consumer protection measures in line with the international conventions to which Turkey is a party in this field. Finally, it aims to augment Turkey's share in the international tobacco and alcoholic beverages supply and strengthen the position of locally

produced tobacco and alcoholic beverages in Turkey in substitution for exported products.[1]

The Department is split into four sub-departments, namely for (i) tobacco and tobacco products, (ii) alcohol and alcoholic beverages, (iii) market regulation and supervision, (iv) administrative affairs and coordination. The second sub-department is responsible for alcohol and alcoholic beverages markets. However, the sub-department handles these two markets separately.[2]

The duties of the sub-department in the field of the alcohol market cover domestic and international trade, denaturation, packaging, distribution, storing for production purposes, stocking, recycling, processing, establishment, authorization, amendment and shutdown of production facilities and all kinds of authorizations of transfer transactions and the implementation of the Law No. 4250 on the Monopoly of Alcohol and Alcoholic Beverages (the "Law no. 4250") and of the Law no. 4733 on the Regulation of Tobacco, Tobacco Products and Alcohol Market (the "Law no. 4733") and the technical control of these activities, for ethyl alcohol and methanol sectors.[3]

Similarly, the duties of the sub-department in the field of the alcoholic beverages market regard the domestic and international trade, distribution, storing, recycling, establishment, amendment and shutdown of production facilities and all kinds of authorization transfer transactions and the implementation of the Law no. 4250 and of the Law no. 4733 and the technical control of these activities for alcoholic beverages sector, including wine.[4]

In fact, the Department, which is devoid of legal personality and is but an office under the Ministry, has been the surviving authority after the abolishment of the Tobacco and Alcohol Market Regulatory Authority ("Former Authority") with Article 81 the Decree-Law No. 696 dated November 20, 2017 published in the Official Gazette dated December 24,2017 and no. 30280 ("Decree-Law no. 696"). The Decree-Law No. 696 had been adopted by the

1 Ministry of Agriculture and Forestry, Tobacco and Alcohol Department <www.tarimorman.gov.tr/TADB/Menu/21/Misyon-_-Vizyon> accessed 31 January 2020.

2 Ministry of Agriculture and Forestry, Tobacco and Alcohol Department, Alcohol and Alcoholic Beverages Sub-Department, www.tarimorman.gov.tr/TADB/Menu/23/Alkol-Ve-Alkollu-Ickiler-Daire-Baskanligi|> accessed 27 April 2020.

3 Ministry of Agriculture and Forestry, Tobacco and Alcohol Department, Alcohol and Alcoholic Beverages Sub-Department, www.tarimorman.gov.tr/TADB/Menu/23/Alkol-Ve-Alkollu-Ickiler-Daire-Baskanligi|> accessed 27 April 2020.

4 Ministry of Agriculture and Forestry, Tobacco and Alcohol Department, Alcohol and Alcoholic Beverages Sub-Department, www.tarimorman.gov.tr/TADB/Menu/23/Alkol-Ve-Alkollu-Ickiler-Daire-Baskanligi|> accessed 27 April 2020.

Council of Ministers during the State of Emergency[5] which lasted for a period of 24 months (3 months initially and extended 7 times for 3-monthly periods) between July 21, 2016 and July 19, 2018 following the *coup* attempt of July 15, 2016.[6] The Decree-Law no. 696 later gained statutory status by being confirmed with Article 77 of the Law no. 7079 dated February 1, 2018 and published in the Official Gazette of March 1, 2018 (bis) and no. 30354. Article 81 of the Decree-Law No. 696, which was the base provision abolishing the Former Authority has been copied as the Provisional Article 7 to the Law No. 4733 and the title of the Law no. 4733 has been changed from "Law No. 4733 on the Organization and Duties of the Tobacco and Alcohol Market Regulatory Authority" into "Law No. 4733 on the Regulation of Tobacco, Tobacco Products and Alcohol Market". Additionally, all references to the Former Authority within the Turkish legal landscape are either to the Ministry of Forestry and Agriculture or to the Ministry of Health depending on their fields of activity and competence.[7] As such, the new regulatory body (i.e. the Department) is now devoid of legal personality as opposed to the Former Authority which was a standalone legal entity under the repealed legislation. It seems that so far the ultimate legal entities responsible for the tasks otherwise previously handled by the Department are the Ministry of Forestry and Agriculture (as of the time this article was written), except in

5 The State of Emergency started with the Council of Ministers decision dated July 20, 2016 and no. 2016/9064, published in the Official Gazette of July 21, 2016 and no. 29777; which itself was approved by the Turkish Parliament decision dated July 21, 2016 and no 1116, published in the Official Gazette of July 22, 2016 and no. 29778. Subsequent Council of Ministers extension decisions have further been approved by the Turkish Parliament decisions, respectively:
- 1st extension with the parliament decision no. 1130 and dated October 11, 2016 (Official Gazette publication date: October 13, 2016 and no. 29856),
- 2nd extension with the parliament decision no. 1134 and dated January 3, 2017 (Official Gazette publication date: January 5, 2017 and no. 29939);
- 3rd extension with the parliament decision no. 1139 and dated April 18, 2017 (Official Gazette publication date: April 18, 2017 (bis) and no. 30042);
- 4th extension with the parliament decision no. 1154 and dated July 17, 2017 (Official Gazette Publication date: July 18, 2017 (bis) and no. 30127);
- 5th extension with the parliament decision no. 1165 and dated October 17, 2017 (Official Gazette publication date: October 18, 2017 (bis) and no. 30214);
- 6th extension with the parliament decision no. 1178 and dated January 18, 2018 (Official Gazette publication date: January 18, 2018 (bis) and no. 30305);
- 7th extension with the parliament decision no. 1182 and dated April 28, 2018 (Official Gazette publication date: April 18, 2018 (bis) and no. 30395).

6 The state of emergency had been extended with the following acts.

7 Additional Article 4 of the Law no. 7079.

those areas explicitly regulated as entering into the field of competence of the Ministry of Health.

While it is unclear why the Former Authority has been stripped of its legal personality and transformed into the Department; this change happens to be one of a series of similar regulatory shifts that has been the trend within the aforementioned 24-month State of Emergency. Not only had the Former Authority lost its legal personality, but also other independent public authorities lost their legal personality or were subjected to a statutory void as to their founding law within this period. For instance, a great deal of the articles of the Law No. 5000 on the Establishment and Functions of the Turkish Patent and Trademark Office ("TURKPATENT"), were revoked by Article 86 of the Decree-Law No. 703 bringing amendments to certain laws and decree-laws with the aim of harmonizing them with the recent constitutional changes published in the Official Gazette dated July 9, 2018 (quater) and no. 30473 ("Decree-Law no. 703"). This is also particularly important for the matters discussed in this chapter, for a good number of provisions regarding the protection of intellectual property of wine producers, sellers or marketers are administered by TURKPATENT. Differently from the Former Authority, the legal personality of TURKPATENT has later been restored and it continued as an independent legal authority and entity by virtue of Articles 358 to 383 of the Presidential Decree No. 4 dated July 15, 2018 published in the Official Gazette dated July 15, 2018 and no. 30479. The decree re-establishes the Turkish Patent and Trademark Office, and the office's legal personality and private budget remained the same. Accordingly, the name of the office remains unchanged ("Turkish Patent and Trademark Office"), with the formal abbreviation "TÜRKPATENT", and the office is still a separate legal entity.[8]

2.2 *The Ministry of Health*

2.2.1 Duties of the Ministry of Health Deriving from the Tobacco and Alcohol Market Regulation

As addressed in the previous section 2.1., the duties of the Former Authority are now shared between the Ministry of Agriculture and Forestry and the Ministry of Health. It is not totally clear which duties fall on the Ministry of Health and which ones fall on the Department. Thus, the question of sharing duties and

8 Uğur Aktekin, 'Turkey: New Presidential Government System Brings Changes to Patent and Trademark Office's Legal Framework', *WTR* (23 July 2018).

powers is expected to be illuminated through the actual practice of these ministries in the coming years.

2.2.2 Duties of the Ministry of Health Deriving from Public Health Protection Regulation

Apart from the undertaking of the duties of the Former Authority, it is appropriate to point out that protection of public health through alcohol control is among the general duties of the Ministry of Health, within which the main department responsible is the General Directorate of Public Health.[9]

To this effect, it must be stressed that the old-dated and still valid applicable Law No. 1593 on the Protection of Public Health dated April 24, 1930 published in the Official Gazette dated May 6, 1930 and no. 1489 ("Law no. 1593") entrusts the Ministry of Health with the control and supervision over food and beverage healthiness. The By-Law regarding the special qualities of foodstuffs and other goods and disposables in relation to public health (the "By-Law"),[10] which is based upon Article 181 of the Law No. 1593 includes provisions under Articles 483 to 507, as to the definitions of wine (in general) and types of wine, technical qualities of wine in terms of ingredients, labeling of wine bottles and the conditions under which wine is bottled, sold or served to the public. Wine produced, bottled, sold or served in derogation to provisions of the By-Law are punishable by prison of 3 to 6 months according to the severity of the derogation by virtue of the penal provisions of the Law No. 1593.[11]

2.3 *Regulation of the Turkish Codex Alimentarius of the Ministry of Forestry and Agriculture*

Turkey has been a member of the Codex Alimentarius Commission ("CAC") since October 1, 1963 with the appointment of the General Directorate of Food and Control ("GDFC")[12] to serve as the contact point at CAC and to represent Turkey in CAC meetings. The GDFC is also the coordinator with other regulatory and legislative units in Turkey and helps to form the opinions of the country

9 Ministry of Health, '2019-2023 Strategic Plan', <dosyamerkez.saglik.gov.tr/Eklenti/35748,stratejikplan2019-2023pdf.pdf?0&_tag1=3749C905F87D5A635913739D6F85458866357B97> accessed 31 January 2020.

10 Official Gazette no. 8236 (October 18, 1952).

11 Articles 708 to 713 of the By-Law and Article 297 of the Law no. 1593.

12 FAO, 'Codex Alimentarius – About Codex – Members – Turkey' <www.fao.org/fao-who-codexalimentarius/about-codex/members/detail/en/c/15596/> accessed 31 January 2020.

within CAC committees. Codex Alimentarius norms serve as the basis for the Turkish national regulations.[13]

The Turkish Codex Alimentarius ("TCA") is mainly composed of regulations for as far as horizontal products and more general topics are concerned (such as food additives, methods of sampling and analysis, food contact materials, contaminants, food hygiene and microbiology), and communiqués on specific and vertical products (such as alcoholic drinks, milk and milk products, meat and meat products, etc.). The regulations and communiqués are based upon the Law no. 5996 on Veterinary Services, Phytosanitary, Food and Feed[14] ("Law no. 5996").[15]

The communiqués regarding wine are the Turkish Codex Alimentarius Wine Communiqué ("TCA Wine Communiqué") published on February 4, 2009[16] and the Turkish Codex Alimentarius Communiqué on Aromatized Wine, Beverages based on Aromatized Wine, and Aromatized Wine Cocktail ("TCA Aromatized Wine Communiqué") published on July 7, 2006.[17] The TCA Wine Communiqué sets rules regarding the technical specifications, additives, contaminants, pesticide residues and hygiene.[18] In addition and more importantly, Article 10 of the TCA Wine Communiqué sets out – the packaging, labeling and affixing of marks on wine, which are applicable on top of the Turkish Codex Alimentarius Regulation on Food Labeling and Consumer Information ("TCA Labeling and Information Regulation"),[19] and so does Article 15 of the TCA Aromatized Wine Communiqué on aromatized wine products.

2.4 *Ministry of Trade, General Directorate of Consumer Protection and Market Supervision, Advertisement Board*

The Advertisement Board of the General Directorate of Consumer Protection and Market Supervision under the Ministry of Trade (the "Advertisement Board") is responsible for determining the principles governing commercial advertisements, adopting regulations for the purpose of protecting consumers against unfair commercial practices, to run examinations and controls if

13 Ministry of Agriculture and Forestry, 'Kodeks Alimentarius', <www.tarimorman.gov.tr/GKGM/Belgeler/DB_Gida_Isletmeleri/kodeks_alimentarius_komisyonu.pdf> accessed 31 January 2020.

14 Official Gazette no. 27610 (June 13, 2010).

15 FAO, <www.fao.org/fileadmin/user_upload/codexalimentarius/CODEX50/presentation_TURKEY.pdf> accessed 31 January 2020.

16 Official Gazette no. 27131 (February 4, 2009).

17 Official Gazette no. 26221 (July 7, 2006).

18 Articles 4 to 9 of the TCA Wine Communiqué.

19 Official Gazette no. 29960 (bis) (January 26, 2017).

necessary and render administrative sanctions according to the outcome of the examinations and controls.[20] It has its legislative basis thanks to Article 63 of the Consumer Protection Law No. 6502 and is based on the Advertisement Board Regulation published in the Official Gazette dated July 3, 2014 and no. 29049.

The main regulation within the Turkish advertisement law landscape is the Regulation on Commercial Advertisement and Unfair Commercial Practices published on January 10, 2015 ("Advertisement Regulation").[21] However, this regulation contends itself with only referring to the "specific regulation" of alcoholic beverages under its Article 26.[22] In fact, it is provided in Article 26 of the Advertisement Regulation that "*Advertisements of those goods and services which have their own specific provisions such as drugs, human medicinal products, medical devices, health services, foods, supplemental foods, cosmetics and hygiene products, tobacco products and alcoholic beverages must comply with the other rules regarding their advertisement and promotion in their respective regulation*".

By this reference, the Advertisement Board is directed towards the Department (see section 2.1 above) regulation to apply in addition to the general provisions of the Advertisement Regulation. Since advertisement restrictions occupy an important portion of the regulatory restrictive rules concerning wine, the Advertisement Board decisions offer a large source for assessing the administrative approach currently in place and the pressure for tighter regulation. As will be addressed later on in this chapter, the tight regulation on alcohol advertisement has raised comments that in spite of the objective to protect children and young adults as well as public health, in practice it seems to be aiming primarily at reducing alcoholic beverage consumption.[23]

According to Article 7 of the Regulation on the Advertisement Board, the Advertisement Board is entitled to impose administrative fines – and if it is judged necessary, withdrawal of the advertisement for a period up to 3 months – prescribed under Article 77 of the Consumer Protection Law no. 6502[24] against persons who are not compliant with the Advertisement Regulation.

20 Regulation on the Advertisement Board published in the Official Gazette dated July 3, 2014 and no. 29049.

21 Official Gazette no. 29232 (January 10, 2015).

22 Advertisement Regulation published in the Official Gazette dated January 10, 2015 and no. 29232.

23 Ugur Aktekin and Basak Gurbuz, 'Turkey chapter of Alcohol Advertising – A Global Legal Perspective', *Global Advertising Lawyers Alliance* (2011) 85.

24 Official Gazette no. 28835 (November 28, 2013).

2.5 *Radio and Television Supreme Council*

2.5.1 Regulation Pertaining to Alcoholic Beverages

Radio and Television Supreme Council ("RTSC") is the relevant authority for regulating and controlling traditional and (since March 2018) online radio, television and on-demand media services in Turkey.[25] Its duties and powers are provided in the Law No. 6112 on the Establishment and Broadcasting of Radio and Television Enterprises ("Law No. 6112") and regards two aspects:[26] (i) regulating the radio and TV field such as frequency planning, allocating channel and frequency, broadcast permission and license; and (ii) controlling activities such as control of broadcast contents, technical-structural control upon ownership structure and technical standards of broadcaster institutions.[27]

In this respect, Law No. 6112 provides a general principle in Article 8, among other provisions, that "*Media service providers shall provide their media services in accordance with the principles under this paragraph with an understanding of the responsibility towards the public. Media services* […] *h*) *shall not encourage the use of addictive substances such as alcohol, tobacco products and narcotics or gambling*".[28] In addition, Article 11 of the Law No. 6112, entitled "Commercial communication of particular products" provides that "*Commercial communication for alcohol and tobacco products shall not be allowed under any circumstances* […]".[29] These provisions are restated by the implementation regulation of certain Articles[30] of the Law No. 6112, titled Regulation on Procedures and Principles of Broadcasting Services dated November 2, 2011.[31]

The general legislative rationale of the Law No. 6112 states that with its enactment, it was intended to harmonize the Turkish legislation with the Directive 2007/65[32] on the Amendment of Council Directive 89/552/EEC on the

25 Article 82 of the Law no. 7103 published in the Official Gazette dated March 27, 2018 (ter) and no. 30373.

26 H. Öztekin, 'Radyo ve Televizyon Alanının Düzenlenmesi ve Denetlenmesinde Yeni Eğilimler ve Yönelimler' (Erciyes University, Social Sciences Institute, Non-published master's thesis), 32 through reference of Sevil Yıldız, 'Control of Contents of the Broadcasts in Turkish Law', (2016) 11(5) IJASOS – International E-Journal of Advances in Social Sciences 332.

27 Sevil Yıldız, 'Control of Contents of the Broadcasts in Turkish Law', (2016) 11(5) IJASOS – International E-Journal of Advances in Social Sciences 332.

28 Official Gazette no. 27863 (March 3, 2011).

29 Official Gazette no. 27863 (March 3, 2011).

30 The regulation brings the implementation rules for Articles 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 21, 22, 24, 30, 31, 37, 45 and 46 of the Law no. 6112.

31 Official Gazette no. 28103 (November 2, 2011).

32 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions

coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. Concurrently, the special legislative rationale of Article 11 Law No. 6112 suggests that with this provision the advertisement and tele-shopping of alcoholic beverages are prohibited. A comparison between Article 15 regarding alcoholic beverages advertisement[33] of the Directive 89/552/EEC as amended with the Directive 2007/65, which was taken as basis for the harmonization effort of Article 11 of the Law no. 6112 and Article 11 of the Law No. 6112 as actually enacted shows that Article 11 of the Law No. 6112 as actually enacted extends further than merely addressing the television advertisement of alcoholic beverages, as is the scope of Article 15 of the Directive 89/552/EEC. Henceforth, the specific rationale of Article 11 of the Law No. 6112 is not in compliance with the general rationale of the Law No. 6112 since the Directive 89/552/EEC (Article 15) and the currently applicable Directive 2010/12/EU (Article 22) do not prohibit (as in the case of Article 11 of the Law No. 6112) but restrict the television advertisement for alcoholic beverages,[34] in addition to their (Directives 89/552/EEC and 2010/12/EU) not addressing the tele-shopping of alcoholic beverages (as in the case of Article 11 of the Law No. 6112) in their relevant provisions. The inclusion of the prohibition regarding tele-shopping activities, in our opinion, is beyond and one step further to the prohibition of advertisement

laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

33 Article 15 of the Directive 89/552/EEC read at the time:

> Television advertising for alcoholic beverages shall comply with the following criteria:
> (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
> (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
> (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
> (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
> (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
> (f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

and so reads Article 22 of the Directive 2010/12/EU, the Audiovisual Media Services Directive.

34 Burcu Sümer and Gülseren Adaklı, '6112 Sayılı Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkındaki Kanun'a İlişkin Değerlendirme Raporu', (2011) 5(2) İletişim Araştırmaları Dergisi 141–158, <dergiler.ankara.edu.tr/dergiler/23/1820/19200.pdf> accessed 31 January 2020.

activities. The relative abundance of such prohibitive provisions would reinforce the character of the RTSC as a "controlling authority", thus keeping its "regulatory" duties and powers in the secondary place.

2.5.2 Sanctions Applicable against Violations of the RTSC's Regulation on Alcoholic Beverages

If Article 8 (h) Law No. 6112 is violated, administrative sanctions such as an administrative fine from two percent up to five percent of the gross commercial communication revenues within the month preceding the month when the violation is found, considering the seriousness of the violation as well as the broadcast's medium and area. The sum of the administrative fine may not be less than 1,000 Turkish liras for radio enterprises and 10,000 Turkish liras for television enterprises and on demand media service providers.[35] Further, as an administrative injunction, it may be resolved that the broadcast of the program subjected to the violation be stopped up to five times and that the program subjected to the violation be removed from the catalogue in case of on demand broadcast services. An administrative fine and an administrative injunction as described above may be imposed cumulatively or alternatively.[36]

If Article 11 Law No. 6112 is violated, a warning is given as an administrative sanction and if the violation is repeated after the warning is served on the enterprises involved, an administrative fine from one percent up to three percent of the gross commercial communication revenues within the month preceding the month when the violation is found may be imposed. The sum of the administrative fine may not be less than 1,000 Turkish liras for radio enterprises and 10,000 Turkish liras for television enterprises and on demand media service providers. If the media service provider commits a violation for the second time within one year as of the notification of an administrative fine, its broadcasting will be stopped.[37]

The producer or provider of the broadcasting program subject to the violation of these provisions cannot engage in any other broadcasting activity by any other media service provider during the period in which the program's broadcast is stopped.[38]

2.5.3 Recent Developments Concerning Online Media Service Platforms

It is important to underline that the Law No. 6112, RTSC regulatory and controlling activities concern the broadcast service providers, who are defined as

35 Article 32 of the Law No. 6112.
36 Article 32 of the Law No. 6112.
37 Article 32 of the Law No. 6112.
38 Article 32 of the Law No. 6112.

radio enterprises, television enterprises and on demand media service providers throughout the Law No. 6112.[39] It is also important to address a recent regulatory introduction: that along with the above three actors within the media broadcasting services industry who are subjected to a "broadcasting license"; the platform operators such as Netflix have become obliged to obtain a "broadcast transmission license" from the RTSC with the introduction of Article 29/A within the Law No. 6112, on March 21, 2018[40] and its implementing Regulation on the Broadcasting of Radio, Television and On-Demand Media on the Internet dated August 1, 2019.[41]

In fact, the on-line platforms, which provide media content on the internet by means of their web-site or mobile applications, have already been regulated as content, access or hosting providers under a separate law concerning the publications on the internet; Law No. 5651 on the Regulation of Publications on the Internet and Combatting Crimes Committed by means of such Publication (the so called "Internet Law")[42] and supervised by the Information Technologies and Communications Authority. However, with Article 29/A of the Law No. 6112 and its implementing regulation, which are now also overseen by RTSC and are subject to the content-wise regulatory and controlling powers thereof, which is reported to be interpreted by certain critics as tightening the grip on media and making content censorship possible on internet based online platforms.[43]

It has been reported by the president of the RTSC that over 600 institutions, including Netflix, Puhu TV and Blu TV, the latter two being notable online on-demand content provider platforms in Turkey, have applied for a license.[44]

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39 Article 3 of the Law No. 6112.

40 Official Gazette no. 30373 (ter) (March 21, 2018).

41 Official Gazette no. 30849 (August 1, 2019).

42 Official Gazette no. 26530 (May 23, 2007).

43 "*Kerem Altiparmak, a human rights lawyer, said the move was the "biggest step in Turkish censorship history" and said all outlets producing opposition news would be affected. "Everyone who produces alternative news and broadcasts will be impacted by this regulation", Altiparmak wrote on Twitter. "Every news report that can be against the government will be taken under control*".

Ece Toksabay and Tuvan Gumrukcu; Additional reporting by Birsen Altayli; Editing by Dominic Evans and Peter Graff, 'Turkey moves to oversee all online content, raises concerns over censorhip', *Reuters* (August 1, 2019) <www.reuters.com/article/us-turkey-internet-censorship/turkey-moves-to-oversee-all-online-content-raises-concerns-over-censorship-idUSKCN1UR539> accessed 28 April 2020.

44 Ali Kucukgocmen and Kenneth Li, 'Netflix applies for license under new Turkish broadcasting rules', *Reuters* (3 September 2019) <www.reuters.com/article/us-netflix-turkey/netflix-applies-for-license-under-new-turkish-broadcasting-rules-idUSKCN1VO14R> accessed January 30, 2019.

The regulation of the content was not limited to commercial streaming services such as Netflix, Blu TV etc., or foreign-based online platforms.[45]

We expect that this amendment and the regulation is susceptible of causing further legal debate over the explicit and covert advertising nature of alcohol and wine-related content or simply an alcohol or wine brand displayed on media provided through online platform operators. A Turkish Council of State decision[46] had cast some light on the explicit advertising nature of the display of an alcoholic beverage trademark during a live broadcasting of a football match by a TV channel in the past.

3 Trade Dress Regulation and Protection

Trade dress is generally defined as the entire selling image of a product, including its packaging.[47] Trade dress is not a distinct legal concept under Turkish law, and it finds its legal basis and regime under various branches of the law.

Within the context of wine, trade dress may pertain to the trademark with which wine is branded – see below, the shape and the decoration of the wine bottle, as well as any outer packaging of the wine bottle, the displays attending wine products on store shelves and any other physical element such as the décor and the environment in which wine bottles are placed on the shelves, through to its purchase by consumers in which wine bottles are sold or wine is served. To the extent permissible by the Turkish law, trade dress elements may be protected under trademark law, design law or unfair competition law provisions.

On the other hand, with respect to restrictive rules governing the trade dress of wine, one is inclined to examine the regulation within other areas such as the tobacco and alcohol market, protection of public health, media-entertainment and advertisement, and competition law. Under this section, we will examine the protection rules within the field of trademarks, designs and unfair competition; and the restrictive rules within other regulatory fields separately.

45 IPS Communication Foundation, Media Ownership Monito (MOM) Project Turkey by Bianet Bağımsız İletişim Ağı and Reporters Without Borders For Freedom of Information <turkey.mom-rsf.org/en/findings/media-regulation/> accessed January 30, 2019.

46 Turkish Council of State decision dated December 5, 2012 and no. E. 2012/2919, K. 2012/3578.

47 Carol Robertson, *The Little Red Book of Wine Law* (ABA Publishing 2008) 91.

3.1 *Restrictive Trade Dress Rules Applying Specifically to Wine*

3.1.1 *General provisions related to wine trade dress under the Law No. 4250 on the Monopoly of Alcohol and Alcoholic Beverages and the Law No. 4733 on the Regulation of Tobacco, Tobacco Products and Alcohol Market*

Under the Law No. 4733, it is prohibited to:

- Sell or service alcoholic beverages without prior authorization.
- Break or divide, to the detriment of their intended purpose for eventual consumers, the packaging of alcoholic beverages for retail sale.
- Set up a sales system of alcoholic beverages through electronic sales means such as via the internet, TV, over the fax or phone or through post. If the sales is effected on the internet, the criminal provisions of Law No. 5651 will be applicable.
- Alcoholic beverages cannot be placed on the shelves or display units in a way that favors one brand over another one.

Main restrictions on alcohol trade dress of the Law No. 4250 are included in Article 6. Law No. 6487 promulgated on May 24, 2013 redrafted Article 6 of the Law No. 4250. We will include a translation of this self-explanatory provision below:

> ARTICLE 6 – Alcoholic beverages cannot be advertised in any way or promoted to consumers. Campaigns, promotional organizations or events (except for national and international sectoral trade fairs and sectoral organizations as well as scientific publications and activities) which encourage or promote the use and sales of such products will not be allowed. Those who produce, import, and market alcoholic beverages cannot support any event (except for the national and international sectoral trade fairs and sectoral organizations), regardless of the nature of the event, by using the trademarks, brands, emblems or tokens of their products. Trademarks, emblems and logos can be used on service materials used at restaurants, bars and night clubs which have an alcoholic beverage license.
>
> Alcoholic beverage producers, importers, and marketers cannot distribute any promotional materials, free gifts, sale samples or free alcoholic beverages for whatever reason.
>
> Liquor shops and all commercial and public places cannot sell or serve alcoholic beverages for consuming or taking away to people who are not over 18.
>
> People who are not over 18 cannot be allowed to work in the production, marketing or sales of alcoholic beverages. Educational activities conducted within the legal regulations are exempt.

Alcoholic beverages cannot be sold in vending machines. They cannot be used (as a reward) in any gaming machines or in any bets or games by any other methods. Alcoholic beverages cannot be sold to the final users via telephone, internet or television marketing systems and cannot be sent by mail order. Retail sale of alcoholic beverages is not allowed between 22:00 and 06:00.

Alcoholic beverages can be openly consumed in places which have an alcohol license but such facilities cannot sell alcoholic beverages to be consumed outside their premises.

Alcoholic beverages cannot be put on retail sale by exhibiting them in the windows of the shops which will make them visible from the outside.

With the exemption of those that are exported, all alcoholic beverages produced in Turkey or imported to Turkey will have Turkish warning notes or messages on their packages that explain the damages of consuming alcoholic products. The warning messages can be in the form of pictures, designs, or graphics. Alcoholic beverages that do not carry the warning messages cannot be exposed for sale or sold.

Brand names, trademarks, any introductory and distinctive names, logos, emblems or tokens that relate to alcoholic beverages, with the exception of those produced for export, cannot be used for nonalcoholic beverages and other products; whereas brand names, trademarks, any introductory and distinctive names, logos, emblems or tokens that relate to non-alcoholic beverages cannot be used for alcoholic beverages.

With the exception of export items, with reference to non-alcoholic beverages which are produced by processing products that are in the alcoholic beverage category, if there is still alcohol left in them, the amount of alcohol they contain; and if the alcohol is completely removed, this fact, must be written on the product's package in a way that will allow the consumers to clearly see them.

Alcoholic beverages cannot be sold or consumed in facilities and premises, with the exception of residential areas and accommodations, which are on the motorways or state highways. Alcoholic beverages cannot be sold or consumed in student dormitories, places that provide health-care services, stadiums and indoor sport halls which hold sports competitions,

> all kinds of learning and education institutes, cafés, coffee-houses, patisseries, bezique and bridge playhouses and at the restaurants and markets of petrol stations.[48]

In addition, Article 9 of the Law No. 4250 states in paragraph 2:

> Businesses that make the retail sale, wholesale or open sale of the products that fall under the scope of this law hereby are obliged to be at least 100 meters away (from door to door) from any organized education institutes and school support courses, student dormitories and places of worship. The municipality or the special provincial administration will exercise the rule of 100 m distance effective on the date of the license. The 100 meters distance rule will not be applicable to businesses that hold a tourism license.[49]

Violation of these rules is sanctioned with administrative fines.[50]

3.1.2 Communiqué Regarding the Warning Messages on the Packaging of Alcoholic Beverages Dated August 11, 2013

The Communiqué provides for the exemplary illustrations to be affixed onto alcoholic beverages' outer packaging (such as boxes, packs, etc.) and bottles or cans, and brings sizing requirements for packaging of alcoholic beverages depending on the amount of alcohol in centiliters contained in the beverage.[51]

3.1.3 Regulation Regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages Dated January 7, 2011

While restating the restrictions codified under the Law No. 4250, this regulation further regulates the sale of alcohol on the internet, e-platforms or by mail order.[52]

– It is prohibited to register a domain name/sub-domain name through using an alcoholic beverage brand or trademark, directed towards the advertisement or promotion of these products. However, alcoholic beverage manufacturers may advertise or promote their products for export purposes

48 Global Agricultural Information Network of USDA Foreign Agricultural Service, Report No. TR5049 (2015).
49 Global Agricultural Information Network of USDA Foreign Agricultural Service, Report No. TR5049 (2015).
50 Article 7 of the Law no. 4250.
51 Official Gazette no. 28732 (August 11, 2014).
52 Official Gazette no. 27808 (January 7, 2011).

subject to the condition that domestic access be prevented from reaching their websites.[53]

- Alcoholic beverage producers, importers or wholesale distributors may enlist the names/trademarks of the products they produce, import or market within the section devoted to products in their corporate websites without advertising or promoting the products and without displaying any visuals. If they wish to create another website or a sub-section separate from other pages in their corporate websites only for the purpose of the sale and promotion of alcoholic beverages to their customers/distributors/resellers within the supply chain, excluding consumers/final users, access to the website must be ensured through a username and password which will be given to the customer. In this case, such website, or sub-section of the corporate website may cover technical information and product trademark and visuals, without any advertisement.[54]
- Alcoholic beverage trademarks cannot be displayed on sale units, coolers, all kind of movable or immovable materials, showcases, inside or outside workplaces.[55]
- Cases, boxes or other material used as outer packaging or for transportation cannot be used for public display.[56]
- Alcoholic beverage trademarks cannot be affixed on commercial vehicles of the firms operating in this sector.[57]

53 Article 11/III of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 5 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

54 Article 11/IV of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 5 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

55 Article 20/IX of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 10 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

56 Article 20/X of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 10 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

57 Article 20/XI of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 10 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

– Sale units for alcoholic beverages must be located in one specific area within the shops.[58] Alcoholic beverages must not be seen from the outside of the premises.[59]
– Alcoholic beverages cannot be sold in a place close to goods intended for children.[60]

The Former Authority had been appointed for overseeing the compliance of firms to these rules and to those within the Laws No. 4250 and 4733. As stated above, these powers and duties are not shared between the Ministry of Agriculture and Forestry and the Ministry of Health.

The violations committed on the internet are reported to the Information Technologies and Communications Authority for the application of the relevant sanctions under the Law No. 5651.[61] The violations committed regarding commercials are also enforced by the Advertisement Board, who is entitled to apply sanctions on the basis of this regulation and the Laws No. 4250 and 4733, by the explicit reference within the Advertisement Regulation (see section 2.4). Contrary to the Advertisement Board, the RTSC's content control does not extend to the application of this regulation and the Laws No. 4250 and 4733. Instead, it applies Article 8-h of the Law No. 6112 over media service providers (see sections 2.4–2.5 above).

3.1.4 By-Law Regarding the Special Qualities of Foodstuffs and Other Goods and Disposables in Relation to Public Health ("By-Law")

The By-Law includes several peculiar provisions dated March 21, 1956, specifying restrictions on the information to be included on wine bottles especially.[62]

58 Article 23/I of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 13 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

59 Article 23/V of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 13 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

60 Article 23/III of the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages as amended with Article 13 of the Regulation Amending the Regulation regarding the Sale and Servicing of Tobacco Products and Alcoholic Beverages published in the Official Gazette dated September 18, 2013 and no. 28769.

61 Official Gazette no. 26530 (May 23, 2007).

62 The By-Law regarding the special qualities of foodstuffs and other goods and disposables in relation to public health as amended on March 21, 1956.

- It must be clearly written on the wine bottle stickers that the wine is "artificial sparkling"[63] or that it is a "sparkling fruit"[64] wine, if this is the case. For fruit wines or sparkling fruit wines, the word "wine" can be used only with a qualitative addition of its fruity nature such as apple wine, pear wine, etc.[65]
- It is prohibited to change in any way the color of red or rosé wine for any reason whatsoever.[66]
- Cocktails made out of wine mixed with fruit wine, cannot be sold as a "wine" or under any name that would make it seem like wine.
- The name and type of the wine, the location of its place of production and bottling and the indicator of its producer, alcohol percentage, net volume, and whether it is artificial sparkling wine or artificial fruit wine.

3.1.5 Turkish Codex Alimentarius Wine Communiqué

Regarding wine trade dress, the communiqué stipulates:

- The size of the indication regarding the alcohol volume written on the bottle.
- That wine may be classified as red, white or rosé according to their colors.
- The naming of the wine according to their sugar content as "sek" ("dry"), "dömi-sek" ("semi-dry"), "tatlı" ("sweet") or "yarı-tatlı" ("semi-sweet"). It depends on the sugar amount to total volume ratio. The naming of the natural or artificial sparkling wine according to their sugar content as "Brüt doğal" ("natural brut"), "ekstra brüt" ("extra brut"), "brüt" ("brut"), "ekstra sek" ("extra-dry"), "sek" ("dry"), or "dömi-sek" ("semi-dry"). No other expression may be used as an indicator of the sugar content.
- Terms such as "like", "-type", "-style" which hint at characteristics that the product does not have cannot be used.
- For artificial sparkling wine or artificial semi-sparkling wine, either the phrase "karbondioksit ilave edilerek üretilmiştir" ("produced by adding carbon dioxide") or "karbondioksit ilave edilmiştir" ("carbon dioxide is added") must be affixed in the same font and size as the product name.

63 Articles 489 and 505 of the By-Law.
64 Articles 489 and 505 of the By-Law.
65 Article 503 of the By-Law.
66 Article 497 of the By-Law.

– If the wine is produced out of highly ripe grapes, the phrase "ileri derecede olgun üzümlerden üretilmiştir" ("produced out of highly ripe grapes") must be affixed.

3.1.6 Turkish Codex Alimentarius Communiqué on Aromatized Wine, Beverages Based on Aromatized Wine, and Aromatized Wine Cocktail

Regarding wine trade dress, the communiqué stipulates:

– The conditions under which the aromatized wine may be named "vermut" ("vermouth"); "bitter aromatize şarap" ("bitter-aromatized wine") and its types "quinquina", "bitter vino" and "americano"; "yumurta bazlı aromatize şarap" ("egg-based aromatized wine"); "cremovo"; "Marsala şarabı" ("Marsala wine"); "cremovo zabaione"; "Väkevä viiniglögi/Starkvinsglögg"; "sangria"; "clarea"; "zurra"; "bitter soda"; "kalte ente"; "glühwein"; "viinglögi/vinglögg"; "maiwein"; "maitrank"; "wine-based cocktail"; "grape-based aromatized artificial semi sparkling cocktail"; "wine-based aperatif"; "natural sparkling"; "cocktail"; "ekstra sek", "sek", "dömi-sek", "yarı tatlı" and "tatlı".
– Terms such as "like", "similar to", "-aromatized", "-style" which hint at characteristics that the product do not have cannot be used.

Annex 3 of this communiqué includes a list of geographical indications for wine-based aromatized drinks:

– Nürnberger Glühwein
– Thüringer Glühwein
– Vermouth de Chambry
– Vermouth di Torino

Pursuant to Article 6/I-i, these denominations are protected provided they are registered with TURKPATENT. To date, they are not registered as geographical indications in Turkey.

3.2 *Trade Dress Protection of Wine*

3.2.1 Protection of Trade Dress through Trademark Registration

Turkish trademark law is generally in line with the European Union directives as part of Turkey's accession negotiations and Chapter 7 of the *acquis communautaire* on intellectual property. Turkey is habitually praised for a good level or preparation and good progress in this field.[67]

67 European Commission, *Commission Staff Working Document, Turkey 2019 Report* (29 May 2019) 69–70.

3.2.1.1 *An Overview of Trademark Registration in Turkey*

Pursuant to Article 4 of the Industrial Property Code no. 6769 ("*IP Code*"); any sign can constitute a trademark, be it a word, device, color, letter, number, sound or shape of a good or a product, as long as it fulfills the function of distinguishing one businesses' goods or services from those of another one and provided that it can be represented on the register in a manner which enables one to determine the clear and precise subject matter of the protection afforded to its owner.[68]

Wine brands including their verbal and figurative elements, bottles' and outer packaging' shapes and textures. Trademark applications are subject to preliminary examination on the basis of the absolute grounds for refusal:

i. lack of compliance with Article 4,
ii. lack of distinctiveness,
iii. descriptiveness in respect of the goods or services applied-for,
iv. identicalness or almost identicalness with a prior application or registration,
v. signs that should remain common to a professional, artistic or commercial group,
vi. signs which refer to the characteristics of the goods or services applied-for,
vii. deceptive signs,
viii. signs to be rejected as per Article 6*ter* of the Paris Convention,
ix. signs which include badges, emblems and escutcheons other than those covered by Article 6*ter* of the Paris Convention and which are of public interest,
x. signs which cover religious values or symbols,
xi. signs contrary to public order or general morality,
xii. signs which consist of or include a geographical indication.

If the application has passed the preliminary examination phase, it will be advertised in the Trademarks Bulletin for purposes of third-party oppositions on the basis of:

i. likelihood of confusion,
ii. unauthorized filing by a commercial agent without a just cause,
iii. prior unregistered trademark rights,
iv. Article 6*bis* of the Paris Convention,
v. Notoriety,
vi. Other IP rights, such as the right to one's personal name, trade name, right to a photograph, copyright and neighboring rights,

68 Article 4 of the Industrial Property Code no. 6769 published in the Official Gazette no. 29944 and dated January 10, 2017.

vii. common or guarantee trademark,
viii. a non-renewed senior trademark, within the first two years after the lapse of the renewal deadline, provided that the trademark is used,
ix. bad faith of the applicant in filing the application.

The opposition period runs for two months as of the publication of the application in the Trademarks Bulletin.[69]

If there has not been filed any opposition or if the oppositions filed are rejected; an application can mature into registration by the payment of the registration fee[70] and be valid for 10 years starting from the application date.[71] A trademark registration can be renewed every ten years.[72]

Use requirement. Trademark registration owners benefit from a 5-years grace period for the non-use of the trademark as of the date of its registration. After 5 years, if the registration is based upon in an opposition[73] or a court action;[74] the opponents or defendants may claim non-use as a defense or they may file a lawsuit for cancellation of the registration on the basis of its continuous non-use for a period of 5 years.[75]

3.2.1.2 *Specific Statutory Rules Applying to Wine under the Turkish Trademark Law*

There are no specific statutory rules under the Turkish trademark law which specifically lay down rules for wine trademarks. However, Turkey has adhered to the World Trade Organization with the ratification law published in the Official Gazette of February 25, 1995 and no. 22213 of the of the Marrakesh Agreement Establishing the World Trade Organization, along with its Annex 1C constituting the TRIPS Agreement. Henceforth, Turkey is bound to observe the obligations concerning the wine therein.[76]

3.2.1.3 *The Approach of TURKPATENT and Turkish Courts Regarding Trademarks Covering Wine and Wine-related Goods and Services and Trademarks Representing Wine-related Elements*

Protectability of wine smells and tastes. It may be important to question whether the smell or taste of wine are eligible for trademark protection in Turkey and

69 Article 18/I of the IP Code.
70 Article 22/I of the IP Code.
71 Article 23/I of the IP Code.
72 Article 23/I of the IP Code.
73 Article 19/II of the IP Code.
74 Article 25/VII of the IP Code for trademark invalidation actions and Article 29/II of the IP Code for trademark infringement actions.
75 Articles 9 and 26 of the IP Code.
76 Ünal Tekinalp, *Fikri Mülkiyet Hukuku, 5. Bası* (Vedat Kitapçılık 2002) 82.

it is apparent from the 2019 Trademark Examination Guidelines ("*2019 Guidelines*") of TURKPATENT that – in line with the previous 2015 version which was less detailed – smells and tastes cannot be afforded trademark protection as opposed to colors or sounds. TURKPATENT is of the opinion that "*with the prevailing technologies, it does not seem possible to represent on the register in a manner which enables one to determine the clear and precise subject matter of the protection*",[77] a condition precedent for being considered a trademark according to Article 4 of the IP Code.[78] References are made by TURKPATENT to the Case C-273/00 *Sieckmann* of the European Union Court of Justice and the Case T-305/04 Eden SARL of the European Union Court of First Instance in the 2019 Guidelines.[79] Whereas arriving at the same conclusion, and differently from the findings of both hereinabove mentioned EU cases, TURKPATENT does not address the "visual" or "graphic" representability since the IP Code does not require the trademark to be represented visually or graphically.[80] According to the doctrine, the very dynamic nature of the wine's taste over time is an example of the difficulty to designate and maintain the taste in the trademark register.[81] Therefore, currently, wine tastes and smells cannot be trademarked in Turkey.

Descriptive nature of geographical names in trademarks covering wine. In the 2019 Guidelines, TURKPATENT also comments that when wine trademarks are at stake, in other words if the goods specification of a trademark application includes wine in class 33,[82] geographical name components in a trademark are more susceptible and "*highly likely*" to be "*perceived as a reference to the geographical location*" where the wine is produced.[83] If the geographical location is known for a wine, then such geographical name component will be deemed

77 TURKPATENT Trademark Examination Guidelines (2019) 18–19.

78 See section 3.2.1.1 above.

79 As regards the Case C-273/00, TURKPATENT (Trademark Examination Guidelines (2019) 18–19) mentions paragraphs 69 to 73 of the decision and confirms that chemical formula, description, deposit nor a combination of the foregoing are able to constitute a representation.

80 See section 3.2.1.1 above.

81 Mücahit Ünal, *556 Sayılı Kanun Hükmünde Kararnameye Göre Marka Olarak Tescil Edilebilecek İşaretler* (Endüstriyel Tasarım Marka ve Patent Hukuku 2005) 43.

82 Turkey adopted the international Nice classification for goods and services covered by trademark applications and registrations by ratifying the Nice Convention (with Geneva and Stockholm amendments) with the Decision no. 95/7094 and dated July 12, 1995 of the Turkish Council of Ministers, published in the Official Gazette no. 22373 and dated August 13, 1995. First implementation of the classification system based on the Nice Convention came into force on January 1, 2007 (See. Ünal Tekinalp, *Fikri Mülkiyet Hukuku, 5. Bası* (Vedat Kitapçılık 2012) 79 footnote 30).

83 TURKPATENT Trademark Examination Guidelines (2019) 125.

as descriptive[84] or weakly distinctive.[85] This may lead to the refusal of an application on absolute grounds by virtue of Article 5 of the IP Code.[86]

In the 2019 Guidelines, TURKPATENT mentions the Turkish Supreme Court decision[87] dated February 6, 2017, which overturned the decision of TURKPATENT to reject the Turkish trademark application "DATÇA BAĞ ŞARAPÇILIK + Device" no. 2012/76928 filed by Datça (a town in south-western Turkey on the Aegean coastline) Bağcılık ve Şarapçılık Limited Şirketi (Datca Viticulture and Oenology Limited).

In its comment the court held that the geographical name in a trademark application was weakly distinctive. In this Supreme Court case, the two other non-geographical verbal components BAĞ meaning vine and ŞARAPÇILIK meaning winery in Turkish and the figurative component, the bunch of grapes, were also examined in respect of their descriptive nature about the vine and wine. The 11th Chamber of the Supreme Court contended, in support of the trademark applicant and upholding the local court's first instance decision, that Datça is not particularly well known for its wine and that the trademark was distinctive. In this case, it was remarkable that the Supreme Court considered *the nexus between the geographical area of which the name was used in the trademark representation and the goods for which the trademark protection was sought*; thereby not concluding, that a geographical name is descriptive per se, although the applicant was apparently resident at this area. The decision pointed out that Datça was known for its "3 B"s (Bal-Badem-Balık, meaning Honey-Almond-Fish in Turkish) but not particularly for its vine and wine. Consequently, the trademark could be registered.

A second Supreme Court case[88] dated September 13, 2017 and involving the same parties also tackled the same matter but ruled otherwise.[89] The matter concerned a different trademark application, namely, "DATÇA ŞARAPLARI + Device" no. 2012/76665 with the denomination ŞARAPLARI meaning wines (of) in Turkish.

In this decision, the Supreme Court stated that the climate and land of Datça is convenient for wine production, that it has a wine history dating back to

84 TURKPATENT Trademark Examination Guidelines (2019) 125.
85 TURKPATENT Trademark Examination Guidelines (2019) 202.
86 TURKPATENT Trademark Examination Guidelines (2019) 125.
87 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2015/12597, K. 2017/601.
88 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2016/1615, K. 2017/4308.
89 Burçak Yıldız, 'Yargıtay Kararları Işığında Coğrafi Markalar – Geographical Trademarks In Light of Jurisprudence of Turkish Court of Appeal' (2017) 9(2) Inonu University Law Faculty Review 133.

ancient times, and therefore it has a great potential for wine production.[90] The Supreme Court confirmed the finding of the first instance court. The translation of DATÇA ŞARAPLARI, meant literally "Datça Wines" or "Wines of Datça" and can be understood as "wine from Datça".[91] This is descriptive for wine and wine-related goods and services, and it may cause unfair competition in the future against wine producers from the same geographical area. Hence, the application was rejected for wine and wine-related goods and services on the ground of descriptiveness.[92]

Another notable finding of the court was regarding the semantic aspect of the trademark representation. Since the trademark representation clearly included the denomination "WINES (OF)"/"ŞARAPLARI", the Supreme Court concluded that, this would cause deception of the consumers if it were to be used on goods and services not related to wine, for which also, trademark protection was sought.[93]

The applicant appealed against this Supreme Court decision to the rectification stage before the Supreme Court, and this time, the Supreme Court ruled with its decision dated June 24, 2019 that Datça is not known for its wine and the only fact of having a wine history and great potential for wine growing is not a sufficient ground to consider that the geographical name use is descriptive.[94] Also, the Supreme Court stated that the trademark is not deceptive for the goods and services not related to wine, without further motivation.

The third conflict between TURKPATENT and Datça Bağcılık ve Şarapçılık Limited Şirketi concerned the trademark application "DATÇA VINEYARD WINERY + Device" no. 2012/76916 of the latter, covering wine and wine-related goods and services as well as other goods and services.[95]

In these two recent decisions dated June 24, 2019 and September 23, 2019, the Supreme Court concluded in a similar direction.[96] Incidentally, it also referred to its precedent[97] decision dated November 26, 1999 (the "Pendik"

90 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2016/1615, K. 2017/4308.
91 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2016/1615, K. 2017/4308.
92 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2016/1615, K. 2017/4308.
93 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2016/1615, K. 2017/4308.
94 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2018/351, K. 2019/4740.
95 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2018/4375, K. 2019/5704.
96 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2018/351, K. 2019/4740 and Turkish Supreme Court, 11th Civil Chamber decision no. E. 2018/4375, K. 2019/5704.
97 It must be borne in mind that the precedent court decisions are not as powerful as their Anglo-saxon counterparts, i.e. there is no stare decisis in Turkish law and the precedent jurisprudence may only be auxiliary in the reasoning of the Supreme Court, appellate courts or courts of first instance, except for the precedent jurisprudence on the unification of conflicting judgments, which is not the case here.

decision).[98] The Pendik decision ruled that a geographical name can be part of a trademark if it is accompanied by another name designating the goods/services.[99]

The Supreme Court arrived at a similar conclusion with the same reasoning for the trademark GANOS ÇINARALTI, wherein "Ganos" is the name of a geographical place near Tekirdağ, a city in north-western Turkey.[100]

The approach of the Supreme Court towards geographical trademarks is disputed. Burçak Yıldız commented that there will be no difference in view of the examination of the likelihood of confusion between a prior trademark that is composed only of the geographical name and one that is constituted of the formula [geographical name]+[good/service]. The examination of the likelihood of confusion and the confusing similarity will still be conducted with the more distinctive part, the geographical name, and the later trademark representation.

One use of this approach, as Hamdi Yasaman puts it, may be to avoid confusion with geographical indications. It is mentioned that "*Use of the denomination Istanbul on wine will not lead to confusion in the minds of the public. That is because Istanbul is not an area known for viticulture and winery. In this respect, the denomination "İSTANBUL" is a distinctive sign for wine. On the other hand, town names such as "MÜREFTE" or "BOZCAADA" will apparently lead to confusion with geographical indications*".[101]

Seeking the non-relatedness of the geographical name to the designated goods or services may help overcome future confusion with geographical indications, especially in the case where a geographical indication is not yet registered with TURKPATENT. In the event where the trademark is confusingly similar to an already registered geographical indication, it is likely to be rejected at the preliminary examination phase on the ground of including or consisting of a geographical indication and at the opposition phase on the ground of including a third party IP right.

Descriptive nature of year indications in trademarks covering wine. According to the 2019 Guidelines, year indications may be considered as a sign

98 Turkish Supreme Court, 11th Civil Chamber decision no. E. 1999/5790, K. 1999/9590.

99 Turkish Supreme Court, 11th Civil Chamber decision no. E. 1999/5790, K. 1999/9590.

100 Turkish Supreme Court, 11th Civil Chamber decision no. E. 2012/2098, K. 2012/3861; Burçak Yıldız, 'Yargıtay Kararları Işığında Coğrafi Markalar – Geographical Trademarks in Light of Jurisprudence of Turkish Court of Appeal' (2017) 9(2) Inonu University Law Faculty Review 138.

101 Hamdi Yasaman/Sıtkı Anlam Altay/Tolga Ayoğlu/Fülürya Yusufoğlu/Sinan Yüksek, *Marka Hukuku: 556 Sayılı KHK Şerhi, C. I* (Vedat Yayınevi 2004) 68.

that shows the *production date*. Since the production date is important for wine, this may hint at *quality* of the wine and be considered descriptive/non-distinctive.[102]

Descriptive nature of percentage indications in trademarks covering wine. The 2019 Guidelines also point out the descriptive nature of percentage indications, explaining that it may reveal the alcohol percentage of wine and gives 13% as an example.[103]

Deceptiveness examination where the trademark representation includes the denomination "ŞARAP"/"WINE" or a geographical name. The 2019 Guidelines give the example of "KAVAKLIDERE WINES" and state that if the goods and services specification include "whiskey", this trademark should be rejected for this item of good on the basis of deceptiveness. However, if the trademark specification mentions otherwise a general term such as "alcoholic beverages", it will be accepted.[104] TURKPATENT also refers to the EUIPO decision regarding the trademark application "WINE OH!" which was rejected on the ground of deceptiveness.[105]

Similarity/dissimilarity of goods and services with wine. TURKPATENT considers that on the one side, wine, and on the other side aromatized wine like vermouth, aromatized wine-based beverages like sangria, cocktails made of aromatized wine like sparkling wine cocktail are comparable goods.[106] Being comparable goods means that these goods will be considered as being "of identical type" within the meaning of Article 5/I-ç of the IP Code, that is a relative ground for *ex-officio* refusal of a trademark application.[107]

Some of the other court decisions regarding the examination similarity/dissimilarity of goods and services in trademark oppositions or court actions are as follows:

– Supreme Court, 11th Civil Chamber decision dated May 6, 2013 and no. E. 2012/10264, K. 2013/9052: The goods in class 33 including wine were similar with the retail services in class 35, pertaining to the identical goods in class 33.

102 TURKPATENT Trademark Examination Guidelines (2019) 174.
103 TURKPATENT Trademark Examination Guidelines (2019) 175.
104 TURKPATENT Trademark Examination Guidelines (2019) 313.
105 *Wine OH! v. OHIM* R 1074/2005-4, 7 March 2006.
106 TURKPATENT Trademark Examination Guidelines (2019) 363.
107 On the other hand, the examination of confusing similarity, a relative ground for rejection upon third party opposition requires a much lesser degree of similarity between the goods and services of the trademarks. The statutory term used for this kind of similarity is "confusingly similar", as opposed to "of identical type" employed for ex-officio relative refusal ground.

- Supreme Court, 11th Civil Chamber decision dated June 24, 2013 and no. E. 2012/15886, K. 2013/13176: The goods "carpet, rug, hall rug, prayer rug, linoleum, artificial grass, flooring linoleum, sports mat, wall coverings (non-textile), wall paper" were dissimilar with wine and even when the wine trademark has achieved the well-known trademark status, this was not sufficient for rejection on the basis of the notoriety of an identical trademark covering the above mentioned dissimilar goods.
- Supreme Court, 11th Civil Chamber decision dated September 16, 2019 and no. E. 2018/4313, K. 2019/5453: The goods jam, marmalade and confectionery" and wine were related.
- Supreme Court, 11th Civil Chamber decision dated March 25, 2014 and no. E. 2013/16546, K. 2014/5767: The goods in class 30 and wine were related. In this case, the first instance court notably considered the earlier trademark owner's arguments regarding wine-meal harmony, the relationship between wine, the restaurant services in class 43 and the goods in class 30 and the example of a catering firm which may brand all the meal set with one trademark.
- Supreme Court, 11th Civil Chamber decision dated April 10, 2014 and no. 2014/3772, K. 2014/7062: The goods in classes 29 and 30 and only "seeds" in class 31 were related with wine. Other goods in class 31 were unrelated.
- Supreme Court, 11th Civil Chamber decision dated April 17, 2013 and no. E. 2012/5600, K. 2013/7539: The goods in class 32 including beverages other than beer were related with wine.

Protectability of 3D shapes. It is possible to trademark three-dimensional shapes under Turkish trademark law and TURKPATENT's approach is highly consistent with the EU trademark practice, however the Turkish jurisprudential sources are still very scarce in this area.

3.2.2 Protection of Trade Dress through Design Registration

In Turkey, it is possible to protect wine bottle shapes, patterns, textures through a design registration for a maximum period of 25 years by renewals every five years, provided that the subject image of the design satisfies the novelty and distinctiveness criteria pursuant to Article 69/I of the IP Code. When the conditions for design protection are met, it is generally the second-best option if the subject image is not protectable through trademark registration, usually because it is not considered as distinctive enough as required for a trademark.

Protection afforded by design registration, unlike trademark, is limited in time (up to 25 years) and in scope. Whereas trademark infringement is penalized, and it is possible to trigger criminal proceedings by filing a complaint,

this is not allowed for design infringement since there is no provisions under Turkish law which penalizes design infringement.[108] Also, the acts constituting design infringement are of a narrower scope than those for trademark infringement in the sense that indistinguishable similarity is required for design infringement as opposed to the sufficiency of likelihood of confusion (without needing an indistinguishable similarity) for the establishment of trademark infringement.[109]

3.2.3 Protection of Trade Dress through Unfair Competition Provisions

"Unfair competition" is regulated in the Turkish Commercial Code No. 6102 ("*TCC*"). Unregistered trademarks, designs or any kind of origin indicator may be protected through the more general rules of unfair competition.[110] Article 54 of the TCC sets forth that behavior or commercial practices that are deceptive or infringe in other ways the good faith, which affects relations between competitors or between suppliers and their customers as unfair and illegal. Further, Article 55 provides an example of such a situation: measures that create confusion about the products, business products, operations or business of another party. These general rules will apply to wine trade dress mutatis mutandis.

The success of an unfair competition claim relies heavily on the documents submitted to the court for proving the unregistered IP right on which the action is based. This requires a good number of documents, which is more burdensome than protection via trademark registration.

108 Article 30 of the IP Code penalizes trademark infringement and there is not a like provision for design infringement under either design provisions of the IP Code or other pieces of Turkish legislation. For an act to be penalized, it must be clearly provided for under a legislation passed by the parliament.

109 Design infringement is regulated under Article 81 of the IP Code and trademark infringement is regulated under Article 29 of the IP Code.

110 Ünal Tekinalp, *Fikri Mülkiyet Hukuku, 5. Bası,* (Vedat Kitapçılık 2012), 37. According to Tekinalp, unfair competition provisions apply cumulatively together with intellectual property law. As such, if the conditions of application are met, unfair competition provisions may apply, not secondarily, but directly and primarily. This view is grounded on the opinion that unfair competition provisions protect the entrepreneurial endeavors, labor, capital and investment based on the principle of honesty and against commercial methods and implementations this principle whereas the copyright, trademark, design and patent protection address the rights bestowed on these intellectual property items and their owners.

3.2.4 Protection Via Copyright Law

In certain cases, trade dress of a wine bottle, its packaging or the way it is served may be considered as a graphical artwork if it can benefit from copyright protection under the general copyright rules of the Law no. 5846 on the Protection of Intellectual and Artistic Works which apply to wine trade dress mutatis mutandis.

4 Conclusion

It is evident that wine producers need to, and do actually, invest a great deal of time and energy for their compliance and competency with the restrictive regulatory rules concerning the trade dress of their products. The regulation of wine trade dress in Turkey encompasses many areas of law including the market regulation and anti-unfair competition law, regulation with regard to general public health, advertisement and broadcasting. In addition, intellectual property law can provide protection. Because of the restrictive regulation on wine trade dress, it often may be hard to trigger IP mechanisms to protect it against competitors. For instance, the absolute advertisement ban and the ban on using alcoholic beverages in broadcasting activities (including on the internet) in a manner that would encourage the public to consume alcohol, makes it difficult for IP owners who try to prove acquired distinctiveness or notoriety of their trade dress to obtain trademark registration protection. Also, the prohibition of using alcoholic beverage trademarks on other goods and vice versa, put also a question mark on the function of "use availability" when IP owners apply for trademark or design registration, which covers wine along with other goods and services. In such cases, if the trademark is used for wine, then it cannot be used for other goods for reasons of compliance with the wine trade dress regulation, hence the trademark would not be available for use, although registered for certain other goods; and vice versa. This would also enable wine producers' competitors to easily claim cancellation of registered wine trademarks for non-use on other goods the trademark covers after the lapse of the 5-years grace period as of their registration date. Finally, we believe that the statutory and regulatory unclarity in the sharing of duties and powers of the Former Authority, between the Ministry of Forestry and Agriculture and the Ministry of Health, both at the level of the market controlling and market regulation is prone to continued legal debate.

CHAPTER 19

Patent Search and Analysis in the Wine Industry

A Guided Tour from Vineyards to Your Table

Luca Falciola

1 Introduction

As for most commercial and economic domains, intellectual property rights (IPR) play an important role in defining operational and strategic activities of private and public entities operating in the wine industry. Many IPR instruments and policies are available across the domains within the wine industry, starting from grape growing (grapevine selection and treatments, agricultural techniques and equipment), to wine production (microbiological and mechanical technologies, long-term storage systems, analytical technologies, etc.) and finally its distribution, retailing, and consumption by consumers (bottling, labelling, home storage, etc.). As recently reviewed,[1] the generation and exploitation of IPR in agriculture, and in industries exploiting agricultural products in general, are important topics not only for stakeholders' activities but also for related research and development activities, giving the possibility of financial reward and public recognition to the developer, as well as of benefits for local and national economy. An "IPR toolbox" is available to companies and institutions for defending the exclusivity and quality of products and technologies they offer to business partners and consumers that properly define and protect such assets. It includes the specificities of plant varieties (using "sui generis" systems such as Plant Variety Protection or Plant Breeders' Rights), wine identity and origin (using trademarks or geographical indications), and technical solutions that are developed to solve problems and improve product features in wine production and commercialization (using patents or designs).

Each of these IPR tools has its own formalities, cost, duration, and other features as defined at the national or international level, in general and in the agri-food sector in particular. Three guides provide enterprises and any IPR user with some useful guidance about good practices and real life situations,

1 Smith S, 'The Foundations, Continuing Evolution, and Outcomes from the Application of Intellectual Property Protection in Plant Breeding and Agriculture' (2019) 43 Plant Breeding Reviews (John Wiley & Sons, Ltd) 121.

 | DOI:10.1163/9789004438316_020

In a first one published end of 2018,[2] a summary for each IPR is provided and compared with respect to criteria such as duration, kind of protection, basic requirements, or routes for registration, in general and specifically in the European Union. An overview of IPR tools for the wine sector in the US is provided in a freely available presentation.[3] Finally, an highly useful handbook[4] provides a detailed analysis of IPR topics for Agri-food Small and Medium Enterprises, also including advices and examples about enforcing, managing, and leveraging IPR s for business objectives.

The wine sector has also been categorised in a recent study[5] among those agriculture-related technical domains that are the most trademark, design-, and geographical indication-intensive in the European Union (EU). Indeed, IPR-related policies concerning oenological or labelling practices are established by the EU regulations in a detailed manner[6] and sometimes they are listed by representatives for non-EU wine producers among the major barriers to wine trade in Europe. For instance, as cited in a report about U.S. Wine Industry and EU trade policies,[7] the Office of the U.S. Trade Representative (USTR) regularly

2 European IP Helpdesk, 'Your IP Guide in Europe' (2018) <http://www.iprhelpdesk.eu/sites/default/files/2018-12/european-ipr-helpdesk-your-guide-to-ip-in-europe.pdf> accessed 28 January 2020.

3 Brody P 'Intellectual Property and the Wine Sector: the United States' Presentation at AIDV conference (2012) <https://www.aidv.org/_media/peter-brody.pdf> accessed 28 January 2020.

4 Guide 'Intellectual Property for Agri-food Small and Medium Enterprises' (2015) <https://www.uibm.gov.it/attachments/FINAL%20Guide_for_IP%20Agri-food%20SME%20_Italian_publication_ EN_GBA-Jaiya.pdf > accessed 28 January 2020.

5 Joint project between the European Patent Office and the European Union Intellectual Property Office , 'IPR-intensive industries and economic performance in the European Union. Industry-Level Analysis Report (Third edition)'(2019)<https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/ IPContributionStudy/IPR-intensive_industries_and_economicin_EU/WEB_IPR_intensive_Report_2019.pdf> accessed 28 January 2020.

6 C/2018/6622 Commission Delegated Regulation (EU) 2019/33 of 17 October 2018 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards applications for protection of designations of origin, geographical indications and traditional terms in the wine sector <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0033&from=EN > accessed 28 January 2020. For a detailed view of EU legislation, labelling, trade measures and market monitoring and protection for grape growers, wine makers, traders and consumers through policy, additional documentation and data can be found at Wine European Commission webpage <https://ec.europa.eu/info/food-farming-fisheries/plants-and-plant-products/plant-products/wine_en> accessed 28 January 2020.

7 Johnson R, 'U.S. Wine Industry and Selected Trade Issues with the European Union' Congressional Research Service U.S. (2016) <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43658.pdf> accessed 28 January 2020 and the Special 301 Report that

highlights how: "*The United States continues to have serious concerns with the EU's system for the protection of GIs* [*geographical indications*]*, including with respect to its negative impact on the protection of trademark and market access for U.S. products that use generic names*".

When deciding why, where, and how to pursue their IPR strategies, any commercial actor needs to take into account not only the specific formal, technical, and financial requirements applying to each legal IPR instrument but also how such protection can be actually enforced in each jurisdiction, often with major specificities on a country-by-country basis. This IPR analysis may also review how competitors position themselves with respect to a local IPR framework and their clients in a given marketplace, identifying areas of major or minor "IPR intensity". For instance, an IPR strategic analysis can be pursued at the different levels of wine "value chains", as identified in the some publications with respect to specific "terroirs" for premium wine productions[8] or at more general level, involving global and environmental challenges, methodological challenges, financial challenges, economic and market challenges.[9] Further practical guidance may be obtained by reviewing the official statistics that national agencies and institutions regularly publish and are consolidated by institutions, such as for wine market in the European Union.[10] Detailed reports and regular updates that compare and rank countries according to quantitative criteria, commercial activities, or legal s are also published by organizations such as OIV (Organisation Internationale de La Vigne et Du Vin – International Organisation of Vine and Wine[11]) CEEV (Comité Européen des Entreprises Vins[12]) or AIDV/IWLA (Association Internationale des Juristes du

USTR issue every year (for 2019 < https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf> accessed 28 January 2020.). About international IP treaties and related conflicts, see also Julien Chaisse and Puneeth Nagaraj 'Changing Lanes – Trade, investment and intellectual property rights' (2014) 36(1) Hastings International and Comparative Law Review 223–270 and Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) Santa Clara High Technology Law Journal 153–178.

8 Warman R and Lewis GK, 'Wine Place Research: Getting Value from Terroir and Provenance in Premium Wine Value Chain Interventions' (2019) 31 International Journal of Wine Business Research 493.

9 Goncharuk A, 'Wine Value Chains: Challenges and Prospects' (2017) 6 Journal of Applied Management and Management 11.

10 EU Wine market observatory <https://ec.europa.eu/info/food-farming-fisheries/farming/facts-and-figures/markets/overviews/market-observatories/wine_en> accessed 28 January 2020.

11 OIV website <http://oiv.int/> accessed 28 January 2020.

12 CEEV website < https://www.ceev.eu> accessed 28 January 2020.

Droit de la Vigne et Du Vin – International Association of Lawyers for Vine and Wine Law[13]).

The use of statistics based on patent publications is well established and regularly used by private and public institutions with the purpose of comparing activities at the level of industries and technological domains, chronologically and/or geographically. This quantitative approach may support evaluations and recommendations about topics such as efficiency of commercial and investment strategies, emerging technological or economic trends, or impact of legal and institutional policies. Similar studies and comparisons can be pursued using data extracted from patent databases by using search criteria related to specific products, technologies, companies, and/or countries. Such studies generally make mostly use of (if not even entirely based upon) codes from patent classification systems. Such coding approach provides users having different levels and types of expertise with easy-to-use and effective means to simplify and make formally consistent and comparable the results of searches that are performed over large amount of documents that are published in different languages, databases, and electronic formats by patent offices worldwide. Examples of such patent-based data and analysis platform for economic studies are the portal dedicated to patent statistics that the Organization for Economic Co-operation and Development (OECD) provides with the OECD. Stat platform, with detailed country-by-country, patent-related indicators[14] or the extensive, worldwide IPR study and related statistics that WIPO has published in the World Intellectual Property Indicators 2019.[15] Alternatively, two recent reports described methods for evaluating and aggregating research activity by using bibliometrics, economic and patent data within some concordance schemes, either with respect R&D output analysis for policymaking[16] or to industry sectors and scientific disciplines.[17]

13 AIDV website <https://www.aidv.org/index-en.html> accessed 28 January 2020.

14 OECD.Stat Website <https://stats.oecd.org/Index.aspx?DataSetCode=PATS_IPC> accessed 28 January 2020.

15 WIPO 'World Intellectual Property Indicators 2019'. (2019) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2019.pdf> accessed 28 January 2020.

16 Frigyesi V et al., ' Exploitation of patent information in R&D output analysis for policymaking' (2019) 121. Scientometrics 1717. See also Côté G et al., 'Patent Indicators and other intellectual property rights indicators for the Science and Engineering Indicators 2020 – Technical documentation' Science-Metrix (2019) <https://www.science-metrix.com/sites/default/files/science-metrix/publications/patent-indicators-for-the-sei-2020-technical-documentation.pdf> accessed 28 January 2020.

17 Neuhäusler P et al., 'Probabilistic concordance schemes for the re-assignment of patents to economic sectors and scientific publications to technology fields' (2019) Fraunhofer ISI

Two main classification systems with comparable, partial overlapping alphanumerical codes are presently applied to patent publications (that is, both to patent applications, as published prior to their examination, and the corresponding patents, as later granted): the International Patent Classification (IPC) and the Cooperative Patent Classification (CPC). The IPC system is maintained by the World Intellectual Property Organization (WIPO), as described in a detailed guide.[18] The CPC has been established by the European Patent Office (EPO) and the United States Patent & Trademark Office (USPTO) as "*a common, internationally compatible classification system for technical documents, in particular patent publications*". The CPC system now covers more than 20 patent offices worldwide, as indicated in the official CPC webpage,[19] which includes a large amount of materials, including a detailed Guide to the CPC.[20] The IPC and CPC codes have a practically identical format, with five levels that constitute hierarchically each IPC and CPC code: Section, Class, Subclass, Group, and Subgroup. Each letter or number at a given level is associated to a title and definition of the product or technological domain that are regularly updated by WIPO and EPO. A typical wine-related patent classification code, common to both IPC and CPC systems, can be used as an example on how an IPC and CPC code is structured (Table 19.1), showing how wine production is formally associated to biochemistry-related patent topics.

Even if the economic importance of the wine sector is widely recognised, only a limited number of studies have been published with specific, practical guidance about how generating and using patent classification systems, and patent-based data in general for wine-related topics. These studies mostly cover specific technologies or products that are applied to winemaking or wine commercialization, without analysing major qualitative or quantitative trends in wine industry. Indeed, such studies do not provide readers with important methodological details that would allow comparing or using the data and analysis published herein, since they do not mention how and where the cited

Discussion Papers Innovation Systems and Policy Analysis No. 60 Karlsruhe (Germany) < https://ideas.repec.org/p/zbw/fisidp/60.html> accessed 28 January 2020.

18 Guide to the International Patent Classification Version 2019 <https://www.wipo.int/edocs/pubdocs/en/ wipo_guide_ipc_2019.pdf> accessed 28 January 2020.

19 CPC webpage <https://www.cooperativepatentclassification.org/index> accessed 28 January 2020.

20 Guide to the CPC (2017) <https://www.cooperativepatentclassification.org/wcm/connect/cpc/212f75e9-e9d4-4446-ad7f-b8e943588d1b/Guide+to+the+CPC.pdf?MOD=AJPERES&CVID=> accessed 28 January 2020.

TABLE 19.1 The structure of IPC and CPC code

EXEMPLARY WINE-RELATED IPC & CPC CODE: C12G1/02		
Section	C	CHEMISTRY
Class	12	BIOCHEMISTRY; BEER; SPIRITS; WINE; VINEGAR; MICROBIOLOGY; ENZYMOLOGY; MUTATION OR GENETIC ENGINEERING
Subclass	G	WINE; OTHER ALCOHOLIC BEVERAGES; PREPARATION THEREOF
Group	1/00	Preparation of wine or sparkling wine
Subgroup	1/02	Preparation of must from grapes; must treatment or fermentation

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF OFFICIAL IPC AND CPC CODE DEFINITIONS

patent publications were searched and selected, or if cited patent documents were granted patents, patent applications still at the examination stage, or already abandoned.

Only a few publications make a quick reference to NACE codes or patent classification codes applicable to grapevine or wine.[21] Otherwise, patent literature has been analysed for identifying the trends in innovation for specific technologies, such as microbiological technologies in wine production, in particular when using yeast and other microbiological tools to improve specific wines during fermentation.[22,23] Patenting activities about isolation and industrial use of specific chemical compounds present in wine and grapes have been also described.[24] Some studies and thesis in economics have analysed patenting activities from the point of view of open innovation and preference

21 Lippoldt, D., 'Innovation and the Experience with Agricultural Patents Since 1990: Food for Thought', *OECD Food, Agriculture and Fisheries Papers, No. 73* (2015) OECD Publishing (Paris).

22 Lombardi SJ et al., 'Yeast Autolysis in Sparkling Wine Aging: Use of Killer and Sensitive Saccharomyces Cerevisiae Strains in Co-Culture' (2015) 9 Recent Patents on Biotechnology 223.

23 Roudil L et al., 'Non-Saccharomyces Commercial Starter Cultures: Scientific Trends, Recent Patents and Innovation in the Wine Sector' (2020) 11 Recent Patents on Food, Nutrition & Agriculture 27.

24 Gollücke APB, 'Recent Applications of Grape Polyphenols in Foods, Beverages and Supplements' (2010) 2 Recent Patents on Food, Nutrition & Agriculture 105.

in specific countries or regions, such as for Canadian and Spanish wine producing companies.[25] Patent activities are also cited for tools supporting the protection and promotion of technologies in marketing, protecting consumers from fraud, or promoting local production in wine sector such as wine tasting kits and packaging,[26,27] or "intelligent" labelling".[28]

Two publications deserve more attention since they offer a more detailed analysis of patenting activities at different steps of the winemaking process. The first one published in 2013[29] has structured the analysis of recent patent publications in several sections, each one dedicated to a specific topic relevant for wine production: vine, microorganisms involved in fermentation and grape transformation, chemical additives used in wine production, methods and apparatus, sensors to monitor wine-making processes, packaging and storing, by-products, and wine serving. The second, more recent study[30] has evaluated technological transitions by exploring the evolution of plant-based biotechnology using the data from patent applications published in Germany between 1995 and 2015 and classified with IPC codes specifically associated to biotechnology and related biological tools or products.

The approaches that were presented in these two publications have been further developed in this Chapter, exploring the patent classification codes and keywords that apply to wine-related products and technologies within patent literature, and the data can be extracted from databases in combination with several chronological, geographical, and/or technical criteria. This chapter demonstrates how patent classification systems may help structuring the search strategy and making the data more consistent and reliable for their

25 Guardia S, 'Open Innovation application comparative analysis for Canadian and Spanish wine producing companies' (2016) Master Thesis, Polytechnique Montreal.

26 Scozzafava G et al., 'Typical Vine or International Taste: Wine Consumers' Dilemma Between Beliefs and Preferences' (2016) 8 Recent Patents on Food, Nutrition & Agriculture 31.

27 Contò F et al., 'Reducing Information Gap and Increasing Market Orientation in the Agribusiness Sector: Some Evidences from Apulia Region' (2016) 8 Recent Patents on Food, Nutrition & Agriculture 48.

28 Lecat B et al., 'The Case of Cruse Affair for the Bordeaux Wines (Winegate) and Its Consequences on the Burgundy Wine Industry' (2016) 8 Recent Patents on Food, Nutrition & Agriculture 25.

29 Baiano A et al., 'Recent Patents in Wine Industry' (2013) 7 Recent Patents on Engineering 25.

30 Kudic M and Shkolnykova M, 'From biotech to bioeconomy New empirical evidence on the technological transition to plant – based bioeconomy based on patent data' (2020) #2002 Bremen Papers on Economics & Innovation, Institute for Economic Research Policy, Bremen University <https://media.suub.uni-bremen.de/bitstream/elib/3601/1/00108571-1.pdf> accessed 28 January 2020.

later analysis and interpretation, using a series of examples. Section 2 provides an overview of main IPC and CPC codes that define distinct products and technologies in the wine industry. The actual use of such IPC and CPC codes for classifying patent documents that claim wine-related inventions is analysed in parallel with the keywords that are most often found associated to such patent publications. Section 3 shows how such patent classification codes and relevant keywords can be used to extract and compare data from patent publications issued by the two main intergovernmental patent authorities (WIPO and EPO) and from patents granted in selected countries worldwide over the 2000–2019 period, suggesting some trends in patent, as well economic, activities for wine industry at national level that are related to the activities of local or foreign entities.

The searches and the analysis were performed between December 2019 and January 2020 in the cited websites. The bibliographical details of the patent documents that were obtained using the described search strategies and data sets from the listed databases (Patentscope, Espacenet, Lens, and Spanish national patent office databases in particular) were downloaded in either csv or xls format, then aggregated and elaborated using Excel to generate Tables 19.4-19.6 and Figures 19.3-19.5. The IPC/CPC code and Word clouds of Figures 19.1 and 19.2 were generated by extracting the related text from the Excel files using WordClouds[31] for generating tables where the number of citations for each word or concept is calculated and then used for generating images using WordItOut.[32]

Additional details on the search strategies and patent data analysis or comparison that were extracted for different countries will be provided in a separate publication.[33]

2 Patent Classification Codes Covering Wine-Related Topics

2.1 *Essential IPC & CPC Codes Describing Inventions in the Wine Industry*

IPC and CPC systems are intended to provide examiners at patent offices and anyone interested in analysing patent publications with a simplified, language-independent approach to summarize the type and technical features of

31 <https://www.wordclouds.com/> accessed 28 January 2020.

32 <https://worditout.com/> accessed 28 January 2020.

33 Falciola L. 'Patent Searching across a Product Value Chain in Food & Beverages: the Example of Wine' (preliminary title, in preparation).

inventions that are defined in the claims in each patent document that is published after its filing, or its grant. Each technology, process, use, or product that is claimed as an invention is associated to an IPC and CPC code that is often (but not always) identical between the two systems with a similar, when not also identical, meaning. These codes are assigned by patent authorities and their definitions are searchable using IPC and CPC dedicated databases or indexes.[34,35] These materials and tools help users in identifying relevant IPC and CPC codes (not always intuitive to find) and navigating across each Section, Class, Subclass, and Group, down to specific Subgroup and are the best starting point to identify the most appropriate patent classification codes for a given product, method, use, or technology. However, this preliminary search for relevant patent classification codes should take into account that:

a) Multiple patent classifications codes (either IPC or CPC) may be associated to a given patent publication (from one to ten or even more, divided in IPC- and CPC- specific sets), depending on the content of claims as filed (and not on the title, abstract, and/or full text as it happens for articles indexed in scientific databases), and then analysed by patent office in charge of assigning such classification codes;
b) At the level of Group, but mostly at the level Subgroup, the same technical concept for a process or a product may be associated to different IPC and CPC codes, but it may be also possible that either IPC-only or CPC-only codes may define specific features more precisely; and
c) The search engines for identifying IPC and CPC codes provide users with results with uneven precision or relevance, highly depending on the choice of the keywords and/or the technical domain.

If not attentively considered, these issues may lead to datasets quite heterogeneous in terms of quality and quantity of patent publications that can be retrieved and grouped on the basis of the patent classification codes only, and thus leading to potentially incorrect analysis and conclusions. An alternative, possibly more appropriate way to proceed would be to search and analyse the technical content of patent publications starting from the main sections (title, abstract, and claims), if not extended to the full text of such documents to be at least later browsed. However, it is evident that this latter approach requires much more time, resources, technical expertise, and even linguistic skills (when dealing with searches on a country-by-country basis and at patent offices where

34 Espacenet CPC webpage <https://worldwide.espacenet.com/patent/cpc-browser#> accessed 31 July 2020.

35 WIPO IPC webpage <https://www.wipo.int/classifications/ipc/ipcpub> accessed 31 July 2020.

the use of English is not allowed) to understand the features of the invention, that goes beyond those available to most searchers and organizations.

As an example, for an initial approach for extracting main wine-related patent classification codes, the IPC and CPC search engines have been searched using "wine" or "grapevine" as keyword. The IPC and CPC common (or specific) codes presenting higher ranking and relevant definitions have been grouped in Table 19.2, together with summaries of their official title.

This analysis clearly shows that, aside to A01H6/88 Subgroup for grapevine plants (common to IPC and CPC systems), the main IPC/CPC common patent classification group C12G1 contains distinct categories of Subgroups:

a) Only a few Subgroups have identical format and definition between IPC and CPC (as in the case of C12G1/02 and other general wine preparation Subgroups C12G1/04, /06, /08 and /14);
b) Some IPC and CPC Subgroups with highly similar, if not identical, definitions for specific methods or processes have different Group and/or Subgroup numbers; and
c) Either IPC-only or CPC-only Subgroups are associated to specific technologies, including the CPC-only C12G2200 Group, covering in particular some specific biotechnological, microbiological or chemical processes that are applied in wine-making processes.

This selection of three patent classification codes A01H6/88 Subgroup, C12G1 Group, and C12G2200 Group (aka the "*Essential Wine IPC/CPC Codes*", as indicated in this and next sections) allows identifying at least the "core" inventions in the wine value chain that are claimed in the patent literature. Essential Wine IPC/CPC Codes can be used to start preparing and performing searches for categories of products or technologies in free and commercial patent search platforms to extract and analyse wine-related patent data more extensively. Such patent classification codes can be combined with other IPC/CPC patent classification codes and/or keywords that would apply to the specific products and technologies relevant for the actual scope of the search.

Indeed, the advice and guidance by a patent attorney is actually needed as well, if the results of the search will be used for taking legally and/or economically relevant decisions), since the actual legal and strategic importance of a patent is based on the content of the claims to be evaluated under applicable legal provisions. Given that patent classification codes are based essentially on the content of the claims, the searcher not having the time, the technical expertise, or the linguistic skills to read patent claims (or full text patent documents) in a specific technical domain, may use an appropriate selection and combination of IPC/CPC patent classification codes looking for relevant patent publications in a given domain. Moreover, patent classification codes allow

TABLE 19.2 IPC and CPC common (or specific) codes

IPC code	CPC code	Title
	A01H6/88	Angiosperms; Vitaceae, e.g. Vitus [grape]
	C12G1/00	Preparation of wine or sparkling wine
	C12G1/005	Methods or means to load or unload, to weigh or to sample the vintage; Replenishing; Separation of the liquids from the solids before or after fermentation
	C12G1/02	Preparation of must from grapes; must treatment or fermentation
C12G1/022	C12G1/0203	Must treatment or fermentation by microbiological or enzymatic treatment
C12G1/024	C12G1/0209	Must treatment or fermentation by in a horizontal or rotatably mounted vessel
C12G1/028	C12G1/0213	Must treatment or fermentation with thermal treatment of vintage
C12G1/032	C12G1/0216	Must treatment or fermentation with recirculation of must for extraction
C12G1/036	C12G1/0206	Must treatment or fermentation by using a home wine making vessel
	C12G1/04	Must treatment or fermentation by sulfiting the must; desulfiting
	C12G1/06	Preparation of sparkling wine, e.g. champagne, impregnating wine with carbon dioxide
C12G1/067		Preparation of sparkling wine with continuous processes
C12G1/09	C12G1/062	Preparation of sparkling wine with agitation, centrifugation or vibration of bottles
C12G1/073	C12G1/064	Preparation of sparkling wine using enclosed, immobilized yeast
	C12G1/08	Must treatment or fermentation with removal of yeast ("degorgeage")
C12G1/10		Deacidifying of wine
C12G1/12		Processes for preventing winestone precipitation

TABLE 19.2 IPC and CPC common (or specific) codes (*cont.*)

IPC code	CPC code	Title
C12G1/14		Preparation of wine or sparkling wine with low alcohol content
	C12G2200/00	Preparation of wine or sparkling wine (special features)
	C12G2200/05	Use of particular microorganisms in the preparation of wine
	C12G2200/11	Use of genetically modified microorganisms in the preparation of wine
	C12G2200/15	Use of particular enzymes in the preparation of wine
	C12G2200/21	Wine additives, e.g. flavouring or colouring agents
C12G1/026	**C12G2200/25**	Preparation of wine or sparkling wine in vessels with movable equipment for mixing the content
	C12G2200/31	Wine making devices having compact design or adapted for home use

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF OFFICIAL IPC AND CPC CODE DEFINITIONS

selecting patent documents of at least potential interest even if the patent attorney or the applicant has, for whatever reason, not included less common (or even unexpected) wine-related keywords in the instructions for searching title or abstract of patent documents, as shown in next examples.

2.2 *Using Essential Wine IPC & CPC Codes to Improve IPC/CPC-based Searches*

When looking for freely available database that allow searching patent information in an effective manner to tools, three databases should be mentioned:

a) Patentscope,[36] provided by WIPO;

36 Patentscope search platform <https://patentscope.wipo.int/search/en/search.jsf> accessed 31 July 2020. See also resources in Patentscope Help page <https://patentscope.wipo.int/search/en/help/help.jsf> accessed 31 July 2020.

b) Espacenet,[37] provided by EPO; and
c) Lens[38] provided by Cambia,[39] an Australian-based, independent, non-profit organization that pursues different activities in open science, innovation, and intellectual property, and that has established this search platform covering both patent and scientific publications in collaboration with several data partners, including main patent offices.

Many other patent databases with variable levels of complexity and completeness are available, in particular those provided by most national patent offices worldwide. Several articles have reviewed the difference and advantages of the different free patent search tools such as those published in the journal *World Patent Information*[40,41] or in listings available from various websites. However, many of such databases and search strategies to be used with them have been object of major updates and improvements during 2019, and in particular Patentscope,[42] Espacenet,[43] and Lens with its Release 6[44] are those to be preferred for establishing patent-related statistics since providing user (after some basics of patent proceedings are understood) with a single access for searching patent publications issued by most important patent authorities. Each of these three databases has search and analysis tools with some differences in their functions, access, structures, data presentation, and complexity but all of them offer means for extracting and reviewing patent data that are quite complete and effective. For instance, all these platforms allow generating graphs and listing of search results for large datasets in Excel-compatible formats. However, each platform presents limits or differences in the number of hits that are extracted, in format and criteria for graphical representations, coverage of territories and/or time periods, including granted and/or filed patent applications,

37 Espacenet search platform <https://worldwide.espacenet.com/patent/search> accessed 31 July 2020. See also Espacenet pocket guide <http://documents.epo.org/projects/babylon/eponet.nsf/0/8C12F50E07515DBEC12581B00050BFDA/$File/espacenet-pocket-guide_en.pdf> accessed 31 July 2020.

38 Lens Patent search platform <https://www.lens.org/lens/search/patent/structured> accessed 31 July 2020. See also < https://support.lens.org/> accessed 31 July 2020.

39 Cambia website <https://cambia.org/> accessed 31 July 2020.

40 Clarke NS, 'The Basics of Patent Searching' (2018) 54 World Patent Information S4.

41 Jürgens B and Clarke N, 'Study and Comparison of the Unique Selling Propositions (USPs) of Free-to-Use Multinational Patent Search Systems' (2018) 52 World Patent Information 9.

42 Patentscope News Archive website <https://www.wipo.int/patentscope/en/news/> accessed 31 July 2020.

43 New Espacenet press release, Nov. 19th 2019 <https://www.epo.org/news-events/news/2019/ 20191119.html> accessed 31 July 2020.

44 New Lens Release notes website <https://about.lens.org/news/category/release-notes/> accessed 31 July 2020.

and "data searchability" with respect to specific criteria, including IPC and CPC codes as well (e.g. Patentscope does not cover CPC codes[45]).

As a follow-up to the initial search in wine-based patent classification databases presented in Table 19.2, Espacenet and Lens were searched in parallel with the Essential Wine IPC/CPC Codes to identify which other IPC and CPC codes are mostly present in association with them in patent applications that are filed under the Patent Classification Treaty (PCT). WIPO (Geneva, Switzerland), is responsible of coordinating and managing the activities under the PCT. This internationally recognized system provides inventors and applicants with a single filing process, publication, and preliminary examination that is recognized in the large majority of countries worldwide, before pursuing substantive patent examination at each national level (with related formal requirements and costs), as summarized in WIPO website.[46] This subset of global patent production is not only formally quite homogenous but also gives an idea of trends in patent protection by applicants and inventors that, at least potentially, are interested in pursuing patent protection over a product or a technology in many countries and not only in own one or only a few ones.

A selection of IPC and CPC Subclasses that may apply to various domains in wine-making, and to wine industry in general, have been obtained by analysing and ranking PCT patent applications that are found by using the Essential Wine IPC/CPC Codes as search criteria in Espacenet and Lens for PCT patent applications that were published between 2000 and 2019. This selection of PCT applications includes approx. 600 "PCT hits", including more than 500 different IPC/CPC Groups and more than 6000 IPC/CPC Subgroups. These patent classification details have been aggregated at the level of Subclasses and the IPC/CPC Subclasses that are most frequently found across this data set are summarized in Table 19.3.

A first group of additional wine-associated IPC/CPC Subclasses under A01 Class and A23N Subclass refers to the technologies, products, and equipment for grape growing, including chemicals that are used in the field (as pesticides or fertilizers). A second group of IPC/CPC Subclasses under A23 Class

45 The possibility to search Patentscope with CPC classification codes has been introduced in February 2020, after the completion of this chapter. For this and other recent changes in Patentscope, see official announcement <https://www.wipo.int/patentscope/en/news/pctdb/2020/news_0001.html> accessed 28 March 2020.

46 'Protecting your Inventions Abroad: Frequently Asked Questions About the Patent Cooperation Treaty (PCT)' <https://www.wipo.int/pct/en/faqs/faqs.html> accessed 31 July 2020.

TABLE 19.3 Most Frequent IPC/CPC subclasses

IPC & CPC Subclasses	Overview of IPC & CPC Subclasses Definition
A01B, A01C, A01D, A01F, A01G, A01H, A23N	Agriculture technologies (soil working, planting, sowing, fertilizing, harvesting, picking fruits, related equipment) and plants
A01N	Preservation of bodies of humans, animals, or plants; biocides, e.g. As disinfectants, pesticides, herbicides
A23F, A23J, A23L	Foods, foodstuffs or non-alcoholic beverages
A47B, A47F, A47G, A47J	Tables; desks, furniture; cabinets; drawers; racks; household, kitchen, or table equipment
B01D, B01F	Separation, mixing, dissolving, emulsifying, dispersing
B65B, B65C, B65D, B67B, B67C, B67D	Containers for storage or transport of articles or materials, e.g. Bags, barrels, bottles, boxes; accessories, closures, or fittings therefor; packaging elements; package conveying; packing; storing; labelling, cleaning, filling with liquids or semi-liquids, or emptying, of bottles, jars, cans, casks, barrels, or similar containers: apparatus, devices for, or methods of, packaging articles; unpacking; applying closure members to bottles jars, or containers; opening closed containers
C12H	Pasteurization, sterilization, preservation, purification, clarification or ageing of alcoholic beverages; methods for altering the alcohol content of fermented solutions or alcoholic beverages
C12L	Pitching or de-pitching machines; casks barrels; cellar tools
C12C, C12G3	Brewing & preparation of other alcoholic beverages
C12M, C12N, C12P, C12Q, C12R, C12Y	Microorganisms or enzymes; fermentation; related compositions, nucleic acids, recombinant DNA technologies, apparatus, testing, and processes
F25D	Refrigeration or cooling

TABLE 19.3 Most Frequent IPC/CPC Subclasses (*cont.*)

IPC & CPC Subclasses	Overview of IPC & CPC Subclasses Definition
G01N	Investigating or analysing materials by determining their chemical or physical properties
G06F, G06K, G06Q	Computing; data processing analysis, storing

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF OFFICIAL IPC AND CPC CODE DEFINITIONS AND BY SEARCHING PATENTSCOPE, ESPACENET, AND LENS WITH ESSENTIAL WINE IPC/CPC CODES

describe various industrial use and transformation of wine and/or grape for producing food or non-alcoholic beverages. A third, large set of IPC/CPC Subclasses under C12 other than C12G1 refers to whole panel of microbiological or biotechnological methods that are involved in grape processing and production of wine (but also of other, mainly alcoholic beverages that make use of fermentation), including as well the containers where such processes are performed. A fourth, small group of IPC/CPC Subclasses under B01 class covers winemaking technologies that involve mechanical, thermal, or other non-biological process. A fifth group of IPC/CPC Subclasses under B65, B67, F25, and A47 Classes covers products and methods for storing, transporting, distributing, and consuming wine at production sites or in shops, restaurants, and at home. Finally, a sixth group of IPC/CPC Subclasses under G01 and G06 Classes cover products and technologies that apply to the wine evaluation and analysis, including the generation and use of wine-related data with specific equipment, analytical products and methods, and/or computing processes. These six, quite distinct groups of patent classification Subclasses can be used together with the Essential Wine IPC/CPC Codes and/or any other relevant text-based, highly wine-specific search criteria to make the analysis of wine-related technologies that are object of patent protection more complete.

However, it is important to mention that if the outcome of the search in combination of such patent classification codes and/or keywords is not attentively reviewed, the analysis may be extended to considerably much bigger data set while reducing the relevance for the evaluation of patenting trends in the wine industry. It is well possible that the search results also cover some products and technologies that may be preferably, or mainly, apply to various

industrial uses of wine or grapes, as recently reviewed,[47] including production and commercialization of other (non-)alcoholic beverages and juices, vinegar, grape extracts and by-products of grape processing, beer, distillation or fermentation products. Moreover, as potential "false positives", the search results may include references to beverages that are defined in available English text as wines but are produced by using other plants, such as rice, especially in Asian countries.

The "PCT hits" that were presented above in Table 19.2 was further analysed in parallel in terms of frequency of both IPC/CPC Groups and words or concepts most often present in the title and/or abstract of PCT patent applications that are associated to the Essential Wine IPC/CPC Codes. Figure 19.1 presents the "IPC/CPC Group cloud" that has been generated using the same set of 600 PCT patent applications that have been used for generating Table 19.3.

The IPC/CPC code information that was initially extracted and summarised above now appears in a more detailed manner, with specific Groups that are particularly frequent, together with additional Groups from other Classes that are often found as well and that may be taken into account for later analysis and for expanding the search in specific wine-related technological domains. As expected, C12G1 Group and, to a lower extent, the CPC-specific C12G2200 Subclass broadly covering the preparation of wine or sparkling wine are largely dominant but a number of CPC/IPC Groups not specifically associated to wine but applicable as well to other beverages are among the ones most present such as:

a) C12G3 (preparation of other alcoholic beverages, by fermentation and/or mixing ingredients);
b) C12H1 (sterilisation, preservation, purification, clarification, or ageing of alcoholic beverages);
c) C12C1 and several others from C12C Subclass (materials, extraction, fermentation, and other processes for making beer, with related equipment); and
d) C12J1, A23L2 and several others from A23L Subclass, A23J3, A23F3, A23F5, A23C9, and A23V2002/2250 (preparation of vinegar, non-alcoholic beverages or foods, from fruit, as concentrates, or by removal of alcohol; the latter ones present only in CPC system).

A further, large number of Groups covers microbiological and biotechnological techniques that apply to either biology potential improvements for grapevine

47 OIV, 'Focus 2019 Industrial use of wine' <http://www.oiv.int/public/medias/6957/focus-oiv-2019-industrial-use-of-wine.pdf> accessed 31 July 2020.

FIGURE 19.1 The IPC/CPC GROUP cloud
Note: This "IPC/CPC Group Cloud" Represents The IPC/CPC Patent Classification Groups More Often Present In The List Of 600 PCT Applications Published In 2000–2019 Period That Has Been Generated By Searching Patentscope, Espacenet, And Lens With Essential Wine IPC/CPC Codes (See Table 19.3). The Size Of Each IPC/CPC Reflects Its Frequency In The Data Set (Occurrence Between 1236 And 10 Times).
SOURCE: ELABORATED BY THE AUTHOR

and grape production or to the fermentation and other processes that apply to winemaking, such as:

a) C12N1, C12N5, C12M1, C12R1, and C12Q1 (processes of propagating, maintaining, or using cells or microorganisms, and related equipment);
b) C12N9 and C12N11 (enzymes and processes for preparing, activating, inhibiting, using, storing, or purifying enzymes);

c) C12N15 (genetic engineering technologies and related DNA vectors, microorganisms); and
d) C07K14 and C12P21 (proteins and their preparation).

A selection of Groups covers physico-chemical processes and devices that may be relevant in wine-making and packaging, but also for other beverages or even food and liquids in general, such as:

a) C12F3 and B01J20 (recovery of by-products, gases, solids, and other substances);
b) B65B31, B65D1 and several others from B65D Subclass, B67C3, and B67D1 (bottles, jars, containers, pallets, packaging, and other storage items in glass, metal or other materials, related transport systems, closures or devices for dispensing beverages);
c) B01F3 and several others from B01F Subclass (mixers and mixing processes for dispersing, emulsifying, ingredients and liquids, some present only in CPC system);
d) B01D1, B01D3, C12H3, and C12H6 (distillation, evaporation, and other methods for increasing or decreasing alcohol content of fermented solutions, with related equipment);
e) B01D15, B01D61, and B01D69 (membranes and processes involving liquid separation);
f) C12L9 and C12L11 (venting devices for casks, barrels and other cellar tools);
g) B30B9, A23N1, and A47J31 (presses and other equipment for extracting juices); and
h) A47B69, A47B73, A27F7, and A47G19 (cabinets, racks, shelves, glasses, holders).

Novel grapevine variants or improvements are not often present in PCT applications, also because the patent protection of plant varieties or genetically modified is a politically sensitive issue in many countries and patent law in such jurisdictions provides limited opportunities for obtaining patent protection for inventions that are defined under A01H6/88 Subgroup and in A01H5 Group (covering specific features of flowering parts, such as flowers or fruits, also found associated to grapevine), with some exceptions notably in USA (see Section 3 below). Otherwise, Essential Wine IPC/CPC Codes can be found associated to a series of Groups that cover grape growing equipment and technologies such as:

a) A23B7 (preservation or chemical ripening of fruit or vegetables);
b) A01N25, A01G7, and A01N63 (biocides, pest repellents, plant growth regulators and treatments);
c) A01D46 (picking fruits or vegetable, see A01D46/28 covering grape harvesting machines);

d) A01G17 (cultivation of hops, vines, fruit trees, including supports, machines); and
e) A23N15 (Machines or apparatus for other treatment of fruits or vegetables).

Finally, only small groups of hits presents IPC/CPC codes related to products and techniques that are relevant for analytical techniques such as G01N33 and G01N21 (equipment and processes investigating or analysing materials and liquids) and compositions for medical, cosmetic, and nutritional uses, possibly including grape or wine extracts or by-products (under various Groups belonging to A61K and A61Q Subclass). Such additional IPC/CPC codes found associated to Essential Wine IPC/CPC Codes in this set of PCT applications are present in a majority of such "PCT hits", indicating some important "innovation spill-overs" across food and beverage technologies, with a degree of wine-specificity that need to be further evaluated by combining appropriately such codes with specific C12G1 and C12G2200 Subgroups (at least when strictly concerning the wine-making process). This analysis also shows how diversified are the technical domains that are mapped by using Essential Wine IPC/CPC Codes and how appropriate combinations with other IPC/CPC codes are needed at the scope of restricting the analysis to specific technological fields.

2.3 *Using Essential Wine IPC & CPC Codes to Improve Keyword-Based Searches*

The Essential Wine IPC/CPC Codes can be also used to identify and aggregate the keywords and concepts that are present in title and abstract of patent documents. The same dataset including PCT applications has been then analysed by using their title and abstracts in English, always available for patent applications that are filed under the PCT system. Figure 19.2 presents a "word cloud" that has been generated using this text-based input wherein some groups of words and concept appear most often present in such title and abstracts.

Aside from those specifically related to wine (including "grape" and "must", sets of words and concepts can be somehow aligned to at least some of IPC/CPC codes listed above, such as:

a) Type or definition for claimed invention such as "process" (and related words such as "control", "adding", "mixing", etc.) "method", "production", "composition", "device", "system", etc.);
b) Drinking or tasting matters ("drink", "flavor", "beverage", "aroma", "sparkling", "taste", etc.);
c) Mechanical matters ("container", "extract", "flow", tank", "bottle", "chamber", etc.);

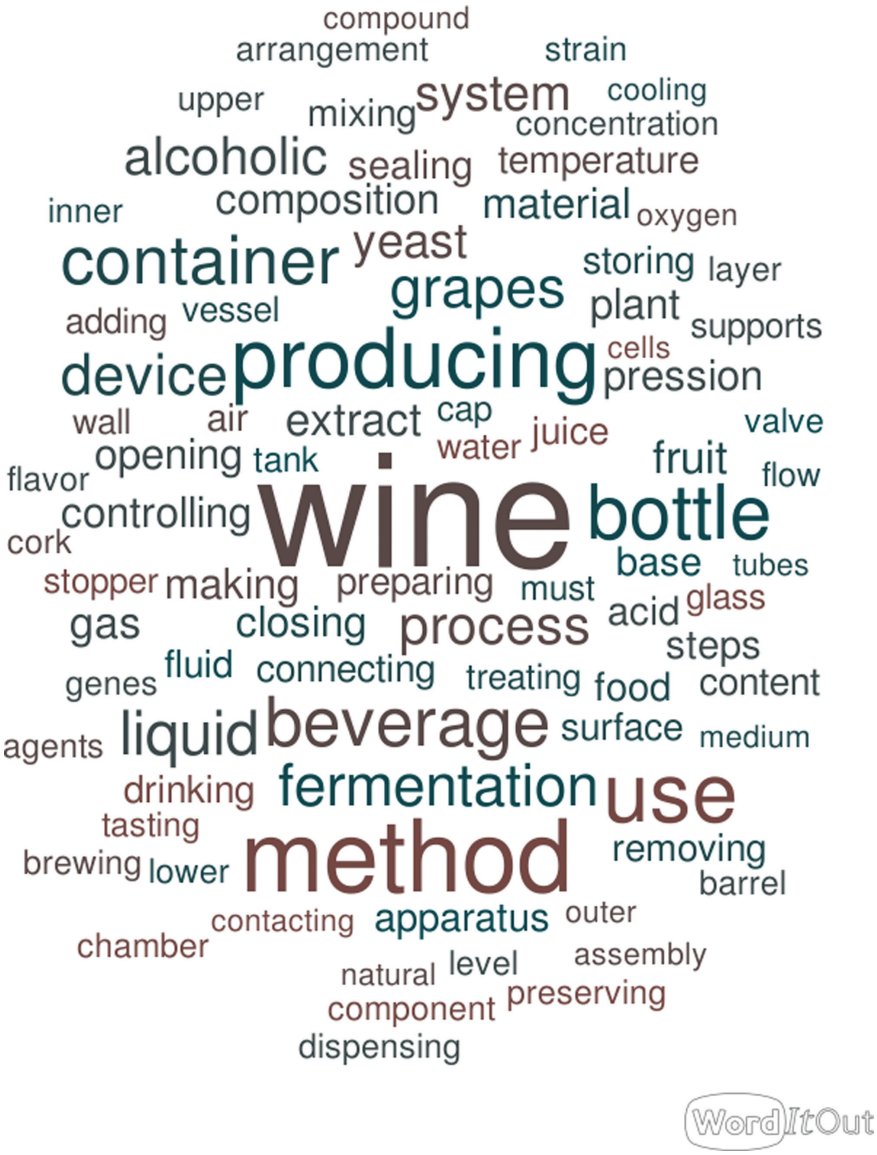


FIGURE 19.2 The "Word Cloud" of essential wine IPC & CPC codes
Note: "Word Cloud" representing the words or concept more often present in the 600 PCT applications published in 2000–2019 period that have been selected by searching with Essential Wine IPC/CPC Codes. The size of each word reflects its frequency in the data set (occurrence between 607 and 25 times).
SOURCE: ELABORATED BY THE AUTHOR

d) Physico-chemical matters ("alcohol", "liquid", "gas", "fluid", "temperature", "solution", etc.);
e) Plant-related items ("vegetable", "plant", "fruit", etc.);
f) Non-wine products ("beer", "brewing", "juice", "food", etc.); and
g) Microbiological or biotechnology ("fermentation", "yeast", "strain", "gene", "cell", "protein", etc.).

Thus, these words and concepts can be used in combination with Essential Wine IPC/CPC Codes and/or other IPC/CPC codes listed above for quantitative and qualitative analysis of patent production that is associated to specific technological fields at different positions within wine value chain and any later industrial use, as shown in the next Section for patent documents published from selected patent offices.

3 Trends in Wine-Related Patent Filings at Main Patent Offices

3.1 *The PCT System and Wine-Related Global Trends at a Global Patent Office*

During the last decades, wine industry has become an increasingly globalised economic activity as confirmed by reviewing statistics and reports that OIV in particular regularly publishes. Table 19.4 provides with a summary of main OIV statistics and country rankings for year 2018.[48] Aside from European countries with stronger wine traditions as producers and consumers (such as Italy, Spain, France, Russia, or Portugal), other European countries with a wine tradition appear having possibly insufficient and/or expensive wine production (such as Germany, Switzerland, or Austria), while others only as important consumers and importers (such as United Kingdom or The Netherlands). Non-European countries can be grouped in those where wine production, consumption, and export activities are well established (USA, Argentina, Chile, Australia, New Zealand, and South Africa), while others are important wine consumers and importers only (such as Japan or Canada). Turkey and China are both historically important grape producers but if the former is almost absent from wine business (grape is essentially used for non-wine, direct use or transformation, e.g. dried), the latter has a growing importance as wine consumer and producing country.

48 OIV 'NOTE DE CONJONCTURE MONDIALE Situation du secteur en 2018' (2019) <http://www.oiv.int/ public/medias/6678 /fr-oiv-note-de-conjoncture-2019.pdf> accessed 31 July 2020.

TABLE 19.4 Summary of main OIV statistics and country rankings for year 2018

Selection of Countries Most Cited in 2018 OIV statistics	Wine-related Global Statistics & Country Ranking in 2018				
	Wine Production, by Volume	Area Dedicated to Grape Growing (Production)	Total Wine Consumption (per capita)	Wine Export,	Wine Import,
				by volume	by volume
Italy	1	4 (2)	3 (3)	2	NA
France	2	3 (5)	2 (2)	3	4
Spain	3	1 (4)	8 (12)	1	NA
USA	4	6 (3)	1 (19)	8	3
Argentina	5	7 (8)	9 (13)	10	NA
Chile	6	8 (9)	23 (18)	4	NA
Australia	7	14 (11)	10 (6)	5	NA
Germany	8	18 (16)	4 (11)	7	1
South Africa	9	15 (12)	14 (20)	6	NA
China	10	2 (1)	5 (24)	NA	5
Russia	11	19	7 (21)	NA	8
Portugal	12	9	11 (1)	9	NA
Brazil	15	20 (15)	15 (23)	NA	NA
New Zealand	16	24	NA	11	NA
Austria	17	23	21 (7)	NA	NA
Switzerland	20	26	19 (4)	NA	NA
United Kingdom	NA	NA	6 (15)	NA	2
Japan	NA	NA	17 (22)	NA	10
Canada	NA	NA	13 (17)	NA	6
Turkey	NA	5 (6)	NA	NA	NA
The Netherlands	NA	NA	16 (14)	NA	7

[a] Roca P, 'State of the Vitiviniculture World Market' Presentation at 42nd World congress of Vine & Wine (Geneva, July 15th 2019) <http://www.oiv.int/public/medias/6779/state-of-the-vitiniculture-world-market-oiv-2019-congress-pr.pdf> accessed 31 July 2020 and OIV, '2019 Statistical Report on World Vitiviniculture' (2019) <http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf> accessed 31 July 2020.

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF OIV REPORT A. NA: NOT AVAILABLE

Such a variety of "wine leaders" over the continents would suggest that at least some applicants may exploit the PCT system to establish patent rights in at least some of such countries where the wine industry has potentially highest economic impacts. As indicated above, the PCT system provides applicants with a series of advantages, main ones being the possibility of filing a single patent application that can be later actually examined to a preferred panel of countries, delaying the decision of if/where/how starting actual substantive, time-consuming (and expensive) examination process leading to actual patent grant, and with the choice of language. On this latter topic, it is important to observe that PCT Rule 48.3(a) presently allows filing and publishing PCT applications in 10 languages: Arabic, Chinese, English, French, German, Japanese, Korean, Portuguese, Russian and Spanish (a list that has grown in recent years). However, every PCT application is officially published with title and abstract translated in English and French. Together with the IPC/CPC coding described in Section 2, this English text helps users in pursuing English-based keyword searches even if for PCT patent applications that were filed in other languages.

Thus, IPC/CPC codes, in particular Essential Wine IPC/CPC Codes, and/or English keywords can be used to search PCT patent applications as published, in any platform, for instance, using Essential Wine IPC/CPC Codes or keywords strictly related to wine within the title and abstracts (claims being in the same language of the rest of the patent application). Such "Wine Title/Abstract Keywords" can be wine*, grapevin*, enolog*, oenolog*, vinif*, or "grape vine" (* indicating any word starting with such word root) that can be used as alternative keywords for formulating searches in Espacenet and Lens, in parallel to IPC/CPC codes. An initial analysis can be performed on the PCT applications that have been published over the last 20 years, comparing the "PCT Hits" selected above for generating Figures 19.1 and 19.2 with those isolated using Wine Title/Abstract Keywords. These data are summarized in Figure 19.3, where numbers are aggregated in ten two-year periods but separating the figures for the two search strategies.

If the two data sets are partially overlapping (approximately 45% of PCT patent applications under "Essential Wine IPC/CPC Codes" are also found with "Wine Title/Abstract Keywords"), it appears that the Wine Title/Abstract Keywords search identify around twice as much PCT patent applications. The chronological trends are quite similar, with a continuous increase until 2007 and after 2015, between these two years those found with IPC/CPC Codes showing a most evident decrease. Thus, entities preferably filing more strictly wine-specific PCT patent applications appear having been more affected by the 2007–2008 financial crisis than others not only working in wine industry but also PCT applicants in general, since World Intellectual Property Indicators

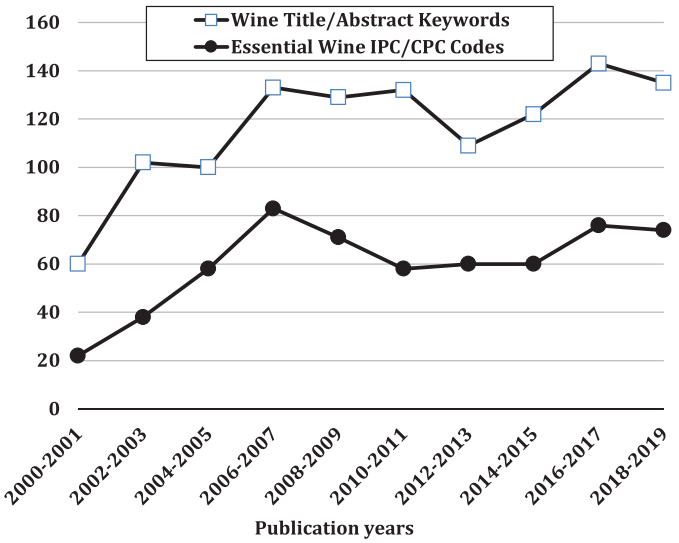


FIGURE 19.3 Number of PCT patent applications
Note: Number of PCT patent applications related to wine industry that were published in 2000–2019 period, comparing the trends observed when either wine-specific patent classification codes or keywords in title/abstract are used to search patent data in Patentscope, Espacenet, and Lens (see Figures 19.1 and 19.2, Table 19.3).
SOURCE: COMPILED BY THE AUTHOR

2019 shows only a minor decrease in 2009 as application year. In any case, the growing use of PCT system among entities active in the wine industry during the period 2000–2019 appears evident, at least until 2007.

The two PCT-based data sets were also identified for two country-related criteria: nationality of applicants and language. The first criteria has been compared in Table 19.5 with some country rankings that were presented in Table 19.4, showing that some "traditional" wine countries such as Italy, France, Spain, Australia, and Germany somehow confirm their presence also among major PCT applicants in both dataset while others (including Russia, South Africa, and South American ones) are not present. Patent applicants from countries such USA, China, Japan, Switzerland and, surprisingly, Denmark (possibly due to Danish companies working in fermentation products and technologies) appears using PCT system more frequently. The Wine Title/Abstract Keywords data set shows a much higher percentage of Chinese applicants and, in general, a more fragmented landscape, with more countries represented among PCT applicants.

TABLE 19.5 PCT applicants

Countries Most Cited for PCT Applicants (2000–2019)	Wine-related global statistics & Country ranking in 2018			Country ranking by no. of PCT appl. published in 2000–2019 (percentage of total)	
	Wine Production (Volume)	Wine Export (volume)	Total Wine Consumption (per capita)	Using Essential Wine IPC/CPC Codes only	Using Wine Title/ Abstract Keywords Only
Italy	1	2	3 (3)	4 (11%)	4 (8%)
France	2	3	2 (2)	3 (12%)	3 (9%)
Spain	3	1	8 (10)	5 (7%)	5 (6%)
USA	4	8	1 (15)	1 (17%)	1 (17%)
Japan	NA	NA	17 (22)	2 (13%)	5 (6%)
Australia	7	5	10 (6)	6 (5%)	5 (6%)
Germany	8	7	4 (8)	7 (5%)	5 (6%)
China	10	NA	5 (20)	8 (5%)	2 (13%)
Switzerland	20	NA	19 (4)	9 (4%)	9 (2%)
Denmark	NA	NA	NA	10 (4%)	10 (2%)
Other	NA	NA	NA	NA (17%)	NA (25%)

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF OIV REPORT (SEE TABLE T4; NA: NOT AVAILABLE) AND DATA EXTRACTED FROM PATENTSCOPE, ESPACENET, AND LENS (SEE FIGURES 19.1 AND 19.2, TABLE 19.3)

This analysis can be complemented with the one of PCT filing languages, summarized in Table 19.6. The expectation that English, as main language for business and scientific exchanges worldwide, should be also prevalently used by PCT applicants (in particular those not having a national language accepted by PCT authorities, for instance Italian or Danish ones) is partially not confirmed. If English is prevalent among PCT patent applications at IPC/CPC Class level for microbiology and biotechnology, the situation changes at IPC/CPC Subclass level, with French, Chinese, and Spanish PCT applicants clearly still

TABLE 19.6 Languages used by PCT applicants

Selection Criteria (n. of PCT application found with this criteria)	Language of PCT applications (as percentage of total PCT applications; period 2000–2019)						
	English	French	German	Spanish	Japanese	Chinese	Other
IPC Section C; Chemistry -622.575	60%	3%	8%	1%	20%	4%	4%
IPC Subclass C12G; wine, beer, other alcoholic beverages (1087)	44%	7%	4%	6%	25%	8%	6%
Essential Wine IPC/CPC Codes (600)	60%	11%	4%	8%	10%	4%	3%
Wine Title/abstract Keyword Only (1127)	55%	10%	5%	6%	6%	12%	6%

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF DATA EXTRACTED FROM PATENTSCOPE, ESPACENET, AND LENS (SEE FIGURES 19.1 AND 19.2, TABLE 19.3)

preferring own language, maybe because they also pursue parallel national, faster-to-grant patent proceedings with the same text.

In any case, this observation also shows that a deeper analysis of PCT patent filing trends in the wine industry (and for whatever other legal, business, or patent scope) that is extended to patent claims or full text applications should integrate as well the language specificities beyond the use of English-based keywords (covering only slightly more than half of PCT patent applications). Thus, a more complete and consistent search in PCT publications:

a) Would require at least making use of online machine translation systems that Patentscope and Espacenet propose;
b) May also involve the use of alternative set of keywords in specific language(s) other than English; and
c) May be made simpler by combining selected IPC/CPC and English keywords in title/abstract, at least for reducing the number of PCT applications to be further analysed at claims or full-text level in the original language.

3.2 *The EPC System: Filing and Granting Trends at a Patent Intergovernmental Authority*

The trends that were observed at the level of PCT patent applications can be compared to those at EPO, another intergovernmental organization that, differently from WIPO, also examine and grant patents. EPO in Munich, Germany, is responsible of managing the patent filing, publication, and granting system under the European Patent Convention (EPC[49]). All European Union members, main non-EU European countries (such United Kingdom, Switzerland, Norway, or Turkey, but not Russia and ex-USSR states that have established a parallel Eurasian Patent Organization, EAPO) plus a few additional non-European ones, are EPO member, extension, or validation states bound by EPC, for a total of 44 states. As for PCT system, EPC system also provide applicants with a series of advantages, main ones being the possibility of having a centralized system for patent examination and grant, with a choice of language of proceedings (but limited to English, French, and German), with EPO pursuing a quite detailed patentability evaluation. EP patents (that is, patents granted by EPO) can be later validated and maintained in any of EPC countries but, in real life, most applicants pursue an EP patent in a limited number of EPC countries, due to the expensive translation and annuity costs that some states still apply. In general, put aside some national exceptions, a company willing to obtain patent protection in a panel of EPC member, extension, or validation states has the choice of filing either:

a) parallel patent applications in each country of interest, directly, and then prosecuting them separately, according to local language and legal requirements; or
b) a single EP patent application (based or not on a previous PCT patent application) that is examined and granted at EPO and then validated only later on, choosing the countries where enforcing patent protection , according to the strategic and commercial interest, and resources as available at that moment.

Analysis of patent protection in Europe is made complex by these alternative, parallel routes, with national patent rights originated and obtained using different examination proceedings, and possibly after longer or shorter period of time, but similarly enforceable at local courts. Moreover, the content of EP patent applications and granted patents and national European patent rights are hardly accessible using free patent databases. For instance, Patentscope

49 EPO Legal foundation <https://www.epo.org/about-us/foundation.html> accessed 31 July 2020.

does not cover most granted patents but only those PCT patent applications for which national phase information is available.[50] Espacenet does not make a distinction for the search between granted and filed EP applications. EPO website offers other free EP patent search tools such as EPO Register[51] and EP Bulletin/Full text search[52] to identify which EP patent applications have been actually granted but, as a main limitation, they do not allow searching CPC codes.

Thus, the IPC/CPC- and Title/abstract-based search strategies pursued above for PCT patent applications, were performed for EP patent applications and granted patents using Lens, still using the 2000–2019 period as reference. If applicant's country is not indexed in Lens, this database makes possible to search and group patent documents on the basis of the date and filing office for the priority application, that is the initial patent application that generally is converted into a definitive PCT or EP application within 12 months. The choice of the country for filing this initial patent application can be associated to own nationality and/or trust in a given patent office. The filing date of the priority patent application can be used as the starting point to calculate how much time is needed to get and officially exploit a granted patent, hopefully claiming the initial invention as broadly as possible. Indeed, this analysis does not evaluate how initial claims were maintained as such after the EPO examination, or if applicant had to limit them and/or separate them in two or more divisional patent applications. However, this approach for the analysis still allow making some general comparisons about organisation filing EP applications and the examination process as pursued at EPO.

Figure 19.4 summarizes the main evidences that were found by comparing the two, partially overlapping datasets of EP patent applications and EP granted patents as being retrieved using the Essential Wine IPC/CPC Codes or the Wine Title/Abstract Keywords.

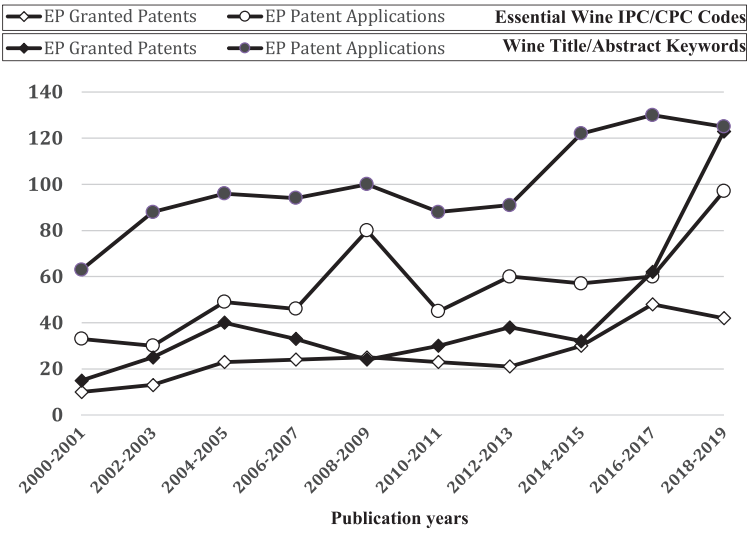
The number of patent applications that are found using with these criteria may appear similar to the ones file at WIPO but this representation actually covers both the PCT patent applications that were later prosecuted at EPO as well as EP patent applications that were directly filed at EPO. As shown chronologically in Figure 19.4 (Panel A), if the number of EP patent

50 Patentscope National collections <https://patentscope.wipo.int/search/en/help/data_coverage.jsf> accessed 31 July 2020.

51 EPO Register search platform <https://register.epo.org/advancedSearch?lng=en> accessed 31 July 2020.

52 EPO Patent information services for experts <https://data.epo.org/expert-services/index.html> accessed 31 July 2020.

(A)



(B)

Priority Appl. (office)	Average Mts. to EP grant	Percentage of EP Appl. That are Granted
Other non-EPC countries	95	23%
	84	45%
USA	98	42%
	84	37%
Japan	89	30%
	80	52%
Australia	79	45%
	65	45%
Other EPC countries	92	46%
	64	39%
Italy	60	54%
	57	58%
Germany	51	48%
	61	55%
Spain	66	35%
	59	45%
France	70	58%
	68	77%
EPO	64	36%
	64	32%

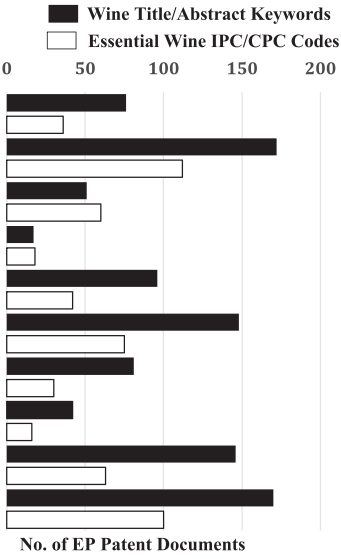


FIGURE 19.4 Number of EP patent documents
Note: EP patent applications and EP patents were retrieved using two different search criteria (either essential wine IPC/CPC codes or Wine Title/Abstract Keywords) over the 2000–2019 period, indicating the number of patent documents by year. The total number of EP patent applications and of EP granted patent identified were 563 and 261 respectively (for essential wine IPC/CPC codes), and 998 and 428 respectively (for Wine Title/Abstract Keywords). The EP patent documents in common between the two data sets were 42 for EP granted patents and 156 for EP applications
SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF DATA EXTRACTED FROM LENS

applications found with these two types of criteria appears more variable, the overall growing trend with an higher number of Wine Title/Abstract Keyword-related patent applications is similar to the one observed for PCT patent applications above. The situation is different for the actually EP granted patents, where numbers are clearly lower and more similar between the two groups of wine-related patents, with a major increase in the number of EP patents that is observed only for Wine Title/Abstract Keywords-related patents in most recent years. Apparently EP patent proceedings from this latter category has taken more advantage of the overall increase in the number of EP patents granted since 2015.[53]

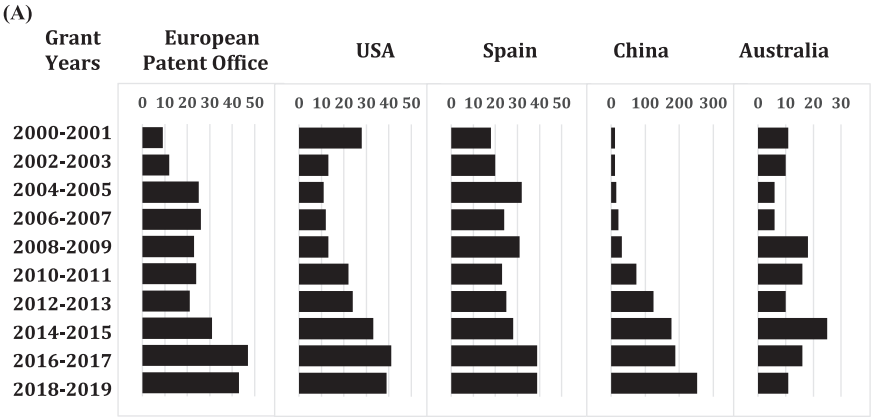
The two EP patent data sets have been also compared in Figure 19.5 (Panel B) at the level of patent office where the patent proceedings were started.

Even if USA appears prevailing as single patent office for number of patent applications from which EP applications are originated, it has to be observed that applicants from major European wine countries (Italy, France, Spain, Germany) have still a strong preference in starting patent proceedings on the basis of patent applications filed in own countries and only later one pursuing EP patent filings. This evidence may be similar to what has been already observed at the level of PCT patent applications with applicants using languages other than English (see Table 19.6). As in the previous example, it appears that applicants in such countries may even pursue parallel, national patent examination at own patent office while waiting for outcome of examination at EPO. In any case, about 80% of all wine-related EP patents stems from patent filings initially pursued at the patent offices of an EPC country or USA, much more then 60% that is defined on the basis of the applicant's country for PCT patent applications (see Table 19.5). It is worth noticing that non-European countries with strong visibility at the level of either wine-rated statistics (such as Chile or Argentina) or at the level of PCT patent applications (such as China and Japan) do not appear among the countries with a significant number of patent filings that later originate EP patents.

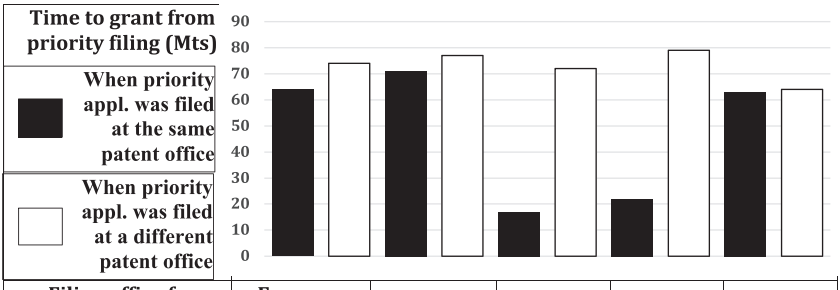
Other trends can be identified in these two data patent sets, for instance at the level of priority-to-EP grant period, generally lower for EP patent applications filed on the basis of EP or national patent filings that possibly entered examination at EPO before than those filed by applicants from non-EPC countries (taking more often advantage of delaying in examination by using PCT system).

53 EPO Annual Report 2018, Statistics and Indicators <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2018/statistics/granted-patents.html> accessed 31 July 2020.

(A)



(B)



Filing office for priority application	European Patent Office	USA	Spain	China	Australia
EPO	12	60	10	1	12
USA	17	7	6	1	17
China	0	0	0	91	1
Spain	2	1	45	1	2
Australia	3	2	2	0	18
Other EPC country	48	19	30	1	34
Other non-EPC country	18	11	7	5	16
	Granting patent office (number of granted patents in 2000-2019 period)				

FIGURE 19.5 Distribution of wine-related patent granted in five representative jurisdictions over the 2000–2019 period

Note: The granted patents have been retrieved using the Essential Wine IPC/CPC Codes as search criteria and grouped either by publication year (Panel A; each column corresponds to a two-year period) or with respect to country of the initial priority patent application, indicating the priority-to-grant period for the patents based on priority applications filed in the same patent office or in other patent offices (Panel B, in months; Mts). The total number of granted patents that were analysed are the following: 261 EP patents, 236 US patents, 278 Spanish patents, 907 Chinese patents, and 129 Australian patents.

SOURCE: COMPILED BY THE AUTHOR ON THE BASIS OF DATA EXTRACTED FROM LENS

Other trends are found at the level of the IPC/CPC codes found in EP granted patents, for instance:

a) EP granted patents found by using Essential Wine IPC/CPC codes present much more frequently patent classification Group codes that are associated to preservation or chemical ripening of fruit or vegetables (A23B7) or to fermentation, with containers and microorganisms related to this process (e.g. within B65D, C12C and C12N);
b) EP granted patents found by using Wine Title/Abstract Keywords present much more frequently patent classification Group codes that are associated to wine storage, analysis, transportation, or consumption (e.g. within B67B, B67D, F25D, or G01N).

3.3 *Trends in Establishing Patent Rights in Wine Industry at Selected Patent Offices Worldwide*

Lens can also be used to extract also data about granted patents from many other patent authorities, but obviously this database is not fully or properly supporting the use of English at least by translating title and abstract, Thus, only Essential Wine IPC/CPC Codes may allow comparing trends across many countries worldwide using Lens. The data obtained for patents granted at EPO were then compared to those extracted using the same criteria for some exemplary countries worldwide in wine industry (USA, China, Spain, and Australia) and distinguishing patents on the basis of the patent office where the priority patent application was filed (the same five countries listed above plus from any EPC country or any other non-European/EPC country).

At the purely quantitative level, the Chinese patents granted in this period are practically equivalent to the number of patents granted by the other four authorities all together (approximately 900) but it is the consequence from the large increase in patent applications that have been granted in the last decade. These Chinese patents were granted on the basis of a patent application directly filed at Chinese patent office that are granted much faster and correspond to more approx. 90% of these Chinese patents. Apparently, non-Chinese applicants would disregard this jurisdiction, somehow similarly to Chinese applicants would disregard other jurisdictions, even though they file a relatively high percentage of PCT patent applications.

Additional observations can be made for wine-related patent production in USA. A similar number of patents are granted at EPO and US Patent & Trademark Office (USPTO), with similar periods of time for examination. Moreover, in USA almost 80% of all wine-related patents stems from patent filings initially pursued at the patent offices of an EPC country or USA (as at EPO, but with

reversed ratio of 60% to 20%). However these data on US patents do not cover a two separate type of patents called Design Patents and, more importantly, Plant Patents. USPTO grants such patents for *"any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state".* (35 U.S.C. § 161;[54]), a type of protection for which there is not an exact equivalent at EPO and in most countries worldwide.

About this topic, the website of International Union for the Protection of New Varieties of Plants (UPOV[55]) gives access (after registration) to the plant variety database PLUTO[56] that compiles data supplied by countries that are UPOV members of the Union and by OECD with respect to plant breeder's rights (PBR), plant patents (PLP) or to national listing (NLI). According to a search in Lens, approximately 220 US Plant Patents around grapevine variants have been granted in the 2000–2020 period, mostly associated to specific US patent classifications codes (PLT205, PLT206, PLT207), practically all filed by US applicants. These variants are also referenced in other dedicated databases such as a scientific international English-language literature database in the field of viticulture established by Julius Kühn-Institut, a German research institution[57] or the US Plant Patents Image database at University of Maryland.[58]

Some further observations can be made with respect to the Spanish patent office and Spanish patent applicants in wine industry. Spain is a country well present in all wine-related statistics but appear pursuing a limited number of patent-related activities directly in other countries, or at least by filing patent applications written in other languages. These data generated by using Lens were also checked by searching the website of the Spanish patent office[59]

54 Kaider B, 'Plant Patents in the Wine Industry' *The Grapevine Magazine* (22 July 2019) <https://thegrapevinemagazine.net/2019/07/plant-patents-in-the-wine-industry/> accessed 31 July 2020. For legal provisions applicable in the USA see also < https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/general-information-about-35-usc-161> accessed 31 July 2020.

55 UPOV Website <https://www.upov.int//> accessed 31 July 2020.

56 PLUTO search platform https://www.upov.int/pluto/en/ accessed 31 July 2020. For an analysis of legal provisions and data at national level platform, see also <https://www.upov.int/pluto/data/current.pdf> accessed 31 July 2020.

57 Vitis Vea, at Julius Kühn-Institut (JKI) Federal Research Centre for Cultivated Plants, Institute for Grapevine Breeding <https://www.vitis-vea.de/En/> Accessed 31 July 2020.

58 Plant Patents Image Database <https://www.lib.umd.edu/plantpatents> accessed 31 July 2020.

59 Invenes Website <http://consultas2.oepm.es/InvenesWeb/faces/busquedaInternet.jsp> accessed 31 July 2020.

which has a very effective search interface, both in Spanish and English, that gives access to both INTERPAT (bibliographic data and patent and utility model documents from Spain) and LATIPAT (bibliographic data and documents of Latin American patents). This database allows extending the analysis not only to Spanish utility models but also to the actual origin of patent rights in Spain (directly from a Spanish plant application or stemming from a granted EP patent), showing that almost the totality of Spanish patents from Spanish applicants are not examined at EPO, with consequent short period from priority application to grant. However, the growth observed in wine-related Spanish patents granted in most recent years appears essentially based in an increase of EP patents that non-Spanish applicants validate at Spanish patent office, an evidence that can be evaluated also in view of other studies on the wine industry in Spain.[60]

Finally, Australia seems a jurisdiction with significant but still limited patenting activity, with domestic and foreign applicants obtaining patents in a similar period of time, with less national leaders than other countries. Other non-European countries with important wine export activities were also reviewed but very few patent filings made by both domestic or foreign applicants were identified.

4 Conclusions

This chapter has not the ambition of being complete and definitive about neither the patent filing trends worldwide applicable to wine industry as a whole , nor the best practices to be applied when searching patent literature and defining patent protection strategies within any sector of wine industry. Wine is a product that contains many thousands of chemical compounds and is commercialized in many formats, providing with consumers with a wide choice of taste, visual, and smelling experiences resulting from a variety of chemical, mechanical, and biological technologies having own history, geographical origin, and requirements that may be difficult to identify and analyse consistently within patent literature. However, some two major, general types of conclusions can be made on the basis of the examples and the data shown above.

60 Lorenzo JRF et al., 'The Competitive Advantage in Business, Capabilities and Strategy. What General Performance Factors Are Found in the Spanish Wine Industry?' (2018) 7 Wine Economics and Policy 94.

From the methodological point of view, the overview of patent searching strategies that is presented in this Chapter may give a guidance on how patent documents can be extracted by duly taking into consideration both the technical features of patent searching (in terms of patent classification systems, keywords, and main databases) and the specificity of patent proceedings and practices (among technical area, countries, or over time). The searcher's own expertise and communication with the patent attorneys, companies, or researchers about a specific wine-related domain will certainly suggest additional elements to combine more appropriately the listed IPC/CPC codes with words and concepts to be used as keywords, including names of companies (or inventors) and commercial or traditional wine names or locations (Champagne, Prosecco, Napa Valley, Rioja, etc.). Keyword-based searches should be associated to categories of processes and products to be found within IPC/CPC patent classification codes and title, abstract, claims, or even full text of patent documents, in the appropriate language(s). However, the importance of understanding and anticipating potential bias in the search and the analysis due to databases features, linguistic choices, patent law and policies at national level, and patent classification systems should not be underestimated when designing and performing a focused patent landscaping study or, even more, legally and strategically relevant studies in the field of wine production and commercialization.

On the more economic and strategic side, the statistics that have been generated for this Chapter using various combinations of criteria and in different countries shows that, beyond general trends in patent publications, specific trends or level of "patent intensity" can be identified in given countries and/or found associated to companies that are located in such countries. Various reasons can explain such diversity at national level: legal and patent system, socio-economic conditions, natural resources, technical expertise, regulatory and certification rules, as well as traditions and history. In any case, patent data and analysis that are generated with a normalizing approach such as patent classification coding may suggest, even before performing a more complete and focused search, some deeper trends and clear preferences that can be aggregated with economic and production statistics in order to have an useful analysis before entering a market, establishing collaborations, starting new projects, or deciding about which IP strategy should be pursued to protect and exploit innovative wine-related products and processes.

Search and analysis of patent information is a time-consuming task, not always pursued and understood correctly. However such activities are doable

and can provide companies and users with a reliable support to any decision making process at each step of wine value chain, from the vineyards until when your preferred wine is served, at right temperature and in a nice glass, at your table.

PART 3

Wine beyond the Market

Health Policy, Ethical and Social Issues

CHAPTER 20

On the Jurisprudence of Wine's Journeys from National Terroirs to a Global Market

Places of Normativity, Mythology and Justice in London and Aotearoa/New Zealand

Wayne Morrison

1 *Pepeha* (Māori for 'Introductions')[1]

In addressing the theme of this collection, 'Wine Law and Policy: From National Terroirs to a Global Market', I wish to frame my contribution through the words of the later part of the title, 'from national terroirs to a global market'.

The words 'from' and 'to' denote travelling, movement, which also means displacement, a carrying from and to, that is a movement from a place and a bringing to, another place. The concept of place is inscribed in the notion of 'national terroirs', that is a bringing together of the idea of the nation and the idea of terroir (itself an almost magical term that denotes a power of place to give wines of authenticity and expression), a combination that can be read as referring to a variety of nations each having a particular 'terroir' or each nation having many terroirs which are then brought to a global market. The fact that the phrase global market has an 'a' in front of it denotes that while we may refer to a broad idea of the globe as a world-wide market such a market is a manifestation of multiple and specific places.

In turn, this chapter will in itself be a 'place', certainly a chapter in a book, but also a space of contention constructed in an interaction with and in between three extracts presented in this *pepeha* ('introductions'). It also reflects journeys between places and the gaze of myself, as a 'jurisprudent of wine'. I live in London whose historical importance for the wine trade can hardly be overstated. Walking my local area in London provides many everyday encounters with wine; I will relate some to distinguish 'terroir' wine from non-terroir wine. I define a terroir wine in terms of a positive sign attached, as wine made

1 Throughout this chapter words of *te reo Māori* (the Māori language) with be italicized apart from Māori and Aotearoa. I do this with some reluctance because of the international readership this book will have and wish to help the reader. By doing this, however, I in no way wish to present *te reo* as exotic, as the 'other' to English.

 | DOI:10.1163/9789004438316_021

by people who aspire to provide wines of character and personality and where the character of those wines is said to be an authentic reflection of the environmental and cultural conditions of the 'place' it comes from. Of course all wine comes from somewhere at a certain level of generality, but by non-terroir wine I mean a wine that is not developed with the idea of it reflecting a place and the attention paid to the conditions of that wine's production is consequently different. A non-terroir wine may be well made, it may be made with care and, to borrow a term from law, it may be made with attention paid to 'due process', in other words the winemaking process involves precise, repeatable and systematic procedures fully reported in accordance with the relevant wine related regulations, but whatever character it has does not derive from the specificity of its place of origin and the professional and ethical commitments involved in its production are also different. In the second part of the chapter I introduce New Zealand as a country in which many reflective wine makers are seeking to tie down the idea of a 'national terroir', that is they are looking for some emblematic factor that can be held out as specific to New Zealand in the process of making high quality wines of character.

> The concept [of terroir] originated in the codification of the AOC in the Burgundy wine region in France as recently as the early twentieth century yet in the early twenty-first century has come to be considered as a natural law of the quality of wine …[2]

Here the social anthropologist Marion Demossier reflects on the use of 'terroir' in Burgundy as an indicative stamp of singular quality. Burgundy produces many of the finest Pinot Noirs and Chardonnays in the world (although traditionally you do not see those grape types on the label). Globally, it is regarded as the exemplar place for the production of high-quality wines, as the place to visit as if on a pilgrimage to see sacred sites. In its 'pure' form, the term terroir evokes an almost timeless quality to an area that means that when wine of a particular sort is made there contingency is denied, and the image created of an enduring historical tradition whose ways of life adapt but largely maintain their distinctiveness over time; as if the soil contained superior natural endowment or as if specific places were God-given for wine making, or, in secular terms, as if there was a form of cultural-environmental determinism at work. Demossier is circumspect, she applies a social constructivist analysis whereby

2 Marion Demossier, *Burgundy: A Global Anthropology of Place and Taste* (Oxford: Berghan Books, 2018), 13.

such claims function as differentiation strategies adding value to the wines. Further, if the idea of terroir seems deeply rooted in French cultural history, it is an inherently 'slippery concept' which has now escaped those confines and has come to circulate as part of a global 'ideology' of discourses concerning quality in wine. It is currently a more open-ended item of 'narrative', around which a 'social construction of place in the face of global challenges' can be devised in whatever location you wish.

Demossier captures a considerable amount of the social and economic functionality of the meaning-in-use of the concept terroir,[3] but I wish to pick up on her reference to terroir as the 'natural law' of modern wine quality. Critics tend to see Natural Law similarly as evasive and under defined, and where the action of attaching the 'natural' as a concept or ascription when joined to 'law' that can slip into meaningless; however I would emphasise the normative bite. Natural law 'theories' have in common a way of directing humans to perceptions of how to judge action in terms of the common good. Natural law comes out of some set of understanding of the relative positions of the cosmos and the human, whether mediated by belief in a supreme being and the concept of divine provenance or, as in indigenous systems, with ideas of the earth as the source of being and justice, principles or axioms are derived that provide guidance for practical rationality. Viewed in this light, the phrases that one faithfully expresses 'terroir', or that one works in partnership with the terroir can, and in ideal circumstances do, operate as a foundation concept or reference point by which ethical stances are guided in the processes of wine production and marketing giving them a depth of commitment, a reverence. Which draws me on to the words of Greening.

3 Consider her earlier summary: 'Burgundians developed new cultural strategies to market their wines during the interwar years. Regional leaders, cultural intermediaries, and the wine industry collaborated to overcome overproduction, prohibition, and foreign as well as regional competition by exploiting the concept of terroir to develop a repertoire of popular festivals … These drew attention to the unique qualities of the wines and suggested how they might be best consumed. This aggressive marketing strategy was so successful that it became a model for French agricultural products promoted through the system d'appelation d'origine controllee. The unification of natural resources, historical memory, marketing strategies, and cultural performance resulted in an imaginative and enduring form of commercial regionalism'. (Demossier, 1997, the extract has become widely quoted, see Mark A. Matthews, Terroir and other myths of winemaking, Oakland: University of California Press, 2015, at 186) To wine-makers searching for guidance she may seem like a Priestess of a secret formula, no wonder she was invited to New Zealand to address the bi-annual Pinot Noir conference and give advice to the Central Otago Wine Association on presentation strategies. (see Demossier, *Burgundy: A Global Anthropology of Place and Taste*).

> [The Māori word] *Turangawaewae* is the nearest you can get to the idea of "terroir" in our country. It is about being grounded, about a place giving you strength …. New Zealand has steadily been going from a culture that defines itself through a winemaker, where the best wine in the range would be the best a winemaker can do, to a country where wine is about place. [This is] a change from the celebration of a person to the celebration of a place. This really changes your ethos.[4]

Greening seeks a local concept to guide contemporary practice in New Zealand. From virtually nothing since the mid 1980's, the New Zealand wine industry has literally exploded on to the world stage as a niche producer of wines that are (often) fruit forward, distinctive in flavour profile and which command a medium to substantial price profile. Today, to take a phrase from Rebecca Gibb, Master of Wine and author of the most recent guide to the Wines of New Zealand, it has reached 'early adulthood' and is appropriately reflecting on and questioning its identity.[5] Greening is the proprietor of the bio-dynamic Felton Road (Winery), located in the southern region of Central Otago and which produces world class Pinot Noirs, along with appropriate price tags. Greening's use of the Māori concept *turangawaewae,* and his narrative of a development in the way that quality of wine can be presented – from a stage where 'the best wine in a range would be the best a winemaker could do' to a position where wine would be 'a celebration of place' – follows the 2017 New Zealand Pinot Noir Conference in which *turangawaewae* was held out by a number of speakers to be, in my language, the foundational term of the natural law for New Zealand wine.[6] In the second part of this chapter I contextualise this need and ask is this merely putting forward a phrase that can serve a branding exercise? Or is it indicative of recognising its place in traditional Māori nomos,[7] which

4 Nigel Greening, co-owner and winemaker at Felton Road Winery, presentation London, June 2017, quoted Anne Krebiehl, Family of Twelve's revolution in New Zealand Wine (The Buyer, June 19, 2017).

5 Rebecca Gibb, *The Wines of New Zealand* (Oxford: Infinite Ideas Limited, 2018).

6 Accounts of the conference all carried this term, see *Turangawaewae: A Maori Expression of Terroir,* at Vinography: a wine blog, which reproduces the Māori ceremonial welcome and challenge and the key note speech by Nick Mills of Rippon Vineyards in which he sets out his *whakapapa* and relates his *turangawaewae*, available at http://www.vinography.com/archives/2017/02/turangawhaewhae_a_maori_expres.html.

7 Nomos as sets of narratives and ethical injunctions that grounds and gives life to 'law' and make law an ethical universe; *Tikanga Māori*, usually translated as Māori law, but given that it is made up of narrative structure it is unable to be extracted from Māori culture As yet few who write on *Tikanga* have drawn parallels with Robert Cover on nomos, see Robert Cover, 'Nomos and Narrative', in *Narrative Violence and the Law: The Essays of Robert Cover*, Martha

in turn would require one to work with, acknowledge and respect Māori cosmology, do you re-cognise your landscape – and thus your place – in terms of a blending, at least, of Māori and Pākehā (Western European) epistemology? Put in more Jurisprudential terms, if you position *turangawaewae* and 'place' as core features of your 'nomos' and which guide 'your ethos', what are the epistemologies and principles that structure your nomos? Put in terms of this book, would this mean that there was a national terroir/'national' nomos for wine in New Zealand or even more daring, as I will put forward, Aotearoa/New Zealand, one that would do justice to its history and land? I take some guidance from the following:

> *Kia whakatōmuri te haere whakamua.*
> I walk backwards into the future with my eyes fixed on my past.[8]

This is a *whakataukī* or 'proverb' which is entrenched in Māori epistemology as a narrative adding to the structure of *Tikanaga Māori*. This *whakataukī* reflects Māori perspectives of time and guides a person's ethical commitment in contemporary action to build on what has gone before. The past, the present and the future are viewed as intertwined; they not only contextualise but constitute the meaning of a person's responsibilities as they build a future in conjecture with others and the objects of the world. Not only can you not deny the past as you walk into the future but the future that you make is moral through your understanding of the past. I borrow this to represent the ethics of my research and my methodology in action, as this chapter draws upon a larger book length project, I entitle *The Jurisprudence of Wine*. Both that book and this chapter are in part a self-reflective account of my own travelling in time, walking in places facing the future with eyes conscious of the past.

In line with this I need to offer you a partial *whakapapa* (historically and narrowly conceived this term means an account of 'genealogy', that to locate the self in relational terms with most respect to ancestors in time, potentially going back to the canoes in which the first Māori arrived in Aotearoa). My *wakapapa* is important to put forward my *mana* (here scholarly authority) for in its entirety it is a narrative foundation on which I am constantly building more frameworks and structures of images of people, places and interactions

Minow, Micheal Ryan and Austin Sarat (eds.) (Ann Abor: The University of Michigan Press 1993), but they are clearly there to be explored.

8 From Lesley Rameka, *Kia whakatōmuri te haere whakamua:* 'I walk backwards into the future with my eyes fixed on my past', Contemporary Issues in Early Childhood, 17(4), 2017, 387–398.

that have provided experiences that provide the rich land/culture/historical 'scape' in which my 'self' locates. Who am I? For most of my life I have considered myself as a New Zealander; one who now has lived in London for 40 years and is a Professor of Law at a lively and highly ranked global law School. That status would normally have been material for an "author's bio" section, but I now wish to write herein *as* a self-reflective *pākehā* New Zealander (i.e. of white settler colonial European descent). I mean this as an act of cultural hybridity, and one which means today, in early 2020, I am called upon to confront a dual heritage, and, with that, dual cosmologies, namely that of the people who were living in the islands they called Aotearoa (the land of the long white cloud), i.e. the Māori, and that of the *Pākehā* (post Enlightenment) white Europeans who in the nineteenth century came to colonise (with superior military power) the islands and named them New Zealand and in whose traditions and ways of seeing the world I have resided. When I grew up my location was South Canterbury in the gaze of Aoraki/Mount Cook, bounded by the sea and the rivers Waitaki to the south and the Rangitata to the north. My Grandfather's small farm and my parent's town house/section with large garden – provided what we would call today a model of sustainability located in a cultural monoculture of the heritage of white colonial supremacy, and virtually no wine, certainly not that of character. But if the only 'wine' circulating domestically was fortified 'Sherry' and 'port' and rather appalling sweet Germanic style white wine I also entered a place where wine held a revered status. Educated in schools run in turns as I grew older by Marist Nuns, Brothers and Priests I served as junior and then head altar boy for years, engaging in the Eucharist, the core sacrament where, in the Catholic faith, the sharing of wine and bread is not just a metaphor for the body and blood of Christ but a way in which one joins your body with his suffering, sacrifice and redemption, a mixture of the existential and the transcendent. And if Marion Demossier can be somewhat reductive in her presentation that in the Old World of Europe that terroir was linked to the idea of 'God given' factors, 'God blessed' land, or 'gifts' of providence, in my final year at school I encountered this existentially when sent to the then Green Medows Seminary for a three week 'retreat/mini seminary' experience to see if I would consider joining the Marist Priest-hood; this was where the wine for the Eucharist was made (and other wine sold to help support the Church) and I spent five hours per day in the vineyard or other wine related tasks. This is now deconsecrated and runs as Mission Estate, the centre of the 'heritage New Zealand' Wine Tourism experience. But I have vague memories of weeding between the rows and pulling leaves from the top of the rows of vines with the Brother wine-maker's words in my ears: 'this is God's work, making wine fit for God, in land given by God, so treat this task with reverence'.

My later life experiences have only furthered a feeling that wine is a unique cultural and chemical/physical commodity. So I find it appropriate to consider wine through another term from Māori cosmology, namely *wairua*, which literally means 'two waters' – the physical and the spiritual. Moreover, that wine can be an object of justice, *wairuatanga,* that is the product of the blending of those two 'waters' into a flowing river capable of sustaining life but also endangering life, thus always carrying '*tapu*' [here meaning respect and restraint].

2 Images from Walking Leytonstone: Experiencing the Global Market

To switch to across the world, for a considerable number of years I have 'lived' in Leytonstone, a borough in East London. For the last twelve and a half years myself and my partner have had a female Shar Pai dog named Tzu Hsi (after the Emperor Dowager of China), and I walk Leytonstone with her. As on and off research for *The Jurisprudence of Wine*, since 2017 I have adopted a jurisprudence of walking similar to the traditional ethnological unit of study being the distance that one could cover by walking (the village etc). We have called in at all of the pubs, cafés, corner stores, and wine outlets (the exception being that I must do supermarket time without her!), talked, observed and took notes. There are over 100 outlets selling wine in the area, and while in contrast to the five or so brands of toothpaste offered there are several 100 varieties of wine, we must note however that their presentation of in the main characterised by the circulation of a relatively small number of brands especially at the largest site, the Tesco Superstore and smaller branches of the large national supermarket chains, while more choice in wine also comes from online providers such as Virgin Wine and locals also drive beyond Leytonstone to nearby major stores such as Waitrose, Marks and Sparks, Lidle and Aldi.

In terms of my research I walk in the reflective mode earlier given. I am not a naïve external observer, thus I appreciate that the space that I walk through and therein encounter people, objects and situations, is socially and legally constituted, comprised of numerous places that are themselves intersections of historical, national and global forces, communication networks and flows of people, goods and narratives of belonging or homelessness, and marketing logos of stimulation of desire and encouragement of consumption.

Scene one: November 2017, the *Theatre of Wine*, a retail outlet on Leytonstone High Road, London E11. As with Burgess & Hall (a Wine Bar/shop located on the edge of Leytonstone with Forest Gate dedicated to 'natural' or 'real' wine) that this place/scene exists is a mark of the relatively recent gentrification of the area for *The Theatre of Wine* is a rather upmarket and individualist

wine shop (part of a small group of three shops). Along with Burgess & Hall these are the two outlets in Leytonstone dedicated to the presentation of terroir wines with staff that are able to put forward narratives of their wines' production, taste and structure profile and, in numerous cases, can offer the reassurance that they have met the winemaker or visited the region the wine is from and may have even walked the fields of the vineyard. Here a customer is perusing the shelves; the store manager asks 'can I help you, are you looking for anything in particular?' 'Something different', the customer replies, '[I am] Having a friend over for dinner I haven't seen for a long time and want to have a bottle of wine you don't see in the supermarkets'. 'What are you cooking?', the store manager asks. 'Beef, slowly cooked … but not spicy'. 'Ah I have the thing for you, try this … it is from Piedmont but if you are thinking of those heavy bodied Barolos you will be surprised, its much lighter bodied and aromatic in taste, and, its pure quality! Its DOC is Sizzano and the production is literally tiny. Ours is fully organic and a wonderful expression of what place can do with the Nebbiolo grape'. 'Well', says the customer taking the bottle and inspecting the label, 'it sounds interesting, and the label is very modern, stylish … ok I'll take it, perhaps two'.

What do we make of this exchange? First, no one would dispute that it is anything other than a common sense language exchange of the type which occurs in many wine shops across the (non-Muslim) world. But also it is a route into, and expressive of, certain social practices, practices which are structured by, regulated by, and also partly constituted by, law, namely practices of global economics and of commodity exchange as well as interactions of expertise, familiarity and trust; familiarity is involved in the very entering into the wine shop, the exchange reveals trust in the expertise of the store manager (who in this case has undertaken a University level Diploma in Wine at Plumpton College, England) to recommend an appropriate wine, and trust that the product is not fraudulent. But let me look at the past, consider Leuchs writing in 1847:

> Italian wines are mostly used for home consumption. Having a very imperfect preparation, they will bear neither transportation nor long keeping … Piedmont produces keen, but sweet and dark-coloured red wines, which mostly sour in August or September, turn next year into vinegar.[9]

9 Johann Carl Leuchs, Treatise on Wines and Wine-Making, 1847, quoted in Agoston Haraszthy, *Grape Culture, Wines, and Wine-Making, with Notes Upon Agriculture and Horticulture*. New York: Harper & Brothers, 1862, 172–3.

Today Sizzano DOC is a quality 'terroir' wine; that is, it is a wine that is clearly tied to place and traditions of winemaking that are said to fit that place and these are mediated by law. Their modern form is a product of State policy to adopt wine regulations reflective of the French *appellation d'origine contrôlée* system (AOC) that was developed in the early part of the twentieth century to combat fraud and give identity in a way that built on local ways of doing things (imaging sets of local custom/acceptable practices) and the power of the State to enforce (Legal Positivism). As a time/space entity, contemporary Sizzano is a *comune* (municipality) in the Province of Novara in the Italian region of Piedmont, located about 80 kilometres (50 miles) northeast of Turin and about 20 kilometres (12 miles) northwest of Novara. It currently has a population of around 1,500 and an area of 10.5 square kilometres (4.1 sq mi).

In relation to wine, the *comune* of Sizzano can legally produce only a specific red wine which then carries the status of Denominazione di origine controllata (DOC).[10] The production can only come from 20 hectares (50 acres) and be a blend of 40 to 60% Nebbiolo grape (known locally as Spanna), 15 to 40% Vespolina and up to 25% of Uva Rara (known locally as Bonarda Novarese). Any grape which goes into the DOC wine production must be harvested at a yield no greater than 10 tonnes/hectare. Then the wine is required to be aged in oak barrels for at least two years with another additional year of aging in the bottle before it can be released to the public. The finished wine must attain a minimum alcohol level of 12% in order to be labelled with the Sizzano DOC designation. How does one know what the wine in the bottle is? We refer to the label: the front label is very simple. It contains Bianchi, the name of the producer and below that SIZZANO *Denominazione di origine controllata*. That is it.

There is more information on the back label. There one learns that the ABV (Alcohol by volume) was 12.5%, that it is of the 2012 vintage and that Bianchi is a certified-organic winery with the full name of Azienda Agricola Bianchi. The blend is stated as 60% Nebbiolo, 25% Vespolina and 15% Bonarda and the wine was aged 24 months in French and Slavonian oak.

The labels are inscriptions of the legal identity of the body of the wine contained therein. The wine contained is not simply 'liquid geography' in the terroir tradition,[11] but, what I term, embodied legality. A chemist may state that

10 An easy guide to Italian wine regulations is provided by Italian Wine Central, for Sizzano DOC see online at https://italianwinecentral.com/denomination/sizzano-doc/.

11 I take this phrase from Jim Jerram co-owner of Ostler Wine, grown in the extreme conditions of the Waitaki Valley, North Otago, New Zealand.

Sizzano Doc is such and such chemical and material composition, an 'expert' wine taster may state that it displays a specific taste structure particular to Sizzano Doc (a balance of tannins, acid, fruit flavour profiles, mouthfeel and so forth), but for that to happen its body must be true to the regulations; it is legally created history. Put somewhat in reverse, for the body of wine of Sizzano Doc to be true and not fraudulent, it must perform the terms of its cultural and legal inscription. Its present, and its future, is a product of place, specific grape types and modern viniculture operating in the fashion and interactions allowed by the Italian (and European Union) Wine Laws; there is for example, a comprehensive listing of what oenological practices are allowed for Italian wine production.

This is a 'quality' wine, moreover, in the language of modern global divisions in wine, this is an 'Old World' wine. The combination of 'quality' and the 'Old World' trope positions this wine as the product of places that express historical depositions of place that can be traced back into time. This is partly mythological; of course, the wine drank in locality in the 18th and 19th century is hardly identical to our contemporary wine. As Andrew Jefford eloquently puts it in his review of a 2017 published French wine history:

> The French wine we global consumers lap up is immeasurably better than that which most French drinkers have endured over the last 2,000 years, and can really only be compared to the sort of wine French aristocrats and the purple-robed church elite enjoyed in the past. We are … all aristocrats now.[12]

I recall another voice to remind us of how much of this change is due to the role of the State and Law.

> The Mosel [wine-grower], demands that, if he carries out the work which nature and custom have ordained for him, the state should create conditions for him in which he can grow, prosper, and live . …[13]

The world knows Karl Marx as the father figure of Marxism and a virulent positivist social scientist who relegated law to the status of a dependent entity

12 Andrew Jefford, Reviewing Phillips, A History of French Wine, Decanter, May 1, 2017.

13 Karl Marx, Justification of the Correspondent from the Mosel by Karl Marx, Source: Marx and Engels Collected Works, (London: Lawrence & Wishart, 1975) Volume 1, 332. Written: between January 1 and 20, 1843.

in an ideological superstructure determined by the economic relations of the social epoch. But Karl was born Carl [he changed his first name to distance himself from the influence of his family] to a family that owned three parcels of land growing grapes in the lower Mosel north of the historic town of Trier and it was his knowledge of wine and the conditions of the wine growers and the disregard of the State for their plight in the late 1830's that first infuriated him and lead him along a path where he later despaired of any meaningful social and political change short of total revolution. In his appeal for the State to support the winegrowers in their post-1838 desperate conditions (made worse in part as it was becoming a criminal offence to take wood, necessary to make staves to hold the vines in place, from the local forests) the young Marx put forward an account of their plight that the State officials not only refused to accept was factual, but *they* also denied the State had any role in principle to address *even* if correct. Marx argued that not only should the State look to support 'nature and custom' but that a free press was necessary to bring the reality of their conditions to the public and to State officials.

Today there is a massive industry producing, circulating and bringing developed and systematic – dare I say rule bound – discourses on wine to the public and the State, including 'state of the industry' documentation and marketing guidance produced at national or government level, state of the market reports from transnational management consultant companies, investment strategy reports, books from wine 'personalities', self- published guidance blogs, numerous consumer guides, atlas's and wine tourist travel guides. Moreover in every major wine producing (and consuming) country in the world from the late nineteenth century the State intervened, moves were taken to protect and enhance the wine industry which shapes todays conditions (and conversely the threat of prohibition, made a reality in the United States destroyed their quality wine industry until the 1970's).

How much of this is made visible to a consumer in London? Perhaps, primarily, to the consumer wine is a commodity; engagement with the bottle as 'history', or embodied legality, is limited. Wines that I term terroir wines may include a small story of the wine's production on the back label, but in only in a handful of the outlets is someone able to provide 'advice' on the wine and direct buying; many of the convenience stores, for example, are operated by Muslims or non-drinkers. We walk a multi-structured environment in which the array of choice is doubly legally constituted; not only is the body of the wine in the bottles a product of legal embodiment, but the market is constituted through agreements and rules of exchange and wine obeys rules, indeed, it is, rule bound. By legal definition, [modern] 'wine' must come from fermented

fresh grapes, not from raisins, not from honey.[14] Given that core ontology, one moves on a global level to questions of the geographies of legality and their intersections and overlapping interfaces in locality, of questions of presentation, of marketing, of discourse and interpretation.

Consider again the *Theatre of Wine*, a particular site in and within a flow of commodity images, of technologies and techniques of display. What is concealed?

Take one example: a fall-back purchase of mine from this shop is one of the cheaper wines. Then at £7.80 the False Bay Pinotage is a red wine located on the bottom shelf. In this shop, wines are separated into white and red (rose with the whites) arranged by two factors – depth of body and price. Lighter in body to the right, cheaper wine on the bottom and expensive at the top. False Bay Pinotage is from South Africa (Pinotage is South Africia's 'signature' red grape variety being a cross between Pinot Noir and Cinsaut – called Hermitage in South Africa – first developed in 1925). The False Bay Pinotage was introduced to me by a local Priest – Black and from South Africa – who, while I was in the shop one Friday evening, purchased several with the humorous comment that he was running a little low on wine for the service on Sunday and this wine was so good that it was ideal for drinking after the service as well!

False Bay is the name of the winery and its website states (sourced late 2018) that it is named after South Africa's most iconic Bay, which frames some of the country's premium vineyards. 'False Bay vineyards was born out of a desire to make real wine affordable. Back in 1994, Paul Boutinot came to the Western Cape to seek out and rescue grapes from old, balanced and under-appreciated vineyards. These treasures were otherwise destined to be lost in the large cooperative blends that were dominating South Africa's wine industry back then. Unusually for that time, Paul transformed those Cape vineyard gems into wines with the minimum of intervention: wild yeast ferments, no acid additions … Even today, making wine this way at this price level is almost unheard of'. Elsewhere it states: 'the grapes for our False Bay Pinotage stem from 30 year old and older unirrigated bush vines in the warmer Paarl region. What attracted us to those vineyards were vines with very small berries brimming with fruit concentration'. The website had profiles on Paul Boutinot, his female cellar Master (later wine-maker), and his (then) Head of Marketing, also female. All are white. There was a photo

14 Wine is, for example in the then EC [now EU] regulations, 'the product obtained exclusively from the total or partial alcoholic fermentation of fresh grapes, whether or not crushed, or of grape must'. Council Regulation (EC) No 479/2008 of 29 April 2008, Article 24, Paragraph 1.

gallery with images of the bay and also of some of the vineyards, one situates a beautiful peacock amidst rows of vines. There were however no images of the labour force which would be almost entirely black.[15] In a controversial speech in September 2017 at the launch of the yearly auction of fine wine in South Africa the well-respected commentator Michael Fridjhon talked of two wine industries (By this he meant not just the fact that many, many wine producers were losing money, but he referred to hidden others that we know vaguely about and choose to ignore: the 'other consumers, living in communities where hope for a better life has long ago faded into the gloom of despair, and where alcohol – cheap wine, and cheaper so-called ales – as well as tik and nyaope are used to block out the vista of desperation extending endlessly into the future'. So, two sets of consumers and a hidden labour force in a neo-colonial situation:

> Vineyard work for many who spend long hours in the sometimes baking sun … is not a choice: in many of the inland areas, it is the only option other than unemployment and starvation. If we wish to transform it from a burden borne with resentment to a career of choice, it must come with skills development and the prospect of skilled labour rates and job satisfaction.

Fridjhon reminded his audience how they were quick to engage in lobbying the government for help, pointing out that 280,000 jobs are directly or indirectly the result of grape-farming, wine making, packaging, and transport, contribution of the wine industry to tourism. Now he laid a challenge: to 'assume responsibility equal to our claims, and play our part in the upliftment of communities whose despair, despondence and general sense of helplessness makes them easy prey to drug pushers, ale-vendors, the merchants of oblivion for those whose everyday lives demand an urgent avenue of escape'.[16]

No wonder his address (and later review) were termed 'controversial'. Relegated usually to the status of footnotes the Black wine yard workers of the Cape have no place in the practices of display and spectacle; except when,

15 I was referring to 2018, Currently at http://falsebayvineyards.co.za/ (accessed 02/05.2020. Images of the young, white, female winemaker still predominate but there is now one image of two black workers leading a large horse through rows of wines.

16 *Michael Fridjhon,* 'Two Wine Industries', *Nederburg Auction Keynote Address*: Nederburg 16th September 2017, online at https://news.wine.co.za/news.aspx?NEWSID=31519.

occasionally, they feature in 'expose' newspaper articles,[17] or coverage when they go, highly unusually, on strike. This is but one example of the mechanisms through which large proportions of the world's population are being excluded from the realm of visibility of the modern consumer society.[18] In part at least, the modern/colonial regime of representation is a machinery of silencing, of forgetting, or more precisely of invisibilizing 'the other', common people, who are removed from the spectacle and on occasion their absence can be seen as 'unjust'. This is, of course, one of the ways in which the question(s) of the justice of the global is unvoiced.

South Africa is a relatively clear case but consider the terroir of the wines of California. The discourses surrounding the history of Californian wines highlight the impact of prohibition and of the earlier devastation from phylloxera, which were hurdles placed in the way of narratives of 'romanticized "settlement" and "pioneering" struggles' in which land was tamed for winemaking. Realities of 'continental expansion, indigenous depopulation, or environmental degradation' are not mentioned, nor that this is the land made available by the genocide of the California Indians.[19] The role of the Spanish Mission estates is sometimes highlighted, absent is the role of those who tilled the land and even then, worked the grapes in those Missions: Indians in semi slavery. One has to search: the reality of labouring on the land is told in Richard Steven Street's aptly entitled *Beasts of the Field: a narrative History of California Farmworkers, 1769–1913*,[20] the cleansing of the land of Indians is told in Benjamin Madley's simply entitled *An American Genocide The United States and the California Indian Catastrophe, 1846–1873*,[21] whose book was endorsed by then

17 South Africa's vineyards 'treat workers like slaves': 'South Africa's vineyards play host to thousands of tourists each year and produce some of the world's finest vintages but vineyard workers are being forced to live in shipping containers and pig sties and operate without proper safety equipment, Human Rights Watch has claimed'. The Daily Telegraph, Saturday 04 November 2017, Food and Drink News.

18 I do not infer that Waterkloof are guilty of treating their workers badly; the ethos of the winery would seem inconsistent with that. I am saying that there is need for mechanisms of transparency. There are an increasing number of initiatives, such as Fair Trade in operation; but there is a lack of evidence as to their effectiveness. For a 'optimistic' account see Lauren Buzzeo, South Africa Shows the World Why Ethics in Winemaking Matter, Wine Enthusiast, February 11, 2020, at https://www.winemag.com/2020/02/11/south-africa-ethical-winemaking/.

19 See Erica Hannickel, *Empire of Vines: Wine Culture in America* (Philadelphia, University of Pennsylvania Press, 2013) for whom most accounts of pioneers and frontier themes are 'shocking' in their 'denial' of the existence of the original land inhabitants.

20 Richard Steven Street, *Beasts of the Field: a narrative History of California Farmworkers, 1769–1913* (Stanford: Stanford University Press, 2004).

21 Benjamin Madley, *American Genocide: The United States and the California Indian Catastrophe, 1856–1873* (New Haven: Yale University Press, 2017).

Gov. Jerry Brown as exposing the truth of genocide and finally in June 2019, Gov. Gavin Newsom formally apologized for California's role in the 'systemic slaughter' of Native Americans and termed it genocide.

But to return to London and another scene: July 2019 summertime, coming out of the *Theatre of Wine* with Tzu Hsi I pass the Continental Supermarket next door and turn into Davies Lane when I see an empty wine bottle discarded on the footpath nearly opposite the Primary School. The 'street drinkers' of Leytonstone often leave empty cans of larger and vodka, but it is unusual to find a wine bottle. Picking it up one reads a label, it is Pink Moscato Wine from Barefoot Cellars, the largest producer of wine in the world: a quick search of the website reveals this statement, a narrative positioning from the producer: 'The pinker, sweeter sibling of our Moscato Wine, Barefoot Pink Moscato is a perfect option for hot and sultry summer nights and leisurely evenings at home surrounded by family and friends'.

One doubts if the consumer(s) of this particular bottle ever read or appreciated this message; it was sold by the Continental Supermarket, which, its Muslim Turkish manger tells me sells, 30% of its alcohol in the morning (mostly to individuals on welfare benefits to help them get through the day) and roughly 50% between 10.30 pm and 1 am in the morning when its closes (for the after pub group). The Continental Supermarket sells by the price-market nexus: this is volume pitching for consumers who may not have heard the term terroir. Take the official story of the lead wine maker for Barefoot Cellars Winery. According to the list of Women winemakers of California web site,[22] Jennifer Lynne Wall is a native Californian born in Sacramento who originally intended to attend medical school after receiving a bachelor's degree in Biology from the University of California, Santa Cruz, but instead after graduation moved to Sonoma County where she took her first winery position at Vinwood Cellars-Gauer Estates, a custom wine-processing facility. She started on the ground floor there, working in the laboratory and checking fermentation tanks daily, but mentored by other winemakers she grew in experience at various crush winemaking facilities until she became lead winemaker for the huge enterprise of Barefoot. This is a story not of learning tradition, or the mysteries of 'terroir', but of science, of the laboratory as the site of checking the process.

I am reminded of Marx's later injunctions that to understand a commodity one needs to consider how labour is organised and the instruments it works with. For Marx if we want to know the history of production, consult a

22 Women Winemakers website © 2011–2018, Lucia and John Gilbert. Last Updated August 2018 at https://webpages.scu.edu/womenwinemakers/facts.php.

museum; consulting the National Museum of American History (Smithsonian) online contains images of wine making in terms of a developing empire of stainless steel, and mechanisms for temperature control for fermentation – in other words science and technology – and quotes winemakers as saying that Californians have done in forty years what it took Europe four or five centuries.

Standardisation, production technique and marketing, along with feedback loops from the consumers to production make the U.S. brand Barefoot as well as the Australian brand Yellow Tail (technically [yellow tail]*) whose distinctive colourful bottles carrying animal images with Aboriginal influenced texture (although there is nowhere a highlighting of Australian Aboriginal heritage) are an essential feature of every convenience store or supermarket in Leytonstone. Standardised work responsibilities decrease the cost of monitoring large numbers of employees, standardised financial accounting decreases the cost of monitoring geographically dispersed economic activity and performance, standardised firm structures allow centralised firm administration to readily evaluate and assign responsibilities to employees in dispersed remote locales. This is wine not tied to a particular site or even blend of different but related sites, this is wine produced according the law of legal positivism and using whatever techniques of production that are allowed, this is wine that does not ask to be judged according to some natural law of terroir, but drawn from heterogonous site/places then blended and adjusted. According to the [yellow tail]* website its wines are produced from 100% premium wine grapes sourced from South Eastern Australia. No sugar or artificial flavours are added in our wines'. This of course allows the use of grape must concentrate post fermentation to give higher levels of residual sugar that turn mouthfeel from dry and hard to round and soft.

Apart from their own publications, you will not find the story of [yellow tail]* or Barefoot in the 'quality' wine press, or in the multitude of online blogs, whether devoted to tasting notes or travel in the 'world of wine'. We are in a radically divided world where the majority of wine actually consumed on a day to day basis in this global marketplace is deemed uninteresting, and, to be honest, too boring, for wine professionals to concern themselves about. The story of [yellowtail]* is told instead in books on market strategies and studied in depth as an example of 'blue water' and not 'red water' business development, in other words a commodity that succeeded not through warfare with its competitors (red water) but by creating a product to fit an unmet potential demand (blue water). Everything was by design: the accessibility, the flavour profile, and, consequently, the market dominance which denotes success.[23] In

23 It is also, on its own terms, an honest wine, it does not hide from scrutiny which I consider a strong ethical principle. It presented at the annual Australian Wine Trade tasting

2018, Wine Intelligence's first Global Wine Brand Power Index crowned [yellow tail]* as 'the world's strongest wine brand'.[24]

3 Has New Zealand Got a 'National Terroir'? If So Would It Be that of New Zealand or of Aotearoa/New Zealand?

In 1982–3 I was operating a wine bar and squash centre in South London and providing part time relief managing work for the New Zealander wine bar owner Don Hewitson (Cork & Bottle, Shampers). Along with Tom, the co-owner and manager of Shampers I undertook the advanced certificate of the Wine and Spirit Education Trust (WSET); there was no New Zealand wine to taste and the only mention of New Zealand in the literature was a very brief statement that there were developments and there could be potential. Then came the 'discovery'. An essential rite of passage of many of the world's leading wine writers and tasters now is an account of when they discovered New Zealand wine, in particular Sauvignon Blanc from Marlborough. I evidence Oz Clarke, who since the early 1980s has become a super-star in the TV and written press for wine in the UK (and in May 2016 installed in the New Zealand Wine Hall of Fame).

> I know when I first discovered that Sauvignon Blanc has a sense of place. It was on February 1st 1984 at 11 in the morning. On the 17th floor of New Zealand House in London. Just inside the door on the left. Third wine along. That's the first time I tasted a Sauvignon Blanc from Marlborough

in London, for example, where I have in 2018 and 2019 spent an hour tasting the range. All of these were, as their marketing literature states, designed wines with simplicity in mind, aimed at consumers who do not want to fight with their wine, who do not need a set of tasting notes to explain the flavour profile or what the mouth feels. Instead they were designed to be fruit dominated, soft, no overt tannins in the reds, no clear acid in the whites; they were, however, 'mixed' to say the least; most were uncomplicated and immediately 'approachable' but the Melbec and the Pinot Noir were almost unrecognisable as examples of those grape types! These are wines designed to be drank within an hour of opening with no possibility of the wine disintegrating in your glass, nothing to offend. Enough said.

24 The index was constructed from consumer data from 16,000 wine drinker interviews across 15 markets, representative of over 380 million wine drinkers. [yellow tail]* is the No.1 most powerful brand in both the US and Canada, as well as top 10 showings in Australia, China, Ireland, Japan, South Korea and the UK. (<http://www.drinkscentral.com.au/4751?Article=yellow-tail-voted-worlds-most-powerful-wine-brand> dated 6/03/2018, accessed 28/12/2018).

> in New Zealand's South Island. That's when Montana 1983 Sauvignon was introducing itself to the world.
>
> My world of wine would never be the same again … And did that taste of somewhere? It sure did. It tasted of somewhere no one knew. It tasted of a somewhere that hadn't existed before – ever. It tasted of a whole new world of wine that was going to be full of somewhere that had never existed before. It tasted of a whole new world of wine which would no longer make you wait a generation to be taken seriously as a winemaker – a whole new world of wine that would allow you to take your very first brave efforts as a winemaker – plonk them down on the table and cry – beat that, old timers.[25]

Discovery, a theme that continues to resonate, the by-line for the New Zealand Wine Association is *Pure Discovery*.

Another scene: Monday 15 January 2020, the 2020 Trade Tasting of New Zealand wine, entitled 'Taste and discovery what gives New Zealand wine its reputation'. Now in the Oxo Tower, London, for this is no longer a tasting where 15–30 people attend, as in 1984; 350 have pre-registered while another 50 have presented themselves on the day.

I enter at 11.30am to hear from the side where the morning 'master class' was in progress, tones from a rather 'North' 'of the North Island' accent! Rebecca Gibb is in full voice leading a session devoted to exploring the aging potential of New Zealand wine.

We are in this scene as in the tasting generally, at an intersection of globalisation, of bringing to and from places. Wines have been brought from New Zealand (along with some winemakers and the export managers or European market agents) to be presented to members of the wine trade and journalists and here in the master class we have a wine professional from the North of England and author of the most recent book on New Zealand wine lead a hands on tasting on 'aging'. What is her *whakapapa* and what of her book and how does it fit with others?

First due to the rapid development of New Zealand wine industry accounts written in the 1990's or even early 2000's are now historical documents. There are two books published recently whose authors – without using that term – provide their contrasting *whakapapa*.

25 Oz Clarke, Oz Clarke's World of Wine: Wines, Grapes, Vineyards, (London: Pavilion, 2017), 307.

New Zealand Wine: The Land, the Vines, The People, is a large scholarly text, the culmination of a life's work for the recently deceased Warren Moran, a New Zealander who worked in school and university holidays on the Corban family's vines in West Auckland in the 1950s, made wine geography the topic of a MA thesis in 1958 and became a professor of geography at the University of Auckland.[26] Warren's *whakapapa* conditions his epistemology; his text, fill of maps and photos, is an account of (Pākehā) pioneers – many of them immigrants from wine making countries of Europe struggling to fit the right types of grape to suit various places of land and climate. The stories at first are of heroic struggle, as New Zealand's culture was drinking beer and the few larger wine producers made mostly low quality wine (often fortified and sweetened), but from the late 70's onwards they recount exciting developments as individuals increasingly transverse Europe, the U.S. and New Zealand, learning, experimenting and creating. Moran's text is a geographer's search for what would make New Zealand wine unique and give an identity to show to the world. While he published a number of respected articles on 'terroir' he always remained sceptical of any thesis of 'environmental determinism', exampling for instance the fact that the vineyards of Burgundy are 'managed' and not natural landscapes. He warns; the current success must be sustained and he leaves us with an image of New Zealand wine industry engaged in an 'increasingly sophisticated' search for 'promotional terroir'.

In *The Wines of New Zealand* (2018) Rebecca Gibb tells a story of a young woman from the North of England who goes to Australia to do a harvest where she encounters industrial winemaking and on what was intended to be a brief side excursion to New Zealand finds a social and professional environment in which she could feel comfortable and develop a 'love affair with New Zealand wine'. She increases her knowledge and experience of New Zealand wine through retail work while undertaking the full ambit of study, culminating with gaining the Master of Wine in 2015. This is an account of an outsider who becomes an insider utilising the growing authority of her study unencumbered by formality; from that inside/outside 'space' she defines New Zealand wine as in its 'early adulthood' and constantly (re) adjusting. And while the term Aotearoa appears on the back cover this first edition is an account of the wines of New Zealand, her experience was of a Pākehā industry.

But to return to the Master class: the choice of Greywacke Marlborough for the Sauvignon Blanc, Neudorf Moutere (from Nelson) for the Chardonnay,

26 Warren Moran, *New Zealand Wine: The Land, the Vines, The People* (Melbourne: Hardie Grant Books, 2016).

Valii Bannockburn Vineyard Central Otago for the Pinot Noir, Te Mata Coleraine for the 'blended' or Bordeaux style, and Pegasus Bay Waipara Valley North Canterbury for the Riesling are all accepted high quality wines (given either Super Classic, Classic or Potential classic by Mchael Cooper whose annual 'Buyer's Guide' reached its 30th edition in 2020); having contrasted two samples 10 years apart for each wine, the participants leave enthused ready to tell the market quality New Zealand wines can age beautifully!

Later I participated in the afternoon Masterclass, entitled 'Pinot Noir from Valley Floor to Mountain Slope'. This is the 'terroir' or 'place' session with a speculative thesis; Rebecca is challenging both herself and the audience, giving five sets of two wines which may come from sites hundreds of kilometres apart with the practical question being could one discern a commonality in the structure and taste of Pinot Noir's from Valley Floors and differentiate those from Mountain Slopes?

Note: the traditional master class for New Zealand Pinot Noir would take the taster through a journey through regions: two wines from Martinbrough in the North Island, two from Marlborough at the top of the South Island, two from North Canterbury and two from Central Otago as if there was a logical 'lesson' to be learnt from a journey through the regions of New Zealand wine, i.e. as if there were discernible 'terroirs'. When I have in the past participated in such a class, it seemed successful; but afterwards I realised it was only descriptive. Regionality does not even guarantee the degree of similarity that being members of an *appellation contrôlée* does, for under New Zealand law – and lack of fixed 'tradition' – the winemaker has freedom as to grape types, clones, planting density, yield, picking, pressing, fermentation, use of oak, and so forth.

Rebecca's presentation echoed her written comment in respect to wines from Central Otago: 'Producers are each seeking their sense of place, and that place is not a subregion, it is their vineyard'.[27] As the session progressed she introduced each particular wine with details as to the particular geographical site, such as density of planting, aspect of vineyard planting, direction the wind came from and effect of the wind, use of irrigation or not. Then the decisions made by the winemaker: cultured yeast or wild ferment, whole cluster verses de-stremmed, temperature controlled verse 'natural' fermentation, stainless steel or oak, racked or not, filtered or not, use of oak or not, and so on. Additionally she emphasised that New Zealand winemakers are not afraid of science and there is considerable research being conducted that they use'. The result was that the contrast between mountain side and valley floors

27 Gibb, *The Wines of New Zealand*, 251.

dissolved into a continual production of choices and use of resources made by the winemaker.

One participant stood and asked: 'so what is the answer'? Rebecca's response that 'the history of Pinot Noir in New Zealand is very recent, perhaps it was too early to tell', caused several to look to the ceiling or raise their hands as if in despair. As the session dissolved, I approached a group of three that seemed frustrated and asked them 'why'? 'Well, we are retailers', they replied, 'we need to tell our customers what is the terroir of New Zealand wine and we got lost …' 'Ah' I said, 'but she had not even got into where I would have led you, namely clonal selection plus rootstock selection, and then …'. 'Enough' said one, perceptually reeling, for their eyes had glazed over, 'what happened to terroir? We need a story. What is New Zealand terroir?'

So the turn to *turangawaewae*; introduced in the 2017 New Zealand Pinot Noir conference, the website for the 2021 conference (now postponed until 2022 due to the Covid-19 pandemic) stated it would pick up the theme and expand it:

> If Terroir is how a place is expressed, through grapevines, into something we can taste and feel, *Turangawaewae* is how a place informs, or defines us as people. It drives our sense of belonging and, in turn, how we relate back to that place. We then turn to how we relate and care for land, as a place, and perhaps as a living entity. We can consider guardianship as Pinot Noir winegrowers, merchants, commentators and enthusiasts. Importantly, it might also lead us towards acknowledging how the land has cared for, or provided for us.[28]

This is a powerful commitment. It is not the only Māori term in circulation. If you go to *The New Zealand Winegrowers* website (www.nzwine.com) you are greeted by '*Kia ora* (literally 'may you have life' or simply an informal hello), welcome to The New Zealand Wine Website'. A highlighted part of the Website is 'Sustainability New Zealand':

> We're committed to protecting the places that make our famous wines.
>
> Sustainability is an integral part of the New Zealand wine industry. New Zealand's winemakers and grape growers are committed to crafting exceptional wine while helping the natural environment, local

28 2021 New Zealand Pinot Noir Conference, preliminary programme, at https://pinotnz.co.nz/programme/.

> businesses and communities to thrive. We were the first wine industry to establish a nationwide sustainability programme in 1997. Twenty years later, Sustainable Winegrowing New Zealand™ is still widely recognised as world-leading, with 98% of New Zealand's vineyard producing area certified by the programme.

New Zealand Wine has five sustainability focus areas aligned to the United Nations Sustainable Development Goals; Water, Waste, Pest and Disease, Climate Action and People.

And then:

> Kaitiakitanga is the Māori concept of guardianship and protecting the environment. A kaitiaki is a person or group that is recognised as a guardian by the tangata whenua. As all New Zealand Winegrowers members are responsible for ensuring the sustainability of the New Zealand wine industry, we can be considered kaitiaki, protecting the places that create our exceptional wines.

There is no explanatory drop down leading into a broader understanding of these terms in *Tikanga Māori* and the interrelationship of how these terms work in Māori nomos. So who is or are the *tangata whenua* who 'recognise' all New Zealand Winegrowers members as *kaitiak*i or guardians 'responsible' for ensuring sustainability of the wine industry and protecting the places that create such exceptional wine?

I certainly do not want to denigrate this use of *te reo* but there needs to be evidence of a genuine understanding to deflect suspicion of an act of cultural appropriation and demonstrate a genuine desire or commitment to reflective considerations.

Consider two interrelated themes. First, the structure of the wine industry, in particular how it is legal regulated and how this is presented for the global market. Second, the question of justice; justice to Māori, the land, to history and even to Pākehā; justice in the sense of recognition, including to the past, of seeking harmony and balance and which then can be the foundation for future development.

Regarding the first, John Barker, completed a PHD in 2004 entitled Different Worlds: Law and the changing Geographies of Wine in France and New Zealand.[29] His theorization is in line with mine: while I look in terms of nomos he

29 John Barker, *Different Worlds: Law and the changing Geographies of Wine in France and New Zealand*, unpublished PHD Thesis, University of Auckland, 2004.

looks for legal geographies and by that he means representations of space that are formalised in law and the multiple ways of which laws are lived by people in the place understood as a specific legal geography. Details change quickly, but his text captures some enduring factors: the New Zealand wine industry is characterized by relative youth, openness to science, well-structured and effective organization at the national level dedicated to represent wine as a National industry, post 1984 development in a context of Government de-regulation but support for wine as an export commodity and a particular form of legal regulation which leaves the production end of the process as a somewhat blank space to be filled by non-law normativity. New Zealand wine related law is more concerned with the control of consumption (licensing, opening hours of retail outlets, dry/wet areas and so forth). The lack of tradition of winemaking means it is simply treated as another alcohol production along with beer and spirits and its history as producing much more fortified wine rather than quality table wine. This is a legal geography that is primarily directed towards the distribution and consumption stages, where 'wine industry participants are portrayed as players in a neutral and transparent free market where everybody competes on equal terms. Government and institutional support is aimed at positioning New Zealand wine industry as 'clean and green', modern and unfettered as well as securing its reputation and access to foreign markets. He finds the industry as restructuring itself around quality wine production, but asks what guarantees this?

As he was finishing his thesis, the 2003 Wine Act was passed that came into force at the beginning of 2004. The Act does not engage with vinicultural or winemaking practices. It concerns itself with 1. Setting standards for identity, truthfulness in labelling, and safety of wine, 2. Managing health risks and compliance with wine standards, 3. Providing controls and mechanisms which are needed to give assurances that the wine meets the conditions for sale in different export markets, 4. Setting export eligibility requirements to safeguard the reputation of New Zealand wine in overseas markets, 5. Promoting consultation with industry organisations on the regulation of the industry and to aid efficiency and growth, and 6. Enabling levies to be imposed on winemakers for payment to entities representing their interests for the funding of industry-good activities.

So winemaking is a supervised undertaking with forms and institutions. This is highly procedural: 1. Winemakers must register a Wine Standards Management Plan (WSMP) with the Ministry of Primary Industry before they start making wine. 2. Winemakers must have an approved person or agency visit their wine processing operation to make sure they're following their WSMP. 3. Wine sold in New Zealand must follow the labelling and composition rules

in the Food Standards Australia New Zealand (FSANZ) code, and extra requirements in the Wine Act 2003. The most important here is the 85% rule; meaning that if you label a wine as Merlot then 85% of the grape at least must have been Merlot and if you label as coming from Marlborough then 85% at least must have come from Marlborough. The contract grape suppliers, or those supplying any other ingredients (commodities) for winemaking, must ensure they meet food safety standards and pesticide residue limits. And there are forms to fill out, with guides to show you how and guides to the requirements for particular export markets, as Japan have slightly different requirements than the EU for example.

This is legal positivism. It lays out process and creates forms to check those processes, and institutions to give assurances to the others, those in the U.K who let the wines come into the Supermarkets and other outlets in Leytonstone. But what connects the winemaker to the process and what provides soul?

The turn to concepts from *te reo* and what I would now call Māori Jurisprudence is a welcome recognition that indigenous cosmologies had a belief in the connectedness of humans and the environment that the European epistemologies cut; it also may help provide Justice, how?

The first great wave of globalisation involved the 'discovery' of the Americas and onwards later to places such as New Holland (Australia) and New Zealand. The natives never asked to be discovered and never asked for the usual accompanying genocidal processes. The first vines were planted in New Zealand by the Missionary Samuel Marsden in 1819. By 1840 when the Treaty of Waitangi was signed there were c. 2,000 assorted settlers and the Māori population had declined from c. 140,000 to c. 100,000 and commentators noted that most Māori now claimed to have converted to Christianity. *Te reo Māori* was oral, it was Missionaries who transferred it to a written form; Marsden was shocked at some of the words, phrases and concepts that Māori related and advised that they be expunged from the language; some consider that the first stage of cultural genocide. At the beginning of the twentieth century fewer than 40,000 Māori remained, their language could not be spoken in schools, their land mostly taken, and resistance crushed in military operations; they were expected to die off. But they adapted, they survived and today are c. 15% of the population. So if today I say: *He Pākehā au* (I am Pākehā) this is a double contingency for growing up in South Canterbury was an unreflective experience of the heritage of White Settler colonialization. I was not conscious of seeing Māori and at University when I studied Law at the University of Canterbury there were no Māori students, little mention of the Treaty and certainly no hint that anyone sensible considered that such a thing as *Tikanga Māori* (Māori law) existed and was worthy of study. I left in 1979; relations between Māori

and Pākehā changed dramatically in the 1980s onwards with two linked movements. The first was the revitalising of *te reo Māori* (which became recognised as a national language in 1987) while the second was the task of redressing and healing past injustices by the Crown against the Māori. The recovery of *te reo Māori*, also meant for some at least taking seriously Māori cosmology and epistemology. While the task of redressing past injustices came to take on the focus around the hearing and decisions of the Waitangi Tribunal which from 1985 took on a wide remit to investigate and recommend settlements to breaches of Treaty of Waitangi and major legal cases in the early 1990s incorporated Treaty principles into the constitutional understanding of New Zealand, accepting the Treaty as a founding document, a partnership document between Māori and Crown/settler. Part of this process became reparatory justice, that is trying to correct the Crown's past wrongs done to Māori, but the process also linked to the idea of creating a partnership. The operation of the Waitangi Tribunal was politically presented in terms of collaboration and reciprocal good faith between Māori and the Crown/settler society. For many the revitalisation of Māori language and culture, the constitutional ideas of partnership, and the healing process involved with the activities of the Waitangi Tribunal resulted in a new existential sense of belonging, a development that sees New Zealand as New Zealand/Aotearoa, a dualism in partnership.

What then would the sense of place be for a wine industry that wished to reformulate its identity understanding the landscape in dual terms and accepting terms from *tikanga Māori* to be the public expression of its normative operation?

4 By Way of a Conclusion, an Exercise in Applying *Turangawaewae*: a Brief Walk Around the Trade Tasting

Traditionally, a person had a *turangawaewae* relation to a place because at their birth, after the cutting of their umbilical cord, the placenta was buried in that place. In addition, they needed to show they were committed to that area, expressed through the concept of *ahi ka*, the need 'to keep one's fires burning'. Another factor would be knowledge of and faithfulness to the knowledges and operations of the ancestors as they had stewardship of the land of that area expressed through their *whakapapa*. *Kaitiakitanga* in its part ensures that the guardian feels they are meeting the responsibilities and hopes of their ancestors. In adapting these concepts we, non-Māori, join in respect to the past and hope for the future, operate with a notion of kinship with nature, and how this idea might be useful in an environmentally threatened world. Another would

be that they possessed the proper spirit, an integrity that can withstand challenge as expressed in the following: *Hokia ki nga maunga kia purea koe e nga hau a Tawhiri-matea* (Let you return to those mountains and there face and be purified by the winds of Tawhiri-matea). What this means is that if you claim to be such and such a person, and if you claim such and such link to a place then you must be prepared to face all contingences that hit you, this is all the spirits expressed and operative in the weather!

With this background I shall consider three wineries present and one major player that is absent: Sacred Hill, Craggy Range, Yealands Estate and the absent Indevin.

The first two wineries come from the Hawke's Bay area in the coastal area in the North Island where I once spent my brief stint at the Green Meadow Seminary (Mission Estate). Consider a sentence from Rebecca Gibb's 'vinous journey': 'What Hawke's Bay does have is a storied history, unlike many other New Zealand wine regions' (p. 138). Rebecca is referring to the narratives of the history of wine where Mission Estate goes back to the Marist Priests' plantings in 1851 and Te Mata Estate has the oldest winery building dating from 1896. But from a Māori perspective Aotearoa is a story-scape. In the oral traditions of the different *Iwi*, almost every hill, certainly the mountains, the valleys, the beaches have a story attached. These stories were part of a geographical jurisprudence, they located what was *tapu* (usually meaning subjected to spiritual prohibition) and what was *noa* (ordinary) they located where the spirits may reside, where ancestors had first arrived and where other ancestors had died in battle, where dangers may lie and where safe passage may be gained.

The first table displays the wines of Sacred Hill. This is a serious wine company with the superb Rifleman's Chardonnay and enticing Deerstalkers Syrah in their collection. Their literature states that their wines express a 'clear sense of place' traceable back to the original place that the family started to make wine in – a farm on the lower slopes of a hill named Puketapu (from *te ro Māori puke* 'hill' and *tapu*, which has been translated as sacred). So 'Sacred Hill's distinctive wines are a true expression of the vineyards they come from' and that the philosophy remains what it was the beginning, a respect for place and thus the name of the company founds that idea. But is this translation correct?

There is a relevant *pūrākau* (literally codified narrative). In pre-European times this was the site of a massacre. Unknown to the main *Iwi* settled at Otatara Pa, a small group had broken away and taken up residence atop this particular hillside which was located as the unofficial boundary with a neighbouring *Iwi*. Fearing occupancy by a neighbouring tribe as a prelude to a warring raid a party of warriors from Otatara Pa conducted a night raid and slaughtered the men in the new settlement. At daybreak, the mistake was

realised that it was actually members of their own tribe. In time the bodies would have been ritually buried and then dung up and the bones ritually reburied near the killing site and the hill declared *tapu*, a place of prohibition. Note: *Puketapu* is not a name, it is the conferment of a status, i.e. it states that that hill is now a place of prohibition; it would form a boundary where both *Iwi* were prohibited to settle. Here *tapu* clearly does not mean, nor can it be translated as 'sacred'. However, colonisation meant the imposition of European epistemic first by the Missionaries putting Māori cosmology into monotheistic forms and then Pākehā common sense, thus by the mid-1800's *Puketapu* became a name and was then established as the first stopping point for travellers on route from the Port of Napier to the Taupo region. So to translate *Puketapu* as Sacred Hill is to engage in what Ani Mikaere calls 'the ongoing colonisation of *tikanga Māori*'.[30] But if the founders of Sacred Hill winery could be forgiven their lack of research when adopting the name in 1996 there appears little excuse for what was found on table eight, Craggy Range.

There we find Te Kahu, a Bordeaux style blend. The accompanying literature, unchanged on the website, explains that

> Te Kahu means 'the cloak' in te reo Maori and refers to the mist that envelops Giants Winery in the Tukituki Valley. Legend has it that this mist was used to protect a mythical Maori maiden from the sun as she visited her lover Te Mata.[31]

That this has not been corrected is a remarkable oversight. I recently visited the winery (February 2020) and its beautiful location is marred by looking out at Te Mata peak which appears to have what is commonly referred to as an open scar on it. It is the decaying mountain bike /walking track carved into the hill forming a path from the restaurant in 2016 which had been built without proper consultation as required under the Resource Management Act (RMA) or the ethos of *Kaitiakitanga*. To understand the thinking consider the online presentation of the cellar door experience for Craggy Range wines

> The Cellar Door is located at the Giants Winery in Havelock North – under the escarpment of Te Mata Peak, and is a breath taking setting in

30 Ani Mikaere, 'Cultural Invasion Continued: the ongoing colonisation of Tikanaga Māori', *Yearbook of New Zealand Jurisprudence Special Issue – Te Purenga* Vol. 8.2.

31 At https://www.craggyrange.com/collections/varietals/bordeaux-style-blends/te-kahu/, accessed last 02/05/2020.

> which to taste a selection of Craggy Range wines. Our experienced cellar door staff will take you through a tasting of the latest release wines and talk you through our winemaking philosophy and … you can also enjoy a personal tour of the winery and the grounds and learn more about 'THE LEGEND OF THE SLEEPING GIANT'.[32]

Along with the restaurant, aptly called Terroirs, the winery is award winning, becoming The New World Winery of the Year in 2016. On a per capita basis, wine consumption in New Zealand is actually declining but the winery could mark itself out by combining the cellar door/restaurant experience with the healthy and community friendly experience of walking or cycling up the side of Te Mata Peak to the summit and then returning, when of course it would be time for a refreshing glass of wine and some substance and coffee. As the later report commissioned by the Winery (2018) laid out, the track would fit into the development of the Peak and position the winery as a key player in the increasing recreationally orientated outdoor pursuits and aid in tourism. So the company purchased a 300 meter strip of land going from the winery up to Peak and with consent from the local Hastings Council built a 1,500 meter track. The track was immediately popular with thousands of people using it and cars filling the winery carpark and backing up for 100s of meters along the local road.

The problem arose that Hasting District Council had given permission without general notification and without any involvement of local *Iwi*, nor had there been any hearing with a declared *tangata whenua* agency. Under land management legislation amended subsequent to Waitangi Tribunal reports, any resource/land development that may affect the cultural values of a place requires consultation with any local *Iwi* or *Iwi* authority, that consultation shall be held with appropriate *Iwi* that are the declared *tangata whenua* for the area.[33]

What is the status of Te Mata Peak? Te Mata Peak is not a declared *puketapu*. It and the hills around it do not need to be, they have inherent *tapu* as a consequence of the *mana* of the persons they concern as revealed in the relevant *pūrākau*. Te Mata Peak is the 'face' of the prostrate body of the Waimarama chief Rongokako, the actual title is Te Mata O Rongokako meaning 'the Face of Rongokako'. This has become colonized and shortened to Te Mata

32 At https://www.craggyrange.com/visit/cellar-door/ last accessed 02/05/2020.

33 In general the Resource Management Act creates a Partnership Objective, whereby Local District Councils will pursue the following objective: Effective partnership between the Council and declared iwi bodies, in the management of the District's natural and physical resources in recognition of the principles of the Treaty of Waitangi, the relationship of the

Peak over time and the *pūrākau* replaced by lose references to a legend of a sleeping giant.

In the *pūrākau* a considerable time ago the members of the *Iwi* on the Heretaunga Plains were under constant threat of war from a particular coastal *Iwi* of Waimarama and had been the victims of numerous raids. At a meeting held to agree responsive tactics a *kuia* (an elderly woman, guardian of the wisdom of *whānau* in tribal councils) declared: *He ai na te wahine, ka horahia te po* (The ways of a woman can sometimes overcome the effects of darkness).

Hinerakau, the beautiful daughter of a Pakipaki chief, was to entice Rongokako the most feared chief of the Waimarama tribes, to fall in love with her, and to find ways to subdue his power. But in meeting him, Hinerakau finds not a figure of darkness but a man of great *mana*, of life and light and enormous strength. She falls in love and proposes that peace be achieved by a union of the tribes through her marriage with him. But her Heretaunga elders seek to destroy Rongokako and absorb his power; they demand that Hinerakau make Rongokako prove his devotion by performing seemingly impossible tasks. He succeeds in all but the last task which is to create a valley and clear a gap through the hills between the coast and the plains so that people could come and go with greater ease when free from his threat.

Rongokako almost succeeds but then bites a huge chunk of the hills and chokes, unable to breathe he dies proving his love. But he has changed the interaction of the hills and valley and fashioned what is now known as The Gap or Pari Karangaranga (echoing cliffs), while his prostrate body forms the crown of the hills with his face at the Peak.

Hinerakau was desolate, she took her tear-soaked cloak and put it over his body (which today reappears in the mists which stretch from the crown of Kahurānaki), then her tears flooded onto the valley forming a river. Knowing that she cannot return to her *Iwi* she leapt to her death from the precipice on the Waimarama side of his body with the impact of her body forming a gully at the base of the cliff.

So the *pūrākau* explains the nature of this place: it is not just a landscape but a culture-scape, a place of hurt, of desires for revenge, of love and of frustrated attempts to find a new way; it is a rich place to stand in and to treasure. European settlers largely ignore this but also thought the hill crown resembled a man lying down and called him the Sleeping Giant.

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tangata whenua and with their ancestral lands, water, sites, waahi tapu, and other taonga, and in accordance with kaitiakitanga.

Craggy Range's choice of the legend of the sleeping giant – rather than the *pūrākau* – and to create the track was to work within the epistemology of colonial power as well as wrong in process under the RMA. In response there were calls for a boycott of Craggy Range wines and local *Iwi* held protests outside the winery. While on the other side thousands joined a body petitioning for the track to remain open, which totalled 24,000 signatures. What seemed like a 'good idea' became exposed as other; local Iwi claimed this was a dramatic and hurtful example of cultural ignorance.[34]

Contrasting this story with the turn to *tikanga* concepts with several persons at the New Zealand wine fair two responses surfaced: the first, paraphrased, ran: I don't understand this [*tikanga*] stuff, but I'm not opposed, it's simply a compliance matter, same as checking where that batch [of finished wine] is going to [i.e. checking to see if the particular requirements of that export market had been complied with]. What were they thinking? The second was 'how can overseas owners [Craggy Range is owned by a Canadian/Australian billionaire] understand concepts from [*tikanga*] Māori? I am happy, I find it freeing, but so much of the industry is now foreign owned. They come over a couple of time a year, have a good time with food, wine and scenery … but they want profit. Will *turangawaewae* deliver a profit?'

Further into the room is Yealands Estate.

Here is a core case study in another Māori term *mauri* (life force or principle). Its current catch phrase is a play on terroir, 'Land made', and at 1,700 hectares this is the largest vineyard in New Zealand ownership. Most New Zealand wine companies have websites, that follow a set pattern: they start with 'our story, then 'our place', perhaps 'our people and philosophy' and then 'our wines'. The current website contains 'The Yealands Story':

> Established in 2008, Yealands was always destined to be a story of thinking differently. In 2002, when our founder Peter Yealands began developing land in the Awatere Valley, Marlborough, at the north-eastern tip of New Zealand's South Island, many thought viticulture would be impossible given it was home to some of the toughest conditions in the region including steep slopes, strong winds, cool nights and low rainfall. Located on the cliff's edge overlooking the Cook Strait, Seaview Vineyard on Yealands Estate is now one of the most sustainable and striking vineyards

34 For *Iwi* opinion see https://www.stuff.co.nz/environment/112829330/track-harmed-relations-between-tangata-whenua-and-community-more-than-any-other-rma-decisions-to-date For Report that Craggy Range had commissioned, see https://www.craggyrange.com/assets/uploads/Te-Mata-Peak-Track-Report7-May-2018.pdf.

> in the world, producing award-winning wines that are enjoyed by millions across the globe. Over the years, Yealands' leadership in sustainability innovation has been recognised globally.[35]

The awards are listed, international awards in 'Sustainable Winegrowing', 'World Green Company of the Year 2014', 'Greatest Contribution to a Sustainable New Zealand', for wine 2012 Producers of the World's Best Sauvignon Blanc, 2014 New Zealand Wine Producer of the Year; 2014 Producers of New Zealand's Best Red Wine. In 2016 Yealands is assessed by DQS The Audit Company (Germany) and becomes first wine company globally to be issued with the Green Company GC-Mark certification.

This is all true: in 2002 Peter Yealand acquired eight individual farm plots and amalgamates into one 1,113 hectare parcel. This was relatively cheap land, for it was land that as the phrase goes, 'even sheep were ashamed to be seen in'. In other words it was so unproductive that there was a very low density of sheep to acre. Peter Yealand had made money in mussel farming and had an interest in 'earth moving' now he and his son got their earth moving equipment going and made terroir. The vineyard is stunning, amazing … all of those things; you get to the estate by driving for 10 plus kilometres off the main road (turn off at Seddon at the memorial to the fallen of WWI) and at the estate you can even go on The White Road tour to 'see sustainability in action'. You get a map from the 'cellar door' and drive the road which 'winds through the vineyard', past wetland areas, replanted native plants, created ponds, 'meet the over-friendly chickens, or miniature Babydoll sheep' or small pigs and hear the classical music in the vines.

If Marion Demossier refers to the landscape of the Burgundy as wine-scape, so is this but Yealands Estate is clearly Peter-scape. It is totally new; Peter was all-too-happy to say: 'a day on the earth mover and a few beers afterwards was fantastic! Look what I made!' (Personal correspondence)

What does this mean for terroir, and *turangawaewae?*

When the Māori arrived in the islands c. 1360, around 80%+ was covered in native forest, by the time of the Waitangi Treaty was signed this had declined to 60%, the settlers cleared the lands for farming so that today c.24% is left (although there are significant forests of introduced timber). The type of land use reflected global market conditions; the landscape that I grew up in and the land that Peter Yealand was buying was very much sheep farming in part reflective of the boom in wool following the Korea War and the switch in the

35 At https://www.yealandswinegroup.co.nz/page/the-yealands-story.

U.S. to woollen clothing. It was land whose productive use was aided by aerial top dressing of chemical fertiliser; it was in essence land stripped of its inherent *mauri*; its *tapau* was not respected. What Peter Yealand did was impose his personal *mana* and *mauri* on a significant parcel of land to actually give this land a new *mauri*. He has now sold this to an Energy Company the consequence is that the vineyard is a modern imposition on the land, ethically then it is open to the new owners to work with this legacy.

Along the way a few difficulties: in 2013 a Marlborough Earthquake 'causes some damage to the Seaview winery tanks. Full reinstatement is completed and all orders processed on time'. What the website does not relate is that the earthquake disruption meant loss of control and so over three and a half million litres of wine for the European Union (wine Yealands was fermenting under sub-labels) had some sugar added to it to stabilise the wine for consumption; as a consequence of a 'whistle blower' in 2018 Yealands became the first winery to be prosecuted under the 2003 Wine Act.

Adding sugar to post-fermentation wine is not illegal for wine consumed in New Zealand or for consumption in many countries but is for the EU. Why was it added? Consider this from a terroir point of view. Yealands was processing Sauvignon Blanc from their vineyard plus some brought in, the whole vineyard is so new that any idea of particular sections or understanding mico-climate is work in progress. When harvesting – which is mechanically done – some grapes will be fully ripe and some under ripe. Thus acid and sweetness levels will vary. So each stainless steel vat will actually be slightly different. With committed winemaking you deal with this by constant blending of vats. What I personally liked about Yealands wines were that they had an element of unpredictability about them, plus the bite (from an element of acid), but, unless its marketed as a terroir wine that reflects the particular climate conditions of the year, the market wants predictability and mellow mouth feel.

It's a nomos, they made a choice, the winemaker and the CEO 'deliberately' falsified entries in the records and Peter Yeland did not stop them. From a legal positive point of view, it's just a matter of rules and they got caught, so the system works.

Finally what is not there?

The biggest selling New Zealand Sauvignon Blanc in the U.K. at c. 370,000 cases annually is sold through Tesco and called Wairau Cove; the Waitrose equivalent is called Cowrie Bay. Do they have an identifiable 'place'? Search the maps, you will not find them. In Leytonstone they are joined by Shorn, which is described as a wine reflecting a 'combination of perfect soil type and temperate climate'. There is the Wairau Valley which along with the Southern Valleys and the Awatere Valley accounts for the majority of the Marlborough wine

region. The Wairau River meets the Pacific Ocean at Te Koko Kupe/Cloudy Bay but there is no Wairau Cove, how can such 'wines' have *turangawaewae?*

These are bulk wines, shipped in huge plastic bladders and bottled in the U.K or even France. Wairau Cove and Cowrie Bay are produced by Indevin, a company that began as a crush facility and now produces over 15% of all New Zealand wine. Its website announces that it creates 'wine programs for 'wine retailers', however, you will not be able to taste them in New Zealand conditions, there is no cellar door. As (Carl) Marx would have said: 'show me the wine in its place!'

5 Conclusion

To conclude: what do I present from this walk of the relationship of national terroirs and global market place and the search for a national terroir for Aotearoa /New Zealand? The simple answer is variation.

The first case presented a simple example of *tikanga* not being investigated fully. The second clear and blatant disregard, perhaps explained by foreign ownership. The third brought out the reality of newness, the forth raised the question of where and what place?

This does not mean that up and down New Zealand winemakers are not engaged in practices that existentially would amount to declaring *wakapapa* and identifying *turangawaewae*. They are; they work in spaces in which normativity resides (inhabiting individual nomos). There is a mythology that New Zealand is a pristine, green and crystal clear environment, it is not. In the face of the pressures of the global market many hundreds of individual winemakers look normatively to their selves and seek a relationship to land, vines and consumers that would do justice to an Aotearoa /New Zealand. This is indeed work in progress.

CHAPTER 21

Protecting Wine Packaging as a Trademark

Why the Substantial Value Exclusion Makes the Task Unreasonably Burdensome

Jacopo Ciani

1 Introduction

In the world of fast-moving consumer goods, whether a consumer buys one product or a rival brand involves numerous sub-conscious factors, many of which relate to packaging and appearance. This is particularly true for wine and spirits. Since there are so many different types of wines,[1] with different ages and from different places, choosing a bottle of wine is probably one of the most complex consumer choices. With the proliferation of wine brands crowding the shelves of wine stores and supermarkets,[2] wineries are having a hard

1 In the EU in 2015, there were over 500 different main vine varieties (in Regulation No 1337/2011, the "Main vine varieties" are only the varieties having an area bigger than 500 ha at the national level). The number of main varieties varied from 2 in Cyprus to 96 in Italy. The red main varieties covered a larger area than the white varieties. In 2015, 52.7 % of the area under main vine varieties was occupied by red main varieties and 42.7 % by white main varieties. The most cultivated main red varieties in the EU were Cabernet Sauvignon (6.7% of all area under red main varieties), Garnacha tinta, Merlot noir, Bobal, Cabernet franc, and Montepulciano. The most cultivated main white varieties were Airen (16.4% of all area under white main varieties), Trebbiano toscano, Chardonnay blanc, Cayetana blanca, Trebbiano Romagnolo, and Verdejo bianco. Cf. Eurostat, Vineyards in the EU – statistics, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Vineyards_in_the_EU_-_statistics#cite_note-1. Collected data were extracted in October 2017. In Italy, statistics over preferred wine in 2018, by type and gender, show that red wines were more popular among men (64%), while white wines were preferred by women (40%). Lastly, rosé wines had a preference rate of 8% among men and 9% among women. According to data concerning preferencies by variety in Italy, the biggest group of respondents, equal to 18 %, stated that their favorite red wine was Lambrusco, followed by Montepulciano (12%), while Chardonnay was the favorite white wine of 37% percent of asked individuals., followed by Pinot Bianco (14%). Cf. Statista, Dossier on wine market in Italy, 2019. Some statistics are freely available at the following website https://www.statista.com/topics/4041/wine-market-in-italy/.

2 According to data related to preferred wine shopping channels, in Italy, 77 percent of asked consumers purchased wine at the supermarket, while 13 percent of them went to the producer or to a winery. Cf. Statista, Dossier on wine market in Italy, 2019. Some

time making their products stand out. This is particularly true in Italy, the EU country producing most grapes for wine use,[3] where wineries present a high territorial concentration since the first six regions[4] account for three-quarters of the total production volume.[5]

satistics are freely available at the following website https://www.statista.com/topics/4041/wine-market-in-italy/.

3 2019 Statistical Report on World Vitivinicuture, prepared by the Statistics Unit of the International Organisation of Vine and Wine (OIV), presenting data on the world's vitiviniculture situation in the year 2018, provides for the most recent overview on the global and country information on vines, grapes, and wine. Cf. http://www.oiv.int/public/medias/6782/oiv-2019-statistical-report-on-world-vitiviniculture.pdf. It shows that 5 countries represent 50% of the world vineyard, and Italy ranks fourth with 9% of the global area under vines (Spain 13%, China 12%, France 11%), corresponding to 705.000 ha vineyards. China is the leading grape producer with 11.7 million t, followed by Italy (8.6%). However, China's production is focused on table grape (84.1%), with a residual (10.3%) part of wine grape. Therefore, Italy is the major quality wine producer with a share of 54.8%, followed by France with 48.6%. The highest wine consumption is located in the USA with 33 million hl, followed by France (26,8 million hl) and Italy (22.4 million hl). Spain is the main wine exporter with 21.1 million hl, followed by Italy (19,7 million hl) and France (14.1 million hl). At the EU level, the most recent official data available in this domain are provided by the 2016 Edition of the Agriculture, forestry and fishery statistics book by Eurostat, the statistical office of the EU situated in Luxembourg. Cf. https://ec.europa.eu/eurostat/documents/3217494/7777899/KS-FK-16-001-EN-N.pdf/cae3c56f-53e2-404a-9e9e-fb5f57ab49e3. Collection of data is done every five years and is regulated by Regulation EU No 1337/2011 of the European Parliament and of the Council of 13 December 2011 concerning European statistics on permanent crops and repealing Council Regulation (EEC) No 357/79 and Directive 2001/109/EC of the European Parliament and of the Council, OJ L 347, 30.12.2011, p. 7–20. The EU is the world's leading producer of wine, with almost half of the global vine-growing area and approximately 65 % of production by volume. Vines are grown on 3.2 million hectares in the EU, representing around 45 % of the world's total area under vines. In 2015, the production of grapes for wine use amounted to 23.4 million tonnes. There were 17 large scale wine grower Member States. Italy (29.4 %), France (26.3 %), and Spain (23.6 %) were the EU countries producing most grapes for wine use, making up 79.3 % of total production. They held approximately three-quarters of the total EU area under vines (74.1 %) and two-fifths of the holdings (39.2 %). They were followed by Germany (5.1 %), Portugal (3.9 %), Romania (3.2 %), Greece (2.3 %), Hungary (2.0 %) and Austria (1.3 %). Bulgaria, Croatia, and Slovenia were also significant grape producers.

4 Italy counts for 20 regions, constituting the second administrative layer after the State. Cfr. https://en.wikipedia.org/wiki/Regions_of_Italy. The overall PDO and PGI wine production volume in Italy in 2018 is mainly concentrated in Veneto, Apulia, Emilia Romagna, Piedmont, Sicily and Tuscany. Veneto overcame all the other regions, producing over eight million hectoliters of PDO wine and about 2.8 million hectoliters of PGI wines. Cfr. https://www.italianwinesmap.com/italian-wine-statistics/.

5 Data available at the national level trace back to 2018. Cf. ISTAT (Italian National Institute of Statistics), Trend of the Agricultural Economy, Year 2018, available at the following link https://www.istat.it/it/files//2019/05/Andamento.economia.agricola.2018_EN.pdf.

Since the wine market faces intensive product competition, there is a considerable need for market operators to distinguish their products from those of their competitors in order to attract the attention of consumers. Protected geographical indications (PGI)[6] or protected designation of origin (PDO)[7] regulated by protocols, specification or production guidelines, despite playing a role in leading consumers' purchasing choices,[8] have ever weaker selling power. The production of certified quality wines is extremely concentrated, with the top three regions producing 56% of the total amount of PDO certified products.[9] This means that the prestige and recognition of a certified variety is common to many wineries, literally levelling the playing field. Indeed, the wine volumes certificated at the PDO level are too large,[10]

6 A geographical indication refers to a region or a specific place. The quality and characteristics of the wine are attributable to this geographical origin. A minimum of 85% of the grapes must come from this geographical area. At the EU level, Sections 2 and 3 of Chapter I of Title II of Part II of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulation (EC) No 1234/2007, lay down rules on designations of origin, geographical indications, traditional terms and labelling and presentation in the wine sector. Those Sections 2 and 3 also empower the Commission to adopt delegated and implementing acts in that respect. Rules have been adopted by means of such acts by Commission Delegated Regulation (EU) 2019/33, OJ L 9, 11.1.2019, p. 2–45, replacing the provisions of Commission Regulation (EC) No 607/2009 and Commission Implementing Regulation (EU) 2019/34 of 17 October 2018, OJ L 9, 11.1.2019, p. 46–76.

7 A designation of origin refers to a name of a region or a specific place. Characteristics and quality of wine are exclusively tied to this particular geographical environment and its inherent natural and human factors. 100% of the grapes must come from this geographical area. Production takes place in this geographical area, as well.

8 Stasi A., Nardone G., Viscecchia R., Seccia A., 'Italian wine demand and differentiation effect of geographical indications Geographical indications (GIs)', (2011) 23(1) International Journal of Wine Business Research, 49–61.

9 Big-name PDO and PGI products are distributed in several regions, but the concentration is evident with the top 10 accounting for more than 80% of the total volume and total value. On a regional level, Piedmont, Tuscany, and Veneto count the greatest number of PDO and PGI wine products: Veneto, where the "Prosecco system" stands out alongside Amarone della Valpolicella PDO, Tuscany, especially for its two great reds, Chianti PDO and Chianti Classico PDO, and Piedmont, with its famous Barolo PDO and Asti PDO. Cfr. Fondazione Qualivita, Food and Wine products with Geographical Indication, 2017, available at the following link https://www.qualivita.it/wp-content/uploads/2017/05/20170523-ENG-PAPER-IG-Qualivita-HQ.pdf.

10 Certified wine production is an important segment of the Italian wine industry. PDO and PGI count 405 and 118 products as of 2016. They represent about 50% of all the wine

so flattening the capacity of a winery to stand out from competitors thanks to its PDO membership.

A good example is provided by a few wine cellars affiliated to the Consortium for the protection of Valpolicella D.O.C. Wines[11] (controlled designation of origin)[12] that, in order to differentiate themselves from the other members of the Consortium, registered as a trademark the label "Amarone of Art" and market their wines under it.[13] The Court of Appeal of Venice established that such advertising constituted an infringement of the designation of origin and a form of unfair competition. Indeed, the use of the sign suggested that within the consortium there could be a special ("of Art") selection of Amarone with an undue advantage for a part of the members.[14]

Both the low rate of e-business implementation and the reduced relevance of the internet as a marketing tool (especially in traditional producing countries

produced in Italy. In 2015, over 23 million hectolitres of PDO and PGI wines were produced, of which 21 million were bottled, corresponding to 2.84 billion bottles. In 2015, the production value of PDO and PGI certified wines was estimated at 7.4 billion Euros.

11 Valpolicella is a viticultural zone of the province of Verona, Italy, east of Lake Garda. The hilly agricultural and marble-quarrying region is famous for wine production. Valpolicella achieved DOC status in 1968. A variety of wine styles is produced in the area, including a Recioto dessert wine and Amarone, a strong wine made from dried grapes. These productions received their own separate DOCG status in December 2009. For further information, cf. https://italianwinecentral.com/denomination/valpolicella-doc/.

12 The history of designations of origin in the wine sector in Italy began in 1963, with the Presidential Decree 930, which for the first time sought to link the quality of a wine to its place of origin, through the introduction of the Designation of Controlled Origin (DOC) concept. With Law 164 of 1992, quality wines have been divided into two typologies: Designation of Controlled Origin (DOC) and Designation of Controlled and Guaranteed Origin (DOCG) wines. Typical Geographical Indication (IGT) was introduced as a table wine category. With the entry into force of the first EC Regulation 479/08, a uniform framework was created (the s.c. common organisation of the wine market, CMO) through the introduction of European protection for wines in the form of a PDO or PGI. Legislative Decree 61/2010, today replaced by Law No. 238 of 12 December 2016 "Regulation on the organic cultivation of grapes and the production and trade of wine", revised the previous Law 164/1992 and established that DOCG and DOC wines merge together in the PDO wine category, while IGT wines are identified with the acronym already in place for similar food products (PGI). However, since their use has become customary in everyday language, the law states that the DOCG, DOC and IGT acronyms can still be used. For the s.c. pyramid of Italian wines see https://www.federdoc.com/international/the-new-pyramid-of-italian-wines-from-1st-august-2009/.

13 http://www.famigliestoriche.it/en/.

14 District Court of Milan, 24 October 2017, no. 2283.

like Italy)[15] demonstrate that the appearance and packaging of wine still play the most important role in influencing consumer perception and subsequent purchasing choices.[16] Indeed – at least for consumers who are not trained sommeliers – it is much easier to remember the design of a bottle or label[17] than the taste of the wine itself.[18] Not by case, it is said that the first taste is almost always with the eye.[19] Extrinsic packaging attributes provide consumers with social and aesthetic utility and strongly influence expectations of sensory

15 Begalli D., Gaeta D.N. and Codurri S., 'Wine and web marketing strategies: The case study of Italian speciality wineries', (2008) 111(6) British Food Journal 17–19. Cipolla, C. (ed), Il maestro di vino, (Milan:Franco Angeli, 2013) has noted different dynamics between relatively newer and older wine-producing countries. In the US, 94.0% of wine producers have a Facebook page, while in the traditional producing countries, such as France, the proportion is as low as 53.0%. Galati, A., Crescimanno, M., Tinervia, S., Fagnani, F., 'Social media as a strategic marketing tool in the Sicilian wine industry: Evidence from Facebook', (2017) 6(1), Wine Economics and Policy, 40–47, https://doi.org/10.1016/j.wep.2017.03.003, show that mainly small firms, in physical and economic terms, led by managers with a higher educational level, have become more involved in social media. As suggested by Leigon B., 'Grape/Wine marketing with new media and return of the boomer', (2011) Pract. Winery Vineyard J., social medias may help to advance wine sales due to platforms' ability to spread wine consumers' opinions to others. Wilson, D., Quinton, S., 'Let's talk about wine: does twitter have value? ', (2012) 24 (4) Int. J. Wine Bus. Res., 271–286, add also that social media platforms allow consumers to exchange information and encourage others to try different wines.

16 Imram, N., 'The Role of Visual Cues in Consumer Perception and Acceptance of a Food Product' (1999) 99 Nutrition & Food Science 224–230, <http://dx.doi.org/10.1108/00346659910277650>; Boudreaux, C. A., and Palmer, S., 'A charming little Cabernet: Effects of wine label design on purchase intent and brand personality' (2007) 19(3) International Journal of Wine Business Research 170–186; Orth, U. R. and Malkewitz, K., 'Holistic packaging design and consumer brand impression' (2008) 72 Journal of Marketing 64–81; Rocchi, B., and Stefani, G., 'Consumers' perception of wine packaging: a case study' (2005) 18(1) International Journal of Wine Marketing 33–44; Jennings, D. and Wood, C., 'Wine: Achieving Competitive Advantage Through Design', (1994) 6(1) International Journal of Wine Marketing, 49–61.

17 Gluckman, R. L., 'A consumer approach to branded wines', (1990) 2(1) International Journal of Wine Marketing, 27–46; Jennings, D., Wood, C., 'Wine: Achieving competitive advantage through design', (1994) 6(1) International Journal of Wine Marketing, 49–61; Verdú Jover, A.J., Lloréns Montes, F.J., Fuentes Fuentes, M.M., 'Measuring perceptions of quality in food products: the case of red wine', (2004) 15 Food Quality and Preference, 453–69; Boudreux, C., Palmer, S. 'A Charming Little Cabernet, Effects of Wine Label Design on Purchase Intent and Brand Personality', (2007) 19(3) International Journal of Wine Business Research, 170–186.

18 According to statistical records, in Italy, the most important factors when picking wine is being an Italian wine, for 59.9 percent of asked consumers, while the quality labels could influence a less significant percentage of respondents. In any case, also the first information is derived from labels.

19 Chaney, I. M., 'External search effort for wine', (2000) 12(2) International Journal of Wine Marketing 5–21.

perception.[20] Those expectations have proved very robust and rarely contradicted when consumers taste the product.[21]

The importance of wine packaging design pushed producers to seek to have distinctive and attractive ones. Veuve Clicquot was far ahead of its time, when nearly a century and a half ago, in 1877, decided to label the bottles with the instantly recognizable yellow label, that would distinguish them from other cuvées.[22] With this visual innovation, transcending current practices, the *maison* secured a well-known trademark that receives protection all over the world,[23] notwithstanding that colour trademarks are among the most controversial and hard to enforce kind of trade marks.[24]

Some producers have tried to enliven their customers' olfactory experience of the wine before they open the bottle. Domaine Bourillon Dorléan, a French entrepreneur from the Loire valley, has put a scratch-and-sniff sticker on the labels of 50,000 bottles of his wines, which release the smell of the flora bordering the vines whose grapes the wine was made from.[25]

Other wine producers decided to replace the natural or silicon corks in their bottles with screw-tops – just like those you might find on a bottle of olive oil.

Most of the time, however, is the bottles' shape to be elaborated in some fanciful way in order to depart from standardized round bases and narrow neck

20 Deliza, R. and MacFie, H., 'The Generation of Sensory Expectation by External Cues and Its Effect on Sensory Perception and Hedonic Ratings: A Review' (1996) 11 Journal of Sensory Studies 103–128. <http://dx.doi.org/10.1111/j.1745-459X.1996.tb00036.x>.

21 Cardello, A. V., and Sawyer, F. M., 'Effects of disconfirmed consumer expectations on food acceptability', (1992) 7(4) Journal of Sensory Studies 253–277.

22 https://www.lvmh.com/news-documents/news/veuve-clicquot-celebrates-140th-anniversary-of-yellow-label/.

23 The CTM (now EUTM) No.747949, which was filed on 12 February 1998 and granted on 23 March 2006, following the demonstration of acquired distinctiveness for champagne wines in class 33 (Case R 148/2004-2). EUIPO rejected also an invalidity action against the orange trade mark for lack of distinctive character (cf. Decision No.8666/2015). Amongst the countless case law, see District Court of Venice, decision no. No. 2355/2018 as of 19 December 2018, which adjudicated a case concerning the use of the colour orange on Prosecco. The court found that consumers seeing an orange colour on the label of a bottle of sparkling wine would immediately associate that bottle of wine with Veuve Clicquot, without paying enough attention to the different "shades" of colour or other elements placed on the bottle or the labels (such as wine denominations). See also Bendnall, D., Gendall, P., Hoek, J., Downes, S., color, Champagne, and Trademark meaning surveys: Devilish detail, (2012) 102 Trademark Rep., 967.

24 Ex multis, Marshall, J., Colour trade marks revisited: use and infringement, (2019) 14(5) JIPLP, 401–406.

25 Perasso, E., 'Wine labels, the importance of the bottle', *Finedininglovers.com* (2011).

models (like s.c. "bordeaux", "burgundy" or "champagne" bottles) traditionally adopted.[26] For instance, the British company Garçon Wines developed a flat bottle that can fit into a letterbox,[27] while California Square Wines introduced a rectangular design both with a focus on sustainability because less material is used to store and ship wine.[28]

Many articles have already discussed the circumstances under which package and container configurations may obtain trademark protection.[29] Someone even examined the application of the distinctiveness criterion to the registration of bottles,[30] also with specific reference to the craft brewing industry.[31] To the best of my knowledge, no legal scholarship directly addressed this issue in regard to the wine industry, focusing on the packaging protection. This chapter looks at how these shapes may be protected under trademark law to prevent competitors from adopting similar packaging and provide a real advantage on the market.

2 Protecting Packaging in the Wine Sector: Shapes at the Borders between Trademarks and Designs

The tools provided by the legislator to protect packaging in the wine sector are mainly registered trademarks and designs. When registration is missing, exclusive rights over the shapes may still be granted by unregistered rights (both

26 These bottles have been used for most of the wine products up to now, Cfr. Does size and shape matter when it comes to your wine bottles?, Chateau55.com, October 17, 2017.

27 Pellechia T., The Wine Bottle's Future May Be Shaping Up To Be Flat, Forbes, 21 October 2018, https://www.forbes.com/sites/thomaspellechia/2018/10/21/the-wine-bottles-future-may-be-shaping-up-to-be-flat/.

28 New Releases: California Square. … wine in a square-shaped bottle, WineBusiness.com, October 24, 2013, https://www.winebusiness.com/blog/?go=getBlogEntry&dataId=123318.

29 For a discussion over the foundations of trademark protection afforded to package and container configurations in the U.S., Europe, and Italy, see Moy, Jr., 'Lanham Act Registration of Container or Product Shape as a Trademark', (1970) 60 Trademark Rep. 71,72; Schuman, G., 'Trademark Protection of Container and Package Configurations – A Primer' (1983) 59(3) Chicago-Kent L Rev 779–816; Spratling, G. R., 'The Protectability of Package, Container, and Product Configurations – Part I-II' (1971) 5/6 USF L Rev 172/451; Llewelyn, D., 'Product Shape and Trade Dress Protection under Trademark Law in Europe' (2001) 6 Int'l Intell Prop L & Pol'y 24-1; Jacobacci, G., 'Italian Trademark Law and Practice and the Protection of Product and Packaging Design' (1984) 74 Trademark Rep 418.

30 Friedmann, D., The Bottle Is The Message: only the distinctive survive as 3-D community mark, (2015) 10(1) Journal of Intellectual Property Law & Practice, 35–42.

31 Ross Appel, 'Worry Wort: A Path to Acquiring Trademark Rights in the Craft Brewing Industry', (2015) 24 Fordham Intell. Prop. Media & Ent. L.J. 1029.

trademark and design), copyright or unfair competition law.[32] According to EU legislation, these rights are not mutually exclusive, so a wine bottle can be protected under all these regimes at the same time.[33]

This chapter mainly focuses on trademarks and designs, since the borderline between them is often seen as being obscure and not really an understandable concept.[34] It mainly depends on the primary function that the shape serves.

The *discrimen* is set forth by Art. 7(1)(e)iii of Regulation 2017/1001 on the European Trade Mark (EUTMR) (a similar provision appears in art. 4(1)(e)iii of Directive 2015/2436 of the European Parliament and the Council to approximate the laws of the Member States relating to trade marks, hereinafter "TMD"), which establishes that "signs which consist exclusively of … (iii) the shape, or another characteristic, which gives substantial value to the goods" "shall not be registered or, if registered, shall be liable to be declared invalid".[35]

Originally derived from Benelux trade mark law,[36] the 'substantial value' exclusion has received relatively limited attention and practical application by European and national trade mark offices and judicial authorities.[37] In 2015, the EU legislature, among the other amendment to the EU trade mark system adopted by the new Regulation and Directive, broadened the scope of the provision adding 'another characteristic' to the wording of Article 7(1)(e) EUTMR/4(1)(e) TMD. Pre-reform, in fact, the exclusion only related to signs consisting exclusively of a 'shape'. Most commentators agree that the reformed

32 See Chaisse, J. *Sixty Years of European Integration and Global Power Shifts – Perceptions, Interactions and Lessons* (London: Hart, Modern Studies in European Law, 2020) 520 p. and Chaisse, J., Liu, K.C., *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p.

33 See Article 17(2) Regulation EU 2017/1001: "This Regulation shall not prevent actions concerning an EU trade mark being brought under the law of Member States relating in particular to civil liability and unfair competition".

34 Opinion of Advocate General Szpunar in C-205/13, Hauck AG, EU:C:2014:322, para. 69, states that "the third indent of Article 3(1)(e) of [Directive 2008/954] is not worded clearly. That is demonstrated by the large variance in the interpretation of it".

35 This is confirmed by the Explanatory Memorandum to the Benelux Trade Mark Act, which is commonly acknowledged as the first legislation to introduce the substantial value exception. Cfr. Max Planck Institute, *Study on the Overall Functioning of the European Trade Mark System* (February 2011), para. 2.32.

36 Kur, A., 'Too pretty to protect? Trade mark law and the enigma of aesthetic functionality', Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11–16, 8.

37 Rosati, E., 'The absolute ground for refusal or invalidity in Article 7(1)(e)(iii) EUTMR/4(1)(e)(iii) EUTMD: in search of the exclusion's own substantial value', (2020) 15(2), Journal of Intellectual Property Law & Practice, 103–122.

language would not entail a change in the scope of the exclusion.[38] EU legislature had merely intended to clarify that Article 7(1)(e) EUTMR may apply also to two-dimensional shapes or other types of sign (eg a colour, pattern) applied to the surface of the goods (hence regarded as being 'another characteristic' of the shape).

This exception intends to "prevent the exclusive and permanent right which a trade mark confers from serving to extend the life of other rights which the legislature has sought to make subject to 'limited periods'",[39] *i.e.* limit the possibility that trademark protection coincides with design rights or copyrights. Indeed, the court should first identify the essential characteristics of the shape and subsequently note whether such a shape has artistic value, the price of the related product is higher than that of competing products and the proprietor's marketing and promotion strategy focused on the aesthetic characteristics of the product.[40] This test has been called the "loudspeaker test" from the slang name of the EU General Court decision that firstly determined whether a shape gives substantial value to the goods, in respect to loudspeakers.[41] If so, it should normally be found that the shape gives substantial value to the

38 Rosati, E., cit., according to which "there is a wealth of pre-reform case law that suggests that the scope of the absolute grounds in what is now Article 7(1)(e) EUTMR/4(1)(e) EUTMD has never been just limited to three- dimensional signs".

39 GC, 6 October 2011, T-508/08, *Bang & Olufsen A/S v EUIPO*, ECLI:EU:T:2011:575, para. 65.

40 Cf. decision 07/07/2017, R 2450/2011-G, GOLDBUNNY (LINDT) (3D), which concerned a three-dimensional sign consisting of the shape of a chocolate bunny wrapped in golden foil, the Grand Board noted that the shape was the traditional shape (in Germany and Austria) of Easter bunnies, that the promotional strategy focused on the said shape and that it played a decisive role in the purchase choice, therefore giving substantial value to the goods.

41 GC, 6 October 2011, T-508/08, *Bang & Olufsen A/S v EUIPO*, ECLI:EU:T:2011:575, para 73–75. The General Court confirmed that the EUIPO Board of Appeal did not err in holding that the shape, in addition to the other characteristics of the loudspeaker, gave substantial value to the product. product". In that regard, two factors are considered to be indicative: first, the overall relevance that the manufacturer himself gives to the shape of his product as a marketing tool, and second, consumer behaviour, i.e. whether or not consumers buy the product for its aesthetic value. Finding that the manufacturer himself has advertised the loudspeaker as a 'design icon' or 'classic design', and noting that in retail advertisements as well as in descriptions found on on-line auction or second-hand websites, the design features of the product are particularly emphasised, it is concluded that it is indeed the design which sells the product and thus gives it substantial value. Ample reference was made to the previous judgement in EUCJ, 20 September 2007, C-371/06, Benetton, ECLI:EU:C:2007:54. For a critic over both decisions see Kur, A., 'Too pretty to protect? cit., 21, inviting the EUCJ "to revisit the issue of how the third indent of the exclusion clause should be understood".

product[42] and may not be eligible for the protection as a trademark (rather only as a design). A somewhat comparable ground for refusal is provided by US trademark law under the so called aesthetic functionality doctrine.[43]

Shapes that fall under this ground for refusal are barred from registration since their position is not reversible based on acquired distinctiveness.[44]

Shapes are not excluded from registration on these grounds can obtain trademark protection, but only if they satisfy criteria for distinctiveness under Article 7(1) (b) of the EUTMR (or art. 4(1) (b) TMD). That means that it has to be capable of functioning as a trademark and serve to identify the goods in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings.[45] Signs with distinctive character are those enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent purchase.[46]

3 Inconsistencies in Demarcating the Scope of Application of the Substantial Value Ground for Refusal

As will be argued below, the author's view is that Article 7(1)(e) iii and (b) of the EUTMR require examiners and courts to carry out a somewhat contradictory test. Indeed, notwithstanding that each of the grounds for refusal to register listed in the Regulation should be considered independent of the others and should call for separate examination,[47] both rules demand to examiners and judges to assess whether a shapes' primary function is distinctive or – at the opposite – attractive. However, whereas article 7(1) (e) has been interpreted as considering arbitrary and fanciful shapes to be attractive and so excludes them from trademark protection, the opposite is valid under article

42 Cf. decision 18/03/2015, R 664/2011–5, Device of a chair (3D), concerning a trade mark consisting of the appearance of a chair.

43 WONG M., 'The aesthetic functionality doctrine and the law of trade-dress protection', (1998) 83 Cornell Law Review 1116, 1154.

44 Article 7(3) EUTMR/4(4) TMD does not list the ground sub 7(1)(e) among those that might be overcome though acquired distinctiveness.

45 EUCJ, 29 April 2004, C-456–457/01 P, Washing tabs, EU:C:2004:258, para. 34; CGUE, 08 April 2003, C-53–55/01, Linde, EU:C:2003:206, para. 40.

46 GC, 09 July 2008, T-302/06, EU:T:2008:267, para. 31.

47 EUCJ, 8 April 2003, C-53/01, *Linde*, ECLI:EU:C:2003:206, para. 26, 67.

7(1) (b).[48] Indeed, the latter normally deems arbitrary and fanciful shapes more likely to be distinctive than standard and customary ones. Although the average consumer does not normally infer from the shape of the goods the origin of them,[49] the EU Court of Justice insists that three-dimensional marks are treated as any other sign in the registration process[50] and it is not appropriate to apply more stringent criteria when assessing the distinctiveness. However, looking at the official statistics of the applications for European trademarks, it is very clear that only 0,31% of all the applications consist of three-dimensional marks.[51] Therefore the chance that a three-dimensional mark might be registered is significantly lower than for a two-dimensional one.[52] In nutshell, the more closely a shape resembles the shape most likely to be taken by the product or its packaging, the greater is the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of the EUTMR.

As a consequence, in the beverage domain, bottles having a cylindrical section and closed with a cap made of different material and colour from the body,[53] like

48 Ricolfi M., Trattato dei marchi: Diritto europeo e nazionale (Turin: Giappichelli, 2015), para. 28.3.4, highlights as the same selling power that reserve stronger and privileged protection to the well-known trademark, at the same time, paradoxically, may amount to a ground for refusing registration, when the aesthetic value of the shape plays a significant role in driving consumer's purchasing choices. See also Ghidini, G., Profili evolutivi del diritto industriale (Milan: Giuffrè, 2008), 245, pointing out that "the theory and praxis of modern aesthetics regularly validate the equivalence between originality and formal value".

49 This is because consumers do not carry out market surveys and do not necessarily know in advance that only a single undertaking markets a particular product in a particular type of packaging.

50 EUCJ, 7 October 2004, C-136/02 P, Mag Instrument, para 32; GC, 24 November 2006, T-393/02, Shape of a white and transparent bottle, para 35.

51 EUIPO, EUIPO Statistics in European Union Trade Marks, 1996-01 to 2020-03 Evolution, table 3.2, available at https://www.oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf.

52 Friedmann, D., The Bottle Is The Message, cit. See also Pagenberg, J., Trade Dress and the Three-Dimensional Mark – The Neglected Children of Trademark Law? (2004) 35 IIC 831, 834.

53 EUCJ, 7 May 2015, C-445/13, Voss, ECLI:EU:C:2015:303, para 69, rejected the appeal against GC, 28 May 2013, T-178/11, Nordic Spirit (Shape of a cylindrical bottle), EU:T:2013:272, para 58, pointing out that "the contested trade mark is characterised by the combination of a three-dimensionally-shaped transparent cylindrical bottle and a non-transparent cap having the same diameter as the bottle itself [and that] the manner in which those components are combined in the present case represents nothing more than the sum of the

VOSS water,[54] or containing lines and creases on them,[55] akin to Adelholzener water,[56] have been all considered not sufficiently striking and just perceived as decorative elements. Even if a single feature of the bottle could be considered unusual, alone it is not sufficient to provide the trademark with distinctive character. This requirement must be assessed by reference to the overall impression which the shape gives, taken as a whole.[57] Therefore, even if traditionally wine bottles bear squared labels, oval or elliptic ones, as those of renowned Ruinart champagne,[58] have been considered not protectable per se.[59] Indeed, the label's form is strictly connected to the shape of the bottle, both for functional purposes (adhesion to the bottle) and for aesthetic reasons.

Only a trademark which departs significantly from the norm or customs of the sector and has sufficient characteristics to attract consumers' attention, as the "frosted" surface[60] of Freixenet's cava bottles[61] or the Nestlè's water bottle

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parts which make up the contested trade mark, that is to say, a bottle with a non-transparent cap, as is the case with most bottles intended to serve as containers of alcoholic or non-alcoholic beverages on the market, [t]hat shape [being] capable of being commonly used, in trade, for the presentation of the products referred to in the application for registration".

54 https://vosswater.com.

55 GC, 19 April 2013, T-347/10, Adelholzener Alpenquellen, ECLI:EU:T:2013:201.

56 https://www.adelholzener.de.

57 EUCJ, 25 October 2007, C-238/06 P, Develey, ECLI:EU:C:2007:635, endorsed the reasoning of the GC, 15 March 2006, T-129/04, Develey, ECLI:EU:T:2006:84, para. 50–54, refusing registration of a bottle with an elongated neck and a flattened body, because "the only characteristic in which the trade mark sought differs from the usual shape is constituted by the lateral hollows".

58 https://www.ruinart.com/en-us.

59 District Court of Turin, 24 October 2014 and 17 April 2015, dismissing an action for trademark infringement and unfair competition brought by MHCS against a south-Italian winemaker, Farnese Vini S.r.l. The Court considered both the shape of the Ruinart bottle and its components (label, capsule, neckband, coat of arms) quite common and lacking of distinctive character. See Banterle F., The Court of Turin ruled that shape of Ruinart champagne bottle has not distinctive character and rejected lookalike claims, IPlens, 27 January 2016.

60 https://www.freixenet.com/#products.

61 EUCJ, 20 October 2011, C-344/10 P and C-345/10 P, ECLI:EU:C:2011:680, which set aside the judgments of the GC, 27 April 2010, T-109/08, Frosted white bottle and T-110/08, Frosted black matt bottle, according to which only a label could determine the origin of the sparkling wine in question, so that the formal appearance of a bottle, consisting of the colour and matting of the glass, could not function as a trade mark, when such features were not used in combination with a word element. The Court clarified that such a position infringed Article 7(1)(b) of Regulation No 40/94, which requires examining whether the marks for which registration was sought varied so significantly from the norm or customs of the sector. For a comment on such decision see Rohnke, C., 'Eintragungsfähigkeit der

with its oblique and horizontal grooves winded up round,[62] is likely to fulfil trademark's essential function of indicating the origin.[63]

As said, however, the more the shape has fanciful characteristics to attract consumer attention, the more it risks falling under the "substantial value" ground for refusing registration.

This approach is inconsistent with EU trademark law that excludes any relevance to the original or acquired distinctive character of a sign in order to assess whether it falls under Article 7(1) (e) of the EUTMR.[64] How contradictory this assessment could be in practice is well exemplified by a fairly large volume of case-law finding a bottle to be protectable or not on the grounds of such a test. As will be demonstrated, it is quite impossible to find a coherent approach across the case law concerning wine and drink bottles and packaging at the Italian domestic and EU level. Many decisions seem to be contradictory[65] and the findings may vary consistently depending on whether the judges took into account the substantial value ground for refusal or limit their assessment to the distinctiveness test.

Oberflächenstruktur einer Getränkeflasche als Marke', (2012) Gewerblicher Rechtsschutz und Urheberrecht, 611–613; Jänich, V. M., 'Die Markenfähigkeit der Oberflächenstruktur von Getränkeflaschen – Anmerkung zur Freixenet-Entscheidung des EuGH', (2012) Markenrecht, 404–406.

62 GC, 3 December 2003, T-305/02, Nestlé Waters, ECLI:EU:T:2003:328, para. 41, related to reg. no. 000 922 179. The GC reversed the EUIPO Board of Appeal decision which described the elements of the bottle as the sum of characteristics "very common for the usual containers". Taking into account the overall aesthetic result, it established that "the bottle is capable of holding the attention of the public concerned and enabling that public, made aware of the shape of the packaging of the goods in question, to distinguish the goods covered by the registration application from those with a different commercial origin".

63 EUCJ, 29 April 2004, C-456–457/01 P, Washing tabs, EU:C:2004:258, § 39; Id., 07 October 2004, C-136/02 P, Maglite, EU:C:2004:592, § 31; Id., 17 January 2006, T-398/04, Tabs, red-white tablet with blue core, EU:T:2006:19, § 30.

64 GC, 6 October 2011, T-508/08, *Bang & Olufsen A/S v OHIM*, ECLI:EU:T:2011:575, para. 43–44, establishes that "*a sign caught by Article 7(1)(e) of Regulation No 40/94 can never acquire distinctive character for the purposes of Article 7(3) of the regulation through the use made of it, although that possibility exists, according to that last provision, for signs covered by the grounds for refusal provided for in Article 7(1)(b) and in Article 7(1)(c) and (d) of that regulation. Consequently, if the examination of a sign under Article 7(1)(e) of Regulation No 40/94 leads to the conclusion that one of the criteria mentioned in that provision is met, this results in a release from examination of the sign under Article 7(3) of the regulation, since registration of the sign in such circumstances is clearly impossible*". Critics against this is Kur, A., cit., 21.

65 For other examples, in other industrial sectors, see Voegl, S., 'Two Eames chairs, two contrary "decisions" ' (2017) 48(4) IIC 452, 452.

While Article 7(1) of the EUTMR lists the various absolute grounds for refusal which may be raised against the registration of a trademark application, it does not specify the order in which those grounds should be considered.[66] The General Court has already excluded that the absolute ground for refusal provided for in Article 7(1)(e)(iii) of the EUTMR must be considered prior to the ground set out in Article 7(1)(b) of the EUTMR.[67] Therefore, since it is well-established case-law that the applicability of one of the absolute grounds for refusal set out in Article 7(1) of the EUTMR suffices for a sign not to be registrable as a trademark,[68] most decisions focus on Article 7(1)(b) of the EUTMR and regularly fail to consider the "substantial value" ground for refusal.

Courts justify such omission with different arguments. Frequently they state that "in so far as the relevant public perceives the sign as an indication of the commercial origin of the goods or services, whether or not it serves simultaneously a purpose other than that of indicating commercial origin is immaterial to its distinctive character".[69] This principle is applied also when the trademark under review might be essentially dictated by aesthetic considerations.[70]

Second, they reduce the scope of application of Article 7(1)(e)(iii) of the EUTMR to those cases where the shapes are purely decorative or at least the decorative function dominates over the distinctive one. On the contrary, where the form is not primarily aesthetically functional the related ground for refusal shall not apply.

Since understanding which of these aspects prevails is demanded to the analysis of the "consumer's behaviour", it is a highly subjective exercise. This makes it a "moving-with-time" test,[71] with the consequence that inconsistencies in the treatment of trademarks with comparable characteristics are commonplace. Therefore, it is argued that there are two possible solutions: remove from EU trademark law the ground for refusal provided for in Article 7(1)(e)

66 GC, 6 October 2011, T-508/08, *Bang & Olufsen A/S v OHIM*, ECLI:EU:T:2011:575, para. 39.

67 GC, 6 October 2011, T-508/08, *Bang & Olufsen A/S v OHIM*, ECLI:EU:T:2011:575, para. 40.

68 see EUCJ, 19 September 2002, C-104/00, *P DKV v OHIM*, ECLI:EU:C:2002:506, para. 29, and GC, 6 November 2007, T-28/06, *RheinfelsQuellen H. Hövelmann v OHIM*, para. 43 and the case-law cited.

69 GC, 9 October 2002, T-173/00, *KWS Saat v OHIM*, Shade of orange, ECLI:EU:T:2002:243, para. 30 and GC, 15 March 2006, T-129/04, *Develey v OHIM*, Shape of a plastic bottle, ECLI:EU:T:2006:84, para. 56.

70 Just to make an example, outside the wine domain, the GC, 10 October 2007, T-460/05, ECLI:EU:T:2007:304, para. 40, found that the vertical, pencil-shaped loudspeaker registered by Bang & Olufsen was a distinctive trademark because of its striking design which is remembered easily, without even considering whether that shape could have a substantial value under art. 7(1)(e)iii.

71 Kur, A., 'Too pretty to protect?, cit., 18.

(iii) of the EUTMR, since it overlaps with Article 7(1)(b); or making its examination for three-dimensional trademarks mandatory rather than optional and consistent with the different ground for refusal set forth in Article 7(1)(b).

4 Overview of Case-Law Concerning Registrability and Protection of Wine Packaging and Bottles as a Trademark

Analysing the case law may help to make the issue at stake clearer. Only decisions concerning registration or invalidity shall be taken into account, where issues concerning the substantial value of shapes should come into play. This chapter deals indistinctively with Italian and European case law since they basically share common rules and principles.

A good starting point may be a rather surprising decision by the Court of Venice concerning a bag-in-box called "Vernissage" marketed by the Swedish wine company Oenoforos. Such box was shaped to look like a women's handbag, corresponding to the wines' colour (white, black, and pink) and finished with a black cord handle and a pop-out spout at one end.[72] The shape was registered both as an international trademark[73] and a European design[74] but this did not prevent an Italian wine producer (Cantina Sociale Cooperativa di Soave) from marketing a very similar packaging.[75] Oenoforos sued the competitor for infringement and slavish imitation. The defendant argued the invalidity of both the registered rights as the shape was aesthetically functional and lacked novelty, distinctive and individual character.

The Court of Venice granted very limited protection under design right but agreed with the counterclaim and declared the invalidity of Oenoforos' three-dimensional mark.[76] It held that article 7 (1) (e) iii prevents the registration of those forms that have a decisive, *rectius* "substantial" impact on the consumers' purchasing choice by inducing him to take an economic decision that he would not have taken if the product did not have that specific form. According to this principle, due to the originality of the idea of associating wine with a women's bag, the box, rather than distinguishing the wine as originating from the Swedish company, drew the attention of the consumer to its

72 https://www.packagingoftheworld.com/2010/10/bag-in-bag-wine-vernissage.html?m=1.
73 Reg. no. 1080843.
74 Reg. no. 001645664-001/002.
75 https://packaging605.rssing.com/chan-9801885/all_p8.html, showing ten new packaging developments.
76 Decision of 21 July 2015, no. 2306/2015.

own attractive power. Therefore, consumers would have focused more on the shape, rather than on the wine origin. Evidence of this was found in newspaper articles attributing the commercial success of the product to the packaging itself.

The Court of Appeal of Venice upheld this finding, acknowledging that a three-dimensional mark is valid when it consists of an unusual, arbitrary or fanciful form, to which aesthetic or functional tasks are extraneous or, at least, not relevant.[77] Trademark protection may only be granted if the aesthetic features of the shape do not reach such a degree to fall within the concept of "ornamentation", for which the legislator provided for different protection, namely the design one.[78] Therefore, the Court found a middle-way coexistence between distinctiveness and attractiveness, requiring that the shape still be unusual, arbitrary, and fanciful, but these characteristics would not affect the power selling of the product. Whether this is the case in practice, it appears very difficult to say. Apparently, these conditions should be met in a very restricted number of cases: as mentioned before, adopting unusual, arbitrary, and fanciful wine packaging or bottles, by definition, aims to attract consumers and drive its purchasing choices.

Against this very strict approach by Italian courts, EU case law seems more relaxed.

The General Court of the European Union, overturning the decision of the EUIPO,[79] granted trademark protection for an amphora-like vessel[80] with a bead in the bottle shape.[81] Both the EUIPO examiner and its Board of Appeal[82] found that the bulbous central part (bead) fulfilled a functional and decorative purpose and "it is therefore in the public interest that shape of amphoras, which is already known and still used in the field of beverages and foodstuffs, … is not to be monopolised but kept freely available for use by competitors". Therefore, the mark applied for was devoid of any distinctive character within the meaning of Article 7(1)(b) of the EUTMR. This position was rejected by the General Court, which acknowledged "that the mark applied for, taken as a whole, has the minimum degree of distinctive character required".[83] Indeed,

77 Decision of 9 June 2017, no. 1230/2017.

78 Indeed article 1 lett. a) Directive 98/71/EC on the legal protection of designs, defines them as "*the appearance of the whole or a part of a product resulting from … its ornamentation*".

79 In summer 2016, the EUIPO examiner refused the trademark registration and the Board of Appeal confirmed this refusal in February 2017 (R 1526/2016-1).

80 https://www.oecherdeal.de/deal.php?v=2&id=4751.

81 Reg. no. 014 886 097.

82 Decision of 15 February 2017, R 1526/2016-1, para. 28.

83 GC, 3 October 2018, T-313/17, *Wajos Gmbh v EUIPO*, ECLI:EU:T:2018:638, para. 29.

the shape differs from that of classical amphoras, it "is easily remembered by the relevant public" and "differentiates it from normal market bottles, since consumers are not accustomed to containers which have an uncurved shape in their surroundings".[84]

Above all, this judgement is remarkable because this outcome was reached despite "the fact that that characteristic of the mark applied for gives an aesthetic value" and "consequently, the mark applied for is likely to attract the attention of the relevant public and to enable them to distinguish the goods covered by the mark applied for because of the shape of the containers".[85] The CJEU confirmed such a decision and stressed that even with a minimum degree of distinctiveness, the ground for refusal did not apply.[86]

This interpretation seems to be in line with another judgements of the same court,[87] concerning the appearance of the well-known Bacardi Rum bottles.[88]

While Martini's bottle,[89] sharing very similar features, was successfully registered without objections at all,[90] EUIPO examiner refused the Bacardi's bottle application on the grounds that the mark was devoid of any distinctive character pursuant to Article 7(1)(b) of the EUTMR. Neither the shape of the bottle, nor the faint green colour of the punt area (also called heel), the label in bright red in a typical form of a wax seal, nor the label with ornaments consisting of a badge of an ancient noble family and awards were significantly departing from the industry standards, being largely used as decorative badges in the relevant sector. The applicant filed an appeal, pleading that the Office accepted a trademark with comparable characteristics and should observe the principle of equal treatment and sound administration. The EUIPO Board of Appeal upheld the appeal, acknowledging that the sign applied for did not incur the ground for refusal contained in Article 7(1)(b) of the EUTMR[91] since the combination of the faint green colour, the bright-red seal and the white label had a greater distinctiveness than the sum of its parts. The Board pointed out that "the colour scheme and different elements of the sign applied for cannot be seen as purely 'decorative'. The term 'decorative' is misconceived when

84 GC, 3 October 2018, T-313/17, *Wajos Gmbh v EUIPO*, ECLI:EU:T:2018:638, para. 34.
85 GC, 3 October 2018, T-313/17, *Wajos Gmbh v EUIPO*, ECLI:EU:T:2018:638, paras. 35–36.
86 EUCJ, 12 December 2019, C-783/18 P, *EUIPO v Wajos Gmbh*, ECLI:EU:C:2019:1073.
87 Reg. no. 01 761 8191.
88 https://www.thespiritsbusiness.com/2015/02/bacardi-unveils-new-bottle-design-for-bartenders/.
89 https://www.foodbev.com/news/martini-to-launch-new-bottle-design-and-double-media-spend/.
90 Reg. no. 17 616 053.
91 Decision of the Fourth Board of Appeal of 21 December 2018, R 1737/2018-4.

applied to everything that has an appeal to the eye".[92] "A sign may fulfil various functions and the mere fact that it also has a decorative one is not a ground for its refusal, unless it is found that those other functions predominate in such a way that the public would no longer perceive the sign as a reference to a commercial origin of the goods".[93]

Another case concerned the attempt to register as a three-dimensional trademark "Bottega Gold", a completely golden, shiny, iconic metallized bottle, conceived by Sandro Bottega in 2000 to create an eye-catching package for their Italian Prosecco.[94] As none of the absolute grounds for refusal were found and as no opposition was filed, the trademark was registered on 12 June 2013 in respect of class 33.[95] Three years later, however, the Renowned Tombacco Winery filed a request for a declaration of invalidity of the trademark, claiming a breach of Article 7(1)(e)(iii). Tombacco argued that the aesthetic qualities of the colour of the bottle and its shape may justify protection limited in time (such as that provided by designs), but not a legal monopoly for an indefinite period through the registration as a trademark. In a decision of 8 May 2019, the EU General Court confirmed the Board of Appeal's previous ruling that all the grounds for invalidity were unfounded.[96] The combination of the shape of the bottle, the gold colour, the letter 'B', in itself distinctive, and a small flame with a satin finish were enough to give the trademark a sufficient (albeit not high) degree of distinctiveness and to rule out the grounds pursuant to Article 7(1)(e)iii. Indeed, there was no evidence that the value that the public attaches to the wine derives from the attractive and pleasing colour of the bottle. The General Court identified as essential features of the bottle its shape and the reflective golden colour. While the first was considered devoid of distinctive character,[97] "the gold colour clearly alludes to the precious

92 Decision of Appeal of 21 December 2018, R 1737/2018-4, para. 21.

93 Decision of 21 December 2018, R 1737/2018-4, para. 24. Reference is made to GC, 10 October 2007, T-460/05, Shape of a loudspeaker, EU:T:2007:304, para. 44.

94 http://vintagewinepicks.blogspot.com/2019/08/bottega-gold-prosecco-italy-wine-review.html.

95 Reg. no. 01 153 1381.

96 GC, 8 May 2019, T-324/18, ECLI:EU:T:2019:297, confirming the Decision of the EUIPO First Board of Appeal, decision 14 March 2018, R 1036/2017-1, SHAPE OF A BOTTLE (3D), para. 53–55.

97 Decision of 14 March 2018, R 1036/2017-1, cit., para. 57. As regards the first, it concluded that "*the shape of the bottle is certainly common. It is the shape known as 'collio,' which has been in use for several decades now by Italian wineries, in particular for sparkling wines. Moreover, this shape is to be regarded as a mere variant of shapes existing since time immemorial. In other words, the shape is entirely devoid of distinctive character; consequently, its design clearly cannot be described as being 'striking', 'particular' or 'easily remembered'*".

metal and is frequently used to decorate many kinds of goods or packaging. In itself, therefore, the colour does not provide any particular design element".[98] Therefore, it concluded that the bottle and its gold colour certainly were not enough to confer on the shape the artistic value and unique design required by the EU case law for a shape which gives substantial value to the goods.[99] The golden bottle has been also successfully enforced in front of Italian courts against producer of confusingly similar products.[100]

Article 7(1)(e)(iii) of the EUTMR has been successfully applied in a case, where the EU Board of Appeal declared invalid a trade mark consisting of the diamond-shaped bottle[101] of the Jewel Lines Precious Vodka,[102] after considering the "essential characteristics" of the sign and whether such essential features were "capable, separately and jointly, of giving substantial value to the product".[103] The Board reasoned that the shape was that of a very expensive gem, that similarly shaped bottles were sold as collectors' items, that the shape reproduced a typical diamond cut, that in the product advertising the bottle was defined as a jewel and that the aesthetic quality and uniqueness of the shape were the most emphasised characteristics in communication. Therefore, it concluded that the trademark at issue fulfilled all the requirements set out in respect of signs that give substantial value to the goods within the meaning of Article 7(1)(e)(iii) of the EUTMR.

The same reasoning would have been applicable to another recent decision of the Cancellation Division[104] concerning the EU trademark consisting of a skull-shaped bottle for vodka.[105] However, in this case, the examiners dismissed the declaration of invalidity under Article 7(1)(e)(iii) of the EUTMR. The applicant claimed that the proprietor wished to prevent the entire drinks

98 Decision of 14 March 2018, R 1036/2017-1, SHAPE OF A BOTTLE (3D), para. 58, stating that "*The mirror effect of the surface of the bottle provides no striking or particular design element, because its effect is due to the polishing of the glass and it is well known that, as a rule, the surface of glass bottles is polished rather than matte or frosted*".

99 Decision 14 March 2018, R 1036/2017-1, SHAPE OF A BOTTLE (3D), para. 57–59.

100 District Court of Venice, Decision as of 10 December 2015. This decision has been confirmed also by District Court of Venice, no. 103 as of 17 January 2019.

101 https://www.jewellinespreciousvodka.com/our-products/.

102 Reg. no. 009 075 532.

103 Decision 23 May 2013, R 1313/2012-1 SHAPE OF A BOTTLE (3D). The reasoning of the Board is explained in Rusconi, C., '23/05/2013, R 1313/2012-1, Shape of a bottle', in EUIPO, 20 Years of the Boards of Appeal at EUIPO (EUIPO:2017), 342–343.

104 Decision 22 October 2019, no. 20063 C, related to Reg. no. 15 736 622. For a comment see Bosher, H., Crystal Head vodka 3D shape mark invalidity application: Who you gunna call?!, The IPKat, 26 November 2019.

105 https://www.crystalheadvodka.com.

market from using skull-shaped bottles which is a matter for design law. The Cancellation Division stated that the fact that a shape may be pleasing or attractive is not enough to exclude it from registration. If that were the case, it would be virtually impossible to imagine any trademark of a shape, given that in modern business there is no product of industrial utility that has not been the subject of study, research, and industrial design before its eventual launch on the market. Following the "loudspeaker test",[106] it found that the applicant failed to demonstrate that the proprietor emphasised the aesthetic qualities of the trademark when promoting its products.[107] The Cancellation Division took the view that the applicant merely demonstrated that there are people who like the appearance of the crystal head bottle, but not that the trademark owner promoted the appearance and aesthetics of its bottle to the extent that it has become an essential part of its branding, increasing the appeal, and therefore the value, of the product contained within the bottle. Furthermore, the trademark holder demonstrated (thanks to the winning of blind taste test awards) that the appearance of the bottle did not strongly sway the preference of the consumer, whose main intention was to purchase a luxury vodka. Therefore, the examiners rejected the action as the applicant failed to prove that the design of the bottle was an essential element of the branding policy of the owner, capable of increasing the value of the product.

5 Different Grounds for Refusal, Similar Assessment

Beyond the inconsistencies between the different rulings, what is by far more interesting is to look at the tests applied by the courts. Many relevant factors which courts and examiners regularly take into consideration when assessing the substantial value ground for refusal are the same scrutinized under the distinctive character assessment.

The average consumer's perception, the nature of the goods concerned, the similarity with other shapes already known, the fact that the product design may be a very important element in the consumers' choice and an essential element of the branding policy and advertising strategy of the

106 See infra para. 2 and related footnote.

107 There was no evidence of a systematic promotional campaign that placed the primary emphasis on the design of the bottle, which could have been demonstrated with adverts or screenshots of the proprietor's website. Instead, most of the extracts seemed to be commentaries on events or interviews which was not deemed evidence of a regular marketing campaign focusing on the aesthetics of the bottle.

trademark owner are all concepts that are not extraneous to the essential functions of a trademark. "Specific designs", "striking designs", "designs which are remembered easily" and "shapes having aesthetic characteristics", all terms normally used to identify shapes falling under the substantial value ground for refusal, all contribute to the advertising function of trademarks, which the EUCJ recognized as something worthy of legal protection.[108] Where the goods are luxury goods, the trademark owner has an interest in protecting such an image of luxury that the owner built up, presumably through advertising.

6 Limiting the "Loudspeaker Test" to the Artistic Value Assessment

Amongst the different factors considered by courts when applying Article 7(1)(e) iii, only the consideration of the "artistic value" stands on its own, provided that it does not matter when assessing the distinctiveness of the sign. Therefore, in order to avoid any useless and confusingly similarity of assessment between distinctiveness and attractiveness, the latter should be evaluated only having regard to the artistic value of the shape. Indeed, according to the rationale of Article 7(1)(e) iii, whether the shape should have artistic value, it should deserve protection only under copyright or design law, while trademark protection should be excluded under the application of the substantial value ground for refusal.

Even when limiting the "loudspeaker test" to the artistic value requirement, there is a strong risk that the meaning of the latter could be misunderstood and arguments that normally foster a finding of "substantial value" could instead be used to justify a distinctive character. This is well exemplified by a decision of the Court of Milan concerning the famous liquor Amaretto Disaronno.[109] Assessing the distinctiveness of the parallelepiped-shaped bottle, the court emphasised that it had been exposed in the exhibition "L'Objet du Design, 99 objects pour un siècle", as one of the most representative objects of a century of design. According to the court, the attribution of a somewhat iconic character to the bottle at stake confirmed the acquired distinctiveness of the shape.[110]

108 For references see Simon Ilanah, 'The Court of Justice's Protection of the Advertising Function of Trade Marks: An (Almost) Sceptical Analysis', (2011) 6 Journal of Intellectual Property Law and Practice 325.

109 http://www.disaronno.com.

110 District Court of Milan, 26 April 2018, no. 4716/2018.

Paradoxically, the presence in museums or national and international exhibitions, the achievement of awards and recognitions from the critics all constitute serious indicators that an object of industrial design fulfils the artistic value requirement which is needed under Italian law for the protection provided by copyright law.[111]

If the *rationale* of the substantial value ground for refusal is avoiding overlapping protection upon shapes which may already benefit from copyright and design law protection, it is clear that giving relevance to the same factors when assessing distinctiveness and attractiveness is somewhat paradoxical.

7 Conclusion: Is the Substantial Value Ground for Refusal Still Reasonable?

As already pointed out by other scholars,[112] these cases show that the substantial value exclusion which prevents such shapes from becoming trademarks does not make sense because it has no real utility. Examiners actually determine whether shapes give substantial value to goods on the grounds of the

111 Under Article 2 no. 10 of Law no. 633/1941, "Works of industrial designs which themselves have a creative and artistic value". See District Court of Milan, 1 December 2015, no. 13487, finding that the Ty Nant bottle design had enough novelty, creative character, and artistic value to be eligible for copyright protection under Article 2 (10) of Italian copyright law. The Court identified the designer's use of lines, folds, and curves in the plastic bottle to represent and evoke the idea of running water as the innovative concept of the design. The court based its assessment also on the appreciation of the bottle as a work of art proved over the years by its inclusion in the collections and exhibitions of major museums of art, nomination for design awards, and publication in leading design, architecture and fashion magazines. The same bottle was also registered as a 3D shape and the Court ascertained its validity since the resistant did not raise any exception in this regard. See also District Court of Milan, no. 9971/2012, *Vitra Patente AG v High Tech S.r.l.*, according to which the artistic value should be assessed ex post, looking for objective and verifiable indicators that the product achieved a non-short-lived recognition by a sectoral qualified public opinion. The EUCJ, by its judgement as of 12 September 2019, C-683/17, G-Star v. Cofemel, ECLI:EU:C:2019:721, ruled that, as far as designs are concerned, no other requirement is mandated for copyright protection to arise under the InfoSoc Directive, but the sufficient originality of the design at issue. The "aesthetic impression" is not a factor that can be considered since it is subjective. The impact of the decision is not crystal clear, but the judgment could mandate Italy to abandon the "artistic value" extra criteria to be fulfilled for a design to be eligible for copyright protection.

112 Gielen, C., 'Substantial Value Rule: How it Came into Being and Why it Should be Abolished', (2014) 3 EIPR 164; Max Planck Institute for Intellectual Property and Competition Law, Study on the Overall Functioning of the European Trade Mark System (2011), §2.32.

same criteria applied to assess the distinctive character. This is clear – for instance – from the above mentioned golden bottled decision where the Board of Appeal, in order to exclude that the shape and the color of the bottle gave substantial value to the Prosecco Bottega, acknowledged that they were "certainly common", "frequently used" shapes "entirely devoid of distinctive character" and could not be described as being "striking", "particular" or "easily remembered".[113]

This contradiction is even more apparent looking at the different factors that examiners consider to determine whether the shapes give substantial value to goods. Price, aesthetic, quality, uniqueness, and the over-emphasis in advertising have little or nothing to do with the purpose of the rule laid down in Article 7(1)(e)(iii) of the EUTMR to prevent the establishment of monopolies of indefinite duration on shapes.[114]

Therefore, it is doubtful that a material distinction exists between the two criteria, as actually interpreted by the European Union and national case law. It is quite interesting to observe that the Italian Trademark and Patent Office (UIBM) has already questioned the utility of such substantial value ground for refusal with specific reference to the beverage industry. The occasion was the application for registering a bottle owned by Uva Saronno S.p.a. The Examiner held that the shape had "undoubted aesthetic value" and denied registration since "there were no other distinctive elements that might justify the granting of a trademark". The applicant appealed such decision arguing that, following the reasoning of the Office, "no bottle could constitute a valid trademark for liquids because obviously liquids should be traded within a bottle". The Board of Appeal upheld the appeal "for specific reasons pertaining to the relevant market sector". "In the liqueur sector, it is unthinkable that the consumer would drive his purchasing choice based on the aesthetic value of the bottle, since the aesthetics of the bottle may not capture the attention of a buyer who makes its choices based on the quality and taste of the drink. It is sufficient to enter any Italian cafè in order to realize that in the vast assortment of drinks commonly shown off, there are not two identical bottles. This means that all the liqueur producers avoid standardized forms and differentiate their products through the most disparate shapes of bottles, not to the purpose of giving

113 decision 14.3.2018, R 1036/2017-1, Shape of a bottle (3D), para. 57–58.

114 Kur, A., 22, notes that " it has been lost out of sight that the original aim of the rule is to foster and ensure efficient competition … The crucial test should consist of an analysis of the competitive potential of the form at stake, considering to what extent its assignment to one particular right holder would be liable to impede, or even exclude, efficient and meaningful competition".

the product a particular aesthetic value but solely in order to attributing it distinctive character and allow consumers to identify their origin on the market".[115] Consequently, according to the Board of Appeal, the ground for refusal for shapes giving substantial value to goods is simply not applicable to drinks.

Even if I do not entirely agree with the reasoning of the UIBM (I do not believe that the aesthetic of a bottle does not drive consumer's choices at all), I fully share its conclusions. We must be aware that bottles and packaging, by definition, give value to products since consumers consider packaging design features when making purchase decisions. Therefore, two different policy options are available. First, we may accept that fanciful and arbitrary bottles and wine packaging would fall *ex se* under the substantial value criterion and as a consequence would be rejected as a trademark because of that. Second, we should abolish such ground for refusal and review packaging trademark only on an acquired distinctiveness base.

An absolute and permanent ban against trademark protection for attractive shapes would not have sense, and not only for wine bottles. For mitigating this effect, someone suggested that attractive shapes should have the chance of acquiring distinctiveness and becoming a valid sign at least at a later stage as a consequence of their use in commerce.[116] It seems to me that this proposal makes clear the overlapping between the interpretations of both the concepts of distinctiveness and substantial value. The European Court of Justice has mistakenly interpreted the substantial value using parameters (consumer's perception and reasons which determine its purchasing choices) that should normally be taken into consideration when assessing the distinctive character. This approach led to disparities in the judicial consideration of the eligibility of attractive shapes for registration as a trademark. This chapter has provided for proof of these incongruences, with reference to wine and spirits bottles or boxes. Out of 6 cases examined above, all concerning renowned and easily recognizable brands, only two have been decided on the basis of Article 7(e) EUTMR. The remaining just took into consideration the ability of a bottle of working as a badge of origin. While there is no apparent justification for such unequal treatment, a question arises: is the distinctiveness assessment not enough? I think so.

Someone argued that the justifications underpinning the application of the substantial value ground to prevent trade mark law from becoming an (undue

115 UIBM Board of Appeal, 14 December 2004.

116 Kur, A., cit., believes that "it should not be precluded forever that a shape, initially attracting customers by its pleasant appearance, should have the chance of becoming a valid sign at a later stage".

and virtually perpetual) extension of time-limited rights (notably copyright and design), could not be absorbed into any other grounds. However, this justification did have a sense when the simultaneous protection of the same object under different IP rights was disallowed and the demarcation between the subject matter protected by design, copyright and trade mark strictly defined.[117] This is not the case of the present legislative and jurisprudential context, which unequivocally does not prevent cumulation between different types of intellectual property rights.[118] This said, the anti-monopoly argument is a weak justification[119] for maintaining a substantial value ground for refusal that, as actually interpreted, requires examiners and courts to carry out a test in full contrast with the well established distinctive character assessment.

In conclusion, this chapter demonstrates that the option of abolishing the substantial value ground for refusal is by far more consistent with the keystone of trademark law, pivoting around the essential function of the trademark as a source of origin.

117 Ghidini, G., Profili Evolutivi del diritto industriale, cit., 244, remembers that until the middle of the last century, the shape mark had no citizenship in the Italian legal system. The *rationale* was avoiding that "the scope of trademark protection would confuse with design right". Cf. Ascarelli, T., Teoria della concorrenza e dei beni immateriali (Milan: Giuffrè, 1960), 483. In the British system, such ostracism continued until the threshold of the 90s, as the famous case of the Coca Cola bottle recalls. See House of Lords, Coca-Cola T.M., 1986, (1986) 103(15) Reports of Patent, Design and Trade Mark Cases, 421–458.

118 IPR cumulation is expressly acknowledged at, eg, Recitals 31 and 32 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, 1–24; Articles 17 and 18 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998, 28–35.

119 Ricolfi M., Trattato dei marchi, cit., para. 28.3.4, excludes that the purpose of the third indent of Article 3(1)(e) of Directive 2008/95 could be the coordination between different rights over the aesthetic appearance of a shape. Within the present regulation, such coordination has become a "mission impossible".

CHAPTER 22

Prošek or Prosecco

Intellectual Property or Intangible Cultural Heritage?

Steven Gallagher

1 The Dispute – Prošek or Prosecco?[1]

On 1 July 2013 Croatia joined the European Union.[2] However, the celebrations for its long awaited accession to the economic and political union were somewhat dampened by a dispute that had been fermenting during the negotiations for its accession and which bubbled over in an agreement that affected an important social and cultural icon of the Croat people. This involved a wine that had been produced in the region for perhaps more than 2,000 years – Prošek. This locally and, usually, domestically rather than commercially produced, dark-amber sweet dessert wine was the subject of furious complaint from Italy. The Italian complaints originated with those representing the mass-produced fizzy straw coloured and, some might say, insipid wine – Prosecco. The issue: the manufacturers of Prosecco were concerned that their product would suffer from confusion with the similar sounding name of the very different Croatian wine.

The makers of Prošek and the Croatian people pointed out the ridiculous nature of this protest. They noted that these were very different types of wine, made from different grapes, by different processes, with different colours, that one had bubbles while the other did not, that one was mass produced while the other was usually domestically produced on a very small scale, and that the two wines had very different tastes.

The Croatians also pointed out the difference in social and cultural customs associated with drinking the two wines. Prosecco is a very popular wine enjoyed on many social occasions as a cheap alternative to Champagne.[3] Prošek

1 European Union, "Goals and values of the EU": https://europa.eu/european-union/about-eu/eu-in-brief_en (Viewed 13/04/20).

2 European Union, "Overview Croatia": https://europa.eu/european-union/about-eu/countries/member-countries/croatia_en (viewed 13/04/20).

3 Wine Folly, "Champagne vs Prosecco: The Real Differences", 11 March 2015, updated on 29 February 2020: https://winefolly.com/deep-dive/champagne-vs-prosecco/ (viewed 13/04/20).

production is actually part of a social custom. Its production is usually small-scale, often by single families according to family recipes. Drinking Prošek is traditional when a child is born, birth vintages are saved for coming-of-age and weddings, and family produced bottles are given as gifts at traditional festivals.[4]

The story of this dispute was reported in various media around Europe and the world, and even made it into the Wall Street Journal.[5] Some coverage mistakenly reported that the Italian producers of Prosecco had taken legal action to prevent their Croatian cousins making their traditional wine, and some reported that after joining the European Union the Croatians would be "forbidden to make, advertise, or sell Prošek".[6] However, although the Croatian government, keen to reap the benefits of membership of the single European Single Market, agreed with little opposition to ban the use of the name Prošek, the wine is still produced in Croatia, sold under its traditional name and under other names, and drunk. For example, Croatian websites still market Prošek and picture bottles bearing the forbidden name.[7]

The reason for the interest in this dispute was the seeming ridiculousness of the fears and complaints of the Italians, and the seeming lack of consideration for the importance of Prošek as part of Croat cultural heritage. However, for the European Union its goal of respect for cultural diversity is second to economic benefit. The Wall Street Journal noted that, "The trade group says the Prosecco industry – with an output of 300 million bottles a year and thousands of employees – is too important to the Italian economy to risk any confusion over naming in the EU."[8] At this point it should be noted that such disputes are often magnified in the press to support criticism of trade bodies like the

4 "A European Name Game Uncorks a Tempest in a Wine Cask – Prosek, a Sweet Croatian Staple, Confuses the Issue for Italian Bubbly", Wall Street Journal, 7 August 2013: https://www.wsj.com/articles/a-european-name-game-uncorks-a-tempest-in-a-wine-cask-1375842706?tesla=y (Viewed 05/04/20).

5 "A European Name Game Uncorks a Tempest in a Wine Cask – Prosek, a Sweet Croatian Staple, Confuses the Issue for Italian Bubbly", Wall Street Journal, 7 August 2013: https://www.wsj.com/articles/a-european-name-game-uncorks-a-tempest-in-a-wine-cask-1375842706?tesla=y (Viewed 05/04/20).

6 The Wine and More, "Prosek vs Prosecco", 1 March 2016: https://www.thewineandmore.com/stories/articles/prosek-vs-prosecco/ (Viewed 13/04/20).

7 Croatian Wine Online, "Dessert wine, Desertno vino": https://www.croatianwine.online/en/dessert-wine/ (Viewed 13/04/20).

8 "A European Name Game Uncorks a Tempest in a Wine Cask – Prosek, a Sweet Croatian Staple, Confuses the Issue for Italian Bubbly", Wall Street Journal, 7 August 2013: https://www.wsj.com/articles/a-european-name-game-uncorks-a-tempest-in-a-wine-cask-1375842706?tesla=y (Viewed 05/04/20).

European Union for overregulation and insensitive and perhaps even idiotic bureaucratic intervention.

This chapter considers the issues that form the basis of this dispute but which were not considered in the heat of passionate rhetoric about the ridiculousness of EU legislation. The chapter first considers what cultural heritage is and in particular what is meant by intangible cultural heritage; then it moves to consider whether Prošek and/or Prosecco may be identified as cultural heritage and therefore benefit from protection. The chapter then considers the intellectual property issues that were raised by the manufacturers of Prosecco in their complaint. Finally, the chapter concludes by considering how the two protection regimes of cultural heritage and intellectual property law interact and which prevails.

2 What Is Cultural Heritage?

"Cultural heritage" is a term of international law. Cultural heritage law is a body of international law which has its roots in the aftermath of the Second World War and the international community's concerns for the loss of culture and heritage that had occurred by way of looting, destruction, and the forced relocation and even extermination of peoples and communities. The immediate responses were the 1948 Universal Declaration of Human Rights and the Geneva Conventions of 1949,[9] the latter of which referenced the importance of culture and property to everyone.[10] There have been six international conventions which directly reference cultural property or cultural heritage, five drafted by the United Nations Educational, Scientific and Cultural Organization ("UNESCO") and one by the International Institute for the Unification of Private Law (*Institut international pour l'unification du droit privé* – "UNIDROIT"). The six conventions are:

9 In particular, the Fourth Geneva Convention, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949: Article 53 provides for the protection of civilian and some state property in occupied territory, unless "such destruction is rendered absolutely necessary by military operations.": https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380 (Viewed 16/09/19).

10 For discussion of the development of the term "cultural heritage" see Prott, L., & O'Keefe, P. (1992). 'Cultural Heritage' or 'Cultural Property'? International Journal of Cultural Property, 1(2), 307–320. doi:10.1017/S094073919200033X. For comprehensive discussion of the development of international law to protect cultural heritage see Forrest, Craig J.S. *International law and the protection of cultural heritage*. (London; New York: Routledge, 2010) doi:10.4324/9780203865194.

1954 – Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "Hague Convention");[11]

1970 – Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;[12]

1972 – Convention Concerning the Protection of the World Cultural and Natural Heritage;[13]

1995 – UNIDROIT- Convention on Stolen or Illegally Exported Cultural Objects;[14]

2001 – Convention on the Protection of the Underwater Cultural Heritage;[15]

2003 – Convention for the Safeguarding of the Intangible Cultural Heritage.[16]

These six conventions make up the body of international cultural heritage law. Each convention has its definition of cultural heritage and a non-exhaustive list of examples. Most require contracting parties to implement domestic measures and these measures now form part of the body of cultural heritage law.

Although each convention has its own definition of cultural property, objects or heritage, which are intended to be specific to its purposes, the term "cultural heritage" has become a very popular term generally. Its popular meaning has become far wider than that in the international and consequent domestic legislation. The author would propose a useful working definition of the popular meaning of the term might be: "Cultural heritage is evidence of the activities and achievements of humankind that should be passed on for the benefit of future generations." It should be noted that the use of the term "activities and achievements" is intentional, as cultural heritage may be negative as well as positive. Negative cultural heritage may refer to things and events that humankind would prefer to forget but which there is value in

11 UNESCO, "Armed Conflict and Heritage": http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/ (Viewed 13/04/20).

12 UNESCO, "Legal Instruments": http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (Viewed 13/04/20).

13 UNESCO, "Convention Concerning the Protection of the World Cultural and Natural Heritage": https://whc.unesco.org/en/conventiontext/ (Viewed 13/04/20).

14 UNIDROIT, "Instruments": https://www.unidroit.org/instruments/cultural-property/1995-convention (Viewed 13/04/20).

15 UNESCO, "UNESDOC Digital Library": https://unesdoc.unesco.org/ark:/48223/pf0000126065 (Viewed 13/04/20).

16 UNESCO, "Intangible Cultural Heritage": https://ich.unesco.org/en/convention (Viewed 13/04/20).

reminding future generations about. For example, there is value in preserving and protecting the sites of the Nazi concentration camps, such as Auschwitz, as reminders of what humankind is capable of at its lowest.

International law has tried to keep up with the wider popular meaning of cultural heritage as interest in the concept developed throughout the second half of the twentieth century. The first five conventions were concerned with tangible property and focused on traditional ideas of what might be identified as monuments, art and antiquities. For example, the first convention to consider cultural heritage was the 1954 Hague Convention, intended to protect cultural property in armed conflict because of the destruction afforded to historic buildings and art and antiquities in the Second World War.[17] The second most recent was the 2001 Convention on the Protection of the Underwater Cultural Heritage, intended to protect tangible cultural heritage such as shipwreck.[18] However, a revolution in the concept of cultural heritage occurred with the most recent convention, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage ("ICH Convention").[19] This convention identifies a new form of cultural heritage, something that may not be touched, seen, smelled, heard or tasted, although it may also be experienced through any or all the senses. This is the intangible cultural heritage which provides the identification of all other forms of cultural heritage – the idea of cultural heritage itself.

2.1 *What Is Intangible Cultural Heritage?*

UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage ("ICH Convention") identified intangible cultural heritage as "the practices, representations, expressions, knowledge, skills … that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."[20]

While commentators on cultural heritage and law such as Craig Forrest have noted that "[d]etermining exactly what is intangible cultural heritage is

17 UNESCO, "Armed Conflict and Heritage": http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/ (Viewed 13/04/20).

18 UNESCO, "Underwater Cultural Heritage": http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/ (Viewed 13/04/20).

19 UNESCO, "Intangible Cultural heritage": https://ich.unesco.org/en/convention (Viewed 13/04/20).

20 Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2(1): http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/.

near impossible",[21] we can identify many examples. For instance, oral history and story-telling, traditional music and dance, agricultural and manufacturing skills, rituals and use of symbols, traditional medicine, food, sports and games. However, it is important to note that many of these are tangible, for example, traditional medicines and foods. As such they satisfy our general definition of cultural heritage as "evidence of the activities and achievements of humankind that should be passed on for the benefit of future generations." However, they are identified as intangible cultural heritage because of the ideas they represent as part of the cultural heritage.

As Arizpe notes, the intangible cultural heritage "is not an object, not a performance, not a site; it may be embodied or given material form in any of these, but basically, it is an enactment of meanings embedded in collective memory".[22] Thus, many identifications of intangible cultural heritage are of tangible manifestations of cultural heritage. The intangible cultural heritage is the idea and meaning behind the tangible manifestation. For example, in Georgia, the former Soviet republic, the Qvevri is used to make wine by a traditional method. The Qvevri is an egg-shaped earthenware vessel which is used to make, age and store wine.[23] The traditions of making Qvevri and using them to make wine are passed on through families and is a social and cultural practice associated with many other religious and social customs. In 2013 wine making using Qvevri was added to the Representative List of the Intangible Cultural Heritage of Humanity because it "defines the lifestyle of local communities and forms an inseparable part of their cultural identity and inheritance, with wine and vines frequently evoked in Georgian oral traditions and songs." The addition of Qvevri to the Representative List has little to do with the earthenware pots, the wine-making practices, the songs and celebrations in themselves, but is added because it evidences an element of Georgian traditional belief and custom, which is worth recording and celebrating for all humanity.[24]

Therefore, intangible cultural heritage is an idea or meaning which is passed on embodying the culture or an aspect of the culture of a people. This passing on often takes place by means of a song, story, tradition, custom or other skills

21 Forrest, Craig J.S. International law and the protection of cultural heritage. (London; New York: Routledge, 2010) doi:10.4324/9780203865194.

22 L. Arizpe, 'The cultural politics of intangible cultural heritage' (2007) 12 *Art Antiquity and Law* 361, 362.

23 https://ich.unesco.org/en/RL/ancient-georgian-traditional-qvevri-wine-making-method-00870.

24 https://ich.unesco.org/en/8-representative-list-00665&include=slideshow.inc.php&id=00870#https://ich.unesco.org/img/photo/thumb/07898-LRG.jpg (viewed 05/04/20).

and practices which have associated physical manifestation. An example may be the making and drinking of wine.

2.2 *Development of Recognition and Protection for Intangible Cultural Heritage*

The development of consensus for drafting the 2003 ICH Convention derived from the recognition that the body of international law intended to identify and protect cultural heritage did not represent many of the world's great cultures. This was because it had been developed under the lead of the traditional western economic and political powers and thus represented their values. For example, the 1972 Convention for the Protection of the World Cultural and Natural Heritage, often lauded for its success with the World Heritage List, initially identified cultural heritage as ancient and monumental buildings such as the great European cathedrals and castles. In the 1980s and 1990s, repeated criticism was made of the failure of such conventions to identify and protect sites which did not fit these values. For example, the *Ise Jingu* grand shrine has seen continuous worship for over 1200 years. Today it is visited by worshippers and those keen to enjoy its simple architectural style and history.[25] It is recognised as one of Japan's great treasures and part of its cultural heritage. However, there was debate over its inclusion on the World Heritage List because the shrine is rebuilt every 20 years. Therefore, it is not "authentic" under the traditional western oriented value of the term. Other issues with traditional concepts of cultural heritage were raised by the "first nations" and indigenous peoples of the world. Many of these peoples did not build ancient monumental buildings but it was recognised that their cultures had much that should be valued and protected. This included their traditional knowledge. For example, the Aboriginal people of Australia were not thought to have left large building complexes that would be categorised as cultural heritage in the international conventions, although we now understand their impact on the land as custodians did leave a lasting impression.[26] However, the Aboriginal peoples have always valued their "knowledge and lore" passed on by story-telling and art, and recognised its importance for the continuity of their heritage and culture.[27]

The development of international measures to protect intangible cultural heritage has been driven by many diverse areas of law, for example the

25 *Ise Jingu*, official website: https://www.isejingu.or.jp/en/ (Viewed 13/04/20).

26 Australian Government, "Indigenous Heritage": https://www.environment.gov.au/heritage/about/indigenous-heritage (Viewed 13/04/20).

27 Victorian Aboriginal Heritage Council: https://www.aboriginalheritagecouncil.vic.gov.au/ (Viewed 13/04/20).

protection of human rights including freedom of conscience and belief, and education. However, the main area of law which affected intangible cultural heritage before it was subject to its own international convention was intellectual property law. Therefore, international bodies whose purpose is to ensure uniform and international protection of intellectual property rights have played an important role in the development of the modern concept and safeguarding of intangible cultural heritage. This even though the legal regimes intended to protect intellectual property and safeguard intangible cultural heritage are at odds if not opposite in purpose. Thus, today intellectual property and intangible cultural heritage are often confused and the laws which are intended to protect them may be brought into conflict.

The World Intellectual Property Organization (WIPO)[28] collaborated with UNESCO to give early recognition to what would now be considered intangible cultural heritage. Therefore, folklore was included in the *1976 Tunis Model Law on Copyright Protection for Developing Countries*, which provides for the protection of works of national folklore "without limit in time" from commercial exploitation, mainly by a prohibition on copies, "translations, adaptations, arrangements, or other transformations" of these works made abroad being imported or distributed, "without the authorization of the competent authority".[29] This initial protection was followed by a more extensive guide on protection when WIPO and UNESCO cooperated again to produce the *1982 Model Provisions for National Law on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions.*[30]

However, some argued that protection using intellectual property laws was inappropriate because of the identification of this form of traditional knowledge as property and the assertions of ownership for protection. Thus, it was UNESCO alone who initiated the idea of safeguarding such knowledge with the *1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore*.[31]

28 World Intellectual Property Organization, "Inside WIPO: What is WIPO?": https://wipo.int/about-wipo/en/ (Viewed 13/04/20).

29 *1976 Tunis Model law on Copyright Protection for Developing Countries*, section 6 "Works of national folklore".

30 UNESVO and WIPO, "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions": https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf (Viewed 13/04/20).

31 Other international measures which deserve note in the development of protection for intangible cultural heritage include the Convention on Biological Diversity (CBD), opened for signature by the United Nations Environment Programme (UNEP) in 1992. This was intended to encourage sustainable development by "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing

Although all these measures identified the importance of what would now be considered intangible cultural heritage, it was UNESCO's 1993 UNESCO Living Human Treasures Programme which really made the concept popular. This was aimed at "encouraging Member States to grant official recognition to talented tradition bearers and practitioners, thus contributing to the transmission of their knowledge and skills to the younger generations."[32] The programme was what might be described as an instant hit with governments and peoples. Indeed, it was so successful that UNESCO, never a body to miss an opportunity, considered amending the World Heritage Convention in 1996 to include such living human treasures and their skills and traditions. However, this idea was abandoned in favour of further measures specifically directed at intangible cultural heritage.[33] Thus the *Masterpieces of Oral and Intangible Heritage of Mankind programme*, loosely based upon the World Heritage List, was announced in 1997[34] and proclaimed in 2001.[35] Proclamations of additions to the list of Masterpieces occurred biennially until 2005, when there was a total of 90 Masterpieces from 70 countries. However, such was the success of this Programme that UNESCO had already drafted a specific convention for intangible cultural heritage. In 2003, the *Convention for the Safeguarding of Intangible Cultural Heritage* (*ICH Convention*) was adopted. It took effect in 2008. The Masterpieces List was then superseded by the *Representative List of the Intangible Cultural Heritage of Humanity*.[36] All the 90 previously proclaimed Masterpieces were featured as the first entries on the new List now referred to as "elements". The ICH Convention and its

of benefits arising from the use of genetic resources." https://www.cbd.int/intro/default.shtml (Viewed 19/09/19).

32 UNESCO, "Intangible Cultural Heritage: Living Human Treasures: a former programme of UNESCO": https://ich.unesco.org/en/living-human-treasures (Viewed 13/04/20).

33 It is worth noting however, that UNESCO included in the Operational Guidelines for the Implementation of the World Heritage Convention (2008, para 77(vi)) a criterion for the listing of natural heritage sites, that it "be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance." https://whc.unesco.org/archive/opguide08-en.pdf (viewed 16/09/19); this provision is also reproduced in the most recent version, 2017: file:///C:/Users/StevenG/Downloads/document-57-11.pdf (Viewed 16/09/19).

34 UNESCO, "Intangible Cultural Heritage: Living Human Treasures: a former programme of UNESCO": https://ich.unesco.org/en/living-human-treasures (Viewed 13/04/20).

35 UNESCO, "Intangible Cultural Heritage: Proclamation of the Masterpieces of the Oral and Intangible Heritage of Humanity (2001–2005)": https://ich.unesco.org/en/proclamation-of-masterpieces-00103 (Viewed 13/04/20).

36 For a brief description of the development see https://ich.unesco.org/en/2000-onwards-00310 (Viewed 16/09/19).

consequent List was an immediate success with many states signing up in very quick order. In September 2019 there were close to 500 elements on the List.[37]

2.3 *The Convention for the Safeguarding of Intangible Cultural Heritage 2003*

The ICH Convention provides a definition for intangible cultural heritage and provides a framework for its safeguarding.[38] Article 2 of the Convention defines Intangible Cultural Heritage:

> For the purposes of this Convention,
> 1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage . …
> 2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:
>   (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
>   (b) performing arts;
>   (c) social practices, rituals and festive events;
>   (d) knowledge and practices concerning nature and the universe;
>   (e) traditional craftsmanship.

…

The ICH Convention notes the importance of intangible cultural heritage to us all as a whole or as "communities, groups and, in some cases, individuals".[39] However, it notes that intangible cultural heritage is "constantly recreated by communities and groups in response to their environment, their interaction with nature and their history", and it does not identify intangible cultural heritage as property and assert ownership, but recognises and celebrates it "as

37 UNESCO: "Browse the Lists of Intangible Cultural Heritage and the Register of good safeguarding practices": https://ich.unesco.org/en/lists (Viewed 13/04/20).

38 UNESCO, "Text of the Convention for the Safeguarding of the Intangible Cultural Heritage": https://ich.unesco.org/en/convention (Viewed 13/04/20).

39 Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2(1): http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/.

a mainspring of cultural diversity and a guarantee of sustainable development."[40] Therefore, the Convention does not seek to protect the intangible cultural heritage as property belonging to a state, group or individual. Instead it provides a framework for safeguarding rather than protecting intangible cultural heritage. Means of safeguarding begin by identifying intangible cultural heritage, respecting it and raising awareness of it by recording and educating.[41] These safeguarding duties are passed on to State Parties in cooperation with each other and "with the participation of communities, groups and relevant non-governmental organizations."[42] To identify intangible cultural heritage with a view to safeguarding, each State Party has to draw up and regularly update an inventory of the intangible cultural heritage present in its territory.[43] These inventories are to be included in the report to be provided by each State Party to the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage.[44] This Committee then publishes a "Representative List of the Intangible Cultural Heritage of Humanity".[45] This list is published "to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity".[46]

3.0 *Are Prosecco and Prošek Cultural Heritage?*

In considering whether we may identify Prosecco and Prošek as cultural heritage, we have to be careful about distinguishing the popular concept of cultural heritage from its meanings within conventions. The popular meaning of the term is so wide that we see the term "cultural heritage" being used for any art work or artefact, for any old building or neighbourhood, for any custom or skill, song, poem, book, food or drink recipe and even for modern American

40 Preamble to the ICH Convention.

41 ICH Convention, Article 1 – Purposes of the Convention.

42 ICH Convention, Articles 11 and 13.

43 ICH Convention, Article 12.

44 ICH Convention, Article 12. Consequent to their obligations under Article 29.

45 ICH Convention, Article 6; https://ich.unesco.org/en/functions-00586 (Viewed 19/09/19). The Committee also has to publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding: ICH Convention, Article 17. The Committee must also prepare and submit to the General Assembly for approval operational directives for the implementation of the Convention (Article 7)- including criteria for inscription on the representative lists. The General Assembly adopted the first Operational Directives in June 2008, and have since amended them so that the present version, adopted in 2018, are the seventh: https://ich.unesco.org/en/directives (viewed 12/09/19).

46 ICH Convention, Article 16.

fast food restaurants in Hong Kong shopping malls.[47] The author has been concerned that the seeming ubiquitous use of the term has may prevent the term being useful for those interested in legal protection and safeguarding of cultural heritage. On the other hand, its popular use may encourage popular safeguarding and protection which, arguably, may be more effective than international legal obligations on states, which are often ignored or only tacitly complied with.

It is unlikely that Italians would see Prosecco as part of their cultural heritage and more likely they would consider it a useful economic export. This is because Italy has a rich cultural heritage, both tangible and intangible, and this includes wines. However, if asked to name wines that form their cultural heritage it is more likely that Italians would identify Barolo, Brunello di Montalcino, Classic Chianti and Amarone della Valpolicella, and others in preference to the more frivolous Prosecco.[48] In fact the history of Prosecco is a history of recent commercial exploitation rather than cultural appreciation and heritage protection. For, example, the grape variety predominantly used in its manufacture, and the word "manufacture" should be emphasised, was referred to as Prosecco but changed in 2010 to Glera, so that it would not affect the protection of the name Prosecco for the wine.[49] The geographic indication protection of the wine is discussed below,[50] but it should be noted that the designation as Prosecco by association with the small village near Trieste, near the Italian border with Slovenia, has been described by noted wine connoisseur Joseph V Micallef as "rather tenuous at best."[51] Although wine production has been associated with the region now associated with Prosecco for centuries, the production of this dry sparkling wine is relatively recent- measured in decades rather than centuries and only becoming an "export phenomenon and

47 Mike Rowse, "Food for thought: Dan Ryan's forced closure at Pacific Place takes cultural heritage off the city's menu", South China Morning Post, 18 February 2016: http://www.scmp.com/comment/insight-opinion/article/1913879/food-thought-dan-ryans-forced-closure-pacific-place-takes.

48 For example, see the identification of Italy's famous wines by Marcella Scialla, "Famous Italian wines: the most appreciated in the world", Snap Italy Magazine, 25 June 2018: https://www.snapitaly.it/en/famous-italian-wines/ (Viewed 24/04/20).

49 Joseph V Micallef, "Is Prosecco Italy's Sparkling Wine Juggernaut", Forbes Magazine, 18 August 2018: https://www.forbes.com/sites/joemicallef/2018/08/18/is-prosecco-italys-sparkling-wine-juggernaut/#5925c7013d89 (Viewed 24/04/20).

50 By both DOCG, Denominazione di Origine Controllata e Garantita, and DOC, Denominazione di Origine Controllata.

51 Joseph V Micallef, "Is Prosecco Italy's Sparkling Wine Juggernaut", Forbes Magazine, 18 August 2018: https://www.forbes.com/sites/joemicallef/2018/08/18/is-prosecco-italys-sparkling-wine-juggernaut/#5925c7013d89 (Viewed 24/04/20).

an inexpensive sparkling wine juggernaut" in the late 1990s.[52] Its economic importance for Italy cannot be underestimated and is such that it was even cited as a bargaining chip in the threats and counter-threats of the Brexit negotiations when the then UK Foreign Minister, Boris Johnson, was reported to have told Italy's Economics Minister that any opposition to the UK in the single market would mean, "You'll sell less prosecco."[53] Therefore, it is unlikely that most Italians would identify Prosecco as part of their cultural heritage, although they would recognise its importance as an economic commodity.

In contrast Croats are likely to believe their wines are part of their cultural heritage, and Prošek is likely to meet the popular idea of cultural heritage as evidence of the activities and achievements of humankind that should be passed on to future generations. However, such recognition would only offer popular protection rather than legal safeguarding.

Prosecco and Prošek and their associated social customs are unlikely to meet the definitions of cultural property, culture objects or cultural heritage in the first five international conventions. They are most likely to come within the ICH Convention. Both Italy and Croatia are parties to the ICH Convention.[54] To qualify as intangible cultural heritage, and thus require safeguarding by these states, the production of these wines and/or the practices associated with their consumption would have to meet the definition in the Convention. If any of these are intangible cultural heritage, they may be subject to safeguarding obligations. The making of these wines in both states may be regarded as part of their cultural heritage by the "communities, groups and … individuals", and thus satisfies the definition in article 2(1) of the Convention.[55] Although,

52 Joseph V Micallef, "Is Prosecco Italy's Sparkling Wine Juggernaut", Forbes Magazine, 18 August 2018: https://www.forbes.com/sites/joemicallef/2018/08/18/is-prosecco-italys-sparkling-wine-juggernaut/#5925c7013d89 (Viewed 24/04/20).

53 Rowena Mason, Peter Walker and Patrick Wintour, "Boris Johnson ridiculed by European ministers after prosecco claim", The Guardian, 17 November, 2016: https://www.theguardian.com/politics/2016/nov/16/european-ministers-boris-johnson-prosecco-claim-brexit (Viewed 24/04/20).

54 Croatia ratified the Convention on 28/07/2005 and Italy ratified on 30/10/2007: (viewed 07/02/20) http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E&order=alpha.

55 For reference to the identification of Prošek as cultural heritage by Croats see, for example, "A European Name Game Uncorks a Tempest in a Wine Cask – Prosek, a Sweet Croatian Staple, Confuses the Issue for Italian Bubbly", Wall Street Journal, 7 August 2013: https://www.wsj.com/articles/a-european-name-game-uncorks-a-tempest-in-a-wine-cask-1375842706?tesla=y (Viewed 13/04/20); it is more difficult to find evidence of Prosecco being recognised as part of the cultural heritage of Italy as, although, undoubtedly, it provides part of the financial heritage of the people and region, it is a relatively recent invention and has no associated customs except profit. However, the regions inclusion

arguably, the commercial mass production of the Italian Prosecco is unlikely to amount to "traditional craftsmanship" or at the least less deserving of recognition as such.

It is the identification as cultural heritage of the social practices associated with production of the wines and their consumption that is more contentious. As noted, Prosecco is an extremely popular wine which is generally drunk with little ceremony on account of its easy flavour and relative affordability. Although it may be used as a cheap alternative to champagne at weddings and other significant celebrations, there is no social custom or ritual directly associated with its consumption. And the Italians claim no such significance to identify it as culture heritage.

The case for Prošek being recognised as a manifestation of intangible cultural heritage is far more convincing. This is not just because the "traditional craftsmanship" is much more artisanal and labour intensive, but also as manifested in the "social practices, rituals and festive events" associated with its consumption. The Croats claim that families are proud to pass down their own Prošek recipes through the generations. Families are often so proud of their recipe that they will pass bottles to others as gifts at special festivals throughout the year. When a child is born parents will lay down bottles from the birth vintage, often burying them, to be opened on the child's wedding day or other special event days, for example college graduation.[56] When children leave home, they are given the wine beaten with an egg to strengthen them for their journey. It is customary to give mothers a spoonful of the wine after they have given birth to help them recover from the rigours of birthing. In similar vein, the wine is used as a traditional tonic for the sick, particularly those suffering from anaemia.[57]

The Croats claim the technique and custom of making Prošek is 2,000 years old and may date to the arrival of the Greeks on the Dalmatian islands in the 4th century B.C.[58] The first written mention of Prošek occurred in 1556, when

on the World Heritage List must be taken as persuasive of its associated identification as cultural heritage: UNESCO, "World Heritage Centre: The List: Le Colline del Prosecco di Conegliano e Valdobbiadene": https://whc.unesco.org/en/list/1571/ (Viewed 13/04/20).

56 See for example, The Wine and More, "Prosek vs Prosecco", 1 March 2016: https://www.thewineandmore.com/stories/prosek-vs-prosecco/ (Viewed 13/04/20).

57 "A European Name Game Uncorks a Tempest in a Wine Cask – Prosek, a Sweet Croatian Staple, Confuses the Issue for Italian Bubbly", *Wall Street Journal*, 7 August 2013: https://www.wsj.com/articles/a-european-name-game-uncorks-a-tempest-in-a-wine-cask-1375842706?tesla=y (Viewed 05/04/20).

58 See for example, The Wine and More, "Prosek vs Prosecco", 1 March 2016: https://www.thewineandmore.com/stories/prosek-vs-prosecco/ (Viewed 13/04/20); and "Nov Hrvaški "kulinarični poraz": EU jim je prepovedal uporabo imena prošek". SiolNet.

the Croatian poet Petar Hektorović records taking it on a fishing expedition in his famous work, *Ribanje i Ribarsko Prigovaranje* (Fishing and Fishermen Talk).[59] Thus they identify Prošek as an intrinsic part of their cultural heritage, as noted by Janica Tomic, a sommelier and member of the most well-known winemaking family on the island of Hvar, who produces Prošek Hektorovic, when she said "[i]t's about identity, tradition and customs".[60]

Prosecco is a much younger wine as, although the Prosecco hills have been associated with wine production for a thousand years,[61] the first written reference to the wine which became Prosecco was in 1754 when Aureliano Acanti wrote "[a]nd now I would like to wet my mouth with that Prosecco with its apple bouquet".[62] As noted above, this wine was developed during the late twentieth century from a sweet sparkling wine into the dry sparkling wine marketed as Prosecco today to satisfy modern taste demands and provide a sound financial product; evidence of this response to market demand is seen in the industrial production of Prosecco. Production doubled between 1998 and 2008 to around 150 million bottles, and doubled again by 2014 to more than 300 million bottles, with a projected production in excess of 400 million bottles by 2020.[63]

Although history is not the most important factor, Prošek would seem to have a far stronger claim to recognition under the ICH Convention as intangible cultural heritage than Prosecco. However, Croatia's obligation to safeguard would depend first on inclusion on the state's inventory of its intangible cultural heritage and, ultimately, on addition to the Representative List of the Intangible Cultural Heritage of Humanity. The process of adding an element to the Representative List of the Intangible Cultural Heritage of Humanity requires that the element is included in an inventory of the intangible cultural heritage

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Translation by Google Translate: https://siol.net/novice/svet/nov-hrvaski-kulinaricni-poraz-eu-jim-je-prepovedal-uporabo-imena-prosek-239371 (Viewed 22/03/20).

59 "Are You Pro Prošek? 12 Reasons Why You Should Be". Wines of Croatia, 26 August 2013: https://uncorkingcroatia.com/2013/08/26/are-you-pro-prosek/ (Viewed 05/04/20).

60 "A European Name Game Uncorks a Tempest in a Wine Cask – Prosek, a Sweet Croatian Staple, Confuses the Issue for Italian Bubbly", *Wall Street Journal*, 7 August 2013: https://www.wsj.com/articles/a-european-name-game-uncorks-a-tempest-in-a-wine-cask-1375842706?tesla=y (Viewed 05/0420).

61 UNESCO, "World Heritage Convention: Tentative Lists": http://whc.unesco.org/en/tentativelists/5566/ (Viewed 13/04/20).

62 "Are You Pro Prošek? 12 Reasons Why You Should Be". Wines of Croatia, 26 August 2013: https://uncorkingcroatia.com/2013/08/26/are-you-pro-prosek/ (Viewed 05/04/20).

63 Joseph V Micallef, "Is Prosecco Italy's Sparkling Wine Juggernaut", Forbes Magazine, 18 August 2018: https://www.forbes.com/sites/joemicallef/2018/08/18/is-prosecco-italys-sparkling-wine-juggernaut/#5925c7013d89 (Viewed 24/04/20).

present in the territory of the submitting State Party.[64] Legislation in Croatia requires that the Ministry of Culture maintains a Register of Cultural Goods of the Republic of Croatia. In 2014 HEREIN, a European Cultural Heritage Information Network developed within the Council of Europe, published the European Heritage Network Croatia National Report.[65] The Report identified 167 Intangible Cultural Goods but no practice associated with Prošek was among these.[66]

Italy maintains its territorial inventory of intangible cultural heritage and last reported to UNESCO in 2013.[67] No social or customary practices associated with Prosecco are mentioned in the inventory or in the HEREIN Report on Italy of 2014.[68]

There are wine making practices and associated customs and rituals on the Representative List of the Intangible Cultural Heritage of Humanity, for example the ancient Georgian traditional *Qvevri* wine-making method.[69] In March 2020, Croatia had 15 elements on the Representative List of the Intangible Cultural Heritage of Humanity and one on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding.[70] At the same time Italy had 12 elements, two shared with Croatia.[71] As noted, Croatia and Italy could not ask for practices or customs associated with Prosecco or Prošek to be inscribed on the List, unless

64 UNESCO, "Intangible Cultural Heritage: Procedure of inscription of elements on the Lists and of selection of Good Safeguarding Practices": https://ich.unesco.org/en/procedure-of-inscription-00809 (Viewed 13/04/20).

65 Council of Europe, "Democracy: HEREIN": https://www.coe.int/en/web/herein-system (Viewed 13/04/20).

66 European Heritage Network Croatia National Report, 21/10/2014: https://rm.coe.int/herein-european-heritage-network-croatia-national-policy-report/16808c6da4 (Viewed 22/03/20).

67 UNESCO, "Intangible Cultural Heritage: Periodic reporting on the Convention for the Safeguarding of the Intangible Cultural Heritage: Italy": https://ich.unesco.org/en-state/italy-IT?info=periodic-reporting (Viewed 13/04/20).

68 Council of Europe, "HEREIN: Organisations: Italy": file:///C:/Users/StevenG/Documents/CH%20articles/IP%20and%20ICH/Wine%20law%20conference/Italy-National-Report.pdf.pdf (Viewed 13/04/20).

69 UNESCO, "Intangible Cultural Heritage: Ancient Georgian traditional Qvevri wine-making method: Georgia": https://ich.unesco.org/en/RL/ancient-georgian-traditional-qvevri-wine-making-method-00870 (Viewed 13/04/20).

70 UNESCO, "Intangible Cultural Heritage: Browse the Lists of Intangible Cultural Heritage and the Register of good safeguarding practices": https://ich.unesco.org/en/lists?text=&country%5B%5D=00058&multinational=3#tabs (Viewed 13/04/20).

71 Art of dry stone walling, knowledge and techniques, and Mediterranean diet: https://ich.unesco.org/en/lists?text=&country%5B%5D=00058&multinational=3#tabs (Viewed 21/03/20).

they were first added to their territory inventory. However, Prosecco has gained world heritage recognition through a different convention. In July 2018 UNESCO declared the Prosecco Hills of Conegliano and Valdobbiadene a World Heritage Site.[72] This was in recognition of the distinctive hill landscape as affected by human cultivation. The inscription on the World Heritage List was a result in large part to the lobbying by the Consortium for the Protection of Conegliano Vadobbiadene Prosecco DOCG; the Consortium to protect the Denominazione di Origine Controllata e Garantita, which is Italy's highest standard of rigour in quality of manufacture of wine and geographical authenticity.

4 Protecting Wine as Intellectual Property?

Wine and practices associated with wine production and marketing are often recognised as intellectual property and protected accordingly. As wine is an almost ubiquitous product of humankind, even among those who subsequently introduced prohibitions on its manufacture and consumption, it is difficult to cite originality as a factor to invoke protection.[73] Therefore the protection of wines is afforded by the use of Geographical Indication (GI).[74] The Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPS Agreement"), Article 22(1) provides:

> Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

72 Prosecco Hills Of Italy Named UNESCO World Heritage Site", *Forbes Magazine*, 8 July 2018: https://www-forbes-com.cdn.ampproject.org/c/s/www.forbes.com/sites/irenelevine/2019/07/08/prosecco-hills-of-italy-named-unesco-world-heritage-site/amp/ (Viewed 22/03/20); http://whc.unesco.org/en/tentativelists/5566/ (Viewed 22/03/20).

73 Mohammed Maraqten. (1993) "Wine Drinking and wine Prohibition in Arabia before Islam." Proceedings of the Twenty Sixth SEMINAR FOR ARABIAN STUDIES held at Manchester on 21st–23rd July 1992 (1993), Vol. 23, pp. 95–115.

74 Danny Friedmann, "The bottle is the message: only the distinctive survive as 3D Community trade marks", *Journal of Intellectual Property Law & Practice*, Volume 10, Issue 1, January 2015, Pages 35–42: https://doi.org/10.1093/jiplp/jpu210. For a detailed consideration of the use of Geographical Indication to protect wine, particularly Prosecco, see Danny Friedmann, Geographical Indications in the EU, China and Australia, WTO Case Bottling Up Over Prosecco, in EUROPEAN INTEGRATION AND GLOBAL POWER SHIFTS: WHAT LESSONS FOR ASIA? (Julien Chaisse ed.) forthcoming 2018/2019.

Geographical Indication provides protection for products associated with their place of manufacture or origin. The protection is afforded because some products have become associated with a geographical source to the extent the name is synonymous with the product. For example, sparkling wines manufactured in a particular way in the Champagne region of France are generically referred to as Champagne. Because other manufacturers of sparkling wine in other parts of France and the world have tried to market their wines as Champagne, the region of Champagne has protected this name.

In jurisdictions in which the Champagne geographical indication is protected, producers of Champagne can exclude use of the term "Champagne" for sparkling wine not manufactured in the region or not produced according to the standards set out in the code of practice for the geographical indication.

The campaign for designation of Prosecco for geographic protection by DOC and DOCG, was dogged with controversy linked to the controversial former Prime Minister of Italy, Silvio Berlusconi. Berlusconi is linked to another issue involving wine and cultural heritage. In 2015, prosecutors in the Ukraine announced they were considering charging the director of the Massandra winery in Crimea, with embezzlement after a visit by Russian President, Vladimr Putin, and Mr Berlusconi.[75] The charge was linked to an incident during the visit where President Putin and Mr Berlusconi were shown and apparently drank from a bottle of 1775 Jerez de la Frontera, worth an estimated €80,000, and described by the Prosecutors as part of Ukraine's heritage.[76] Perhaps sensibly the prosecutors did not mention charging the two gentlemen with any associated offences.

Although Dr Danny Friedmann has noted the issue with the protection of Prosecco by GI, as the name of the wine came originally from the grape variety and has been extended to the region,[77] Italy and the European Union has afforded Prosecco Geographical Indication protection. Italian regulation of wine production recognises three categories or classes of wine production. These range from the highest standards and most rigorously monitored DOCG,

75 "Putin and Berlusconi in Crimea wine row", BBC, 19 September 2015: https://www.bbc.com/news/world-europe-34297545 (Viewed 24/04/20).

76 Paul Dallison, "Putin, Berlusconi and the 240-year-old bottle of wine", Politico, 19 September 2015: https://www.politico.eu/article/sour-grapes-putin-berlusconi-wine-massandra-ukraine-crimea/ (Viewed 24/04/20).

77 see Danny Friedmann, Geographical Indications in the EU, China and Australia, WTO Case Bottling Up Over Prosecco, in EUROPEAN INTEGRATION AND GLOBAL POWER SHIFTS: WHAT LESSONS FOR ASIA? (Julien Chaisse ed.) forthcoming 2018/2019.

Denominazione di Origine Controllata e Garantita, which is tested for quality and geographic authenticity. The second class is DOC, Denominazione di Origine Controllata, which is still strictly controlled but which is subject to a wider geographic zone and less restriction on grape varieties. The third class is the more common IGT, Indicazione Geografica Tipica. As might be expected, DOCG wines are usually considered more desirable and more expensive than DOC wines which similarly rank above IGT wines.[78] Prosecco has received both protected DOC status in 1969 and DOCG status on 17 July 2009. This was at the time Croatia was negotiating to join the EU.[79] The DOCG Prosecco can only be produced in the hills in two areas, around the town of Treviso, about 25 miles north/northwest of Venice, and between the towns of Cornuda and Asolo, just south of Conegliano, about 35 miles northwest of Venice, whereas DOC Prosecco comes from the low plains.[80] As noted previously, the grape variety predominantly used in its manufacture, was referred to as Prosecco but changed in 2010 to Glera, so that it would not affect the protection of the name Prosecco for the wine.[81] The issue of the grape variety used has also received some attention on te Prosecco v Prosek debate, with some Croatian sources claiming that the Prosecco/Glera grape actually originates from Croatia.[82] A team, led by Croatian scientists, have identified the genetic relationship among Croatian grapes, which show that the Teran Bijeli variety, now known as Glera, and previously Prosecco, is a Croatian variety related to Žilavka from Bosnia-Herzegovina.[83] However, Prosecco has geographic protection under the DOC and DOCG systems in Italy. Prošek is produced by many different producers to

78 "What's the Difference? DOCG, DOC, and IGT Italian Wines", 22 August 2008: https://www.thekitchn.com/whats-the-difference-docg-doc-60449.

79 Croatia was in negotiation to join the EU from 2005–2011 and finally acceded on 1 July 2013: https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/croatia_en (Viewed 22/03/20).

80 Joseph V Micallef, "Is Prosecco Italy's Sparkling Wine Juggernaut", Forbes Magazine, 18 August 2018: https://www.forbes.com/sites/joemicallef/2018/08/18/is-prosecco-italys-sparkling-wine-juggernaut/#5925c7013d89 (Viewed 24/04/20).

81 Joseph V Micallef, "Is Prosecco Italy's Sparkling Wine Juggernaut", Forbes Magazine, 18 August 2018: https://www.forbes.com/sites/joemicallef/2018/08/18/is-prosecco-italys-sparkling-wine-juggernaut/#5925c7013d89 (Viewed 24/04/20).

82 "The Prošek – Prosecco EU Scandal: The Origins of Prosecco are Croatian!", Total Croatia News, 26 March 2013: https://www.total-croatia-news.com/hvar-news/5744-the-prosek-prosecco-eu-scandal-the-origins-of-prosecco-are-croatian (Viewed 24/04/20).

83 E. Maletić et al. (1999). "Genetic characterization of Croatian grapevine cultivars and detection of synonymous cultivars in neighboring regions". Vitis 38 (2), 79- 83: https://pdfs.semanticscholar.org/f686/4647151af40edb4266dcfc6dc3b0473c5ae3.pdf (Viewed 24/04/20).

different recipes in different areas. It has no Geographic Indication in Croatia and thus no domestic protection.[84]

Article 2(1) of the TRIPS Agreement requires that the substantive obligations of the Paris Convention of the World Intellectual Property Organization (WIPO) must be complied with by all Member countries.[85] The Paris Convention for the Protection of Industrial Property was adopted in 1883. It is intended to help creators ensure that their intellectual works are protected in other countries, for example by way of indications of source or appellations of origin.[86] Italy and Croatia are members of both the WTO Agreement and the Paris Convention.[87] Thus, both countries are under the obligations to each other arising from the Paris Convention by express adoption and incorporation by reference in Article 2(1) of the TRIPS Agreement.[88] Article 22(2) of the TRIPS Agreement provides that parties subject to Geographical Indication must have legal means to prevent use of indications which mislead the public as to the geographical origin of the good, and use which constitutes an act of unfair competition. Article 23 of the TRIPS Agreement further provides that interested parties must have the legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication. This protection applies even where the public is not being misled, there is no unfair competition and the true origin of the good is indicated or the geographical indication is accompanied be expressions such as "kind", "type", "style", "imitation" or the like.[89]

84 "Prošek vs. Prosecco – cheers!". AXON, 13 November 2013:| https://www.axonlawyers.com/prosek-vs-prosecco-cheers/ (Viewed 22/03/20); http://foodhealthlegal.com/?p=251 (Viewed 22/03/20).

85 World Trade Organization, "Overview: the TRIPS Agreement": https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#geographical (Viewed 13/04/20).

86 WIPO, "Paris Convention for the Protection of Industrial Property": https://www.wipo.int/treaties/en/ip/paris/ (Viewed 13/04/20); see Article 1(2)(h) and (i) of the Paris Convention as revised at Stockholm in 1967: https://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf (Viewed 13/04/20).

87 Italy joined the WTO in 1995 and Croatia joined in 2000: WTO, "Members and Observers": https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Viewed 13/04/20); For the Paris Convention the relevant years are Italy in 1884 and Croatia in 1992: WIPO, "Administered Treaties: Contracting Parties > Paris Convention": https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2 (Viewed 13/04/20).

88 See Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) Santa Clara High Technology Law Journal 153–178. See also Julien Chaisse and Puneeth Nagaraj 'Changing Lanes – Trade, investment and intellectual property rights' (2014) 36(1) Hastings International and Comparative Law Review 223–270.

89 WIPO, "Overview: the TRIPS Agreement": https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#geographical (Viewed 13/04/20).

As the dispute involving Prosecco and Prošek focused on Croatia's negotiations to join the EU, it is interesting to note the EU's relationship with the TRIPS Agreement. The European Union may become a party to certain international agreements as a body but not others. For example, it could not become a party to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.[90] However, it could and did become a party to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications in 2019, as this permitted and was intended to allow intergovernmental organizations to join and so expand the geographical protection by way of registration systems.[91] Similarly, it could not be a party to the Madrid Agreement Concerning the International Registration of Marks 1881, but it could become a party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989, and so joined in 2004.[92] The EU is also a member of the World Trade Organization.[93] TRIPS is an integral part of the WTO Agreement and so binds the European Union.[94] Thus, although there have been decisions where the EU courts have noted that international agreements do not prevail over primary EU law,[95] and there has been criticism that the courts do not "engage in consistent interpretation or application of the TRIPS provisions",[96] the TRIPS Agreement provisions have been recognised and enforced among Member States.

As an example of such recognition, Italy had previously been on the wrong side of a decision of the EU courts on an issue involving similar names being used for wines. In 2008, the Second Chamber of the European Court of Justice confirmed the Advocate General's opinion of 2004, involving the Hungarian

90 WIPO, "Lisbon Agreement for the Protection of Appellations of Origin and their International Registration": https://www.wipo.int/treaties/en/registration/lisbon/ (Viewed 13/04/20).

91 WIPO, Press Releases, "European Union Joins Geneva Act of WIPO's Lisbon Agreement, Enabling Entry into Force", Geneva, 26 November 2019: https://www.wipo.int/pressroom/en/articles/2019/article_0015.html (Viewed 13/04/20).

92 WIPO, "Administered Treaties: Contracting Parties > Madrid Protocol": https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=8 (Viewed 13/04/20).

93 WTO, " The European Union and the WTO": https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (Viewed 13/04/20).

94 WTO, "AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION": https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (Viewed 13/04/20).

95 Case T–01/04, *Microsoft Corp. v. EC*, [2006] ECR II–1491; EC Decision of 24 Mar. 2004, *Microsoft Corp.*, COMP/C–3/37.792, OJ (2004) L 32/23.

96 Sujitha Subramanian. "EU Obligation to the TRIPS Agreement: EU Microsoft Decision". *European Journal of International Law*, Volume 21, Issue 4, November 2010, Pages 997–1023, https://doi.org/10.1093/ejil/chq075.

wine Tokaj and the Italian wine Tocai.[97] The Hungarian wine is sometimes called "Tocay" and so there are very similar pronunciations. The issue for the Court was whether an agreement respecting Hungary's geographical indication protection of the Tokaj could be used to prevent Italian wine producers marketing the wine made from the grape-variety Tocai. The Advocate General had identified that, "[w]hereas 'Tokaj' constitutes a geographical indication in Hungary, 'Tocai' is not an Italian geographical indication, but a grape variety and as such cannot benefit from the protection granted to these indications."[98] Therefore, for the purposes of the TRIPS Agreement, Tokaj constituted a geographical indication whereas Tocai did not. Thus Italian producers were prohibited from marketing their wines using this name. Thus, although the EU describes itself as "a key supporter" of the TRIPS Agreement and, as such, "firmly protects" geographical indications, it should be noted that it is under an obligation as a WTO member to comply with TRIPS and EU law actually provides for more protection of GI's than TRIPS.[99]

As discussed in the following section, the EU's attitude to cultural heritage law is a little more ambiguous.

97 Joined Cases *Confcooperative Friuli Venezia Giulia* (*C-23/07*), *Luigi Soini* (*C-23/07 and C-24/07*), *Azienda Agricola Vivai Pinat Mario & Figlio* (*C-23/07*), *Cantina Produttori Cormòns Soc. cons. arl* (*C-24/07*) *v. Ministero delle Politiche agricole, alimentari e forestali, Regione Friuli-Venezia Giulia*: http://curia.europa.eu/juris/document/document.jsf?text=&docid=69048&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=267117.

98 Advocate General's Opinion in *Regione Autonoma Friula-Venezia Giulia & Agenzia Regionale per lo Sviluppo Rurale* (*ERSA*) *v Ministero per le Politiche Agricole e Forestali & Regione Veneto*, Case C-347/03, 16 December 2004: European Commission, Press Corner, "According to Advocate General Jacobs a prohibition on the use of 'Tocai' to designate certain Italian wines arising from a 1993 agreement between the EC and Hungary is lawful": https://ec.europa.eu/commission/presscorner/detail/en/CJE_04_102 (Voewed 13/0420).

99 European Commission, "Home: Trade: Policy: Accessing markets: Intellectual property": https://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/ (Viewed 13/04/20); The Council of the European Union Regulation establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), provided for denomination protection: EC No 1234/2007 of 22 October 2007: Eur-Lex: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007R1234; repealed by REGULATION (EU) No 1308/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 December 2013: Eur Lex: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1308; see also European Legislation on Protection of Geographical Indications Overview of the EU Member States' Legal Framework for Protection of Geographical Indications, Prepared February 2011: https://ipkey.eu/sites/default/files/legacy-ipkey-docs/european-legislation-on-protection-of-gis-en.pdf (Viewed 13/04/20).

5 The European Union and Intangible Cultural Heritage

As noted, the European Union has been active in promoting the recognition and protection of intellectual property through encouraging its Members States to join relevant international organisations and conventions, and by recognising international agreements in its courts. However, it has been a little less active with regard to cultural heritage protection and international law, preferring to allow its member states to make their own decisions.

The EU has often voiced support for initiatives intended to protect and promote cultural heritage, particularly as a method of encouraging unity and celebrating the EU's shared cultural and heritage. Further, the last sentence of Article 3(3) of the Treaty on European Union (The Lisbon Treaty) states that the Union shall "ensure that Europe's cultural heritage is safeguarded and enhanced".[100] The importance of cultural heritage is also noted in the Treaty on the Functioning of the European Union (TFEU).[101] Article 167 TFEU defines the EU's role in this domain as one of encouraging cooperation between Member States and supporting the improvement of the "knowledge and dissemination of the culture and history of the European peoples" and the "conservation and safeguarding of cultural heritage of European significance".[102] Thus, there have been Directives intended to celebrate cultural heritage and facilitate the return of cultural property unlawfully removed from States.[103]

However, domestically, "cultural policy and care for cultural heritage are the sole responsibility of the Member States".[104] There also has been a lack of commitment to the international conventions intended to provide legal means of

100 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007: "Cultural heritage in EU policies". Briefing European Parliamentary Research Service, PE 621.876 – June 2018: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621876/EPRS_BRI(2018)621876_EN.pdf (Viewed 13/04/20).

101 Official Journal of the European Union, C 326, pp.47–390, 26/10/2012, "Consolidated Version of the Treaty on the Functioning of the European Union": https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF (Viewed 13/04/20).

102 "Cultural heritage in EU policies". Briefing European Parliamentary Research Service, PE 621.876 – June 2018: http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621876/EPRS_BRI(2018)621876_EN.pdf (Viewed 13/04/20).

103 DIRECTIVE 2014/60/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast).

104 "Cultural heritage in EU policies". Briefing European Parliamentary Research Service, PE 621.876 – June 2018: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621876/EPRS_BRI(2018)621876_EN.pdf (Viewed 13/04/20).

protecting cultural heritage. This is not surprising given the issues that arise with international conventions and the mixed civil and common law jurisdictions of the EU, particularly those dealing with the return of illicitly obtained cultural property.[105] For example, the United Kingdom, a Member State until January 2020, has ratified only three of the six international conventions concerning cultural heritage with ratification of the Convention for the Safeguarding of the Intangible Cultural Heritage pending. Malta has joined three of the conventions and Ireland four.

6 The Conflict: Intellectual Property *v.* Intangible Cultural Heritage

The main problem facing the safeguarding of intangible cultural heritage stems from the origins of its legal recognition in intellectual property law. This origin is confusing as these two areas of law now have opposite objectives. Intellectual property law is intended to protect property rights for individuals.[106] Intangible cultural heritage law, as expounded in the ICH Convention, is intended to safeguard intangible cultural heritage as identified by "communities, groups and … individuals" for the benefit of the "communities, groups and … individuals", and for us all.[107] There is concern about exploitation of intangible cultural heritage but otherwise the idea is to share knowledge and celebrate intangible cultural heritage. These seemingly opposite purposes are clear from the early development of laws which affected what now would be considered intangible cultural heritage. For example, when WIPO worked with UNESCO to protect folklore in the *1976 Tunis Model law on Copyright Protection for Developing Countries*,[108] it provided this protection in the only form it is mandated to use, by encouraging protection as intellectual property. Subsequently, as UNESCO appreciated the importance of intangible culture heritage, and its popularity, the partnership was abandoned in favour of UNESCO's less property rights focused-legislation.

105 E.g. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

106 WIPO, "What is Intellectual Property?": https://www.wipo.int/about-ip/en/ (Viewed 13/04/20).

107 Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2(1): http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/.

108 UNBESCO, UNESDOC Digital Library, "Tunis model law on copyright for developing countries": https://unesdoc.unesco.org/ark:/48223/pf0000031414 (Viewed 13/04/20).

The UNESCO programmes and the ICH Convention have focused on celebrating intangible cultural heritage and so safeguarding it, rather than protecting property rights for any state, group or individual. And this focus has led to the next important issue in the conflict between intellectual property law and intangible culture heritage – the success of intangible cultural heritage law. The 2003 Convention, although the most recent international convention, is one of the most popular alongside the 1972 World Cultural and Natural Heritage Convention.[109] It has been claimed that the ICH Convention has been successful because, "[i]t steers attention away from mere monumental or material heritage to those that are intangible, invisible, spiritual."[110] However, the truth may be a little more prosaic: both share a common characteristic – they do not contain much hard law. As a government of a Member State of either convention, you do not have to do much. Just identify heritage within your territory and commit to publicise it, educate about it and safeguard and/or protect it. And if a government fails in this final obligation, the most severe consequence is removal from the relevant list.[111] Both conventions have been recognised by governments as cheap and popular ways of drawing attention to the heritage of their state, with consequent financial and social benefits from tourism, *etc*. It should also be noted that inscription of a site whether cultural or natural on the World Heritage List may have some financial costs for a state. In contrast, identifying a customary practice as intangible culture heritage and sharing and celebrating it is usually cheap to initiate and maintain, and often involves a substantial net gain in returns from tourism and other forms of revenue exploitation. The ICH Convention has also been used by some states for political purposes, for example to increase the sense of nation in states by celebrating the seemingly contradictory identification of quite disparate groups, by their customs and practices, as belonging to the nation.

As an example of the success of the ICH Convention it is interesting to consider the remarkable enthusiasm which China has shown for the identification of intangible cultural heritage. For example, China joined the Convention in 2004 and, unusually, expressly included Hong Kong and Macau in its

109 UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage": https://whc.unesco.org/archive/convention-en.pdf (Viewed 13/04/20).

110 Toshiyuki Kono, "Unresolved Issues and Unanswered Questions", in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property* (Antwerp: Intersentia, 2009), p.39.

111 As happened to Germany's Dresden Elbe Valley in June 2009 because of the construction of a new bridge in the historic and cultural landscape: International Institute for Conservation of Historic and Artistic Works, "Dresden struck off UNESCO world heritage list", 29 June 2009: https://www.iiconservation.org/node/2414 (Viewed 13/04/20).

accession. By 2015 China had 38 elements inscribed on UNESCO's Representative List of the Intangible Cultural Heritage of Humanity. However, in its first scrutiny of the intangible cultural heritage, the National List of Intangible Cultural Heritage of China, released by the Ministry of Culture on 20 May 2006, included 518 different items.[112] Subsequently, most of the nation's province-level administrative units drew up lists of their own, as did many municipal and county-level administrative units such as prefecture-level cities or districts. It has also been reported that in China's first ICH census (2005–2009), 1.15 million folk artists had been visited and 970,000 projects counted.[113] It also noted that 2,438 items had been inscribed on China's National Lists (batch 1–4 of the scrutiny), and that there were 8,786 items on the provincial level intangible cultural heritage lists.[114]

The popularity of the ICH Convention is due to and testament of its ineffectiveness as enforceable law. This is best exemplified in the express provisions in the Convention regarding its interaction with other international legal instruments, particularly those dealing with intellectual property. Article 3(b) of the ICH Convention provides:

> Nothing in this Convention may be interpreted as:…
>
> (b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.

Thus intellectual property rights would seem to trump the aspirations of the ICH Convention, which is to be expected as the Convention's negotiating parties would have protected established property interests first. This overriding of intangible cultural heritage should not prove a problem for conflicts involving traditional knowledge, as intellectual property laws have traditionally not protected cultural traditions and traditional knowledge, which have been considered available to all and so in the public domain.[115] In addition, there should be no conflict with concepts such as copyright, as they require creativity and originality, not tradition.

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112 Chinese Cultural Studies Center, "Intangible Cultural Heritage in China": https://www.culturalheritagechina.org/ (Viewed 13/04/20).

113 "Protection and Promotion of China's Intangible Cultural Heritage", China.org.cn, 2 June 2010: http://www.china.org.cn/china/2010-06/02/content_20171387_2.htm (Viewed 13/04/20).

114 Chinese Cultural Studies Center, "Intangible Cultural Heritage in China": https://www.culturalheritagechina.org/ (Viewed 13/04/20).

115 WIPO, "Traditional Knowledge": https://www.wipo.int/tk/en/tk/ (Viewed 13/04/20).

Thus it would seem that only in issues such as the Prosecco v. Prošek dispute, "name games", are we faced with true conflicts, and in these intellectual property will triumph over intangible cultural heritage. However, recent developments in the concept of intangible culture heritage and in claims for its safeguarding may be moving more towards traditional property protection rights. Further, although most states will always protect existing property rights and resist developing new contradictory rights, the source of the conflict and the social and political sensitivity of some of the issues may force changes which may see intellectual property rights being even more temporary than they should be now.

7 The Future: Cultural Appropriation and Cultural Theft

The popularity of intangible culture heritage has led to a celebration of traditions and cultural practices which has caused a backlash against those from outside the associated groups or cultures seeking to exploit those traditions and practices in any way. At its easiest to empathise with this would include claims that drug companies have attempted to patent traditional medicine formulas for gain and prohibit the local communities from marketing their own remedies, or at least from sharing in the financial benefits of their knowledge and skill – "biopiracy".

The claim for indigenous or traditional property rights is not entirely new and commentators such as Dalibard have noted that intellectual property law has already acknowledged some of these rights or, at least, considerations. For example, the Convention for Biological Diversity, Article 8(j), provides that each contracting state shall "as far as possible and as appropriate … respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge".[116]

Dalibard also notes that there are competing considerations within the framework of safeguarding intangible cultural heritage itself, as the ICH Convention asserts the need to give the holders of traditional knowledge and cultural expressions effective control over their knowledge while still disseminating and making known this traditional knowledge and expressions to all.[117]

116 WTO, "Trade-Related Aspects of Intellectual Property Rights": https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (Viewed 13/04/20).

117 Joel-David Dalibard, "Empowering the Bearers of Cultural Traditions", in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property* (Antwerp: Intersentia, 2009), p.247.

Recently there have been further issues involving claims that "rights" to intangible culture heritage have been violated. This may involve minor celebrities being accused of wearing clothes, dressing hair or even having tattoos which are associated with a particular ethnic or cultural group.[118] This may be seen as cultural insensitivity at the least, but is now more often termed "cultural appropriation" or even "cultural theft".[119] Claims of cultural appropriation have been levelled at those producing alcoholic drinks. The manufacturers of a Belgian drink called "Apache Gin" who have faced criticism on social media for their cultural insensitivity.[120]

This may be a signal for the future, where the celebration of intangible culture heritage transforms into enforceable rights to protect it, even in the face of intellectual property laws. For indigenous and traditional communities, it has been noted, "the entire community is the actual owner, steward or custodian of intangible cultural heritage."[121] This development is something Toshiyuki Kono, one of the draftsmen of the ICH Convention, has long been considering. Kono has noted the contradictions between the stated purposes of the ICH Convention and its deference to established intellectual property laws raise interesting questions:

"Does respect and appreciation of intangible cultural heritage also include recognizing rights communities, groups and individuals hold? What relationships exist between any entitlements to intangible cultural heritage held by communities and intellectual property rights related to intangible goods stemming from traditional knowledge and cultural expressions?"[122]

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118 "9 Times The Kardashians Have Been Accused Of 'Cultural Appropriation' ". Buzz, 13 July 2015: https://www.buzzfeed.com/elliewoodward/times-the-kardashians-have-been-accused-of-cultural-approp (Viewed 22/03/20).

119 The last term was used to attack the use of art pained in the style of an Australian Aboriginal group in a television series. The painting had been painted by a white English woman. Bundjalung artist, Ella Noah Bancroft claimed the fake Aboriginal art in the Netflix drama "After Life" was not a prop, but "cultural theft". The production company later paid compensation to the community. Mondaq, "The after-life of art: Netflix series by Ricky Gervais used a fake indigenous painting – does it matter?" 29 February 2020: https://www.mondaq.com/australia/Intellectual-Property/898954/The-after-life-of-art-Netflix-series-by-Ricky-Gervais-used-a-fake-indigenous-painting-does-it-matter (Viewed 05/04/20).

120 https://vinepair.com/articles/spirits-cultural-appropriation/ (Viewed 05/04/20).

121 Toshiyuki Kono, "Unresolved Issues and Unanswered Questions", in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property* (Antwerp: Intersentia, 2009), p.17.

122 Toshiyuki Kono, "Unresolved Issues and Unanswered Questions", in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property* (Antwerp: Intersentia, 2009), p.16.

8 Conclusion

To be clear, and in contrast to many reports,[123] it seems that the European Union has taken no action on the issue of Prošek *v.* Prosecco. Thus although Wikipedia claims that"[b]ecause of the name similarity, on 1 July 2013, EU banned the use of name Prošek in all of their members" and that "Croatia filed a complaint because the name has been used 'for at least 2000 years'",[124] it seems that no such ban was instituted or complaint filed. The references used in the Wikipedia article are to a Croat article which, with the benefit of Google Translate, states that Italy might use geographic indication to enforce a ban on the use of the name and Croatian wine producers might litigate.[125] Indeed, it was purely an internal decision of the Croatian government, desperate to join the European Union, that led to pressure on producers in Croatia to avoid using the name.

It should also be noted that the Croatian government offered no opposition to the Italian demands. Croatian wine producers had also not sought any protection for their wine, although as most of the Prošek production is small scale and over a diverse geographic area, it might have been difficult to claim protection by GI. As Prošek was not protected on a national level, it was not entitled to protection at an EU level or under any international agreement.[126]

There was never really an issue with Prošek being confused with Prosecco, as it seems correct to note that those who drink Prosecco "*do not* identify with, or care all that much about, Prosecco's history, background story, or protected … status. They *do* care about access to low-priced, easy-to-understand and appreciate alternatives to pricier sparkling wine."[127] In contrast, Prošek has been described as having "a centuries-old tradition that is a strong

123 See, for example, Paul Bradbury, "EU madness hits Croatia: no more prošek from July 1", Digital Journal, 26 March 2013: http://www.digitaljournal.com/article/346517#tab=comments&sc=0 (Viewed 24/04/20).

124 Wikipedia, "Prošek": https://en.wikipedia.org/wiki/Pro%C5%A1ek (Viewed 13/04/20).

125 "Nov Hrvaški "kulinarični poraz": EU jim je prepovedal uporabo imena prošek". SiolNet. Translation by Google Translate: https://siol.net/novice/svet/nov-hrvaski-kulinaricni-poraz-eu-jim-je-prepovedal-uporabo-imena-prosek-239371 (Viewed 22/03/20).

126 "Prošek vs. Prosecco – cheers!". AXON, 13 November 2013:| https://www.axonlawyers.com/prosek-vs-prosecco-cheers/ (Viewed 22/03/20); Food Health Legal, "Prošek vs. Prosecco – cheers!" 13 November 2013: http://foodhealthlegal.com/?p=251 (Viewed 13/04/20).

127 "Are You Pro Prošek? 12 Reasons Why You Should Be". Wines of Croatia, 26 August 2013, quoting Meininger's Wine Business International: https://uncorkingcroatia.com/2013/08/26/are-you-pro-prosek/ (Viewed 05/04/20).

symbol of national pride and family life, as well as a trusted elixir that locals depend upon to treat ailments and celebrate important milestone events in their lives."[128] Therefore, commentators on wine around the world have noted that Prošek and Prosecco are distinctly different products and thus, "[n]o one has anything to fear from them being allowed to peacefully co-exist in the European Union or elsewhere."[129] Italy's threats regarding the use of the name were undoubtedly an overreaction, as it is unlikely that anyone can even find Prošek for sale outside Croatia.[130] However, given the euro value of Italy's wine trade, Italy has a very important reason for protecting Prosecco from any threat – even Prosecco flavor Pringles.[131] Prosecco forms one of the most important facets of Italy's wine industry, an industry that now is financially only second to France but with Prosecco sales in euro value exceeding those of Champagne.[132]

As an example of conflict between intellectual property laws and intangible culture heritage, Prošek reminds us of one simple thing – economic benefits and financial considerations will usually trump heritage concerns. Although governments and international bodies enthusiastically join toothless conventions promoting the safeguarding of heritage, or make strong worded declarations with regard to celebrating and protecting heritage, the bottom line always triumphs. Because of this, these issues may seem largely academic. However, these may become more important "real" issues with the popularity in the international community of the ICH Convention. This popularity, coupled with the vocal assertions of rights by indigenous peoples, which now have some legal basis because of international and domestic human rights agreements and legislation and indigenous rights declarations and legislation, may translate into something UNESCO and Member State governments never intended. The political and cultural sensitivity of some of these issues may lead

128 "Are You Pro Prošek? 12 Reasons Why You Should Be". Wines of Croatia, 26 August 2013: https://uncorkingcroatia.com/2013/08/26/are-you-pro-prosek/ (Viewed 05/04/20).

129 "Wine-o-graph: Prošek and Prosecco made simple". Wines of Croatia, 1 September 2013: https://uncorkingcroatia.com/tag/prosecco/ (Viewed 05/04/20).

130 See for example, The Wine and More, "Prosek vs Prosecco", 1 March 2016: https://www.thewineandmore.com/stories/prosek-vs-prosecco/ (Viewed 13/04/20).

131 "Stop, you can't pop: prosecco Pringles seized in Italy". The Guardian, 16 October 2019: https://www.theguardian.com/world/2019/oct/16/stop-you-cant-pop-prosecco-pringles-seized-in-italy (Viewed 23/03/20).

132 Prosecco Hills Of Italy Named UNESCO World Heritage Site", *Forbes Magazine*, 8 July 2018: https://www-forbes-com.cdn.ampproject.org/c/s/www.forbes.com/sites/irenelevine/2019/07/08/prosecco-hills-of-italy-named-unesco-world-heritage-site/amp/ (Viewed 22/03/20).

to recognition of "rights" to intangible culture heritage and even protection of intangible culture heritage as a property right.

For those reflecting on the outcome of this particular dispute and concluding that the result is World Heritage status for Prosecco, and oblivion for Prošek, it should be noted that the publicity generated by the dispute probably sold a few more bottles of both Prosecco and Prošek. It should also be noted that when the author visited Croatia in 2018, many restaurants and bars were still marketing the traditional wine under its traditional name and seemed unconcerned by their government's commitment to Italy and the EU, perhaps even inspired by this to ignore Zagreb, Italy and the EU. The popular identification of Prošek as intangible cultural heritage is far more powerful a safeguard than the Convention's recognition. As one wine maker said to the author over a glass of his family recipe Prošek, "[w]e are a small pond with big crocodiles hungry for the EU. But we have a heritage to be proud of and we will pass it on."

CHAPTER 23

The Use of All Wines

A Legal Analysis for Conservative Judaism

Elliot N. Dorff

1 Introduction

Jewish dietary laws (*kashrut*) specify which foods Jews may eat and which they may not.[1] The requirements for a food to be ritually acceptable for Jews, or kosher, begin with the lists in Leviticus 11 and Deuteronomy 14 of animals, fowl, and fish that are acceptable for eating and those that are not, and then, based both on biblical interpretation and on tradition, animals and fowl must be slaughtered in a specific manner to minimize pain to the animal, the blood must be removed from the meat as much as possible through broiling or a prescribed process of soaking and salting, and meat meals may not include dairy foods.[2]

How shall we understand the kosher status of American wines? Grapes, like all fruits and vegetables, are both kosher and pareve (neither meat nor milk, and so

1 This chapter was originally written as a rabbinic ruling for the Committee on Jewish Law and Standards of Conservative Judaism. The Conservative Movement in Judaism, called Masorti Judaism outside the United States and Canada, is the middle movement, with Orthodox Judaism on its right and Reform Judaism on its left. Like Orthodox Judaism, Conservative Judaism asserts that Jewish law is binding on Jews today, even in nations with freedom of and from religion; but unlike Orthodox Judaism, Conservative Judaism maintains that Jewish law has historically evolved over time and should do so in our day as well. Like Reform Judaism, Conservative Judaism understands Jewish history, law, and thought using not only the interpretations and additions of the tradition, but also through modern historical methods, including archeology, literary analysis, and cross-cultural studies of the cultures among whom Jews lived. For more on the Conservative Movement, see Elliot N. Dorff, *Modern Conservative Judaism: Evolving Thought and Practice* (Lincoln: University of Nebraska Press, 2018). The original ruling on which this chapter is based was adopted by the Committee of Jewish Law and Standards of Conservative Judaism on December 4, 1985 by a vote of thirteen in favor, and two opposed (13-2-0). The full rabbinic ruling can be found at <http://www.rabbinicalassembly.org/sites/default/files/assets/public/halakhah/teshuvot/19861990/dorff_wines.pdf> accessed February 11, 2020. I would like to thank Prof. Cornelius Ough of the University of California, Davis; Mr. Robert Geskin; Rabbi Yehuda Bukspan; and Prof. Eliezer Slomovic of the University of Judaism (now American Jewish University) for their help, with the usual proviso that mistakes and conclusions herein are solely the responsibility of the author.

2 For a fuller, but brief description of Jewish dietary laws, see Ansley Hill, "Kosher Food: Everything You Need to Know," https://www.healthline.com/nutrition/what-is-kosher (accessed

may be eaten in either a meat or dairy meal). The problem arises in the process of transforming grapes into wine, including, in particular, the way the skins, seeds, and other waste matter are removed from the juice that can then be fermented into wine. Historically winemakers used a variety of methods to do this, including especially filters of various sorts, but by the seventeenth century winemakers had discovered that introducing proteins of various sorts that precipitated to the bottom of the barrel and brought the unwanted materials with them made the wine clearer and more visually appealing. This process is called "fining" the wine. Chemically, these "impurities" are colloids, which are molecules that include tannins, phenolics and polysaccharides, some of which taste bitter, and so fining has the purpose of improving the taste of the wine as well as its appearance. The fining agent binds to the unwanted particles in the wine, which means they become sizeable enough to be filtered out by precipitating to the bottom of barrel, leaving the wine in the rest of the barrel clear.[3]

Because of the enormous influence of the wine lobby in Washington, D,C., in American law there are no "truth in labeling" requirements for a winery to label its products or to divulge anything in writing or by telephone about the ingredients or process it uses. Wineries, though, commonly use some fining agents that are both kosher and pareve, such as bentonite (a form of clay), monostearates; egg whites (albumen); carbon; and polyvinylpolypyrrolidone (PVPP). Others use dairy products, such as skim milk, non-fat dry milk powder, lactose, casein, or caseinates (milk derivatives), raising the question as to whether they make the wine dairy and therefore not fit of use, according to Jewish law, with meat meals.[4] Still others use animal products, including: isinglass (a fish glue often made from sturgeon bladders), animal blood, gelatin (protein from boiling animal parts), bone marrow, and chitin (fiber from crustacean shells), all of which raise major

April 8, 2020). For a much fuller description, see Isaac Klein, *A Guide to Jewish Religious Practice* (New York: Jewish Theological Seminary of America, 1979), chapters 21–26.

3 "Fining," https://www.google.com/search?rlz=1C1CHBD_enUS883US883&sxsrf=ALeKk00pQij9N4h73Kd68GPIm0zSE2Lkxw:1586365109240&q=red+wine+fining+agents&sa=X&ved=2ahUKEwjlusfGptn0AhVCuZ4KHdZ0AAUQ1QI0A30ECA0QBA&biw=1920&bih=888 (accessed April 8, 2020).

4 "Fining Agents in Wine," https://www.google.com/search?rlz=1C1CHBD_enUS883US883&biw=1920&bih=888&sxsrf=ALeKk03QwSIs5apkWDW0MbU8NSNY0_TOmA%3A1586365496276&ei=OASOXsO0EJTC0PEP8MOAiA4&q=fining+agents+in+wine&oq=fining+agents&gs_lcp=CgZwc3ktYWIQARgAMgQIIxAnMgQIABBDMgIIADIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeOgQIABBHOgcIIxCwAhAnOgUIABDNAjoECAAQHjoECAAQDToGCAAQDRAeSg8IFxILMTAtOThnOTlnNDlKDAgYEggxMC0yZzVnNFCsvx1Y0NMdYL7wHWgAcAJ4AIABZIgBxAaSAQM3LjKYAQCgAQGqAQdnd3Mtd2l6&sclient=psy-ab (accessed April 8, 2020).

kashrut concerns.[5] Because some people are allergic to animal products, the European Union, Canada, Australia, and New Zealand require disclosure on the label of the wine if animals products were used to fine it, and so wineries in those countries are usually using bentonite or other non-animal proteins instead.[6]

Although there is a negligible residue of the fining agents left in the wine after the fining process, some does remain. In Jewish law there is a principle that if something by accident gets into an otherwise kosher substance, it is legally nullified if the item that was accidentally introduced into the food is less than one-sixtieth of the volume of the food (*batel b'shishim*),[7] but that nullification does not happen if the product is introduced intentionally (*ain me'vatlin issur me'likhathilah,* there is no prior nullification of a forbidden substance).[8] Therefore, because the winemaker intentionally introduces the fining agent into the wine, the fact that there is a residue at all raises questions about whether a dairy fining agent makes the wine dairy (and therefore not kosher for use in meat meals) and whether an unkosher fining agent makes the wine completely unkosher. Specifically, must we not assume that without someone actually standing at the site watching the ingredients that are added to the wines, the wines are, at best, dairy and, at worst, unkosher?

This chapter is divided into four parts: the ingredients and process used for making wine and their *halakhic* [Jewish legal] implications as to their *kashrut* [whether they are kosher, permitted to Jews to eat or drink]; the issue of *stam yeinam* ["simply their wine," that is, wine produced by non-Jews for drinking for pleasure and not for ritual purposes in their religion]; the production of wine on the Sabbath; and, finally, my recommendations for how Jewish law should apply to wine.

2 Issues of Jewish Dietary Laws (*Kashrut*) in the Making of Wine: Clarifying the Wine

After grapes are harvested, they are crushed and pressed in order to extract as much juice as possible. Then the juice ("must") is partially clarified through

5 "Fining Agents," https://www.grapesandcorks.com/blog/fining-agents (accessed April 8, 2020).

6 "Let's Talk About Fining," https://veganwines.com/vegan-wine-fining-how-it-works/ (accessed April 8, 2020).

7 B. *Hullin* 97a-97b; S.A. *Yoreh De'ah* 98:1 (gloss).

8 S.A. *Yoreh De'ah* 99:5.

settling, centrifugation, and/or vacuum filtration. Pectic enzymes are sometimes used in conjunction with the settling method, but they are always from a vegetable base and thus pose no kashrut problems. A juice that is too clean because of excessive pectic enzyme treatment, filtration, or centrifuging may have difficulty completing the fermentation process that follows, and so the must at this stage is often left as 0.25–1.0% solids. Then the juice is fermented, usually with the addition of yeast.

After fermentation, the wine is clarified, i.e., the yeast and remaining grape solids are removed from the wine. Three methods are commonly used: letting the wine settle and then "racking" it (i.e., removing the clear wine of its settled solids, or "lees," after the period of natural settling) by siphoning it, draining it through a bunghole, or pumping it; centrifuging; or filtration through diatomaceous earth, cellulose pads, or cellulose asbestos pads.

In addition to these steps in the process of making wine, wine makers often "stabilize" their wine in order to guard against the effects of storage conditions that are either too hot or too cold. Stabilization commonly takes place after fermentation, but it can be done prior to it or as late as the last stage before bottling.[9] "Cold stabilization" protects the wine against excessively cold temperatures in which crystals of potassium bitartrate may form in the bottle. That is generally done by chilling the wine and then putting it through a filter to trap and remove the crystals. "Heat stabilization" or "protein stabilization" minimizes the possibility of a protein haze or cloud forming in the wine due to excessive heating of the wine in storage. To accomplish this, fining and/or filtration is used.

While both cold and heat forms of stabilization are in common use, many wine makers "feel that excess stabilizing treatments reduce the wine quality and will only stabilize a wine to the minimum level of stability they judge is needed."[10] On the other hand, even when not needed to clarify the wine, fining may still be done to make the wine smoother and more harmonious by removing remaining astringency or bitterness.[11]

9 Zelma R. Long, 'White Table Wine Production in California's North Coast Region', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 41, 51.

10 Zelma R. Long, 'White Table Wine Production in California's North Coast Region', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 46.

11 Louis P. Martini, 'Red Wine Production in the Coastal Counties of California 1960–1980', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 78.

2.1 *Clarifying the Wine through Fining It*

One commonly used method to clarify wine is to insert a protein substance that precipitates to the bottom of barrel, bringing grape skins and pulp with it and leaving the wine clear. The United States Government's list of fining agents defines what legally may be used for fining, and that list grows out of common practice. Beef blood, which has been used in Europe for fining, does not have government approval for use in the United States.[12]

As noted above, casein and casein salts are used in fining many white wines in America and Europe, and because casein is derived from milk, that may make the wine unfit for use with meat meals. Those are derivatives from milk, and so one might argue that they do not count as dairy (although most rabbinic authorities categorize them as dairy); but surely milk itself and dry milk powder, which also are used as fining agents, raise that concern, for they are clearly dairy. As explained above, that would not make the wine unkosher according to Jewish dietary law, but it would make the wine prohibited to drink during a meat meal and for a period of time thereafter, varying from one hour to six hours, depending on the custom of various Jewish communities.

Furthermore, gelatin is often used to fine red wines. While some wineries restrict themselves to vegetable gelatin, others fine with animal gelatin. Rabbi Isaac Klein wrote a responsum permitting the consumption of animal gelatin,[13] but there are some in the Conservative movement who do not want to take advantage of the permission therein granted.

Louis R. Martini reports the increased use of egg albumin for higher quality red wines in recent years,[14] but probably the most commonly used fining agent is bentonite, an aluminum silicate made from clay. Clearly, neither egg albumin nor bentonite poses a problem for Jews obeying the Jewish dietary laws.

According to the California Wine Institute, there are 1,000 wineries and wine-related businesses in California alone.[15] I clearly could not canvass them

12 "Materials Authorized for the Treatment of Wine and Juice," Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/cfr/text/27/24.246 (accessed April 8, 2020). This article lists the various parts of United States laws and regulations that may be used in the production of wine or juice. Blood is not on the list at all.

13 Isaac Klein, *Responsa and Halakhic Studies* (New York: Ktav, 1975; reprinted Jerusalem: Schechter Institute of Jewish Studies, 2005), 71–88.

14 Louis P. Martini, 'Red Wine Production in the Coastal Counties of California 1960–1980', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 78.

15 'About Wine Institute', <https://discovercaliforniawines.com/about-wine-institute/> accessed Feb. 4, 2020.

all, but I wrote to the ten largest wineries and to ten of the more popular, quality wineries to get an idea of what is actually happening in the wine industry. I did not get answers from all of them, but I suspect that the following sampling is typical.

Fining Agents Used	Wines Pasteurized?
1. Beaulieu Vineyard	No.
Animal gelatin, egg whites, bentonite	
2. Chateau Montelena	No.
Animal gelatin, bentonite	
3. Chateau St. Jean Vineyards and Winery	No.
Bentonite, animal gelatin, isinglass	
4. E. and J. Gallo Winery	No.
Bentonite, animal gelatin, casein and casein compounds	
5. Guild Wineries and Distilleries, Cribari Winery	Only a few wines at 190 degrees.
Bentonite only	
6. Heitz Wine Cellars	No.
Bentonite, gelatin in red wines	
7. Inglenook	No.
Bentonite, egg whites, gelatin (undefined)	
8. Charles Krug and C-K Mondavi	Only the 3 and 4-liter bottles at
Vegetable and/or animal gelatin, isinglass 165 degrees.	
9. Paul Masson Vineyards	No.
Bentonite and vegetable gelatin	
10. Ridge Vineyards	No answer.
Egg whites, bentonite, animal gelatin, isinglass	
11. Simi Winery	No.
Egg whites, isinglass, dairy products or their derivatives.	

These discrepancies reflect the wide variation in techniques and materials used from one winery to another.

I also checked some wineries whose wines are rabbinically certified. The makers of Manischewitz, Mogen David, Kedem, and Weinstock wines all confirmed that they use only bentonite, vegetable gelatin, or diatomaceous earth

as fining agents, and the rabbi who certifies wines for the Union of Orthodox Jewish Congregations (OU) also insists on the use of fining agents whose kashrut is beyond question.[16]

In sum, then, some substances used for fining wines are clearly kosher and pareve (e.g., bentonite, egg albumin); others are dairy (casein and its compounds); others are clearly not kosher (beef blood [in Europe]); and some (animal gelatin; isinglass made from sturgeon bladders) are considered kosher and pareve by, I suspect, most of Conservative rabbis but not kosher by some.

Professor Cornelius Ough, Chairman of the Department of Viticulture and Enology at the University of California, Davis, confirmed that some of the fining agents are left in the wine after settling.[17] That is ironic because the criterion for United States government approval of clarifying agents is that none of the agent remains in the wine.[18] Because some people are allergic to milk products, however, studies have been commissioned to determine how much casein is left in wine after settling or after bentonite or filtration is used to remove it. From 10% to 30% of the casein used remains. In the absence of a medical reason to conduct similar studies in regard to gelatin, the percentage of gelatin that remains is not known.

Jewish dietary laws provide that if something unkosher or unwanted because it is dairy becomes part of a food item but adds an unsavory taste to it (*notein ta'am lif'gam*), it is legally nullified – that is, legally it is as if it does not exist in the food.[19] On the chance that any fining agents left in the wine might be nullified halakhically on the basis of this principle, I asked how bad it was for the quality of the wine if the fining agent remained in it, even minimally. Professor Ough told me that even before most of the fining agent settles to the bottom, one could taste little difference, if any, in the wine due to the presence of the fining agent,[20] and so one could not declare the wine kosher regardless of the fining agent on that ground.

16 From Manischewitz, Mogen David, Kedem, and Weinstock I received letters stating this in 1985, when I was writing the rabbinic ruling on which this chapter is based. I know personally the rabbi who conferred OU certification on wines in California at that time, and he told me what I am reporting here in a conversation we had then. What happens now I do not know, but given the rightward drift of Orthodoxy in the last thirty-five years, I frankly doubt that Orthodox kosher certification agencies have become more lenient on this.

17 This was in a telephone conversation with him in 1985, when I was writing the rabbinic ruling on which this chapter is based.

18 George Thoukis, 'Chemistry of Wine Stabilization: A Review', in A. Dinsmoor Webb (ed.), *Chemistry of Winemaking* (Washington, D.C.: American Chemical Society, 1974) 122; U.S. Internal Revenue Service, 'Wine' (1961) 146.

19 B. *Avodah Zarah* 75b; S.A. *Yoreh De'ah* 103:1.

20 See note 18 above.

2.2 *Clarifying Wine through Filtration*

Filtration is another way to eliminate impurities in wine. It is "all but universally used today in commercial wine making, but its common practice has come about only during the past forty years or so."[21] That is because until then the materials and techniques used for filtering wine often imparted distorted flavors or odors and unwanted substances such as metal particles. Many filtering systems also exposed the wine to too much air, leading to effects of over-oxidation such as browning of the wine's color and spoiling of the wine's flavor. These problems have now been solved, and the advantages to the winery of using filtration rather than fining are many.[22] Since filtration involves no chemical reaction with the wine itself, it also eliminates any kashrut problems.

In practice, however, the availability of modern filtration techniques will not solve our kashrut problems. Even the smallest of well-designed filters is expensive, and so economic motivations lead many small wineries to fine their wines rather than filter them. Beyond that, fining enables the wine maker to control the quality and individuality of the wine more carefully, and so most continue to use fining or a combination of fining and filtration as part of their distinctive art of wine making. Professor Ough estimates that 99.5% of the wines sold commercially in the United States (both domestic and imported) are fined in some manner.[23]

The clarification of wine, of course, is not a new problem. The wine industry dates from at least 3500 B.C.E., and the story of Noah's drunkenness[24] reflects an early familiarity with wine among our ancestors. In ancient times, however, wines as well as beer were drunk soon after fermentation and were cloudy; consequently, they were an important source of vitamins from the suspended yeast cells. Not until much later were methods developed for easy and early removal of suspended solids.[25]

Isaiah's words seem to indicate a preference for fat, bodied wine:

> The Lord of Hosts will make on this mountain for all the peoples a banquet of fat things, a banquet of wines on the lees, of fat things full of marrow, of wines on the lees well refined.[26]

21 Philip M. Wagner, *Grapes into Wine* (New York: Alfred A. Knopf, 1976) 189.
22 Philip M. Wagner, *Grapes into Wine* (New York: Alfred A. Knopf, 1976) 190.
23 See note 18 above.
24 Genesis 9:20–21.
25 M.A. Amerine and V.L. Singleton, *Wine: An Introduction* (Berkeley and Los Angeles: University of California Press, 1977) 14.
26 Isaiah 25:6.

The ancient Greeks and Romans used lead containers to clarify and stabilize their wines, but that practice contributed to many early deaths in that era. In our own day enologists recognize that protein haze or bitartrate crystals may have no negative effect on the sensory quality of the taste or smell of wine whatsoever, and yet wine makers regularly stabilize their wines for fear of adverse consumer reaction to the sight of such colloidal suspensions.[27] For the same reason, to judge from the last of Isaiah's words cited above, the wine growers of ancient Israel apparently tried to clarify their wines as much as possible.[28] Rabbinic literature often mentions filters, constructed either as a cloth "tent" over the mouth of the vessel into which the wine was poured or as a basket made of palm branches placed over the vessel.[29] Filtration is one of the oldest techniques known. We find it in the First Dynasty of Egypt (c. 3500 B.C.E.), when a sack-press, made of cloth or matting, was used to squeeze the juice out of the grapes and then to strain it. We meet it again in the Roman authors of the first century C.E. Columella says that they let the fluid "percolate through small rush baskets or sacking made from a butcher's broom," and the poet Martial writes, "and, that Alauda may drink his wine strained, anxiously … pass the turbid Caecuban through the bag."[30] It is also possible that one rabbinic source reflects the practice of racking the wine after the lees have settled by siphoning off the clear wine with "a large and small tube" – although it may be referring only to transferring some of the wine from one vessel to another for sale.[31] In any case, Jews clarified wine during rabbinic times with filtration, apparently preferring the resulting effects of overoxidation to unrefined wine.

At some point Jews learned the art of fining. In seventeenth century Christian sources we hear of the use of the white of eggs for fining, and isinglass (fish glue, the best of which is obtained from sturgeon) is also recommended.[32]

27 Zelma R. Long, 'White Table Wine Production in California's North Coast Region', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 46.

28 Isaiah 25:6, end. The ancient Israelites had developed a drainage system of vats to clarify their wines, although sometimes they later improved the color of the wine by seeping crushed grape skins in it; see Ze'ez Yeivin, "Food, The Biblical Period," *Encyclopedia Judaica* (2nd edition, 2007) 7:117. As he points out, wines during the biblical period were made mostly from grapes, but also from raisins, dates, figs, and pomegranates.

29 M. *Shabbat* 20:2; cf. also M. *Shabbat* 20:1; M. *Kelim* 28:9; J. *Terumah* 8:5, 45d; B. *Avodah Zarah* 56b.

30 Columella, XII, 17, 2; Martial, XII, 60; cited in William Younger, *Gods, Men, and Wine* (London: The Wine and Food Society, 1966) 291.

31 B. *Avodah Zarah* 72b.

32 William Younger, *Gods, Men, and Wine* (London: The Wine and Food Society, 1966) 312.

Skim milk and beef blood were also used as proteinaceous fining agents. Since most of the fining agent settles to the bottom, and since the remainder is undetectable by the naked eye, it is quite possible that Jews learned these techniques from their Christian neighbors and used them without fear of violating the laws of kashrut.

During Prohibition my father-in-law's father made wine for sacramental purposes using a technique he learned from a wine maker from the Zanz community of Hassidim. They curdled some wine with skimmed milk and poured the remaining wine through a funnel laced with the curdled mixture. They were confident that the wine contained no milk because they could not see any in it; they assumed that the wine would appear cloudy if it contained any milk.

As my inquiry of eleven wineries in California indicates, modern wine makers generally use more purified and predictable proteins, with bentonite, gelatin, and casein the most common. A solution of the protein is made up in some of the wine and then is well mixed into the rest of the wine at the rate of about one ounce per 100 gallons (7 grams/100 liters). The protein forms a coagulum that settles over a period of several days to a few weeks and leaves the remaining wine clarified. Bentonite is commonly used for clarifying wine, but it removes some of the color of the wine (especially disadvantageous in red wines)[33] and after precipitation it makes much more bulky lees than other finings, thus wasting wine.[34] Consequently wine makers often prefer to fine their wines with one of the other fining agents and then use bentonite to clear out as much as possible of the fining agent that has not settled to the bottom on its own. That way there are less impurities in the wine to which the bentonite will adhere, and so its disadvantages of discoloration and heavy lees are minimized while wine makers can take advantage of its greater effectiveness as a clarifying agent. This is by no means the universal practice, however. As Wagner notes,

> There is no such thing as the perfect all-purpose fining material. Each has its advantages and disadvantages. Thus several may be combined in various proprietary formulations. For the same reason, experienced wine makers tend to develop their own pet procedures. By way of illustration, the Marquis d' Angerville, one of the best wine makers in Volnay and thereabouts, customarily gives his superb white burgundies two finings: first, 100 grams per piece of powdered skimmed milk and a few days

33 Louis P. Martini, 'Red Wine Production in the Coastal Counties of California 1960–1980', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 78.

34 Philip M. Wagner, *Grapes into Wine* (New York: Alfred A. Knopf, 1976) 189.

later a dose of 60 to 100 grams of bentonite. Under his circumstances, experience has shown the combination to be ideal.[35]

2.3 *The Halakhic* (*Jewish Legal*) *Problems Involved in Clarifying Wine*

These, then, are the realities: the fining and filtration practices of the wine industry are not uniform; even individual wine makers may alter their method of clarifying wine from one crop to another; some of the substances used in fining are unkosher or dairy; and very small amounts of the fining agents do remain in the wine. Wagner lists the amount of fining typically used for each 5 gallons of wine as follows:

Gelatin: 2 grams
Beef blood: 2 to 3 grams
White of egg: 2.5 to 4 grams
Skimmed milk: .5 pint (10 grams)
Casein salts: 6 grams (potassium caseinate and/or sodium caseinate)
Bentonite: 5 to 10 grams[36]

3 Halakhic Principles and Precedents Relevant to Fining Wine

3.1 *"No Prior Nullification of Remainders"* (Ain Mevatlin Issur Mi'likhathilah)

Most of these amounts precipitate out of the wine; but even if they remained fully in the wine, they would constitute less than one sixtieth of the volume of wine. As explained above, there is a principle in Jewish law such that a substance is legally nullified if it constitutes one sixtieth or less of the volume of the mixture into which it falls, but that principle applies only retroactively, i.e., if the substance was added accidentally.[37] Consequently, it appears that there is no way to guarantee the kashrut or non-dairy status of wine absent the supervision and certification of a rabbi that no unkosher or dairy substances were used.

3.2 *"An Unintended Result"* (B'aino Mitkaven)

The principle described above of no prior nullification, however, has certain exceptions. According to many authorities, one exception is those situations in

35 Philip M. Wagner, *Grapes into Wine* (New York: Alfred A. Knopf, 1976) 189; cf. also pp. 183–189 and M.A. Amerine and V.L. Singleton, *Wine: An Introduction* (Berkeley and Los Angeles: University of California Press, 1977) 110–111.

36 Philip M. Wagner, *Grapes into Wine* (New York: Alfred A. Knopf, 1976) 185–189.

37 See notes 7 and 8 above.

which the person adding the forbidden substance does so not to nullify it but rather for some other reason (*b'aino mitkaven*, he does not intend this). So, for example, if worms, which are not kosher, fall into honey, which is kosher, you may heat the mixture until it melts and then strain it because your intention is not to nullify the taste of the worms in the honey but rather to fix the honey.[38] This, in fact, is the reason that we may purge vessels (*hag'alah*) in order to make them fit for kosher use, even if they contain forbidden food less than a day old: when the forbidden food is extracted from the vessel and absorbed into the water, it is nullified there because the person does not intend to effect that nullification but rather to make the vessel kosher by extracting the absorbed, forbidden food.[39]

Those cases, though, are both situations in which the intention is to *remove* the forbidden substance in order to make something else kosher. In the manufacture of wine, however, it is the specific intent of the wine maker to *insert* the fining agent (although not that it remains in the wine).

3.3 *Permissive Precedents*

There is one case in the sources in which a similar action is permitted. Specifically, one may intentionally cook a non-Jew's butter in order to eliminate the particles of milk in it (since a non-Jew's milk is forbidden), and if a little milk remains, it is null and void because the person's intention is not to nullify the little that remains but rather to remove the particles of milk.[40] In this case one is intentionally doing something that will leave the milk in the butter (albeit it in a different state), and yet one may eat the butter.

The strength of this line of argumentation goes even further. In what clearly became a landmark decision, Rabbi Ezekiel ben Judah Landau (the Noda B'Yehudah, 1713–1793) ruled permissively in the very case before us. The way he phrases the question indicates that fining wine with an unkosher fish had been done by the Jews of Poland for twenty years and had become common practice among the Jews of Germany too by the time he wrote his responsum. This is what he says:

38 Shul*h*an Arukh, Yoreh De'ah 84:13 and Taz and Sha*h* there. And cf. Resp. Rashba, Vol. I, no. 463 and Pri *H*adash, Yoreh De'ah, end of par. 64, who bring support for this from Mishnah Terumah, end of Ch. 5 and the Jerusalem Talmud there.

39 Ran, *Avodah Zarah*, Ch. 2. On all of these, see *Encyclopedia Talmudit*, Vol. I, p. 298 (Hebrew).

40 Maimonides and the Maggid Mishneh and the Kesef Mishneh on Mishneh Torah, Ma'akhalot Assurot [Forbidden Foods] 3:16. See also Beit Yosef, Yoreh De'ah. 115:3 and Rama and Sha*h* there.

> (The question revolves around) Krok, which some call Heusen Bleusen, which is the bladder of the fish called Heusen, which is an unkosher (*tameh*) fish. People dry the bladder of that fish and insert it into the drink that is called *med* in Poland, or honey juice. Its nature is to precipitate the lees and to clarify the drink. In Germany they are already used to acting like this, i.e., to put it into barrels of wine for this reason, and it is now about twenty years since they began doing this also in Poland in the drink of honey juice called *med*. And the great scholars of the generation were aroused by this to forbid it on the grounds that it remains in the drink, and "that which is preserved is treated legally as if it were cooked" (i.e., it is as if the juice and the unkosher fish were cooked together). And if one argues that it (the unkosher fish) is nullified by being less than one part in sixty, we do not nullify a forbidden substance *ab initio*. And there are those who want to permit the practice on the grounds that it is dried out, and it is therefore like wood, which has no taste whatsoever, and they see it as being analogous to the inner lining of a stomach. And there are those who want to permit the practice on the grounds that we only restrict prior nullification when it is one's intention to nullify, but here the intention is only to clarify the wine and not to give it a taste. My honored cousin, the rabbi, the great luminary, Rabbi Joseph, the head of the court and the academy of the city Hadesh in the region Cracow, ruled to forbid the practice. But since the custom has already spread to permit the practice in the regions of Germany and Poland, I have decided to write according to my humble opinion.[41]

After a long responsum, he ultimately says this:

> For all the reasons mentioned above, it seems that it is permitted to put Heusen Bleusen into the wine or the drink that they call *med* in Poland because the intention is not to nullify but only to clarify the drink and to precipitate the lees. And "it is good for Israel, for if they are not prophets, they are children of prophets." (B. *Pesahim* 66a). According to my humble opinion it is completely permissible (*heter gamur hu*). And what seemed right to me I have written.[42]

In more recent times, Rabbi Moshe Feinstein has also taken this position.[43] This exception to the usual rules against prior nullification thus applies fully

41 *Noda Biyehudah*, Yoreh De'ah 26.
42 *Noda Biyehudah*, Yoreh De'ah 26.
43 *Iggerot Moshe,* Vol. 2 (1973), Yoreh De'ah 24 and 36.

to the case at hand. When the wine maker adds fining to the wine, he certainly does not intend that it become nullified for purposes of Jewish law. His intention is that it clarify the wine. He does not even want it to remain in the wine. Therefore, some wine makers, as we have seen, add bentonite after using gelatin, casein, or some other fining agent in an effort to eliminate whatever is left of the original fining agent. Most also filter the wine after fining. Consequently, there are Jewish legal (halakhic) grounds to say that wine is kosher no matter what fining agent is used: it is legally nullified since the one adding the fining intends to clarify the wine and not to nullify the fining, and he does not intend that the fining agent remain in the wine.

3.4 *Possible Stringencies*

At the same time, one must realize that this is pushing matters. There are some who do not recognize such cases as exceptions to the general rule that forbidden substances cannot be intentionally nullified. Rabbi Abraham b. David of Posquieres (the Rabad, c. 1125–1198), writing about the case of nullifying drops of milk in butter made by non-Jews, attacks the principle of intentional nullification in his usual, acerbic style:

> In regard to what Maimonides wrote, i.e., that the forbidden substance became smaller and was nullified, how ugly is the fact that the worry about eating forbidden foods has left them because of its nullification in the majority substance![44]

Rabbi Solomon b. Abraham ibn Adret (the Rashba, 1233–1320) also takes this stance.[45] Others place restrictions on the use of the exception. David ben Samuel Halevi (the Taz, 1586–1667) accepts the exception only when adding forbidden food is the only way to do what the one who adds it intends to do; if, however, there is another way to carry out his intention and he does it in a way that raises doubts about whether it is forbidden or not, then that is intentional nullification and the mixture is forbidden.[46] Because wine can be clarified by settling, filtration, centrifuging, or the use of kosher and pareve fining agents, the use of an unkosher fining agent would render the wine unkosher according to this line of reasoning.

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44 Mishneh Torah, Ma'akhalot Assurot 3:16, comment of the Rabad there.

45 Cited in the Maggid Mishneh's comment on Mishneh Torah, Hilkhot Ma'akhalot Assurot 3:16; see also the commentaries of the Kesef Mishneh and the *Lehem* Mishneh there.

46 Taz, Yoreh De'ah 137, comment #4.

Others restrict use of the exception to cases in which there is a specific action intended to remove the forbidden substance afterward.[47] In our case, that would restrict permitted wine to the situation in which bentonite is added in an attempt to clear the wine of the original fining agent, a common practice, but by no means a universal one.

Furthermore, one wonders whether even Rabbi Ezekiel Landau would have permitted the fining of wines with unkosher materials if he knew the Jewish wine industry could be saved through the use of equally effective methods of fining that did not involve halakhically questionable substances.

3.5 *Evaluating Contemporary Wine Making in Light of the Precedents*

In sum, then, although there are grounds to permit all wine, regardless of the fining used (if any), the grounds are not beyond challenge. Moreover, one can understand the rationale for forbidding wine with unkosher fining agents: the substances are being intentionally added to the wine, after all, and we now know beyond a doubt that some of them remain in the wine.

4 The Issue of Gentile Wine (*Stam Yeinam*)

In addition to issues concerning the kashrut of the substances used in making wine, wine is subject to a special decree forbidding any use of the wine used by idolaters for libations (*yayyin nesekh*)[48] and the subsidiary decree against drinking wine touched by idolaters, even if they have not used it for sacramental purposes (*stam yeinam*), for fear that they used it in idolatrous rites but we just did not see them do it, and a second fear expressed in later Jewish literature that drinking wine with non-Jews will lead to interfaith marriages with them.[49] Jews may, however, buy and sell wine made by non-Jews that had not been used for idolatrous purposes (e.g., wine made by monotheists).[50] If such wine is kosher in its ingredients and cooked, then Jews may even drink it, because idolaters in Roman times saw it as a dishonor to their gods to offer them cooked (and therefore, in their estimation, spoiled) wine.[51]

47 Resp. Rabbi Akiba Eger, par, 77. See also Sha*h*, Yoreh De'ah 201, comment #46 for another example of requiring a contrary action.

48 B. *Avodah Zarah* 29b.

49 M.T. *Hilkhot Ma'akhalot Assurot* (*The Laws of Forbidden Foods*), 11:8; S.A. *Yoreh De'ah,* 123:1; 124:6–7.

50 S.A.*Yoreh De'ah* 123:26.

51 B. *Avodah Zarah* 30a; S.A. *Yoreh De'ah* 123:3.

4.1 *Rabbi Silverman's 1964 Responsum*

In 1964, Rabbi Israel Silverman wrote a legal ruling in which he demonstrated that under modern conditions the reasons for these prohibitions no longer apply. He marshaled three arguments to demonstrate this:

(1) In the production of wine in modern factories, the wine is made entirely by means of machines, and consequently no human beings touch it from the time that the grape juice ferments into wine. The only exception is the occasional drawing of some wine from large containers in order to taste or examine it, but that is permitted because it is usually done with a utensil. Furthermore, even if it were done by hand, Rabbi Moses Isserles (1532–1572) has ruled "in these times, non-Jews are not considered idolaters, and all of their touchings are considered to be 'without intention."[52]

(2) All wine produced in our time is pasteurized and therefore is to be considered as "boiled wine," which the Talmud exempts from these prohibitions against wine for libations.[53]

(3) Non-Jews in our day – and especially Catholics – produce special wine for sacramental purposes that is not sold on the open market. Moreover, the Sages long ago dropped the parallel prohibitions against non-Jewish bread and oil, which Catholics use in their worship as much as they use wine.[54]

I would like to note several points about the last two arguments, beginning with the last. It is certainly true that the parallel prohibitions against non-Jewish bread and oil were dropped long ago and that Catholics today use those products in their worship just as surely as they use wine, but it is not necessarily true that wine produced for Catholic sacramental purposes is necessarily used that way. The Novitiate of Los Gatos in Los Gatos, California, for instance, "has produced fine altar wines since 1888, … in strict accordance with the Canon Law of the Roman Catholic Church. Once the needs for sacramental wines is met, the remainder of the production is made available to the public through commercial channels … The Novitiate's Altar Wines are only available to the clergy. They are similar or identical to the wines marketed for the public … but are in each case labeled with a distinctive name, appropriate to the particular

52 S.A. *Yoreh De'ah* 124:24, gloss.

53 B. *Avodah Zarah* 30a.

54 Israel Nissan Silverman, 'B'Inyan Setam Yeinam She! Goyyim', *Conservative Judaism* 18:2 (1964), 1–5 [Hebrew]; translated as "Are All Wines Kosher?" in Seymour Siegel (ed.), *Conservative Judaism and Jewish Law* (New York: Rabbinical Assembly, 1977) 308–316.

wine."[55] It may be enough for us Conservative rabbis and Jews from a Jewish legal perspective that the wine that finds its way to the market cannot possibly have been used for sacramental purposes because of the Catholics' own scrupulousness in that regard, but it does appear that in some instances, at least, what is offered at the market may come from the same stores and processes that produce altar wine.

Rabbi Silverman's second argument, that most wines are pasteurized ("warm fermented"), may have been true when he wrote his rabbinic ruling in 1964, but nowadays that no longer is common practice.[56] Experts complain that when wine is subjected to 142–145 degree Fahrenheit temperatures for 30 minutes, as pasteurization requires, a "cooked aroma and taste" result.[57] Professor Ralph E. Kunkee of the Department of Viticulture and Enology of the University of California at Davis reports an experimental procedure of exposing wine to a temperature of 98 degrees Centigrade for one second followed by rapid cooling in order to inhibit malo-lactic fermentation, but he is "not in a position to comment on its effect on wine."[58] Here, as in the case of fining agents, the variety of practices within the wine making industry is such that we cannot assume that all wine is "cooked" in the halakhic sense of that term. On the contrary, it appears that most wine is not "cooked," as noted above in the list of wine makers I contacted.[59]

This has an important consequence. It has become common practice for non-Jewish waiters and waitresses to pour wine at kosher functions. Since we can no longer rely on the assumption that wine is warm fermented, even rabbinically certified wine must be confirmed as "cooked" in order to permit this practice.

The issue is even harder. Jewish sources speak of two separate situations in regard to Gentiles and wine, i.e., when Jews produce wine, but it is touched by

55 John Melville, *Guide to California Wines* (4th fourth edition revised by Jefferson Morgan, San Carlos, California: Nourse Publishing Co., 1972) 124–125.

56 Zelma R. Long, 'White Table Wine Production in California's North Coast Region', in Maynard A. Amerine (ed.), *Wine Production Technology in the United States* (Washington, D.C.: American Chemical Society, 1981) 47. See also my brief survey of eleven California wineries above.

57 A. Dinsmoor Webb, 'The Chemistry of Home Winemaking', in A. Dinsmoor Webb (ed.), *Chemistry of Winemaking* (Washington, D.C.: American Chemical Society, 1974) 122; Ralph E. Kunkee, 'MaloLactic Fermentation and Winemaking', in A. Dinsmoor Webb (ed.), *Chemistry of Winemaking* (Washington, D.C.: American Chemical Society, 1974) 157.

58 A. Dinsmoor Webb, 'The Chemistry of Home Winemaking', in A. Dinsmoor Webb (ed.), *Chemistry of Winemaking* (Washington, D.C.: American Chemical Society, 1974) 122; Ralph E. Kunkee, 'MaloLactic Fermentation and Winemaking', in A. Dinsmoor Webb (ed.), *Chemistry of Winemaking* (Washington, D.C.: American Chemical Society, 1974) 157.

59 See the list on p. 687 above.

Gentiles, and secondly, when Gentiles produce it. When Jews produce wine, it is "our wine" and therefore permissible for both drinking and selling. If it is touched by Gentiles, however, Rabbi Joseph Karo prohibits even doing business with such wine. Following Maimonides and Jacob ben Asher, though, he makes an exception if the Gentile is "a star worshipper who is not an idol worshipper" (e.g., a Muslim), in which case the wine is permitted for commercial benefit but forbidden for drinking. Moses Isserles permits even drinking "our wine" touched by non-Jews because "in our times" the Gentile can be assumed not to intend to touch the wine for the purposes of idolatry.[60] After that ruling he adds, "However it is not advisable to publicize this among the ignorant." Even so, we might choose, as Rabbi Silverman does, to depend upon the ruling itself to permit the drinking of wine touched by non-Jews.

Quite another matter is wine produced by Gentiles. Such wine is always forbidden for drinking under the rules of *stam yeinam,* "simply their wine."[61] Consequently wineries owned by Gentiles who want to make kosher wine (e.g. Manischewitz, now owned by a conglomerate) must arrange to have exclusively Jewish workers handle the wine from the time of the crush of the grapes until the wine is either bottled or cooked so that it is "wine made by Jews" even if the owner of the grapes and equipment is Gentile. Absent such a special arrangement, all wine produced by Gentiles is forbidden under the rules of *stam yeinam* even if no Gentile touched it. The fact that wine made in this country is machine-made is therefore true but irrelevant if the winery is owned by a Gentile.

In the responsum that Rabbi Silverman cites, Rabbi Isserles finds reasons to permit the drinking of wine made by Gentiles, but it is not because he thinks that the practice is indeed permitted. As he says there, he was faced with the fact that the Jews of Moravia drank wine produced by Gentiles and that their rabbis permitted it. He therefore wanted to show that there was a "slight" reason to permit the wine, "even though it is not according to custom and law," so that other Jewish communities would not classify the Moravian Jews as sinners and so that their rabbis would not be those who knowingly lead others astray (*mahti'im*) but rather those who stumble in understanding the words of the Torah. Furthermore, even then the grounds for permitting wine made by Gentiles were only in a case when all other drinks were contaminated. As Rabbi Isserles says there:

60 M.T. *Hilkhot Ma'akhalot Assurot* (*Laws of Forbidden Foods*) 11:7; 13:11; Tur, *Yoreh De'ah* 124; S.A. *Yoreh De'ah* 124:6–7, 24 and gloss there.

61 M.T. *ibid.,* 11:8; S.A. *ibid.,* 123:1; 124:6–7.

> All of this seems right to me for those who are lenient in those regions where there is nothing to drink but wine. But far be it from me to say that one should depend upon my words because I have only come to "give 150 reasons to prove the worm pure" (i.e., to justify a wrong)[62] even though the Torah specifically says that it is impure. Similarly in this matter I say that I have only come to give a slight rationale to permit the practice but not to depend upon this at all, especially in those places where the practice is not to permit it because they have grabbed hold of the truth that it is a proscription that it is forbidden to change. The forms of rabbinic excommunication (acronym: *nahash*, snake) will bite anyone who violates this, for anyone who violates the Rabbis' words is liable for the death penalty. Nevertheless, my reasoning has the consequence that they (those who drink Gentile wine) shall not be called suspicious (of violating all of the law) and not intentional violators but only unintentional violators because they will have something to rely upon in their regions that looks to them like a rationale for permissiveness.[63]

This is hardly a ringing declaration in favor of accepting all wine made by Gentiles!

4.2 *The Prohibitions of Wine Made by Gentiles are No Longer Relevant*

This means that we must squarely face the issue of whether we Conservative rabbis intend to be concerned any longer with what remains of the rabbinical prohibitions against drinking wine made by Gentiles. I believe that the answer should be "no."

The reason for the Tannaitic prohibition against drinking *yayyin nesekh,* wine used for libations in a religious ceremony, was to prevent Jews' involvement in idolatry. When the Rabbis instituted the prohibition, they had in mind the Roman idol worshippers familiar to them at that time. Such people constantly thought about performing acts of idolatry – to the extent that one could, according to the Rabbis, assume that "the thoughts of a heathen are usually directed towards idolatry."[64]

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62 B. *Eruvin* 13b.

63 Resp. Rema 124 in the first, Cracow edition of 1640 but omitted in many subsequent editions, probably because later editors were anxious about its permissiveness. Cf. Hayyim Hillel Ben-Sasson, *Hagut V'Hanhagah* (Jerusalem: Bialik Institute, 1959) [Hebrew], 22–25.

64 M. *Hullin* 2:7 (38b). I would like to thank Rabbi Ben Zion Bergman, z"l, for pointing this out to me.

As we have noted, however, Maimonides and those who followed him excluded Muslims from the category of "idolaters" for purposes of this prohibition even if Muslims did not openly embrace the seven Noahide laws, the laws that, according to Rabbinic tradition, God legislated for all descendants on Noah (i.e., all human beings).[65] Centuries later, Isserles explicitly assumes that the Christians of his time are not idolaters so that if they touch wine made by Jews, Jews may still drink it. It is interesting that Isserles never explicitly restricts his exclusion to those Christians living around him but rather says that Gentiles "in this time" are not idolaters.[66] Although one could read that as including all of the world's non-Jews, I doubt that he was making that kind of sweeping statement, if only because he must surely have realized that he did not know much about the people of Asia.

In any case, in the modern, largely secular world, one doubts whether the Talmud's characterization of idolaters, based on the Roman rites they witnessed, can fairly be applied to non-Jews, at least those living in the areas of Western Europe and North America from which most of our wines come. Moreover, the wine used by the Catholic Church for purposes that come closest to "idolatry" in our sense is specifically kept from the general market. There are some contemporary cults that could legitimately be classified as idolaters, but few of them produce wine. If a Jew bought only from the major wineries or from those known not to be owned or operated by such a cult, the issue of idolatry would become moot, at least as far as the prohibition of wine is concerned.

The tradition's concern about drinking "their wine" (*stam yeinam*) – that is, wine made or touched by non-Jews even though not used in their religious ceremonies – was to prevent interfaith marriages ("because of their daughters," as the Talmud phrases it).[67] If anything, that problem is more acute in our

65 T. *Avodah Zarah* 8:4; B. *Sanhedrin* 56a-56b. The list of seven includes six prohibitions – against murder, idolatry, incest and adultery, eating a limb from a living animal, blasphemy, theft – and a requirement to establish laws and courts to govern the community. Some rabbis in that Talmudic passage add a few more to the Tosefta's list of seven, and Ulla creates a list of 30 laws that God demands of everyone (B. *Hullin* 92a-92b). For a comprehensive treatment of these laws as they were defined and interpreted in the Talmud and thereafter, see David Novak, *The Image of the Non-Jew in Judaism: A Historical and Constructive Study of the Noahide Laws* (New York: Edwin Mellen Press, 1983).

66 See n 60 above for both the Maimonides and Isserles passages, and see the commentaries of the Beit Yosef on the Tur and the Taz on the passage in the Shul*h*an Arukh cited there for a discussion of why formal acceptance of the Noahide laws was not required for this purpose.

67 B. *Avodah Zarah* 36b.

day than it was in Talmudic times, for the rate and ramifications of interfaith marriage for the future of the Jewish community are now a critical concern,[68] whereas the rate during Talmudic times, though unknown, could not have been high if only because of the derogatory evaluation of the non-Jewish cultures among whom Jews lived at the time, presumably not only on the part of the rabbis of the time but shared by lay Jews as well. If I thought for one minute that prohibiting wine made by Gentiles would have the slightest effect on diminishing the number of interfaith marriages, I would drop all other concerns and opt for prohibiting it on that basis alone. I frankly doubt, however, that prohibiting wine touched by non-Jews will have any effect whatsoever on eliminating or even mitigating that problem. Other spirits prepared by non-Jews were permitted long ago, and it is precisely at the cocktail party where much initial socializing takes place. Moreover, the real factors creating our high rate of interfaith marriage have little, if anything, to do with the dietary laws in general, let alone Jewish laws governing wine in particular. Few Jews who plan to marry someone of another faith keep kosher at all, and those who do will not be prevented from marrying their intended spouses by a prohibition against drinking wine with them.

Moreover, as Rabbi Silverman points out, the prohibitions originally instituted against the bread, oil, and cooked foods prepared by non-Jews have been abrogated long ago.[69] If one were keeping these strict measures in order to prevent social intercourse between Jews and Gentiles, then the policy would at least be consistent. Such a policy would be ineffective, however, because Jews in their modern business and social contacts will not, and often cannot, observe such rules. We rabbis have enough difficulty convincing Jews to observe the laws of kashrut in both their homes and when eating elsewhere without these additional stringencies. Even if a return to all of the former prohibitions

68 Pew Research Center, *A Portrait of Jewish Americans* (2013), Chapter Two: intermarriage and Other Demographics, https://www.pewforum.org/2013/10/01/chapter-2-intermarriage-and-other-demographics/ (accessed April 11, 2020).

69 The prohibition and its exceptions first appear in M. *Avodah Zarah* 2:6–7. The Talmud (B.*Avodah Zarah* 35b) states that the reason is to prevent interfaith marriage. Rashi (Rabbi Shelomo Yitz*haki, 1035–1104, France*), *the most studied medieval commentator on the Talmud, adds another reason* (*ibid.38a*), *namely, that a Jew eating food cooked by a non-Jew could not be certain that it was kosher. Later Jewish codes of law then permit Jews to eat food cooked by non-Jews if neither of those concerns applies.* For example, if a non-Jewish professional cook is cooking in a Jewish home, where the rules of kashrut are explained and required of the cook, or much more commonly, if a non-Jewish producer of food, caterer, or restaurant is under rabbinic supervision, then Jews may eat such food. That is the widespread Jewish practice among Jews who keep kosher today, but some ultra-Orthodox Jews still avoid food produced by Gentiles, regardless of the circumstances.

could be effectuated, it would not be desirable. In keeping with our acceptance of the conditions of modernity, we in the Conservative movement would undoubtedly hold that, short of interfaith marriage, Jews *should* have social and business contacts with non-Jews. In any case, all of the other prohibitions designed to inhibit social intercourse between Jews and Gentiles have been dropped in the course of history. Maintaining the prohibitions against wine alone will not prevent interfaith marriages in the modern context of constant interactions between Jews and non-Jews. One doubts whether standing alone it is even a significant factor.

In modern conditions of wine making, what originally began as Jewish companies are continually subject to corporate takeovers by conglomerates. This requires those who still want to produce kosher wine for the Jewish trade and abide by the Mishnah's rules to invent legal fictions in order to make the wine "Jewish wine," despite the fact that everything from the grapes to the bottles is owned by non-Jews. Legal fictions have their place, but it seems senseless to multiply them when they do not serve the initial goal anyway.

One must also recognize that many Jews who otherwise observe the laws of kashrut drink rabbinically uncertified wine. In other words, whatever one may think of the halakhic status of the prohibition based on the sources, the fact is that for many religiously committed Jews, the prohibition has fallen into disuse. In the operation of any legal system, Jewish law included, when that happens those in charge of the law must decide whether to lament and combat the widespread transgression or to accept it, recognizing that a specific law has fallen into disuse and that there is no strong reason to fight for it. Even if we rabbis decided that we wanted to maintain the ban against "their wine" as part of the law, I doubt that it would be very high on our list of educational and halakhic priorities. We are better off acknowledging the fact that this prohibition has fallen into disuse and letting it be.

In sum, then, both because of the shift in the beliefs and practices of non-Jews in the modern, Western world from those of Roman times such that modern Christians and Muslims are not idolaters in the way the Romans were, and because the prohibition against wine alone will not accomplish the rabbis' goal of preventing interfaith marriages in contemporary society, we should extend the approach suggested already four centuries ago by Rabbi Isserles. Specifically, while he reluctantly found reason to maintain the validity of Jewish witnesses who drink Gentile wine, we should openly assert that, unless we have specific evidence to the contrary, we can presume that the Gentiles who produce and serve wine in the Western world are not "idolaters" in the halakhic sense of that term. Moreover, because the prohibition against the use of wine made by Gentiles is no longer an effective means for preventing interfaith

marriage, which was its specific, original goal, we shall let the prohibition fall into disuse without protest. The most trenchant issues about the permissibility of Gentile wine in our time therefore center around the materials used in producing it (i.e., its kashrut), not the gentile identity of its producers (i.e., the issues of *yayin nesekh* and *stam yeinam*).

5 Producing Wine on the Sabbath

One side issue. It is clear that some wine uncertified as kosher by a rabbi or rabbinic organization will be produced on the Sabbath. This fact in and of itself, however, does not make the wine unkosher. That is because, first of all, we must assume that the vast majority of wine makers and their helpers are non-Jews making wine according to their own, chosen timetable. They are not making the wine primarily for Jews, and they certainly are not timing their activities to take place on the Sabbath for the benefit of Jews. Even if the wine maker and all his or her helpers are Jewish (an unlikely assumption), the wine itself would become kosher for a Jew to drink as soon as enough time had elapsed after the Sabbath to do whatever the Jews had done in violation of Jewish law on the Sabbath.[70] Because shipping time is much longer than that (to say nothing of the time that wineries generally store wine after processing for additional fermentation and settling), the possibility that wine will be produced on the Sabbath is true but not relevant to its kashrut status.

6 Lessons

The life situations in which this question arises are three: (1) the individual Jew who keeps kosher and wants to know whether drinking rabbinically uncertified wine is permissible when eating at home, in a restaurant, or at someone else's home; (2) Conservative synagogues; and (3) other Jewish institutions that observe the laws of kashrut.

6.1 *The Individual*

Unkosher or dairy fining agents are used in the production of some wines. Because fining leaves the wine clear and not cloudy, our ancestors may well have assumed that all fining agents precipitate out of the wine. Moreover, since

70 B. *Shabbat* 18b; M.T., Shabbat 3:9, 12, 18; S.A. Ora*h Ha*yyim 254: 8, 9.

the intent of the wine maker in adding unkosher or dairy substances is not to augment the taste of the wine but rather to clarify it, many rabbis ruled that the use of unkosher or dairy fining agents does not make the wine unkosher or dairy.

Through chemical analysis, however, we now know that some fining remains in the wine even if it is invisible. Furthermore, in modern times it is possible to clarify wine in a variety of effective ways that do not involve dairy or unkosher materials – specifically, filtration, centrifuging, and fining with kosher, pareve substances. It is therefore certainly preferable to use wines that have been fined without the use of substances that would call the kosher status of the wine into question.

Although some of the rabbis and rabbinic agencies whom I contacted did not answer my questions concerning the fining process of the wines that they certify (e.g., Carmel) and others would not answer in writing (e.g., the Union of Orthodox Jewish Congregations), I did not find even one rabbi or agency that certifies the kosher status of wine who takes advantage of the leniency in the law. Therefore, there are grounds to assume that rabbinically certified wines are not fined with problematic substances, and for that reason they are preferable to those without such certification.

Of course, if someone has a favorite, rabbinically uncertified wine, one could easily contact the winery to determine the substances in its manufacture. Although there is no legal requirement that the winery answer consumers' questions, I found a large percentage of the wine makers I contacted to be prompt and forthright in their answers, even when they had grounds to suspect that their answers would mean that their wines would not be permitted. Moreover, as the list of California wineries at the beginning of this chapter indicates, there are some wineries that do not use problematic substances. There is no guarantee, though, that rabbinically uncertified wineries will continue to use tomorrow the processes and substances that they attest today; only rabbinic certification with periodic checking provides a measure of continued assurance that such substances are not used.

Even though I cannot confirm that all certifying rabbis and agencies insist upon fining agents that are kosher according to all opinions, there seems to be a consistent practice among certifying rabbis not to permit debated substances. Furthermore, even though those who take the more stringent stance today might presumably decide to take advantage of the leniency in the law tomorrow, there is little chance of that because there would be clear, religious implications in such a decision for significant segments of the observant Jewish community, implications that the certifying rabbis would probably not want to risk. Uncertified wineries, on the other hand, would not even be aware of such

concerns, let alone be swayed by them, if there were economic or aesthetic reasons to change their mode of manufacture.

Under these circumstances, it is preferable that Conservative Jews who observe the laws of kashrut use only rabbinically certified wines in their homes. Because many of the modern processes of wine production are clearly within the bounds of kashrut while others are questionable, a Jew serious about kashrut has no need to compromise on this issue in those circumstances where he or she controls what will be served. The increased quality of rabbinically certified wines in recent years makes such a compromise even less justifiable.

At the same time, there is a strong basis in Jewish law permitting the nullification of forbidden foods *ab initio* when that is not the intention, including responsa addressed to the specific issue of clarifying wine. Whatever is used to fine the wine would, on that view, be nullified. Consequently, one cannot say that wine fined with unkosher or dairy substances is unkosher or dairy, no matter what is used to fine the wine.

Therefore, those individuals who find themselves in business or social situations where drinking wine is an accepted part of protocol may drink whatever wine is served them in good conscience. This is especially true when one is served wine in another person's home, where one must be concerned not to embarrass the host. It would be wrong of others to think or say that those who drink rabbinically uncertified wine in such circumstances are thereby abandoning the laws of kashrut since there is ample basis in Jewish law to support the kashrut of such wine.

Similarly, even though restricting one's own home use to rabbinically certified wines is preferable, those who use uncertified wines in their homes should not thereby be considered Jews who do not keep kosher just as those who take the more stringent stance should not be branded as fanatics. In light of the questions raised about uncertified wine, however, it certainly should be a standard for our movement that only certified wines be used for sacramental purposes – kiddush, the seder, etc. – at home as well as in the synagogue. One should fulfill a mitzvah (commandment) as elegantly as possible, and there is no reason to use wine about which there is some question for those purposes.

The Conservative movement is the only religious movement that has always been Zionistic and has never had an anti-Zionist wing. It is therefore fitting that this chapter indicate that Israeli wines are especially appropriate for sacramental use, both to support Israeli industry and to reap the emotional and Jewish benefits of calling to mind our ties to Israel on such occasions.

In any case, I have not investigated the special issues involved in using uncertified wine for Passover, and this chapter should therefore not be seen as permission for such use.

6.2 *Conservative Synagogues*

The use of rabbinically uncertified wine in Conservative synagogues is complicated by several factors. Despite my own position on the subject of *stam yeinam* expressed above, there undoubtedly are segments of the Conservative community that want to maintain the traditional strictures against wine produced by non-Jews. More importantly, in my view, there are grounds for insisting upon rabbinically certified wines for reasons of kashrut, as explained above. Part of our ideology as a Conservative movement provides that maintaining the tradition is always a valid position when there is no moral or social imperative for changing it. Even though some would like to avail themselves of the good taste of many uncertified wines, that hardly constitutes a moral or social imperative. Therefore, synagogues may well want to insist upon rabbinically certified wines for both ritual and social occasions, and I would frankly prefer that.

At the same time, several congregational rabbis have indicated to me that drinking rabbinically uncertified wine has become the accepted practice in their synagogues with few, if any, who even think of it as an issue. Those few who do not drink uncertified wine can simply refrain from drinking the wine and still trust the kashrut of the synagogue because wine is usually served in glassware, which is made kosher again simply by washing. While these rabbis would be prepared to educate their constituency to the necessity to change accepted practice if there were serious halakhic objections to it, the use of rabbinically uncertified wines is not clearly forbidden. They therefore wonder whether it would be a productive use of their time to take a stand on this issue when there are so many other, more central religious and educational goals to attain.

Other congregational rabbis have mentioned that insisting upon rabbinically certified wine would be just another obstacle to overcome in convincing people to schedule their social events in the synagogue, including especially their bar/bat mitzvah and wedding parties. Restriction to kosher food and other Shabbat limitations on music and photography that the rabbi may impose are already significant deterrents for some people, and this would be just another barrier. The issue for these people is not so much the quality of the wine, for many rabbinically certified wines of high quality are now available; the issue is more the variety of wines that are open to the celebrant to choose. We clearly are more interested in encouraging Jews to have kosher events and to schedule their life cycle celebrations in the synagogue than we are on insisting on rabbinically certified wine, for the latter is only a higher degree of observance, while the former goes to the heart of what we want in Jewish practice. On the other hand, a number of

congregational rabbis have indicated to me that in their synagogue's insistence on rabbinically certified wine is already the practice or would be easy to implement.

I would say, then, that it would be preferable to insist on rabbinically certified wine in the synagogue for the reasons of kashrut and community indicated above. An individual rabbi, however, who knows that this would simply be unacceptable to his or her congregation or that it would seriously deter significant numbers of families from scheduling their celebrations in the synagogue may rest assured that the kashrut of his or her synagogue is not impugned by permitting rabbinically uncertified wine. Such rabbis may want to insist upon attestation by the winery that problematic substances were not used in the wine's manufacture, but they need not do so. Even if they do insist upon that, they would still be providing a much wider choice of wines from which celebrants could choose. In line with what was said above in regard to individuals, even rabbis who permit the use of uncertified wine for social purposes should insist on rabbinically certified wine for ritual purposes, with Israeli wines being preferable.

6.3 *Communal Institutions*

Those communal institutions that observe the laws of kashrut and that are designed for the entire Jewish community are generally under the supervision of Orthodox rabbis who insist on rabbinically certified wine. Because of the communal nature of those institutions and the legitimacy of the questions of the kashrut of uncertified wine, we should support that requirement.

In addition, the Conservative movement has its own institutions and national and regional bodies. The legitimacy of the halakhic concerns delineated above and the communal nature of our national and regional institutions and groups demand that they serve only rabbinically certified wine. This would include social events, fund raising events, and all other occasions in which wine is served in such institutions and groups in addition to specifically sacramental uses. Although a rabbi of an individual synagogue may know his/ her congregants sufficiently well to find reason to permit the use of uncertified wine in his or her synagogue, no national or regional leader can presume that knowledge for the entirety of the Movement, especially because there clearly are Conservative synagogues, rabbis, and lay people who will drink certified wine exclusively. The permission to use uncertified wine, to the extent that it has been provided above, is, after all, at most permission and not an obligation, and our national bodies should serve all of the members of the movement.

7 Conclusion

The Psalmist writes that "wine cheers the hearts of people,"[71] and that certainly has been true for people all over the world. In line with this, Jews use wine not only for social purposes, but also to sanctify joyous occasions, including the Sabbath, Festivals, and weddings. This chapter explored the conditions under which wine satisfies the requirements of Jewish law in its food restrictions and its historical concerns that drinking wine made by non-Jews would lead to interfaith marriage. Although the Jewish tradition clearly discouraged drunkenness and the irresponsible behaviors that accompany it,[72] and although recently many Conservative synagogues and those in other Jewish denominations are serving grape juice rather than, or in addition to, wine at religious communal gatherings in recognition that some people have problems with alcoholism, wine continues to be part of the religious and social events of many, if not most, Jews. It is appropriate, then, to end this chapter with the traditional Jewish toast over wine, "*L'hayyim*," "To life!"

71 Psalms 104:15.

72 "Drunkenness," Jewish Virtual Library, https://www.jewishvirtuallibrary.org/drunkenness (accessed April 11, 2020).

CHAPTER 24

Risk Management in the Wine Supply Chain

Diego Saluzzo

1 Introduction

Along human history wine has been constantly matter of dichotomy between its beneficial effects and the potential damages it could cause, both for acute wine intake (intoxication, numbness, logical inconsistency) and for chronic excess (alcoholism, drunkenness, liver disease). Therefore the fruit of the vine carries with it, since the time of Noah, potential benefits combined with intrinsic risk for health, which are more subject of a medical debate.[1]

From a lawyer's perspective wine industry is one of the world's most heavily regulated food sectors at national, European Union and international level. Related regulations and standards are generated locally, where grapes cultivation and wine production are made, but are rapidly extending their area of enactment and application worldwide, where marketing, distribution and consumption of wine occur, by following the evolving of a product locally born, but which became truly global along the centuries.

Like any global F&B product it must comply with rules and regulations applicable to the whole supply chain, from the vineyard to the glass of the final consumer. For such a reason wine is one of the few commodities singled out by the World Trade Organization's Agreement on Trade-Related Aspects of

1 Pliny the Elder. Natural History, Volume I: Books 1–2. Translated by H. Rackham. Loeb Classical Library 330. Cambridge, MA: Harvard University Press, 1938, XXIII, 40.8-11. "… the more generous a wine is the thicker it becomes with age, contracting a bitter taste, which is very injurious to health, and to spice a less mature wine with it is also unwholesome. Each wine has its peculiar flavour, the presence of which is a sign of great purity; each wine has an age – its middle age – when it is more pleasant". Wine was used in facing epidemics: in such a respect see R.ALESSI, *Le vin dans les Epidémies d'Hippocrates,* in J.JOUANNA, L.VILLARD, D.BEGUIN, *Vin et santé en Grèce ancienne. Actes du colloque de Rouen et de Paris* (28–30, September 1998). Paris: Ecole française d'Athènes; 2002. pp.105–112. For its therapeutic virtues in preventing various diseases, see also D.BÉGUIN, *Le vin médecin chez Galien*. In: J.JOUANNA, L.VILLARD, D.BÉGUIN, Vin et santé en Grèce ancienne. Actes du colloque de Rouen et de Paris (28–30, September 1998). Paris: Ecole française d'Athènes; 2002. pp. 141–154; F.MARTÍNEZ SAURA, *El uso terapéutico del vino en la medicina romana del siglo I.* In: A.A.ÁVILA, *Homenaje al profesor Á. Montenegro: estudios de historia antigua*. Valladolid: Universidad de Valladolid; 1999. pp. 381–385.

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Intellectual Property Rights (TRIPS), which at article 23[2] provides enhanced protection to geographical indications for wines and spirits. And it is object of many bilateral commercial treaties, aimed to favour international commerce of truly original products of required quality, with rules consistent with international trade regulations and even more with provisions able to safeguard genuine products for the benefit of the final consumer.

First aim of this chapter is to outline various different risks that wine could potentially face along its global supply chain, from risks peculiar to agricultural business, when still a grape in a vineyard, to risks occurring along its production, aging (whenever applicable), transportation and consumption phases. In doing that, they will be outlined applicable standards and regulations aimed at public law level to ensure product safety and, from a private law perspective, to prevent possible risks and, if not, to have them adequately indemnified. That by considering how wine supply chains around the world are becoming more and more complex and taking into account direct impact on human health and welfare. A complexity amplified by the fact that wine is not just grape juice, and an important part of the product is made by the immaterial and evocative contents implied and by consequential consumers' expectations. With modern evolution of wine supply chain, failures in vineyard cultivation and canteen care, labelling, contamination and environmental issues could have huge impact. Smart farming, growing social consciousness on how wine industry treats grapes and consumers' increasing interest in what they really drink, combined with an enlarged product offer by worldwide wine producers, are making wine provenance more and more important. From biological cultivation to aging methods and techniques, from stock management to unsafe product recall and, even more, need of providing adequate responses to the presence on the market of a large number of non genuine and misleading products, trying to benefit of original brands, these out-coming issues create a new paradigm that will give rise to new risks to be adequately faced by wine makers.

Evolving risks in global wine supply chain and their appropriate management are so a matter under continuous evolution: let's think to the dramatic impact that a new risk like COVID-19 could have on wine business, starting from reduced

2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – Article 23 – Additional Protection for Geographical Indications for Wines and Spirits at https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm. See Julien Chaisse and Luan Xinjie 'Revisiting the Intellectual Property Dilemma – How Did We Get to Strong WTO IPR Regime?' (2018) 34(2) *Santa Clara High Technology Law Journal* 153–178 and Julien Chaisse and Kung Chung Liu, *The Future of Asian Trade Deals and Intellectual Property* (London: Hart, 2019) 524 p.

or no harvest in 2020, due to the many difficulties of having personnel (in Europe mainly made of non national farmers) taking care of vineyards, and moving to the many potential disruption in the phase of delivery, distribution and sale of products. And, above all, risk of lack of liquidity that shall unavoidably affect both producers and consumers, being the latters more focused on primary food needs, apart top income buyers, who see in wine market of high rank also an alternative investment, maybe more stable than current Stock Exchanges.[3]

In going through evolution of main risk affecting wine and wine producers along their global supply chain, they are briefly described and compared legal systems applicable worldwide in protecting consumers by ensuring product safety and analysed methods aimed to prevent, whenever practicable, that potential risks become damages. And, should damages occur, they are analysed applicable legal systems intended to indemnify and, parallel to that, to sanction possible infringements of the rule of law. A comparison between strict liability and negligence systems, that could also suggest which tort system is most suitable to safeguard consumers worldwide and improve welfare.

And in looking for a proper manner for wine industry in facing the challenge of global markets and evolving related risks, as a third and last issue potential application of methods and techniques of Supply Chain Risk Management ("SCRM") is proposed.

2 Risk Management in Context

Like any agricultural sector, the wine market is subject to a very broad range of typologies and severity of risks such as human behaviour, climate changes, pollution, plant diseases and harmful insects, production processes, policy framework, price fluctuations, and economic and financial risks. In regard of the latter, it should be highlighted that the wine industry is characterized by a higher added value, if compared to other sectors. Due to that high value, producers may lose part or the complete production in a very short period of time, finding themselves in a serious financial situation. And for certain top tier wines the rules of

3 Regretfully in March 2020 mainly due to COVID-19 pandemic also the *Liv-ex Fine Wine 100 Index*, the wine industry leading benchmark representing price movement of 100 of the most sought-after fine wines on the secondary market (https://www.liv-ex.com/news-insights/indices), was dreadfully negative. Dislocation caused by Covid-19, combined with 25% US tariffs on European wines and geopolitical uncertainty heavily affected the wine market, even if prices remained relatively resilient with a decrease of about 4% in March/April 2020 compared to the record level reached in the same period in 2018. From May 2020 on a moderate optimism preavailed, so that in September 2020 there was an increase of 1,4%.

the game are closer, at least at the level of marketing, to those referable to luxury goods and the contemporary art market. If the wine is intrinsically linked to a specific land of production, even the enormous increase that certain vineyards acquired in recent times could become an issue and, to a certain extent, a financial risk. In fact it could block the growth of current producers, due to the high investments required for enlarging cultivation, whenever practicable. Above all there is the risk of having an industry in many countries still operated as a family business, having recourse to corporate vehicles closer to the agricultural world rather than to the industrial and commercial one. That attitude generates a risk in ensuring continuity of the business in passing through generations. Which many times mean to preserve the original and traditional methods of production, the "*secrets*" that any wine maker introduces in the production phase, combined with compliance to the applicable specifications and the "*terroir*" typical of the areas of cultivation of a given grape. In addition, a generational risk may exist due either to the absence of heirs or the existence of too many of them, not necessarily all interested in continuing the activity, but very often eager to monetize in a short time the high value of a vineyard or an aging cellar of fine wines.

There is increasing evidence that such risks affect several actors in the wine industry besides producers: insurers, traders, retailers, consumers, investors, public institutions and policy makers. Scientific literature classifies risks in agricultural production based on the origin of uncertainty (weather, price, yield, fashions), scale of the events (idiosyncratic and systemic risks), frequency (remote, rare or more frequent) and intensity of their consequences.

Producers can cope with risks by adopting various risk management instruments, in some cases to prevent the negative effects of risky activities and in others to minimize their negative consequences. Such instruments imply costs. Empirical evidence shows that wine producers – at least those based in the EU – are more farmers than business oriented entrepreneurs, being characterized by risk aversion when they deal with economic decisions. They very rarely have recourse to any sort of insurance or other financial coverage instruments. This is simply because, especially in the Old Continent, they totally rely in the intervention of the governmental and European Union funds, which takes on most agricultural risks. This is a natural consequence of a subsidized agricultural policy, which is not favouring adoption of a real strategy in managing the risks of the wine supply chain via prevention and mitigation, or adaptation, whenever practicable.

We will focus on certain more typical risk attaining the wine supply chain, starting from vineyards cultivation and climatic risk, which represents a serious concern for productions areas that are expected to substantially change in the incoming decades due to global warming, with grapevines' migration no more following the migration of generation of European workers, like it

was from Europe to North and South America last century in between the two World Wars, but looking for more temperate climates in Northern Europe and Asia. Thereafter we will move to wine production processes and related product liability risks, by looking to the implications of the US strict liability model or the European fault/negligence model on the wine industry, also to realize if we are expecting to move towards a global concept of product liability, and which kind of model it could be.

2.1 *Climatic Risks*

Grapevines are, all over the world, a geographically expressive crop which grows well in its specific environments and climate regime, but remains very sensitive to fluctuations in weather conditions which may impact on yield and quality of grapes and wine. In the agriculture sector insurance instrument have a very limited area of application.[4] Revenues are influenced not only by weather occurrences, but also by its timing.

Hotter temperatures and global warming of the planet surely have an impact in the long run. Countries like Algeria – the fourth largest world producer of wine in the first decades of the last century – are no longer significant producers;[5] more generally, Mediterranean Europe is facing early harvests and increased gradations of the wines. In such a context, risk mitigation, whenever

4 The most important aspect of weather insurance is defining what constitutes an adverse weather event. To a large degree, there is the discretion of setting a specific definition by choosing the strength of hailstorm or amount of rain or snow, or unfavourable temperature in terms of frost or drought, even within the hours preceding the event or during the event that will trigger coverage. The cost of weather insurance is a function of the statistical probability that the adverse weather event will be triggered at designated location(s) or selected reporting station, date and time of the day of covered event based on several years of historical weather data and the amount of revenue insured. Verification can be determined either by the data from the closest weather station or an on-site independent weather observer.

5 In reality the growth of the Algerian wine industry was mainly triggered by the introduction of important wine regulations in France at the beginning of the twentieth century and during the 1930s. When France seized Algeria as a colony in 1830, the country produced virtually no wine. Fifty years later, as Phylloxera ravaged French vineyards, plantings in Algeria soared. By the 1930s, Algeria grew into the world's largest exporter of wine, until 1962 when the French left the country. Over the next decades production and exports gradually collapsed, even if Algeria still safeguards from desertification 75khe of vineyards, i.e. more than Hungary, according to OIV 2019 Statistic Report on World Viticulture, in a ranking leaded by Spain, China, France and Italy. Source G.MELONI J.SWINNEN, *The rise and fall of the World's largest wine exporter and its institutional legacy*, (2014) 9 (1) Journal of Wine Economics, 3, as also summarized by J.MALIN, *Tipsy History: The Great Boom & The Epic Bust Of The Algerian Wine Industry*, at https://vinepair.com/wine-blog/tipsy-history-boom-bust-algerian-wine.

possible (combined with peculiar cultivation techniques[6]) and adaptation to climate changes seem to be the mainly adopted strategy.

Researchers found that 2.5 C degrees (a likely scenario) of warming above pre-industrial levels would result in changes in rainfall, with heat damaging plants and making the grapes too high in sugar.[7] More than 50% of suitable land within current wine-growing regions is expected to "disappear" compared with the 1970s, i.e. before the most serious impacts of global warming. The wine industry is expected to face, in a decade or two, a real revolution in the EU, with a forecasted drop in production of 85% in Mediterranean areas, not differently from California, South Africa, Australia and Chile, and more dramatic consequences for current main producers like Italy and Spain. White grape varieties like Riesling and Ugni Blanc are expected to suffer more than red grapes. These areas will not necessarily be lost as long as certain varieties are switched; surely new suitable wine areas could be properly planted, for example in South-East England (Surrey, Sussex, and Kent already produce world class sparkling wines) and East Anglia. The same could be said about Northern and Eastern Europe.[8] Such a scenario would surely significantly reduce various special wines that have very restricted production areas and reward the grape varieties with the greatest geographical spread. Areas that are currently suitable for Pinot Noir would need to be switched with grapes such as Grenache or Syrah, which are able to better tolerate warm climate and produce later in the season.[9] All that would not take place without pain either in term of costs (insofar as replanting vineyards would be a very expensive exercise) and in regulatory terms (by implying

6 Like, for instance, the Pantelleria sapling vine (*Alberello pantesco*), UNESCO World Heritage, a traditional cultivation which takes place in very harsh climatic conditions and has been handed down through practical and oral instructions in local dialect by generations of vintners and farmers on the island of Pantelleria, close to Sicily, where 5000 inhabitants cultivate small lots of land using sustainable methods.

7 The Intergovernmental Panel on Climate Change (IPCC) – *United Nations body for assessing the science related to climate change Sixth Report – Climate change 2022*, available at https://www.ipcc.ch. See also G.V.GJONES, L.WEBB, Climate change, viticulture, and wine: challenges and opportunities, Journal of Wine Research, 21(2–3), 103–106, 2010.

8 S.BEARD, *The sun finally shines on one of the world's most northerly vineyards – because of climate change* November 22, 2019, at https://www.marketplace.org/2019/11/22/climate-change-creating-better-conditions-english-winery/. See also J.GALBREATH, Response to the risk of climate change: A case study of the wine industry, (No. 231251), AAWE Working Paper No. 181, 2015.

9 N.DAVIS, *Global heating may lead to wine shortage*, The Guardian, January 2020, at https://www.theguardian.com/food/2020/jan/27/global-heating-may-lead-to-wine-shortage-vineyard.

deep revisions in denominations of origin and related labelling). Regretfully, it seems that adaptation to climate evolution, by changing the current varieties, shall be the main strategy to face the risk of reduced snow and rain and rising temperatures, combined with any effort possible in minimizing global warming. Increasing diversity within crops may be a powerful way to reduce agricultural declines from climate change. As such, it has garnered increasing attention, especially in documenting within-crop diversity through different cultivars or wild relatives, able to mitigate agricultural losses. Their effectiveness will depend on global decisions regarding future emissions.

Obviously, wine grape producers are aware that climate changes and any other adverse effects on the cultivation imply newly generated plant diseases and introduction of alien insects damaging vineyards. That means increase of production and market risks associated with unexpected lower yields caused by less fruit buds flowering or less grapes of quality produced, with price fluctuations resulting from changes in the market supply and demand. In a business model where prices are extremely sensitive to climate variations and cannot be determined correctly prior to production, climate events and their market effects will imply considerable revenue variability for winegrowers. Moreover, fast international expansion of the wine industry implies the need to better understand the reasons that create wine price risk and introduce the more appropriate strategies for having such a risk at least mitigated. That is even more the case in the EU, where the agriculture policy orientation is focused on the reduction of wine market subsidies.[10]

10 Wine promotion subsidies over the European Union Common Agricultural Policy are aimed primarily at increasing European wines' competitiveness in non-EU countries through activities such as information campaigns, market studies and participation at wine fairs abroad. There are two parallel schemes for wine promotion. One was dealt under EU Regulation 1308/2013, now supplemented by Regulation (EU) 2019/33 of 17 October 2018 attaining applications for protection of designations of origin, geographical indications and traditional terms in the wine sector, the objection procedure, restrictions of use, amendments to product specifications, cancellation of protection, and labelling. The second one is dealt under Regulation (EU) No 1144/2014 of 22 October 2014 on information provision and promotion measures concerning agricultural products implemented in the internal market and in third countries, repealing Council Regulation (EC) No 3/2008. See also K.ANDERSON, H.G.JENSEN *How much government assistance do European wine producers receive?* University of Adelaide, February 2016, at https://www.adelaide.edu.au/wine-econ/pubs/working_papers/0216-How-much-govt-assistance-do-European-wine-producers-receive-Feb16.pdf.

For a detailed evaluation of subsidized amounts see EUROCARE, *Europe's billion-euro wine spillage A report on EU's wine promotion subsidies – 2018* at http://www.politico.eu/wp-content/uploads/2018/03/Europes-Billion-Euro-Wine-Spillage.pdf.

2.2 *Wine Production Processes and Product Liability Risks*

Wine makers and distributors have to comply with non-uniform regulations of wine making, composition, labelling and to face various issues having as object wine and health, a matter where human habits, from Noah's times on, play an important role. And more and more producers and their distributors are asked for and committed to ensure the safety of the wine served to consumers.

There are substantial inherent risks associated with the production, marketing and sale of wine that requires the introduction – both at the public and private level – of proper risk management methodologies and strategies. The goal is to prevent or at least reduce circulation of wine of inadequate quality. That both for safety reason and for minimizing commercial risk, with products not meeting reasonable customers' expectations and resulting in consumers losing confidence and trust in certain labels and products.

It is not unusual for claims to be filed alleging changes in a wine between the initial tasting and delivery of the bottled wine (because of damages occurring during shipment or from improper storage) or regarding the integrity of a wine, microbial spoilage, or sulphites aromas.[11]

Product traceability is of essence for successfully managing the case, and that namely in a global wine business where at least one bottle of wine out of four is a fake.[12]

In fact wine producers risk to be simultaneously exposed to: (i) unfair competition of apparently similar wine makers and brands and (ii) negative consequences and damages that non original products could generate in the wine market and with respect to consumers worldwide.

And in the absence of an appropriate traceability system, hopefully combined with increasing use of blockchain techniques, a wine maker could be exposed to legal actions having as object not only quality complaints, but even health issues.

In 1986 a leading case, in terms of magnitude and serious damages caused to wine consumers, occurred in Italy when adulterated wine with methanol caused the death of 23 people, dozens of cases of blindness, and multiple

11 See V.Loureiro, M.malfeito-ferreira, *Spoilage yeasts in the wine industry*, International Journal of Food Microbiology 86 (2003) 23 – 50.

12 For Italian counterfeit wines see the study made by M.turchini, *Averting counterfeiting in the wine industry: a supply chain-based framework*, Università degli Studi di Firenze, January 2012, for a global evaluation see the study made by E.przyswa, *Counterfeiting in the wines and spirits market*, at http://selinko.com/site/wp-content/uploads/2014/06/Anti-counterfeiting-study-wines-and-spirits-market.pdf.

hospital admissions, inflicting a serious blow to the Italian wines market.[13] Methyl alcohol in small quantities is a natural constituent ingredient of wine, able to minimize the negative effects of poor quality in pressing the grapes, illegally utilized to increase alcoholic content, which was massively used in those days, also due to a national tax increase imposed on a less dangerous ingredient like sugar.[14] Italy learned its lesson, mainly thanks to a strong reaction from serious wine makers against pure wine traders like Messrs. Ciravegna, the wine sellers responsible for that case.

And nowadays, supported by a better legal scheme of rules[15] and even more by an excellent control system, local producers – including global makes investing in Italian vineyards – are in the position of producing excellent and renowned wines, by respecting environment, quality and traditions.

13 See *Italy acting to end the sale of methanol-tainted wine*, by R.SURO, The New York Times, April 9, 1986, Section A,1 available at https://www.nytimes.com/1986/04/09/world/italy-acting-to-end-the-sale-of-methanol-tainted-wine.html.

14 In Italy this method of adulteration was an indirect made consequence of law July 28, 1984 n.408 concerning amendments to the tax regime for alcohol and certain alcoholic beverages in implementation of the judgments of 15 July 1982 and 15 March 1983 issued by the Court of Justice of the European Communities in cases no. 216/81 and n. 319/81. Cost of methanol became, in proportion, ten times lower than ethyl alcohol and some unscrupulous producers and traders took advantage of that and of the deficiencies in the food control system at that time. Methanol became an alternative to sugar in increasing alcholic content and from mid December 1985 to March 1986 an amount of methanol of about 2 and a half tons was used for such a purpose. Following the scandal, Italian government took emergency measures, intended to make the prevention and repression of food sophistication more effective. On April 12, 1986 the Ministry of Health issued ordinance no. 267900 ("*Urgent precautionary measures for the protection of public health aimed at avoiding the risk of release for consumption of wines adulterated with methanol*"), which prohibited the distribution and sale of wines produced by investigated wine makers, whose products were subject to precautionary seizure. Legislative Decree n. 282 was then issued on June 18, 1986 containing "*Urgent measures in the field of prevention and repression of food sophistication*", converted with amendments into Law no. 462 of 7 August 1986, still in force. With that law Italian wine register was established on regional basis, reporting all data related to the activity of each single winemaker and producer of vermouths, flavoured wines and derivatives.

15 In Italy the wine business is currently ruled by Law 238/2016, "*Organic regulation of the cultivation of vines and the production and trade of wine*", published in the Italian Official Gazette no. 302 of December 28, 2016, a consolidated collection of existing laws and regulations, which reviews, updates and rationalizes the whole national legislation in force in the wine sector. The law, known as "*Testo Unico del Vino e della Vite*", apart granting bureaucratic simplification in recollecting previous legislation into 90 articles, introduces various innovations as regards, among other things, production, marketing and control system in the wine sector. By bringing together the national provisions of the wine sector into a single law, it has been supplemented by operational decrees that have been gradually enacted in the following years.

So an unexpected and extremely serious occurrence became a way to completely re-think and re-organize the Italian wine business model, now based on massive investments in quality. In those days a local Chamber of Commerce proposed the introduction of valid prevention and control tools, made part of the denomination of wine controlled origin system.[16] A choice that supported re-launch of the sector, making as of today wine one of the main F&B products exported from Italy all over the world. That by placing Piedmont, the Italian region involved in the scandal, in a leading position with its 16 DOCG wines, namely including Barolo, Barbaresco and Roero, in terms of quality and product appreciation in international markets.

The implied risks were in fact extremely serious because, apart from the occurrence of damages to health, domestic and international consumers could have unjustly considered wines produced in Italy as of modest and unreliable quality. A not negligible commercial risk, if we consider that, as previously mentioned, just over 50 years ago the fourth largest world producer and largest exporter of wine was Algeria, a North African Country that since 1880 had been producing wine as a French colony, and which today has almost completely disappeared from the world wine market, due to inadequate support to its structure since independence from France in 1962 and, even more, because the

16 In Italy the protection of wine denominations of origin had been already introduced since 1963, by means of Presidential Decree no. 930. That law, strengthening the concept of link with the territory of origin, fixed clear and strict rules regarding the production and marketing of wines such as the production specification, specific for each denomination, the establishment of special registers for the registration of production areas and the system for reporting the quantities of grapes produced by assigning a specific denomination. That law established a new system of classification of wines:
- Simple Denomination of Origin (*Denominazione d'Origine semplice*);
- Controlled Designation of Origin (*Denominazione d'Origine Controllata* or D.O.C.);
- Controlled and Guaranteed Denomination of Origin (*Denominazione d'Origine Controllata e Garantita* or D.O.C.G.).

The first Italian DOC wine was Vernaccia di San Gimignano, followed by other grapes, including Brunello di Montalcino, which in 1980 obtained recognition as the first D.O.C.G.

In the early 90s the wine sector felt the need for a modernization of the legislation that had to face both the significant growth of the Designations of Origin themselves and the new needs of the market. In 1992 Law n. 164, based also on the outcome of the methanol case, introduced important innovations in the sector. If on the one hand the general approach, based on the wine-territory relationship, has been maintained, on the other significant innovations were introduced, including:
- valorisation of denominations;
- introduction of Typical Geographical Indications ("Indicazione Geografica Tipica" or I.G.T.);
- mandatory chemical-physical analysis before marketing.

outlet market was mainly the French wine market, where wine makers' lobbies and national regulations,[17] resulting in the French *Statute Viticole,*[18] severely penalized extensive cultivations with medium-low quality, mainly used for composite and table wines. In such regulatory respect France is once more a leader in the worldwide wine market, insofar French producers and their trade organizations had already promoted since 1908 the close correlation among wine quality, production area (the so called *terroir*) and traditional production methods for Bordeaux, Cognac, Armagnac and Champagne, and introduced, with the law of June,6 1919,[19] severe sanctions for improper use of these names by those who had no title,[20] and the rafter, in 1935, had established the *Appellations d'Origine Contrôlées* (AOC).[21]

The inclusion of risk management methods as part of food legislation is a manner for better guaranteeing product safety. And it is part of a process aimed at safeguarding the health of consumers and also their trust in the product, and therefore wine's commercial success.

The aim is to move from food insecurity to a more comfortable system of safety and quality of wine products, derivatives included, and more generally of the entire food production chain and distribution. Wine, as other foods, is also affected by various environmental and macroeconomic factors, namely including soil and air pollution, climate changes and consequent loss of biodiversity. But main food risk – higher than those deriving from microbes and

17 In this respect G.MELONI, J.SWINNEN, *The rise and fall of the World's largest wine exporter and its institutional legacy*, Journal of Wine Economics 3, 9 (1), 2014. See also G.MELONI, J.SWINNEN: *L'histoire se répète: Why the liberalization of the EU vineyard planting rights regime may require another French Revolution.* (*And why the US and French Constitutions may have looked very different without weak planting rights enforcement*), LICOS Discussion Paper n.367, Katholieke Universiteit Leuven, LICOS Centre for Institutions and Economic Performance, Leuven, 2015.

18 JORF, 1931, Article 3.

19 France was the first country that developed the systematic legal protection of geographical indications. Appellation of origin (*Appellation d'Origine*), received a detailed protection under the Law on the Protection of Appellations of Origin of May 6, 1919. Appellation of origin was established as a collective intellectual property right and conferred to the judges jurisdiction on the use of geographical names. As a result, a large number of appellations of origin for wines in France were declared after the law of 1919 had been adopted. The first product other than wine was Roquefort cheese, protected as an appellation of origin since 1925.

20 D.GANGIEE, *The Appellation of Origin in France,* Cambridge University Press, March 2012.

21 In 1935 the Decree of 30 July on controlled appellations of origin for wines established a special category of controlled appellations of origin (AOC) for wines and spirits, and set up an institution to specify production requirements: the National Committee for Wines and Spirits (*Institut National des Appellations d'Origine* – http://www.agriculture.gouv.fr).

contaminants either from natural sources or from chemical contaminants and additives – is represented by the consumers (bad) habits and behaviour, having in pole position poor nutrition caused by economic recession and consequent reduction in purchasing power. Alcohol abuse and drunkenness are additional risks of drinking wine, but differently from many spirits the wine market has been always able to find a different positioning, by becoming, more than a simple food, a status symbol and part of fashion, more close to the luxury goods market. And that is especially valid for top quality wines from EU and the US.

2.3 *Product Liability Rules and Legislation: State of the Art and Future Developments*

In the US the development of case law in product liability matters[22] resulted in a strict liability approach, i.e. a sort of objective liability of the producer, justified by being the latter who can best prevent damage, insofar managing the production phase and knowing better than anybody else its characteristics and potential risks.[23] And the "deeper pocket" better capable of compensating injured consumers remain the wine producers, or their importers and master distributors in the US.

Therefore, with healthy pragmatism, the economic risk of damage compensation claims is shifted to those who are in a position to better monitor, avoid or in any case minimize potential dangers first and damages thereafter. Subjects that, in any event, should be reasonably able to retaliate in turn towards

22 In USA product liability was at first mainly focused on products "*inherently*" or "*imminently dangerous*",,by stating that: "*... sellers of goods have a duty to use reasonable care in the production of those goods. Sellers were held liable to third parties for negligence in the manufacture or sale of goods "inherently dangerous" (the danger of injury arises from the product itself, rather than from a defect in the product) to human safety, ranging from food and beverages to drugs, firearms, and explosives*". In this respect leading case was *MacPherson v. Buick Motor Co.*, 1914 N.Y. App. Div. LEXIS 5051, 161 A.D. 906, 145 N.Y.S. 1132 (N.Y. App. Div. Jan. 21, 1914) as commented by Anita Bernstein, 'The Reciprocal of MacPherson v. Buick Motor Company', (2016) 9(1–2) De Gruyter Journal of Tort Law. Thereafter they moved from the doctrine of products "*inherently dangerous*" to a doctrine of *liability in tort*, based on due care to be applied by producers and distributors when dealing with consumers.

23 A leading case is *Escola v. Coca-Cola Bottling* Co., 24 Cal.2d 453, 150 P.2d 436 (1944). See in this respect: Friedman, Lawrence M., *American Law in the 20th Century* (New Haven: Yale University Press, 2004) 356–357; J.O'CONNELL, et al., *The Rise and Fall* (*and Rise Again?*) *of Accident Law: A Continuing Saga*, Law and Class in America: Trends Since the Cold War, New York: New York University Press, 2006, 349–363, retrieved 12 February 2017; F.J.VANDALL, *A History of Civil Litigation: Political and Economic Perspectives*. Oxford University Press, 27, 2011.

other co-responsible subjects of the supply chain, in the face of existing contractual agreements or of their own weight and economic importance.

These principles have been enshrined and codified in the Uniform Commercial Code, by operating a more appropriate distribution of losses, if a damage occurs.[24]

In this way compensation is paid to the injured party, especially in a system where healthcare is widely privatized, by ensuring the payment of compensatory damages (patrimonial and otherwise, including moral, biological and existential damage).[25] But that is not all, because if this is true in the private sector, under a public policy profile placing on the market of dangerous products is punished in the US through the use of punitive damages, linked not only to the extent of the damage, but also to potential danger and reprehensibility of the conduct.[26]

From the culpable responsibility of the producer, therefore, they moved to a doctrine based on strict liability. The injured party only needs to prove that damage is attributable to a defective product, focusing on the product and not on the use made by the consumer. The producer is responsible just for having

24 Uniform Commercial Code Section 2–102. It is up to the plaintiff to decide who to sue, and in some instances a plaintiff could decide to sue the retailer only and not involve the wine maker, even more if it is a foreign company not necessarily in the position of better indemnifying the injured consumer. However some States recognized that the strict liability concept could unreasonably affect retailers of products they know nothing about. So, if the producer is available and in a better position to defend its own products, they passed laws that modify the strict liability standard for defendants into a product liability lawsuit, which provides some relief to mere resellers. Even though the retailer will almost always have the right to seek indemnification from the manufacturer.

See T.S.LEVINE, *When Product Liability Meets the Uniform Commercial Code,* Wilson Elser, January 2016, available at www.lexology.com.

25 G-RIDIC,S.GLEASON, O.RIDIC, *Comparisons of Health Care Systems in the United States, Germany and Canada,* Mater Sociomed; 24(2), 2012, 112–120.

26 L.L. SCHLUETER-K.R. REDDEN, *Punitive Damages*, New York, 2000, p. 1. See also D.D. ELLIS JR, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Law Rev 1, 1982, p. 3, according to case law at least six objectives have been identified for imposing punitive damages: (1) punishing the wrongdoer; (2) deterringthe wrongdoer and other parties from committing similar offenses; (3) preserving public peace; (4) inducing private law enforcement; (5) compensating victims for an otherwise non compensable loss; and (6) paying the plaintiff's attorneys' fees. In this respect also D.G. OWEN, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev., 1994, pp. 363–383, which describes punitive damages as "…straddling the civil and the criminal law", being a form of "quasi-criminal" penalty" and, for a comparison with European tort law regime, G. GEORGIADES, *Punitive Damages in Europe and the USA: Doctrinal Differences and Practical Convergence*, 58 RHDI, 2005, p. 147, according to which « […] punitive damages serve to punish and deter the tortfeasor».

placed an unsafe product on the market. The consequence is that all operators in the supply chain are held responsible, having all of them the possibility to monitor the quality of the product and, in any case, to transfer the lack of quality to the sale price. All that in an American context where this trend, which had peaks of exacerbation and extremism, was corrected at a certain point in time in an attempt not to penalize too much local industries. That was favoured by peculiar factors, linked to procedural and substantial profiles of access to justice, even if the main driver is not penalize the national industry out of all proportion. As far as wine is concerned, in the recent years a few class actions started having as their target mainly popular, inexpensive brands of wine and alleging that trace amounts of arsenic in some California wines was excessive and potentially hazardous, with levels up to four and five times the maximum amount the Environmental Protection Agency (EPA) allows for drinking water, ten parts per billion.[27]

Moving to the Old Continent, in the European legislation consumers have always been characterized as weak subjects. That not only at economic level and due to their poor negotiation strength, but because, more generally, they are perceived as "disarmed" against sophisticated marketing techniques adopted by producers and less equipped and favoured in accessing justice.

Consumer protection in the EU has been as well gradually increased and legislation became very strict in regard to product liability, albeit to a lesser extent than in the US. And as far as wine is concerned, attention is paid to the entire supply chain, including not only producers and suppliers upstream of the process, but also logistics operators and downstream distributors, who move the goods up to the glass of the final user. The main target remains to avoid placing on the market of unsafe products, by implementing a sort of preventive protection under public law.

27 State and national class action lawsuits filed in California, Florida, Louisiana, and Puerto Rico. Plaintiffs did not allege that any person had been injured from arsenic in wine, but sought to recover the purchase price and other damages, and to force wineries to adopt an extremely low concentration of arsenic in wine by global standards. The Judicial Panel on Multi-District Litigation denied plaintiffs' motion to consolidate the federal cases. The federal plaintiffs then agreed with defendants' suggestion to transfer all cases to New Orleans, and they voluntarily dismissed their cases after defendants filed motions to dismiss. In California, the trial court granted defendants' demurrer and dismissed the case without leave to amend. Plaintiffs then appealed, and the California appellate court unanimously affirmed the dismissal. *In re: California Wine Inorganic Arsenic Levels Products Liability Litigation*, No. 2632 (J.P.M.L.); *Charles v. Wine Group*, No. BC576061 (Super. Cal.); *Washington v. Wine Group*, No. 4:15-cv-00163-RH-CAS (N.D. Fla.); *Marvin v. Wine Group*, No. 3:15-cv-00176-JJB-SCR (M.D. La.); *Bithorn v. Wine Group*, No. 3:15-cv-01424 (D.P.R.); *Lopez v. Wine Group*, Inc., No. 2:15-cv-01131 consolidated with No. 2:15-cv-2890.

In view of ensuring protection to the less informed and weak final buyers,[28] and particularly elderly, low-school and low-income subjects, they impose on the producer the obligation of adequate information to build a genuine[29] consent aimed to a conscious and properly informed purchase. In this context, the most important regulatory references are represented by Regulation (EC) n.178/2002,[30]which

28 The weak consumer safeguarded by EU legislation is frequently corresponding to the "ghetto consumer" as described by marketing literature, starting from A.R.ANDREASEN, *The Ghetto Marketing Life Cycle: A Case of Underachievement,* Journal of Marketing Research, Vol. 15, No. 1, Sage Publications, Inc. on behalf of American Marketing Association, p.20–28, February 1978. See also O.M.CALLIANO, *Some Preludes for a Critical Study on lentos and prestos of Private and Comparative Law in the concerto of European Integration Process*. The Case of European Consumer law, in Comparative Law Review n.2, 1–27, 2010.

29 European Commission, Product safety rules at https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/product-safety-rules_en.

30 REGULATION (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety – Official Journal L 031, 01/02/2002 P. 0001 – 0024.

Amended by:

- Regulation (EC) No 1642/2003 (OJ L245, p4, 29/09/2003) of 22 July 2003
- Commission Regulation (EC) No 575/2006 (OJ L100, p3, 08/04/2006) of 7 April 2006 as regards the number and names of the permanent Scientific Panels of the European Food Safety Authority
- Commission Regulation (EC) No 202/2008 (OJ L60, p17, 05/03/2008) of 4 March 2008 as regards the number and names of the Scientific Panels of the European Food Safety Authority
- Regulation (EC) No 596/2009 (OJ L188, p14, 18/07/2009) of 18 June 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny – Adaptation to the regulatory procedure with scrutiny – Part Four
- Regulation (EU) No 652/2014 (OJ L189, p1, 27/06/2014) of the European Parliament and of the Council of 15 May 2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material, amending Council Directives 98/56/EC, 2000/29/EC and 2008/90/EC, Regulations (EC) No 178/2002, (EC) No 882/2004 and (EC) No 396/2005 of the European Parliament and of the Council, Directive 2009/128/EC of the European Parliament and of the Council and Regulation (EC) No 1107/2009 of the European Parliament and of the Council and repealing Council Decisions 66/399/EEC, 76/894/EEC and 2009/470/EC;
- Commission Regulation (EU) 2017/228 (OJ L35, p10, 10/02/2017) of 9 February 2017 amending Regulation (EC) No 178/2002 as regards the names and the areas of competence of the scientific panels of the European Food Safety Authority
- Regulation (EU) 2017/745 (OJ L117, p1, 05/05/2017) of the European parliament and of the council of 5 April 2017 on medical devices, amending Directive 2001/83/EC,

specifically regulates the food sector, introducing risk management as a reference tool, and on Regulation (EC) 1924/2006,[31] relating to the nutrition and health claims made on food and the communication of risk to the consumer, by so defining general food safety principles and food safety procedures.

Once Regulation (EC) n.178/2002 was in place, with the aim of harmonized procedures in the member states and regulating provisions that extra-EU countries have to fulfil for having their F&B products entering EU markets, the European Food Safety Authority (EFSA) was set up, by starting its activities in 2003 and focusing on risk assessment and scientific advice on food safety matters. These regulations provide common principles of food legislation and establishment of a food safety policy. Moreover Regulation 882/2004/EC[32] gives rules for the official control on the import of products from third countries.

Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC

- Regulation (EU) 2019/1243 (OJ L198, p241, 25/07/2019) of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union.
- Consolidated Version of Regulation (EC) No 178/2002 (as at 26 July 2019)
- Regulation (EU) 2019/1381 (OJ L231, p1, 06.09.2019) of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain and amending Regulations (EC) No 178/2002, (EC) No 1829/2003, (EC) No 1831/2003, (EC) No 2065/2003, (EC) No 1935/2004, (EC) No 1331/2008, (EC) No 1107/2009, (EU) 2015/2283 and Directive 2001/18/EC.

Implemented by:

- Commission Regulation (EC) No 2230/2004 (OJ L379, p64, 24/12/2004) of 23 December 2004 laying down detailed rules for the implementation of European Parliament and Council Regulation (EC) No 178/2002 with regard to the network of organisations operating in the fields within the European Food Safety Authority's mission.
- Commission Implementing Regulation (EU) No 931/2011 (OJ L 242, p2, 20/09/2011) of 19 September 2011 on the traceability requirements set by Regulation (EC) No 178/2002 of the European Parliament and of the Council for food of animal origin.
- Commission Implementing Decision (EU) 2019/300 of 19 February 2019 establishing a general plan for crisis management in the field of the safety of food and feed OJ L 50, 21.2.2019, p. 55–65.

Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0178.

31 REGULATION (EC) No 1924/2006 of the European Parliament and the Council of 20 December 2006 on nutrition and health claims made on foods, at https://eur-lex.europa.eu/legal- content/EN/TXT/HTML/?uri=CELEX:32006R1924&from=EN.

32 Regulation (EC) No. 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0882.

Breaches of food law provisions may constitute a threat to human health and are therefore subject to effective, dissuasive and proportionate measures at national level.

As more and more consumers shop online, and wine is not an exception, on 1st August 2017 the Commission issued a Notice on the market surveillance of products sold online to help public authorities with their work. The ultimate goal is to improve the detection of unsafe products marketed in the EU before they are sold to consumers or as soon thereafter as possible, and to improve consumer protection. The competent authorities shall take necessary measures to limit or prevent the placing on the market or request the withdrawal or recall from the market of the product, and even despite compliance, if it is nevertheless proven to be dangerous to the health and safety of the consumer, there are applicable criminal penalties.[33] The product safety legislation has the preventive function of ensuring that the products placed on the market are safe and is inspired by the fundamental principle, whereby each product, whatever the intended use, must be able to be used in safe conditions. For safety they mean not only the actual suitability for the use for which that product was conceived, but also the safety that the general public can legitimately expect. For this reason, the manufacturer is obliged to provide the consumer with any information useful for assessing and preventing the dangers deriving from the normal or reasonably foreseeable use of the product, if they are not immediately perceptible without adequate warnings, and to prevent these risks, as well as to take measures adequate to identify the dangers associated with its use (marking, sampling, examination of complaints, distributors' information). To this end, producers are asked to collaborate with the national authorities and ensure traceability of the product.[34]

Since this is a publicity regulation, it provides for the intervention of public authorities both for checks and for the implementation of measures aimed at recalling or withdrawing dangerous products as they are not safe; it is residual in nature and applies where there are no specific legal requirements for particular categories of products. In fact, producer's responsibility is increased in

33 Guidance on the Implementation of Articles 11, 12, 14, 17, 18, 19 AND 20 of Regulation (EC) N° 178/2002 on General Food Law Conclusions of the Standing Committee on the Food Chain at https://ec.europa.eu/food/sites/food/files/safety/docs/gfl_req_guidance_rev_8_en.pdf.

34 Traceability in Food and Agricultural Products, International Trade Center, Bulletin 91/2015 at www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting_Better/Quality_Management/Redesign/EQM%20Bulletin%2091-2015_Traceability_FINAL%2014Oct15_web.pdf.

product sectors, like F&B, requiring higher standards in relation to the potential dangerousness of the products, also taking due account of the nature of consumers. Minimum standards are introduced to guarantee equal protection and treatment to all consumers in the EU, as well as in the food sector, where the producer's responsibility is permeated by natural and external factors. Consequently in EU legislation (art.7 of Regulation 178/2002[35]) and at national level they have been introduced the precautionary principle and that of agri-food traceability, meaning the possibility of reconstructing and following the path of a food through all stages of production, transformation and of distribution. The EU Regulation in fact imposes on every operator of the sector the obligation to follow and demonstrate, if necessary, the progress of each food and each raw material that constitutes it to ensure full visibility of the entire supply chain and, when necessary, to identify and recollect risky items from the market, allowing to trace causes and stem the danger of spreading damages.

The so-called precautionary principle operates in this respect, which principle finds application not only when the potentially dangerous effects of a phenomenon, a product or a process have been identified through a scientific and objective evaluation, but also when this evaluation does not allow to determine the risk with sufficient certainty (so-called "potential risk"). That with the aim of ensuring a higher level of protection. Therefore, if there is the possibility that a food may produce harmful effects on health, the precautionary principle may be applied, in order to intervene quickly by adopting all the necessary, risk-appropriate measures to be reviewed within a reasonable time.

The issue therefore falls within the scope of risk corresponding to the decision-making process and in this regard the European Commission underlines

35 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety – Article 7 – *Precautionary principle*, by fixing the following basic criteria:

1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified, but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.
2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.

how this principle can be invoked only in the hypothesis of potential risk and can never justify arbitrary decision-making.[36]

The food risk is represented by the more or less high probability that a danger, or an event harmful to human health, identified together with the harmful agent that had generated it, occurs with greater or lesser severity. It could be natural contamination (for example from bacterial origin), or from anthropic sources, such as the improper use of chemicals and pesticides, or presence of foreign physical bodies in the product released for consumption.

In particular, the producer is asked to carry out the most complete possible evaluation of the technical-scientific data available and the potential consequences of absence of action and verify the existence and extent of the scientific uncertainty that emerges from the analysis.

The risk management authorities assess whether to act or not to act on the basis of the level of risk detected, and in this regard the traditional general principles of risk management remain applicable, namely:

- examination of advantages and charges resulting from the action or absence of action;
- consistency of the measures adopted with those already taken in similar situations;
- non-discrimination in the application of the measures;

36 The precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union. It aims at ensuring a higher level of environmental protection through preventative decision taking in the case of risk. However the scope of this principle is far wider and also covers consumer policy, EU legislation concerning food and human, animal and plant health. The definition of the principle shall also have a positive impact at international level, so as to ensure an appropriate level of environmental and health protection in international negotiations.

According to the European Commission the precautionary principle may be invoked when a phenomenon, product or process may have a dangerous effect, identified by a scientific and objective evaluation, if this evaluation does not allow the risk to be determined with sufficient certainty. Recourse to the principle belongs in the general framework of risk analysis (which, besides risk evaluation, includes risk management and risk communication), and more particularly in the context of risk management, which corresponds to the decision-making phase.

The European Commission stresses that the precautionary principle may only be invoked in the event of a potential risk (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al32042) and that it can never justify arbitrary decisions. The precautionary principle may only be invoked when the three preliminary conditions are met:

- identification of potentially adverse effects;
- evaluation of the scientific data available;
- extent of scientific uncertainty.

- proportionality between the measures taken and the level of protection sought;
- review of the adopted measures on the basis of the scientific evolution that has taken place.[37]

Risk analysis is a principle already introduced, at international level, in the Codex Alimentarius launched by the mixed commission composed of over 180 representatives belonging to FAO and WHO to standardize, collect in a single text and dictate guidelines to the Member States, to protect and provide a reconciliation of the main interests at stake, namely the health of consumers and the freedom of commercial traffic, but in compliance with fairness rules, for the benefit of international trade. In this context, food safety is of primary interest, which led to consider all the profiles of the food chain, from plantation and primary production to sale of F&B products to the final consumer as a single process, consistently with the "Farm to Fork" Strategy (FFS) adopted by the European Union and supported by an investment of 10 billion Euro, where safety is a direct responsibility of the wine maker. The latter has to guarantee what has been properly cultivated, processed and marketed, to protect any consumer, wherever allocated. In addition to the withdrawal, if the product had already been sold to the consumer, the producer must inform consumers about the products at risk, also by means of signs to be affixed in its stores, and publish the recall in the specific area of the portal of the Ministry of Health of the involved Member State.

In addition to food recalls, revocations of subsequent recalls to favorable analysis results, due dates or for other reasons are also published online. Only the references and revocations published on the portal of the Ministry of Health are authentic and fulfil the obligations of information to consumers. Any manipulations or fakes disseminated online must be reported to the judicial authority (think of the recent fake news that in Italy alleged the presence of arsenic within a well-known brand of tomato sauce, by altering a prior communication used for this purpose by the competent Ministry).[38]

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37 VASCO BARROSO GONÇALVES, *The precautionary principle and environmental risk management: contributions and limitations of economic models,* Ambiente & Sociedade,vol.16 no.4 São Paulo Oct./Dec. 2013.

38 Fake news stating that the Italian Ministry of Health had asked Italian tomato sauce maker Mutti to recall its "Passata" due to asserted arsenic contamination, On November15, 2017 Italian Ministry of Health issued a press release http://www.salute.gov.it/portale/news/p3241istampa.jsp?id=4971 to "deny the legitimacy of the documents published on the Web". The Italian Fraud Police published on its website an announcement confirming the fake news http://www.commissariatodips.it/notizie/articolo/attenzionebufala-sul-web-falso-richiamo-passata-mutti.html A defamation complaint was placed to Italian Fraud Police for the unnecessary alarm so raised, representing criminal offence.

The General Food Law Regulation sets out certain procedures relating to food safety. In particular, it provides for the establishment of the Rapid Alert System for Food and Feed (RASFF), the adoption of emergency measures, and, whenever required, the establishment of a general plan for crisis management. The primary focus of the Union is on maintaining a high level of safety and ensuring quick responses to any threats that could arise. RASFF enables information to be shared efficiently between its members (EU-26 national food safety authorities, Commission, EFSA, ESA, United Kingdom, Norway, Liechtenstein, Iceland and Switzerland). RASFF members have to notify the RASFF if they take such measures as withdrawing or recalling food or feed products from the market in order to protect consumers' health and if rapid action is required.

Non-compliance with the legislation would result just in a potential risk that can justify withdrawal from the market, with a significant extension of the precautionary principle, and applicable penalties to be fixed by each single State, which will have to be apportioned to the size of the operators. Defective products can cause damage to the consumer, in severe cases even personal injury or death. In this regard, EU legislation has taken steps to approximate existing laws of the various Member States relating to product liability, in order to guarantee a high level of protection of the consumer from the damage caused to the person and property by a defective product and simultaneously reduce the divergence between national liability laws that distort competition and limit the free movement of products. The awareness that the rules on contractual liability alone are not enough in ruling responsibility of the producer/distributor who placed the product on the market, neither from a subjective nor from an objective point of view, should the chain of suppliers called under warranty is interrupted.

This concerns a private profile, where under EU legislation the primary point of reference for products other than food remains Directive 85/374/EEC,[39] which applies to movable property and objects of industrial production, whether or not incorporated into another asset or property. Directive 1999/34/EC,[40] implemented in Italy with Legislative Decree no. 25 of February 2, 1999, mainly aimed to face the so-called "Mad cow" disease

39 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning general liability for defective products, at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31985L0374.

40 Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Official Journal L 141, 04/06/1999 p. 0020 – 0021, at https://eur-lex.europa.eu/eli/dir/1999/34/oj.

(Bovine Spongiform Encephalopathy or BSE), then partially integrated the previous Directive 85/374/EEC (which in the food sector was applied only for processed food) to agricultural raw materials (meats, cereals, vegetables and fruit) and to hunting products.[41] As a consequence of this legislation the producer or importer is required to pay compensation for damages where a causal link between the defect and the damage suffered occurs, without the injured party having to prove the negligence of the manufacturer or importer.[42]

As commerce becomes more and more globalized, there is clearly a need to harmonize the laws dealing with products liability across nations, namely in respect of F&B products.

Europe has up to know escaped an American style litigation explosion by erecting barriers to excessive litigation. Such barriers include:

- Absence of contingent fees
- Loser in legal cases pays for winner's attorney fees
- Discouragement of massive discovery filings
- Lower damage judgments
- Absence of punitive damages
- Non-use of juries in civil cases
- Lower expectations of compensation for possible damages.[43]

The European Directive contributes to raising the level of consumer protection by encouraging producers and importers to strictly comply with the applicable safeguard rules and measures and to adopt a responsible attitude towards product safety, including agricultural raw materials.[44] This makes it possible to

41 M.FERRARI, *Risk Perception, Culture and Legal Change: A Comparative Study on Food Safety in the Wake of the Mad Cow Crisis*, Farnham: Ashgate Publishing Limited, 2009. See also A.W.BARENDSZ, *Food safety and Total Quality Management*, 9 (2–3) Food Control 163–170, 1998.

42 COMMISSION STAFF WORKING DOCUMENT *Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products* Accompanying the document: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC) Brussels, 7.5.2018, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018SC0157.

43 S.B. PRESSER, *How should the Law of Products Liability be Harmonized? What Americans Can Learn from Europeans,* CENTER FOR LEGAL POLICY AT THE MANHATTAN INSTITUTE, Global Liability Issues Vol. 2, February 2002.

44 L. SALGUEIRO,A.P. MARTINS, H.CORREIA, *Raw materials: the importance of quality and safety. A review*. Published online in Wiley Online Library: 26 January 2010, at https://onlinelibrary.wiley.com/doi/pdf/10.1002/ffj.1973. See also A.ARANDA, S.SCARPELLINI, I.ZABALZ,

eliminate the risks of competition dispersion in the single market deriving from the differences between legal systems and relevant applicable liability regimes. Compared to the product safety legislation, there is a common non-contractual safety obligation at the basis, but aimed at protecting all subjects that could be potentially affected by the products introduced into a given market. Furthermore, the fact that a safer product has been subsequently introduced into the market is not normally relevant, provided that such an issue in wine market mainly attains bottles and packaging, corks and other bottle stoppers mainly included.

A wine exporter is reasonably expected to build up an appropriate and effective internal governance system, aimed to safeguard product quality, in coordination with public control systems in place both in the Country of Origin and in the Country of Destination, taking into account related costs and benefits.[45]

2.4 *Commercial Risks and Transaction Costs*

The value of wine is greatly influenced by quality issues, and particularly by the preservation of quality during storage, when wine is highly sensitive to variables such as temperature and humidity, that could alter the quality. This is a critical concern for wineries and distributors which have to manage risk under storage facilities for maintaining wine quality and preventing the depreciation in value. For monitoring real-time storage conditions of wine and for planning an immediate strategy for handling unpredicted events, investments in technology are required to keep under control the goods in transport and minimize related risks. Another peculiar kind of risk concerns the market relationships between different enterprises and transaction costs. That starting from the procurement of required quality grapes, if and to the extent that cultivated vineyards directly owned by a wine maker are not enough, and where perishability of grapes – both physiological as consequential to a plant disease or due to climatic events – could make uncertain, difficult and costly the procurement of desired quality grapes. Facing similar risks impose strategies of vertical integration, starting from the adoption of detailed written contracts, even today not so common in a business world which remains mainly linked to its agricultural

Economic and environmental analysis of the wine bottle production in Spain by means of life cycle assessment. Int J Agric Resour Gov Ecol,178–191, 2005; B.NOTARNICOLA, GTASSIELLI, M.NICOLETT., *Life cycle assessment (LCA) of wine production. In: Mattson B, Sonesson U (eds) Environmentally friendly food processing*, Woodhead, Cambridge, pp 306–326, 2003.

45 R.N.GWYNNE *Governance and the wine commodity chain: Upstream and downstream strategies in New Zealand and Chilean wine firms* Asia Pacific Viewpoint, Vol. 47, No. 3, December 2006, pp381–395. See also J-P.COUDERC, A.MARCHINI, *Governance, commercial strategies and performances of wine cooperatives: An analysis of Italian and French wine producing regions*, International Journal of Wine Business Research, August 2011.

roots and based more on oral understandings and handshakes.[46] And to introduce and constantly adopt a contractual strategy is the first resource to adequately face marketing and provision risks in the wine industry. Thereafter, if quality is difficult to be evaluated and the winemaker needs to check also production practices, a complete and genuine direct vertical integration could be necessary, which leads to consecutive stages in the supply chain.

3 Risk Management and Wine

Risk analysis is a principle introduced at international level in the *Codex Alimentarius*, which represents an international point of reference that reconciles and protects the two main public interests at stake: the health of consumers and the freedom of commercial traffic of goods, in compliance with the rules of fairness and for the benefit of international trade.[47]

In this context food safety is of primary interest and implies a deep reconsideration of any and all the profiles of the related supply chain, from plantation and primary production to bottling, storage, marketing and sale, as components of a single process. A process in which safety is a direct responsibility

46 M.f.OLMOS, J.ROSELL-MARTINEZ, M.ESPITIA-ESCUER, *Vertical Integration in the Wine Industry: A Transaction Costs Analysis on the Rioja DOC*. Agribusiness. 25, 2009, 231–250. See also S.K.NEWTON, A.GILINSKY JR., D.JORDAN *Differentiation strategies and winery financial performance: An empirical investigation,* Wine Economics and Policy, Volume 4, Issue 2, December 2015, Pages 88–97.

47 A.M.THOW, A.JONES,C.HUCKEL SCHNEIDER,a.LABONTÉ, *Global Governance of Front-of-Pack Nutrition Labelling: A Qualitative Analysis* at https://www.mdpi.com/2072–6643/11/2/268/htm. See also D.E.WINICKOFF, D.E.; D.M. BUSHEY, *Science and Power in Global Food Regulation: The Rise of the Codex Alimentarius*. Sci. Technol. Hum. Values 2010, 35, 356–381; A.TRITSCHER, K.MIYAGISHIMA, C.NISHIDA, F.BRANCA, *Ensuring food safety and nutrition security to protect consumer health: 50 years of the Codex Alimentarius Commission*. Bull. World Health Organ. 2013, 91, 468; C.DOWNES, *Is Codex Alimentarius All Talk? The Importance of Standards in Transnational Food Governance In The Impact of WTO SPS Law on EU Food Regulations*; Springer: Berlin, Germany, 2014; pp. 205–243; F.VEGGELAND, S.O.BORGEN, *Negotiating International Food Standards*: The World Trade Organization's Impact on the Codex Alimentarius Commission. Governance 2005, 18, 675–708; A.COSBEY, *A Forced Evolution? The Codex Alimentarius Commission, Scientific Uncertainty and the Precautionary Principle*; International Institute for Sustainable Development: Winnipeg, MB, Canada, 2000; F.FONTANELLI, *ISO and Codex Standards and International Trade Law: What Gets Said Is Not What's Heard*.Int. Comp. Law Q. 2011, 60, 895–932; Luan Xinjie and Julien Chaisse 'The WTO Seals Products Dispute (*Canada vs. European Union*) – Traditional Hunting, Public Morals and Technical Barriers to Trade' (2011) 22(1) *Colorado Journal of International Environmental Law and Policy* 79–121.

of the wine makers, compelled to guarantee the entire chain from the vineyard to the final consumer, wherever located.

At the level of the EU, the principles of risk management – with a risk analysis divided into three phases: 1) risk assessment; 2) risk management and 3) risk communication – made their appearance among the general principles of EU food law starting from Regulation (EC) no. 178/2002 of 28 January 2002, both in article 5[48] and in the recitals that introduce the fundamental reasons for the legislation,[49] and namely:

1) risk, to be evaluated in function of the probability and severity of an adverse effect on health, implying notification of the presence of a hazard;
2) danger, meaning any biological agent, chemical or physical content, capable of effecting a harmful effect on health, where connection with relevant risk is depending from duration and characteristics of the exposure, and
3) risk analysis, intended as a systematic methodology for adopting restrictions or others effective measures, proportionate and targeted to guarantee human health protection and aimed, among other things,

48 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety – *Art.5 General objectives:* "1. Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment. 2. Food law shall aim to achieve the free movement in the Community of food and feed manufactured or marketed according to the general principles and requirements in this Chapter. 3. Where international standards exist or their completion is imminent, they shall be taken into consideration in the development or adaptation of food law, except where such standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives of food law or where there is a scientific justification, or where they would result in a different level of protection from the one determined as appropriate in the Community".

49 Regulation (EC) No 178/2002 – *Recital 16* – "Measures adopted by the Member States and the Community governing food and feed should generally be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure. Recourse to a risk analysis prior to the adoption of such measures should facilitate the avoidance of unjustified barriers to the free movement of foodstuffs".

Recital 17 – "Where food law is aimed at the reduction, elimination or avoidance of a risk to health, the three interconnected components of risk analysis – risk assessment, risk management, and risk communication – provide a systematic methodology for the determination of effective, proportionate and targeted measures or other actions to protect health".

at facilitating the prevention of unjustified obstacles to free movement of food;

4) risk-benefit analysis, intended as a method for weighing up possible risks (in terms of the incidence and severity) associated with exposure to a substance versus potential benefits.[50]

The risk in the wine sector – like in other F&B businesses – is represented by the probability that a danger or any other event harmful for human health may occur, which risk is usually identified together with the harmful agent that caused it; for instance it could be represented by natural contamination from bacterial origin or from an anthropic source, like abuse of chemical substances on the branches or the bunches, or the presence of foreign substances in the winemaking process.

The risk assessment phase is conventionally divided into four phases, and namely:

(i) identification of the hazard (like, for instance, the presence of pathogens);

(ii) characterization of the danger, in terms of the degree of presence of the danger in the product, its characteristics and the possible solution/prophylaxis to reduce risk and risk exposure;

(iii) assessment of the exposure to the hazard, in terms of duration of ingestion, quantitative measurement of what is ingested, concentration of the biological, chemical and/or physical elements present and pathogenic or toxicological power of the agent, number of subjects involved, as well as level of sensitivity and vulnerability of some of these subjects, for example in the case of allergies or intolerances, given that the essential route of exposure is digestion, and

(iv) risk characterization, quantitatively estimating its nature and magnitude, having at least a significant cluster of consumers as a reference and being able to distinguish normal effects deriving from excessive consumption, such as intoxication for alcoholic beverages, from those having pathological nature, to be borne not only by the exposed subjects, but also by subsequent generations.[51,52]

In the EU the European Food Safety Agency (EFSA) is required to evaluate, based on the state of the art in the related scientific field, if and which kind of risks can result from the intake of a food, wine included.[53] And this is also

50 See EFSA Glossary at https://www.efsa.europa.eu/en/glossary-taxonomy-terms.

51 FAO/WHO – Qualitative risk characterization in risk assessment – Chapter 3 *Qualitative risk characterization in risk assessment* at http://www.fao.org/3/i1134e/i1134e03.pdf.

52 R.SIVAN, *Risk Management*, October 1st, 2015 at https://remiyasivan.wordpress.com/2015/10/01/risk-management//.

53 THE EUROPEAN FOOD RISK ASSESSMENT FELLOWSHIP PROGRAMME SERIES 1 2017–2018, Luxembourg: Publications Office of the European Union, 2018.

in the event that, without prejudice to the presence of an adequate scientific basis, the risk may also be merely potential, as repeatedly clarified by EU jurisprudence. The risk assessment allows to define and circumscribe to the maximum possible extent the expected and reasonably foreseeable impact that the potential risk may have on health, taking due account of:

(i) geographical extent of the risk;
(ii) prospected financial consequences;
(iii) expected social consequences, based on the number of exposed subjects,[54]

and must lead to identify both the scientific information required and the required and effective risk management strategy and systems to be adopted to prevent or at least minimize the harmful effects of the risk, in the event that occur.[55]

The results of the scientific evaluation represent the scientific basis for the formulation and revision of the rules on food safety, as well as for the consequent monitoring and control activities. Once the required information have been collected, the risk assessment phase is followed by an appropriate risk management phase where most appropriate measures are taken, both for prevention and risk monitoring, as well as for possible interventions. That means to move from a purely technical evaluation phase to an operational and decision-making activity, where administrative bodies of each Member State are asked to intervene directly or by involving, when conditions exist, the EU Commission in order to identify and adopt the most appropriate measures to avoid health risks, safeguarding the autonomy of scientific assessments, on which the risk estimate is based, compared to often opportunistic assessments of a purely political nature.[56] Autonomy is necessary in the light of the lessons learned at the time of BSE, the so-called "mad cow" disease, when having put political considerations ahead of scientific evaluations proved to be an imprudent choice, that seriously jeopardized the health of European consumers.

The two phases of risk assessment and risk management are strongly interrelated. Therefore the EFSA, the European Commission and the governments of the EU Member States, and their bodies and administrative authorities, must establish a continuous and fruitful dialogue in this respect, to make the

54 *Emerging Risks in the 21st Century – An Agenda for Action* OECD, 2003.

55 T.AVEN, *Risk assessment and risk management: Review of recent advances on their foundation,* European Journal of Operational Research Volume 253, Issue 1, 16 August 2016, Pages 1–13.

56 M.C.PACIELLO, *Building Sustainable Agriculture for Food Security in the Euro-Mediterranean Area: Challenges and Policy Options,* Edizioni Nuova Cultura, 2014.

best use possible of the information acquired during the assessment.[57] This internal exchange of information opens up to the third phase of the process, the risk communication, which in the European Union is the responsibility of each individual Member State, especially when the nature of the danger is such as to legitimize the use of the Rapid Alert System for Food and Feed (RASFF), with information that should be addressed, also pursuant to Regulation (EC) 1924/2006,[58] to the so-called "*average consumer*".[59]

The components of the risk analysis are closely interconnected each other, representing a structured methodology and an ongoing activity, aimed at identifying and defining who, what and how to protect against even potential risk. This methodology requires prompt and systematic application, multidisciplinary evaluation of options and related costs/benefits and the definition of a priority scale. And requires upstream prevention activities and, even more, education of both the wine producer (and other operators of the distribution chain) on the one hand and the consumer on the other hand, to ensure the well-being of the individual. Also, being fully aware that the assessment of food risks, including wine, has repercussions not only on health, but also on social and economic profiles. In fact, the same Regulation (EC) 178/2000 expressly mentions how risk assessment activities are also aimed at strengthening consumer confidence both in the product and in the producer, in the institutions and in the country-system. Among risk assessments, an important role belongs to the environmental risk assessment (VRA), asked to estimate possible repercussions on the environment and on the product deriving, for example, from the use of certain ingredients in plant protection products.[60] It also involves assessing the health risks of the consumer deriving from chemical contaminants and microbiological hazards present in the environment, in the air, in water and in the soil, which can contaminate the food chain. Climate change and environmental degradation introduce mutability in potential danger of food contaminants; finally, natural, physical and/or chemical contaminants can

57 EFSA Strategy 2020, Trusted science for safe food – Protecting consumers' health with independent scientific advice on the food chain, at https://www.efsa.europa.eu/sites/default/files/corporate_publications/files/strategy2020.pdf.

58 Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1924&from=EN.

59 M.SAARELA, *Functional Foods: Concept to Product,* Woodhead Publishing Serries in Food Science, Technology and Nutrition n.205, Cambridge, 110, 2011.

60 Guidance on tiered risk assessment for plant protection products for aquatic organisms in edge-of-field surface waters, Scientific Opinion, EFSA Panel on Plant Protection Products and their Residues (PPR), European Food Safety Authority (EFSA), Parma, Italy, EFSA Journal 11, 2013 at https://www.minambiente.it/sites/default/files/archivio/allegati/vari/EFSA_Guidance_on_tiered_risk_assessment.pdf.

be introduced unintentionally in the cultivation, production, processing and transport phases. As far as voluntary contamination attributable to boycotts, ruthless competitors and bioterrorism are concerned, safety task force have been established in USA and UE to protect food supply from potential threats, wine included. Wine in all events is considered a low-risk target for bioterrorism because fermentation process and alcohol content could kill most bacterial contaminants. In USA the Bureau of Alcohol, Tobacco and Firearms ("ATF") is cooperating with FDA and routinely purchases wines at retail for lab testing.

A definition of a contaminant is given by the *Codex Alimentarius,*[61] meaning any substance not intentionally added, but present in the food as a result of the production, packaging, transport or conservation process or following environmental contamination. Foreign matters, like fragments of insects, animal hair, cork, metals or glass, are not included in this definition.

Contaminants are divided into natural contaminants (toxins, bacteria and microorganisms in general, developed in the winemaking and aging process) and contaminants from anthropogenic sources,[62] for wine in particular from:-

(i) use of agricultural chemicals;
(ii) environmental air and water pollutants;
(iii) contaminants from containers used both for winemaking and aging and for bottling.

The globalization of markets has also spread food products to consumers who are not necessarily educated and aware, especially in the face of a specific product such as wine, where the expected and perceived quality has a high threshold that requires not only mere food safety, which is the basic and minimal threshold required, but real food security.[63]

61 See Codex Alimentarius, international Food Standards at http://www.fao.org/fao-who-codexalimentarius/thematic-areas/contaminants/en. For contaminants in wine also G-TRIOLI, *Microbial contamination in wine*, Extract from Technical Notes of Code of Best Practice for Organic Winemaking, produced under the EU FP6 STREP project ORWINE, INTERNET JOURNAL OF ENOLOGY AND VITICULTURE, N.3/2 2010 at www.infowine.com.

62 S.RHIND, *Anthropogenic pollutants: A threat to ecosystem sustainability?* Philosophical transactions of the Royal Society of London. Series B, Biological sciences. 2009, 364.

63 Food security and food; are both public health issues, both aimed to protect and promote health.

Food security includes food safety and means that all people at all times have physical and economic access to adequate amounts of nutritious, safe, and culturally appropriate foods, produced in an environmentally sustainable and socially just manner, and that people are able to make informed decisions about their food choices.

Foods Security is a universal concern, where food access is closely linked to food supply, so food security is dependent on a healthy and sustainable food system. Namely including production, processing, distribution, marketing and consumption. Looking to the producer's food security means that the they have to be able to earn a decent, living wage

Furthermore, the increasingly high selection of qualified wine makers led not only to develop rigorous national and federal advertising regulations in the sector, but also to consolidate a sort of private food law, made up of strict self-regulation codes and stringent contractual rules that bind together both subjects belonging to the production consortia and the various actors part of wine production and distribution chain on a global scale, also in relation to the characteristics of appropriate bottling, aging and conservation of the product that could affect not only taste, but also organoleptic characteristics of wine, which is and remains a "live" and extremely sensitive product.

Codex *Alimentarius* recommended the adoption of a very specific methodology, known as "*Hygiene and Hazard Analysis of Critical Control Point*" (HACCP),[64] which made it possible, through establishment of common standards, to gradually harmonize the food regulations of the various countries.

As there are many agents and substances potentially harmful to human health present in cultivation and wine production, often of natural origin such as fungi and bacteria, which can be associated with chemicals used in cultivation, such as pesticides, it is necessary to fix maximum permitted thresholds for these contaminants so that they are not harmful to health, and not in an abstract manner, but making reference to the environment in which these substances act, often with sudden mutations. In this context, the risk analysis is divided into:

1. Analysis of dangerous substances, which are identified and measured, to determine if the risk threshold is not exceeded;
2. Determination of procedures aimed at evaluating along the supply chain both parameters and levels of said contaminants, in order to prevent risks, and correctness of the procedure adopted;
3. Acquisition of timely documentation of all the activities carried out and the results achieved;
4. Identification of corrective actions, if any to be put in place;

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growing, catching, producing, processing, transporting, retailing and serving food. See S.FLORES *What is sustainability in the wine world? A cross-country analysis of wine sustainability frameworks.* Journal of Cleaner Production. (2017).172; G.BENEDETTO, B.RUGANI, I.VÁZQUEZ-ROWE *Rebound effects due to economic choices when assessing the environmental sustainability of wine*, Food Policy. 49 and, more generally, P.FERRANTI, E.BERRY J.ANDERSON, *Encyclopedia of Food Security and Sustainability*, Elsevier, November 2018, p.103–104; S.CROSSLEY, Y.MOTARJEMI, *Food safety management tools*, ILSI Europe (International Life Sciences Institute), 2011.

64 *HAZARD ANALYSIS AND CRITICAL CONTROL POINT* (*HA*(2014). *CCP*) *SYSTEM AND GUIDELINES FOR ITS APPLICATION* – Annex to CAC/RCP 1-1969, Rev. 3 (1997) at http://www.fao.org/3/Y1579E/y1579e03.htm .

5. Implementation of a process of constant traceability of products and individual batches, if feasible by recurring to block-chain techniques and methods.[65]

These activities, initially performed by public bodies to safeguard health, are increasingly intertwined with private control actions carried out by the wine makers themselves, either directly or through their quality protection consortia aimed at guaranteeing the quality of their products, the correctness of procedures and methods followed throughout the production and distribution chain and, more generally, to ensure a continuous improvement of both the quality of the products and the specifications called to regulate their production; also for fighting counterfeits and sophisticated techniques implemented by third parties who want to imitate the products.

Particular attention is then paid to types of "special consumers", who could be exposed to food risks, due to their own specific allergies and intolerances, namely when a product is part of innovative processing stages, or when particular materials and techniques are used for bottling and conservation. All that in a context in which food law has a public nature and is made up of standards, specifications, controls, sanctions and possible recall campaigns, and it's strongly corroborated by a supranational law that tends to harmonize, like it happens in the EU scenario the various national, federal and community laws. Private virtuous conducts of winemakers are offering valid support, by providing for further checks and tests by private and voluntary accreditation bodies, which sanctions the lack of quality with the loss of the certifications necessary to access the most economically relevant markets.[66]

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65 Tracing food and feed throughout the food chain is very important for the protection of consumers, particularly when food and feed are found to be faulty. The General Food Law Regulation (EC) 178/2002 defines traceability as the ability to trace and follow food, feed, and ingredients through all stages of production, processing and distribution.

Traceability: facilitates withdrawal of faulty food/feed from the market; provides consumers with targeted and accurate information on specific products; covers all food and feed, all food and feed business operators, without prejudice to existing legislation on specific sectors; affects importers who are required to be able to identify from whom the product was exported in the country of origin; obliges businesses to be able to identify at least the immediate supplier of the product in question and the immediate subsequent recipient, with the exemption of retailers to final consumers – one step back-one step forward (unless specific provisions for further traceability exist). See the factsheet on traceability at https://ec.europa.eu/food/sites/food/files/safety/docs/gfl_req_factsheet_traceability_2007_en.pdf and also *FAO/WHO guide for application of risk analysis principles and procedures during food safety emergencies*, Food and Agriculture Organization of UN and World Health Organization, Rome 2011, at http://www.fao.org/3/ba0092e/ba0092e00.pdf .

66 D. MOSCOVICI, A.REED, *Comparing wine sustainability certifications around the world: history, status and opportunity*, Journal of Wine Research. (2018) 29. 1–25.

The successful wine producer therefore does not limit himself/herself to respecting the imposed legal standards, but assumes more and more specific guarantee obligations and equally specific responsibilities towards the market and its own consumers, with penalties that will no longer be limited to the pure and simple refusal of a bottle that does not respond to consumer's expectations in the tasting phase. A market where quality producers decided to pass through a triple level of quality standards, where legal standards have been flanked by the certifications first and by accreditations thereafter. Insofar quality of wine is becoming more and more a market prerequisite, producers unable to accept these challenges will suffer the heaviest sanction, namely that of not being admitted to the "real" wine market. They will be progressively marginalized and condemned to operate in a secondary market of mediocre quality products, with increasingly reduced economic margins.

Also, national public regulations are adhering to this trend, being fully aware that, in a market global by nature, compliance with the advertising standard, strongly supported by safeguarding of product quality, will increasingly assert itself. And for better protection of famous and notorious brands even more rigorous standards are set at private level, to characterize blends by greater reliability, taste and global fame.

In the frame of the continuing challenge to Old World global supremacy by New World producers and its response, the wine makers, who are more and more becoming wine exporters,[67] are thus expected to build up an appropriate and effective internal governance system, aimed to safeguard product quality, in coordination with public control systems in place both in the Country of Origin (and, for European wine makers, at the EU level, too) and in the Country of Destination. The starting point shall be to provide a proper definition of wine quality, to be mainly referred to premium bottled wines and based both on applicable legal regulations and on required market and sector parameters.

On such a ground (and taking into account also the more strict and severe rules imposed by food safety regulations) and in coordination with existing quality control systems in place at public and market level, international best practices aimed to anticipate, identify, assess, manage and control potential risks must be adopted. All that with a particular focus on private analysis and voluntary certification of the products made "at the source", traceability along

67 E.fleming, S.mountera, B.grant, G.griffith, renatovillano, *The New World challenge: Performance trends in wine production in major wine-exporting countries in the 2000s and their implications for the Australian wine industry,* Wine Economics and Policy, Volume 3, Issue 2, December 2014, 115–126. See also S.cholette, R.castaldi, F.april, *The globalization of the wine industry: Implications for old and new world producers* January 2005.

the distribution channels having also regard to a proper storage of the products up to the consumer's glass, information and risk communication to the consumers, and with indication of some recommended clauses in related distribution agreements with importers and retailers, in order to extend the risk monitoring and assessment system along the distribution network, to make it more effective. That namely when they are exported and sold overseas, out of the usual area of direct control of the wine maker and the Country of origin's legal system.

4 Wine Industry and Supply Chain Risk Management ("SCRM")

The risks in the supply and distribution chain of products in internal and international markets gained increasing importance following globalization.[68]

The role played by Supply Chain Risk Management ("SCRM")[69] is therefore central: it is a process aimed at highlighting and minimizing risks and optimally managing all involved processes and sub-processes, by involving all subjects, internal and external, that operate in the production and distribution chain, allowing to create effective value from the combined and coordinated contribution of operators, each of them having his own role in creating the product and placing it on the market. Risks involved are extremely varied: they range from climate and agricultural cultivation issues to non-adequate stocking and preservation, from contaminants used in the production process to recourse to irregular workers or the presence of unsafe or unhealthy work environments. There are two main drivers that lead to the application of the risk management process in the supply chain, responding on the one hand to the speed requirements that globalization imposes, particularly in the commercial sector and with the advent of e-commerce (with the inevitable and statistically proven increase of error risk), and on the other hand to favour the integration of different operators with equally different

68 For wine supply chain structure, see M.VARSEI, S.POLYAKOWSKIY, *Sustainable supply chain network design: A case of the wine industry in Australia,* Omega, Volume 66, Part B, January 2017, Pages 236–247.

69 Definition of SCRM was provided by A. NORMAN, R. LINDROTH, *Supply Chain Risk Management: Purchasers vs Planners' Views on sharing Capacity Investment Risks in the Telecom Industry*, 11th Annual IPSERA Conference, Twente University, March 25–27, The Netherlands, 2002 as: "*….a shared risk management process, developed in a collaboration with the partners in the entire supply chain, to deal with the risks* (*logistic, financial, information, relationships and innovation risks*) *and uncertainties resulting from logistic activities and resources*".

objectives through increasingly integrated processes among the members of the supply chain to create value. This methodology implies the need of establishing and keeping in place an adequate internal control system. The risk will then be analysed and addressed from two different perspectives: a broader risk management perspective, understood as continuity of processes and safeguarding the company and its products and a second one focused on compliance and anti-fraud issues. Supply chain is made up of different operators, each of which bears equally different interests, thus offering great growth opportunities that can be reached through synergies.[70] With regard to the first perspective, the economic operator is preliminarily called to identify the areas of risk and then to manage them with the most appropriate methods, keeping in mind that the potential consequences that could involve the wine maker, his/her company, brand, products and management are not only economic, but also reputational.[71]

To govern its own supply chain, therefore, each company must necessarily invest first of all from a managerial perspective, where many of the techniques used in the risk management process can in fact constitute a common ground for identifying process improvements. The first risk management lever is therefore internal prevention, focusing namely on the quality of the products and passing through all the sectors that make up the supply chain and which must go through it in the opposite direction when product defects are detected either by a distributor or, surely worse, by a customer raising a complaint or even starting a legal action, resulting from non-received or poorly managed complaints. And continuous prevention and monitoring must concern not only its own products and services but, necessarily and as far as possible, must be extended also to the other members of the supply chain, and this both to ensure conformity of production and to avoid production blocks linked to occasional events (such as strikes) or structural events, such as the insolvency of the supplier and his subjection to insolvency proceedings, and this also for being prepared to activate alternative suppliers. Therefore, exclusive relationships with single sources of supply are not recommended.[72] This lever must necessarily be parallel to an

70 T. BETTIS, H.THOMAS, *Risk, strategy and management* Greenwich, Connecticut, JAI Press Inc. 1990. Similarly G.A.ZSIDISIN, *Environmental Purchasing: A Framework for Theory Development,* European Journal of Purchasing & Supply Management, 7(1): 61–73 · March 2001.

71 Y. SHEFFI, *Supply chain management under the threat of international terrorism*, (2002) 12(2) International Journal of Logistics Management 1–12.

72 K.MILLER, *A framework for integrated risk management in international business*, (1992) Journal of International Business Studies 311–331; SMITH, M., G.ZSIDISIN, *Early Supplier Involvement at MRD*,4 Practix, Best Practices in Purchasing & Supply Chain Management,

TABLE 24.1 Supply chain risk management – elaborated by the Author

Risk generated by business partner:	Risks in export/ production abroad:	Local risks:	Risks attaining wine sector:
· Operational capability	· Financial risk		· Shortage of quality grapes
· Availability of required goods and services	· Corruption index	· Acts of God	· Climate issues
· Quality	· Geopolitical risk	· Strikes	· Proper storage
· Financial stability	· Political risks	· Regulatory	· Regulatory issues
· Price increases	· Embargo	· Labelling	· Compliance with regulatory provisions
· Cartels	· Terrorism/wars	· IPRs Infringement	· Labelling
· Legal risks	· Pandemics	· Political risks	
· Environmental compliance		· Protectionism	
· Reputational risks		· Religious constraints	
		· Embargo	
		· Terrorism/wars	
		· Pandemics	

SOURCE: ELABORATED BY THE AUTHOR

effective use of contractual tools in negotiating with the numerous players that make up the supply chain rules of the game aimed at ensuring the correct execution of the activities and services entrusted and – in the denied occurrence of pathological events that create malfunctions or blockages in the production chain or production and marketing of defective or dangerous products – leading to joint and coordinated actions aimed at remedying, where possible, and

2002, 9–12; W.TING, *Multinational risk assessment and management,* Westport Connecticut, Greenwood Press, 2008.

minimizing negative consequences of the event, figuring out the required remedial actions and behaviours and distributing the costs to be borne by virtue of their respective responsibilities.[73] First strategic foresight is to establish negotiating agreements with "strong" members of the supply chain,[74] as they are less subject to risks of failure or improper supply or production blocks related to labour disputes or economically critical issues that may prelude to insolvency; however, this strength must be assessed not only against this perspective, but also looking to the adequacy and robustness of the supplier/business partner in terms of compliance with the rules and the adoption of correct ethical and environmental policies.[75,76]

The third lever that necessarily contributes to addressing and managing the risks of the supply chain is insurance, also in the face of a dimension of risk that is such that it cannot be easily addressed by a single operator in the supply chain; indeed even in this case the fact that a producer insures himself against blockage of production (mainly insofar it could generate penalties for delayed deliveries) and to manage recall campaigns and deal with claims for compensation from consumers damaged by products that are not safe and defective, should reasonably cause this subject, more exposed to the consumers, to cause also his own suppliers and his distributors to ensure themselves for that part of the risk under their own control and responsibility, so as to facilitate recourse actions within the supply chain.[77] In addition to the regulatory profiles, the role that also wine corporations – especially the truly global ones – have assumed towards all external stakeholders is becoming increasingly important for companies operating at a global level, to be expressed in the various profiles that make up the so-called Corporate Social Responsibility ("CSR") and that lead many companies to adopt codes of conduct and to

73 H.LEE, P. PADMANABHAN. S. WHANG, *The paralyzing curse of the bullwhip effect in a supply chain*, Sloan Management Review (1997) 93–10.

74 S. GOLDBERG, S. DAVIS, A.PEGALIS, *Y2K risk management* (New York, Wiley, 1999); B. GLASER, A.STRAUSS, *The discovery of grounded theory: Strategies for qualitative research* (London, Wiedenfeld and Nicholson, 1967); C. SCOTT, R. WESTBROOK, *New strategic tools for supply chain management*, (1991) 21 International Journal of Physical Distribution & Logistics Management 23–33.

75 J.G.MARCH, Z.SHAPIRA, *Managerial perspectives on risk and risk taking*, Management Science (1987) 33.

76 For a complete guide to risk management in the wine industry see New South Wales Government *Guide to manage risks in wineries* 2016 at https://www.nswwine.com.au/wpcontent/uploads/2017/01/Guide_to_managing_risks_in_wineries.pdf.

77 R.HALL, *Rearranging risks and rewards in a supply chain*, 24(3)Journal of General Management, 1999, 22–32. See also G.GILBERT,M.GIPS, *Supply-side contingency planning,* 44(3)Security Management 70–74, 2002.

publish true and proper sustainability reports to prove their commitment to society.[78] All in a context where reputational and image damages must also be duly taken into account and in a legal scenario where issues related to different jurisdictional powers and the difficulty and costs of starting legal proceedings abroad have a significant influence on real possibility of successfully defending cases in court.

4.1 *SCRM: Best Practices*

Risk is an integral part of entrepreneurial activity and inherent to it but, looking at the supply chain, the greatest risk is not so much represented by major events that "break" the chain and require immediate restoration actions, such as natural events or insolvency procedures that involve a primary distributor both for its own company and for the sector in general, but rather not being any more competitive in respect of competitors, insofar other players are able to operate at lower costs and to generate higher margins.

This in a context where the flexibility required to remain competitive upfront context changes and to react quickly and effectively to unexpected events through implementation of contingency plans prepared in good times becomes vital. If, as mentioned, the management and control of the supply chain means first of all being an integral part of its organizational model, in line with its internal corporate compliance rules, this starts from a well-established contractual relationship that unequivocally clarify: (i) respective areas of responsibility, through a correct and objective sharing of risks, and the limitations of liability that derive from them; (ii) rules relating to compensation for damages that may be caused[79] and (iii) the insurance coverage available to the upstream supplier and the downstream distributor against their legal and contractual responsibilities, also aimed at preventing injurious events that may compromise the solidity and continuity of the supply chain.

These techniques are essential to guarantee the necessary and continuous visibility on the progress of the supply chain and its component parts – namely

78 R.LAMMING,T.E.JOHNSEN, J.ZHENG, C.HARLAND, *An initial classification of supply networks,* 20(6) International Journal of Operations and Production Management 675 – 691, 2000; see also T.K. DAS, B.TENG, *'Resource and risk management in the strategic alliance-making process'*, (1998) 24(1) Journal of Management 21–42; A.BRAITHWAITE, D.HALL, *Risky business? Critical decisions in supply chain management* (Parts 1 & 2)', *Supply Chain Practice* (1), Part 1: (2) (1999) 40–57; Part 2: (3) (1999) 44–58.

79 *Enterprise Risk Management, Applying enterprise risk management to environmental, social and governance-related risks,* Committee of Sponsoring Organizations of the Treadway Commission (COSO), October 2018, available at https://www.coso.org/Documents/COSO-WBCSD-ESGERM-Guidance-Full.pdf.

in a F&B market where even too frequently the agreements with the business partners are still oral and trust based – but they are not in themselves sufficient, because the supply chain must necessarily be in continuous evolution, as the underlined business is dealt at global level.

It must be followed by a continuous analysis of the underlying scenarios, being at any point in time able to predict and anticipate related events and risks as far as possible, and to offer rapid and effective responses. And this leads to a continuous benchmarking activity at a strategic level, dealing with the best global competition, balancing the pros and cons, in terms of risks and costs, in a necessarily changing and dynamic context, either by market factors or by accidental events unrelated to the business in strict sense. In addition, an analysis is required not only by the wine operators who utilize the supply chain, but also by third parties, including the authorities and public agencies called to monitor particular risks at a local level, which companies must consider themselves not to be like enemies to this end, but as valuable allies, insofar these entities do not merely sanction but offer effective support in preventing risk, having a broader and wider view to all wine producers and operators in the sector and to respective production and distribution chains.

In fact, based on the assumption that the supply chain risk is a growing and unavoidable risk, business operators can only equip themselves in the best way possible to understand first all its aspects, and that even more when production on one side and distribution and sale on the other side are unavoidably played on a global chessboard, being conscious that risks must necessarily be taken in doing business, but with a proactive approach, at least aimed at minimizing the negative consequences that could occur.

The important thing is to understand and internalize the rules of the game and be equipped accordingly, as wine makers active worldwide, to minimize the risk and maximize the benefits that supply chain inevitably guarantees and will continue to guarantee, also in the wine business,[80] to well prepared and virtuous operators and companies. A passive attitude is not a choice, and neither it is exclusive reliance on insurance protections. Therefore, whenever practicable, corrective and concrete actions on the field are required, by fully adhering

80 R.HALL, *Rearranging risks and rewards in a supply chain*, Journal of General Management, 24(3), pp. 22–32, 1999.

See also K.A.MILLER, Framework for integrated risk management in international business, Journal of International Business Studies, pp. 311–331,1992; S.KIMURA, J.ANTON, C.LETHI, Farm level analysis of risk and risk management strategies and policies, 2010; H.LAM,K.CHOY, G.HO, C.KWONG, C.LEE, A real-time risk control and monitoring system for incident handling in wine storage, Expert Systems with Applications, 40(9), 3665–3678, 2013.

to the words of a well-known athlete: "*You always miss 100% of the shots you don't take*".[81]

81 Wayne Greitzky, Canadian former professional ice hockey player, nicknamed "The Great One" who played 20 seasons in the National Hockey League (NHL) and is the leading scorer in NHL history, with more goals and assists than any other player with 2857 points (see also https://www.nhl.com/player/wayne-gretzky-8447400).

CHAPTER 25

The Grass is Greener on the Other Side

Biodynamic Wines and Trademarks, the Quest for Answers

Ana Penteado

1 Introduction[1]

The market for alternative viticulture has increased exponentially in our environmental wellbeing and sustainability conscious society. As a result, the production of organic wine has become a highly profitable label in the wine industry. Provenance-orientated drinking has become an attractive identity for a new generation of wine consumers. This growing awareness of the importance of responsible sourcing has placed a higher value in wine made using environmentally friendly methods. It is challenging to serve an oenophile community, where alcohol-reduced, sulphite-free, and pesticide-free wine can all be expectedly sourced from the same bottle. This is not to mention consumers who wish to experience locally sourced wines, so that less preservatives or inter-continental transport is involved. The ecological model of viniculture (biodynamic wine inclusive) is branded as an alternative to

1 This work has commenced before September 2019. The author would like to acknowledge the assistance of many librarians without their professionalism; this chapter would not have been possible to come to fruition. Thank you to Silvana Gouveia, at the Notre Dame University Library; to David Berry, Veronica Dartnell, Caroline Bamback, Jo Searle, Steve Richards, Helen, Bruce, and Margherita, Edith Ho, Maria Wiemers, at the New South Wales library for their patience and attention. Thank you to Quentin Slate at the National Library of Australia in Canberra for unlimited access to their magnificent archives of ancient Persian maps and ancient trade routes, providing many primary sources at my disposal. I would also like to express a special thank you note to Ivan de Carvalho. This European oenophile expert kindly shared his busy time to help me with reviewing some aspects of the European organic wine industry. I am also grateful to his in-depth knowledge of wine history that he shared with me, his suggestions and commentaries improved my learning of viniculture appreciation in general. Last but not least, a special acknowledgement to Marcos Penteado for reading my early drafts, discussing topics and editing historical parts of this chapter, from the reader's point of view, sharing additional comments that helped me shape this content in a more precise structure. Also thank you to Jaquerli Serafim for helping me with the final draft of this chapter. This chapter represents my research and does not represent any views of any institution or governmental agency in the matter. All errors are mine.

non-organic wine. Yet organic wines and biodynamic wines are not interchangeable products, neither does being described as organic and biodynamic mean that those are natural products (in the sense of containing no additives or animal by-product). While they may share similar philosophies regarding wine production, biodynamic wines differ in various aspects of micromanagement methods, such as soil preparation, grape growth, juice preservation, and fermentation techniques in the production of wine. But the question remains: are *all* natural wines organic? The answer is uncertain: what constitutes an organic wine is subjective, as wine labels are unclear about both procedures and ingredients. Wine labels seldom describe the full process pertaining to the preparation of the *terroir*, grape cultivation and pest control practices, nor do they often disclose any animal-derived elements added in the processing of organic wine. Consequently, the final product is a result of a combination of disclaimers that are often deceptive to consumers of organic wine. In effect, most of the organic wines sold in the market will (potentially) fail to meet consumers' expectations. In perceiving a wine as organic or biodynamic, consumers expect to experience a natural wine in the holistic sense of the word. This chapter proposes mechanisms to unveil the authentic organic wine (if such liquid truly exists). We will explore the history of cultivation, from the earliest grape cultivation to modern European and American organic wines (particularly the popular biodynamic methods) in an attempt to identify what *organic* and *biodynamic* wine genuinely means. This chapter will also explore national standards and practices adopted by organic wine producers around the world, with a brief introduction upon the chemical aspects and label practices for organic products.

This chapter proceeds as follows: section 1 deals with organic wine considered from historical roots of the ancient Cradle of Wine. Section 2 introduces the concept of biodynamic wines from the perspective of its creator, Rudolf Steiner. Section 3 discusses what qualifies a grape and a wine as organic. Section 4 introduces certification schemes for organic and biodynamic wine produce; organic wine defined by regulatory organisations; label considerations for consumers of organic viticulture; general concepts of organic production, and finally, certification labels, which are linked to reputation in the market. This chapter concludes with an overview of relevant information to be considered on an organic and biodynamic wine label to address misconceptions of natural ingredients that consumers may expect on organic wine, so that valid claims of organic ingredients are included as opposed to marketing strategy. Finally, suggestions of what can be done to clarify regulatory and label practices have also been made for this competitive market.

1.1 *A Brief History of Organic Wines*

Are natural wines natural? This question must be answered only from the perspective of the act of domestication of wild *Vitis vinifera.* The domestication of *Vitis vinifera* was a result of consistent human intervention in the process of viticulture. That is not a natural process. Moreover, if 'natural' means occurring in conformity with the ordinary course of nature – growing without human care[2] – then there is nothing natural about modern viticulture. However, grapes growing in the wild as natural and untamed vines can still be found in regions such as Turkey, Georgia and Armenia. Generally, the definition of 'natural' is what is growing in the wild without human intervention. Claiming something organic as natural (free of additives, pesticides and human intervention) is controversial. Preservatives may have always been present in the winemaking process in a manner that today may be considered organic (such as the addition of sugar) for aiding the production of alcohol, sulfur-dioxide, and natural pesticides.[3]

We will start by looking at domesticated wild vines that originated as natural wines in the *Cradle of Wine*.[4] In this region, wine is as natural as one would understand the concept. The *Cradle of Wine* is an expression that refers to a collection of territories which produced traditional wine for local consumption that even predate ancient civilisations. The idea of tracing back organic wines crafted in an artisanal fashion before the age of commercialisation in bulk scale is the closest argument one could study to formulate a comparison of organic wine and natural wine.

The earliest evidence of organic wine was found in 2007 in the Areni Cave, in Armenia.[5] Investigators discovered fully operational fermenting vats, a preserved grape press and a collection of storage vessels from around 6,100 BC in a well-guarded cave infested with bats and wine-friendly cold temperatures.[6]

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2 See Merriam-Webster Dictionary, entries 8 and 10. "Natural is occurring in conformity with the ordinary course of nature or growing without human care".

3 See, The World Health Organisation, Pesticides residues in food, https://www.who.int/news-room/fact-sheets/detail/pesticide-residues-in-food accessed April 11,2020.

4 The Cradle of Wine is an expression coined by Neeta Lal to showcase Yerevan, in Armenia, which she claims as to the Caucasus Mountains biblical viticulture region along with Georgia, Azerbaijan, northern Iran and eastern Turkey. See Neeta Lal, "Armenia, where natural beauty, wine and brandy trump a troubled past and a volatile present", in The Economic Times, published by Bennett, Coleman & Company Limited (2017).

5 See, Ambassador Mills Open U.S. Government-Funded Cave Preservation Project, Targeted News Service, Washington, D.C., (September, 2017), <https://am.usembassy.gov/areni-cave/> accessed March 8 2020.

6 See, Daniel Zohary, "The Domestication of the Grapevine Vitis Vinifera L. in the Near East", in Patrick E. McGovern, Stuart J. Fleming and Solomon H. Katz (eds) *The Origins and Ancient History of Wine*, (Gordon and Breach Publishers 2008) pp. 23–29.

Natural snow would be stored to chill wine in caves, similar to a natural icebox circa 2,000 BC.[7]

The technique of winemaking became a sophisticated enterprise, as winemakers from past civilisations grappled with oxidation and experimented with many ways to store and preserve wine from bacteria contamination (amongst other pests) from at least 8,000 years ago.[8] The need to protect wine from becoming an unappealing vinegar must have created an opportunity to explore creative solutions and some benign lethal experiences with human health including the use of honey, natural resinous acids and toxic lead in wines, as molecular biology can attest.[9] Studies of the ancient winemaking process record critical evidence of the existence and use of resinous acids and other residues such as tartaric acid found in amphoras called *Massaliettes*.[10]

Many experimentations later, the adoption of sulphur dioxide to preserve wine was discovered as a practical choice for its anti-microbial and antioxidant properties.[11] Sulphur dioxide decreases the risk of wine sourness and prolongs its life. In antiquity, good quality wine was a result of a traditional technique repeated by generations of local winemakers for local consumption. It is safe to say that minimal guided scientific interference combined with the conventional process of fermentation resulted in natural wine.

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7 See, Richard Love, Chillin'at the Symposium with Plato: Refrigeration in the Ancient World, (2009) CH-09-013.

8 See, Earliest Evidence of Wine-Making Found in Ancient Relics from Georgia, Radio Free Europe Documents and Publications by Federal Information & News Dispatch, Inc. (Washington, November 14, 2017). (This report tells us that the earliest evidence of winemaking was detected in an old pottery jar unearthed in Georgia, which is older than the prior earliest evidence from Zagros Mountains of Iran). For ancient Iranian pottery discovered in 1990, see also Patrick E. McGovern, Stuart J. Fleming & Solomon H. Katz, The Origins and Ancient History of Wine, Introduction, (Gordon and Breach Publishers, 2008).

9 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine*, Mitchell Beazley, (7th edition, published by Octopus Publishing Group), p. 274.

10 See, Vernon L. Singleton, "An Enologist's Commentary on Ancient Wines", in Patrick E. McGovern, Stuart J. Fleming and Solomon H. Katz (eds) *The Origins and Ancient History of Wine*, (Gordon and Breach Publishers, 2008) p. 67. See, also Françoise Formenti and J.M. Duthel, "The Analysis of Wine and Other Organics Inside Amphoras of the Roman Period" in Patrick E. McGovern, Stuart J. Fleming and Solomon H. Katz (eds) *The Origins and Ancient History of Wine*, (Gordon and Breach Publishers, 2008), pp. 79–80.

11 See, Benjamin Lewin MW, *Wine Myths and Reality* published by Vendange Press, Dover (2017) p.119.

Louis Pasteur's scientific studies on the fermentation process[12] and Jean-Antoine Chaptal's[13] chemical studies on the sugar additives changed winemaking dramatically. The French winemaking process went from a phenomenon that happened according to the rules of Nature to an industrialised operation.[14] Since Pasteur's and Chaptal's discovery of the process of pasteurisation and the addition of sugar to produce alcohol, respectively, the natural production of wine received more human intervention and control.

To understand how organic and biodynamic processes for wine production are so popular today, one needs to consider the history of oenology practices in the old civilisations that enjoyed the drink.

1.2 *Persia*

The Persian Empire was one of the world's oldest civilisations that dominated ancient winemaking production. Before the invasion of Alexander III of Macedon, in fact even predating the formation of the Achaemenid Empire with Cyrus I (559–530 BC), local viticulture was notable for its vigour and quality, today sadly restricted due to the conservative and deeply religious laws of modern Iran.[15]

The Persian *terroir* (in which wild grapes still grow) is defined by many distinctive micro-climates, irrigated by canals and local rivers, due to a collection of mountains that range from 1,000 to 3,000 meters in elevation that is composed in many irregular tablelands above sea level. Its geographic structure of valleys, sea breeze and irrigation has similarities with Spanish, Turkish and Mexican soils, countries that produce premium wine in areas with desertic soil type and artificially irrigated areas.[16] In some of these now Iranian heartlands, these native Iranian grapes (after domestication by humans) might have been propagated by seed to other localities.

12 See, Benjamin Lewin MW, *Wine Myths and Reality* published by Vendange Press, Dover (2017) pp. 95,119.

13 See, Benjamin Lewin MW, *Wine Myths and Reality* published by Vendange Press, Dover (2017) pp. 100, 102, 132.

14 See, Benjamin Lewin MW, *Wine Myths and Reality* published by Vendange Press, Dover (2017) pp. 95, 100–107, 118–119.

15 See, R. Ghirshman, *Iran The story of Persia from earliest times until its unique Iranian civilization was transformed by the Islamic Conquest* (Pelican Archaeology Series, 1954) pp. 127. See, also, Introduction, Ancient Wine The Search for the Origins of Viniculture by Patrick e. McGovern (Princeton University Press, 2003) and Benjamin Lewin, *Wine Myths and Reality* (Vendange Press, 2017) pp. 127, 136–139.

16 See, W.B. Fischer, *The Cambridge History of Iran,* vol I, The Land of Iran (Cambridge at the University Press, 1968) pages 3–4.

Notable regions in ancient Iran for vine cultivation are the middle and higher Rezaiyeh basin (Persian Kurdistan) particularly away from saline areas (valley area of Aji Chai leading to Tabriz); parts of the Qizil *Uzun* lowlands in the valley of Zanjan river; the *Quareh* valley around Ardabil; the Khuy basin and adjacent parts of the Aras near Julfa; and, the well-known region of Zagros, where *Shiraz,* the city, is still located.[17] *Shiraz* is an old locality nearby Persepolis, which had an ancient reputation for Khular wines.[18] *Khular* is said to be of similar taste to sherry, a Spanish fortified wine, for many qualities that both alcoholic fermented juices share for oenophiles. Shiraz is also a deceptive word that one may notice its similarity with *Syrah* grapes from the appellation *Hermitage* in France.[19]

Persian viticulture had a highly skilled glassmaking market and pottery artisans at their disposal, two crucial elements that contributed to preserving wine for transport.[20] Persian glassmaking is a traditional craft recorded by historians[21] allied to pottery skills allowed wine vessels to be manufactured for transportation and to produce in large quantities, so that glass and pottery may have been the best options to preserve wine for future use.

1.3 *Georgia*

Another country in the *Cradle of Wine* is Georgia. Georgian grapes are native to the Caucasus mountains, and have been intensely cultivated there at least as early as the beginning of the Bronze age.[22]

17 See, W.B.Fischer, *The Cambridge History of Iran*, vol I, The Land of Iran (Cambridge at the University Press, 1968), pp. 13, 18, 23,25, 43, 44, 53, 54, 57, 76, 89.

18 See, R. Ghirshman, *Iran The story of Persia from earliest times until its unique Iranian civilization was transformed by the Islamic Conquest* (Pelican Archaeology Series, 1954) p. 25.

19 That Shiraz and Scyra, the red wine from Hermitage may be similar grapes or vines is a question for another paper, but this author thinks that the coincidence is not accidental. For Hermitage vineyard history, see Remington Norman, *Rhone Renaissance*, (Mitchell Beazley, 1995) p. 62. See also Benjamin Lewin MW, *Wine Myths and Reality* published by (Vendange Press 2017) pp. 173–174.

20 See, R. Ghirshman, *Iran The story of Persia from earliest times until its unique Iranian civilization was transformed by the Islamic Conquest* (Pelican Archaeology Series 1954), pp.184–185.

21 See, R. Ghirshman, *Iran The story of Persia from earliest times until its unique Iranian civilization was transformed by the Islamic Conquest* (Pelican Archaeology Series), p. 25.

22 See, Daniel Zohary, "The Domestication of the Grapevine Vitis Vinifera Grape" in Patrick E. McGovern, Stuart J. Fleming and Solomon H. Katz (eds) The Origins and Ancient History of Wine, (Gordon and Breach Publishers, 2008), p. 29.

Following the discovery of a large number of clay vessels, evidence has been revealed of winemaking dating from 8,000 years ago in Georgia. Those clay vessels were also subject to chemical tests for wine storage.[23] This traditional practice is still in use in artisanal Georgian viticulture. Georgian wine is produced following a *sui generis* process of fermentation in a large amphora called QVEVRI, which is now known as the qvevri method.[24] The process is described as burying an earthenware vessel in the ground allowing all elements of the vine to be blended in with its roots. This ancient method is in contrast to commercial wine fermentation, in which any vine elements other than the grape are not part of the process. The fermented juice of indigenous Georgian grapes, such as *Mtsvane*, *Kakhuri, Saperavi* and *Rkatsiteli*, produce distinctive, natural flavours.[25]

Georgian wine has 18 appellations of origin registered with the European Union.[26] From all these regions, *Kakheti* is a leading appellation producing flavoured wine from indigenous grapes as *Saperavi* and *Mtsvane Kakhuri*.[27] Georgian wine is predominantly a traditional farming activity. Rural communities in Georgia have made wine primarily for personal consumption using artisanal processes, which are now developing consistent standards for international quality control.

The fact that indigenous Georgian grapes are well regarded and have grown naturally in Georgian soil for centuries is an advantage.[28] Further, a certification label for wine excellence and also a certified label for organic wine boosted qvevri method to the international market.[29] From the last decade to now, Georgian wine artisanal cultivation practices attracted a reputation

23 See, Earliest Evidence of Wine-Making Found in Ancient Relics from Georgia, Radio Free Europe Documents and Publications by Federal Information & News Dispatch, Inc. (Washington, November 14, 2017).

24 See, Earliest Evidence of Wine-Making Found in Ancient Relics from Georgia, Radio Free Europe Documents and Publications by Federal Information & News Dispatch, Inc. (Washington, November 14, 2017).

25 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine*, 7th edition by (2013), Mitchell Beazley (first edition 1971), p. 272.

26 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine*, 7th edition, Mitchell Beazley 2013 (7th edition, 1971), p. 272.

27 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine*, 7th edition Mitchell Beazley 2013 (7th edition, 1971), p. 272.

28 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine* Mitchell Beazley 7th edition 2013 p. 272.

29 See, David Williams, "Why Georgia is a hotspot for natural wines", https://www.theguardian.com/lifeandstyle/2018/feb/25/georgia-natural-wines accessed March 3, 2020.

for natural wine and efficient eco-branding. After the European Commission in 2012 approved new regulation to identify techniques for organic wine, the qvevri method was identified as organic. That was a clear message to consumers of the natural process and the provenance of Georgian indigenous grapes.[30]

1.4 *Turkey*

Turkish indigenous grapes grow in an excellent *terroir* for wine cultivation, where they are also found in the wild.

However, the Turkish population primarily utilizes Turkish grapes for consumption as the unfermented juices or the fruit itself, not as an alcoholic beverage. The Republic of Turkey's strict regulations on the domestic consumption of wine halts most reputation or provenance recognition.[31] Turkish wine has been recognised for its quality due to this favourable combination of indigenous grapes and a diversified climate that enriches its *terroir*, which proves the point that natural grapes and favourable soil make an excellent combination for good viticulture.

Indigenous grapes such as *Misket*, *Sultaniye*, *Oküzgözü*, *Boğazkere* or *Kalecik Karas* are among many other native grapes in Turkey. For organic wine, the Shiluh winery makes natural wines following a 1000-year-old practice, according to the local traditions in the south-eastern Anatolia.[32]

The use of indigenously sourced Turkish grapes, combined with a clear label description of ancient methods employed and any additional ingredients used in the process, will add to the reputation of a Turkish provenance to internationally marketed wine.

1.5 *Jordan*

In the *Cradle of Wine*, another region of importance is the Jordanian viticulture. In the world of genetics and agronomical research, Daniel Zohary has extensive knowledge of this region. Zohary has documented the grape cultivation in the Jordan Valley, particularly in Tell-esh-Sheima, Numeira, and in the Levant area which is today in the West Bank.[33]

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30 See, Wine Observatory Sustainability, "Organic Wine (EU certification)" 2012, available at http://wineobservatorysustainability.eu/en/sharing/Organic-Wine-EU-certification.112/ accessed March 8, 2020.

31 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine*, (Mitchell Beazley 7th edition 2013)(first edition 1971), p. 277.

32 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine* (Mitchell Beazley, 7th edition 2013), p. 277.

33 See, Daniel Zohary, "Domestication of the Grapevine Vitis Vinifera in the Near East", in The Origins of and Ancient History of Wine, Patrick e. McGovern, Stuart J. Fleming and Solomon H. Katz (eds) (Gordon and Breach Publishers, 1996), p. 26.

Zohary explained that cultivated vine varieties achieve a rich genetic diversity, traits, size, colour, juiciness and palatability via constant and meticulous human interference. Zohary explains that domestication of vines allows the winemaker to be in control of the grape production, which is acceptable than running the risk of producing natural wine.[34]

Zohary's research into the domestication of wild vines describes an exceptional level of human intervention to domesticate wild vines. As a result, adaptability to certain conditions in the *terroir* chosen for grapes cultivation would be achievable. Therefore, grapes grown in these conditions would be non-natural if compared to native grapes grown in the same *terroir*. Theoretically, one could say that domesticated grapes are less natural than native grapes used to produce wine.

1.6 *Greece*

Greece has had a long association with grapes and wine culture. Aristotle and Plato cited festivals celebrating wine drinking, raising concerns about responsible drinking in an age where chariots rather than automobiles existed, but where wine was readily available. Greek grape cultivation was found in Thessaly, Lerna, Sitagroi and Greek Macedonia.[35]

Plato also advocated for drinking restrictions for Greeks.[36] Plato argues that those who are older should be allowed to indulge in wine, because it is an educational tool.[37] Indigenous growing grapes are found in abundance in Greek territory and are celebrated as part of Greek lifestyle, as Aristotle and Plato's observations can attest.

In recent times, Greek grapes include *Assyrtiko* from Santorini, *Muscat Blanc* in Samos, *Monemvassia* in Páros, and *Mandilaria* in Crete. There are, however, brand new varieties such as *Xinomavno*, from the Náoussa appellation. More Greek indigenous grapes are *Malagousia*, *Mavrotragano*, *Debina Limnio* and *Limniova* that represent the wide variety of the Aegean *terroir*. Therefore, it would appear that Greece has a reputation for wild grape and successful grape cultivation.

One ancient Greek winemaking practice is addition of *retsina*, a natural resin, to the freshly crushed grape juice just prior to fermentation. *Must* is the

34 See, Daniel Zohary, "Domestication of the Grapevine *Vitis vinifera* in the Near East", in The Origins of and Ancient History of Wine edited by Patrick e. McGovern, Stuart J. Fleming and Solomon H. Katz (Gordon and Breach Publishers, 1996) p 26.

35 See, Daniel Zohary, "Domestication of the Grapevine Vitis Vinifera in the Near East", in The Origins of and Ancient History of Wine edited by Patrick e. McGovern, Stuart J. Fleming and Solomon H. Katz (Gordon and Breach Publishers, 1996), p. 29.

36 See, Plato, *The Laws,* Book One, (Penguin Books) pp 64–68.

37 See also Aristotle, *The Politics*, Penguin Classics, 1981, revised by Trevor J. Saunders, p. 475 (education should be proper, appropriate).

name of this young grape juice. Modern production of Greek resinated wine continues, especially in Attica, a region well-known for its produce sherry-like wine.[38]

Apart from this remarkable reputation, Greece, as a member of the European Union, must have certified grapes to be considered eligible for the European Union's organic certificate.

Greek grapes, along with other indigenous grapes described above, are strong contenders for production of natural and organic wine of the best quality. According to the *New Wines of Greece*,[39] a promotional campaign to showcase Greek organic grapes and wine, organic viticulture certification has been claimed since 1993, having in mind that some schemes are voluntary, not mandatory.[40] Accredited organisations regulate oenological practices and protocols; however, human intervention is highly present. If having an organic label means less or no human intervention to the process of viticulture, then adding electrodialysis or sulphur dioxide to the process is not *natural* and would ultimately modify the composition of the wine produced from local grapes.[41]

But are all-natural wines considered organic wines? The answer is, to some extent. The consideration of ancient winemaking and manipulation already described above; may show a clue why. One can notice that additives were always present either in their natural chemical form as retsina, milk, yeast, egg whites, or any other additives added for flavour, for preservation or other benefits.[42] Food additives are defined as "any substance not normally consumed as the food itself and not normally used as an ingredient of food, but which is intentionally added to a food to achieve a technological function" and as a result, it remains in the food.[43] However, in the European

38 See, Hugh Johnson and Jancis Robinson, *The World Atlas of Wine*, 7th edition (2013), Mitchell Beazley (first edition, 1971), p. 274.

39 See, Wines of Greece, available at < http://www.newwinesofgreece.com/organic_farming_in_greece/en_organic_farming_in_greece.html> accessed March 4, 2020.

40 See, Commission Communication – EU best practice guidelines for voluntary certification schemes for agricultural products and food stuff (2010/C 341/04) Official Journal of the European Union (for classification of schemes into self-declaration and certification (third-party attestation).

41 See, Commission Implementing Regulation (EU) n. 203/2012 amending Regulation (EC) N. 889/2008 and N. 834/2007) (7), (8) Official Journal of the European Union.

42 See, for example, the current list of allowed wine inputs that Australia has to abide by to export into the European Union and further required conditions required by the European Union at NASAA National Association for Sustainable Agriculture Australia Certified Organic, Additional Requirements Wine to EU.

43 See, Wine Australia for Australian Wine producers, Compliance Guide published by Australian Grape and Wine Authority, Australian government.

Union, the concept of additives is related to processing aids and classified according to their nature. Food enzyme may come from plants, animals or microorganisms.[44]

With so many varieties of *Vitis vinifera*, different *terroirs* and some indigenous grapes to claim as natives, blending vine species became common for winemakers to achieve excellence and reputation for wines including branded organic wines. Blending techniques are so standard nowadays that consumers need to rely on what is claimed on the wine label. Alternatively, consumers rely on the information panel to make a decision of what is inside a wine bottle and to make a choice that matches their lifestyle.[45]

Label information *matters*. Certification by a reliable, independent third-party matters to the reputation of an unknown winery. In a world in which the term natural wine is used as a marketing tool, certification of all claims stated on a label offers credibility to a winemaker.

Another critical point to remember is that natural, organic and biodynamic wines are not interchangeable concepts. As Benjamin Lewin wisely teaches us, organic labels are no guarantee of anything organic in the final product.[46] Further, the price of a bottle of wine does not necessarily convey information or quality of a product. Economic value is an illusionary signal for the privilege and does not necessarily signify quality.

The information displayed on the label concerning appellations, grape cultivation and goodwill is a powerful tool to promote a winery in the market, never mind being a sign of regulatory rigour and protective power, and thus will shape the winery's reputation for consumers. For instance, a bottle of wine bearing a label from the area of Île-de-France, Aquitaine Poitou-Charentes, or Bordeaux, which has about 60 appellations, more than any other region in Europe,[47] and probably more appellations than any other place worldwide, has an international reputation acquired by all these elements

44 See, Regulation (EC) number 1332/2008 of the European Parliament and of the Council (16 December 2008) Official Journal of the European Union, (for food enzymes and definitions).

45 See, Agricultural Marketing Service, Guidelines for Labeling Wine with Organic References, Department of Agriculture, <https://www.ams.usda.gov/sites/default/files/media/NOP%20Wine%20with%20organic%20references.pdf> accessed March 9, 2020.

46 "But organic food is a farce, and there is no guarantee "an organic chicken" will have been treated any better than a battery chicken or that it will taste any better". See, Benjamin Lewin MW, *Wine Myths and Reality* Vendange Press, 2017, p. 669.

47 An open search on the internet engine will consistently present about 60 appellations for Bordeaux as 2015.

mentioned above.[48] You say merely Bordeaux wine, and even with an imperfect recollection of the brand and type of wine, most consumers will expect an exceptional product.[49]

A winery that is in the process of building its reputation in the trade struggles to sell because it does not possess strong public recognition. Unlike appellations that are controlled and protected by official legislation and regulations, and unlike almost any other food, there is no exact final date for the consumption of wine, making the quality of being vintage another aspect of the economic value. Vintage is a concept that earns financial appraisal with the years that passed between grapes harvested for wine production and its consumption. Another aspect of vintage wines is related to the grape itself: Australian concentrated grape juices, for instance, have no eligibility to be claimed as a varietal composition in vintage wine, because of Australian blending rules.[50]

Another observation must be made concerning preservative-free wines, which has found controversy. This is because sulphur dioxide, which as mentioned previously is a preservative, can be produced naturally by yeast. Therefore, claiming on an organic label that the bottle of wine is sulphur dioxide-free would be rather impossible, to say the least. It would seem natural to assume that such a by-product is almost always in the fermentation process.[51] Thus, it appears that we need further clarification to make an informed decision of sulphite presence or absence in organic wines.

Buehler and Schuett demonstrate that to be claimed as organic wine, a full disclosure of ingredients on the bottle's label is needed, which is

48 See, Institut National De L'Origine Et de La Qualité, available at <https://www.inao.gouv.fr/eng/> accessed March 8, 2020.

49 But see that financial crisis hit the Bordeaux region when phylloxera invaded Bordeaux wineries, a vine-pest that destroyed French vineyards in 1875, causing Bordeaux wines to suffer damage in reputation. See Nicholas Faith, *The Winemasters*, (Hamish Hamilton Limited, 1978) pp. 89–99.

50 See, Blending Rules, Compliance Guide, Wine Australia for Australian Wine Producers, Australian Grape and Wine Authority, <https://www.wineaustralia.com/getmedia/81cbe0c6-491b-46ed-8b82-4f5af51c44d4/Wine-Australia-Compliance-Guide-June-2016.pdf> accessed March 8, 2020.

51 See, Blending Rules, Compliance Guide, Wine Australia for Australian Wine Producers, Australian Grape and Wine Authority,< https://www.wineaustralia.com/getmedia/81cbe0c6-491b-46ed-8b82-4f5af51c44d4/Wine-Australia-Compliance-Guide-June-2016.pdf > accessed March 8, 2020. See, also, Commission Delegated Regulation (EU) 2019/33 (October 17, 2018), article 53, (5), (c), Official Journal of the European Union (for sulphur dioxide maximum content).

a challenge for organic and biodynamic wine.[52] But what precisely is biodynamic wine?

2 An Introduction of the Concept of Biodynamic Wines

In 1924, Rudolf Steiner, an Austrian philosopher generally known for his educational methods as well as his non-orthodox thoughts of agronomic studies, created the idea of biodynamic farming. Steiner organised a series of lectures called *Agricultural Course* in modern Poland aiming to educate farmers of a holistic philosophy for agriculture. His book, *The Story of my Life,* published in 1928, introduces his spiritual-scientific method, which is a description of science with holistic and lunar interrelationships that influence human beings on practising agriculture.[53] Biodynamic wines are just one of the final products of biodynamic agriculture.

A tangible representation of Steiner's farming practices from soil preparation to the final product is embodied in the biodynamic farming movement founded after his death with the successful and controlled certification label administered by the brand of DEMETER® International.[54] Steiner's method was called bio-dynamic or biodynamic and received registered protection as a mark DEMETER®, which is a transnational organic label bestowed to biodynamic farmers around the world.

There are some particularities to biodynamic wines that are somewhat confusing to consumers: are biodynamic wines free of animal-sourced by-products? After bottling, biodynamic wines typically must be consumed young, which appears to indicate that preservatives are not in use. But we have already seen that fermentation naturally produces chemicals such as sulphur dioxide, including in biodynamic wines.

Biodynamic wines use animal components in its wine production, namely in their *terroir* preparation, at an early stage of vine cultivation. The cow pat compost, an essential soil preparation, is composed of cow horns stuffed

52 See, Benno Buehler and Florian Schuett "Certification and minimum quality standards when some consumers are uniformed" *Why is a challenge to disclose all wine ingredients in biodynamic and organic processes to produce wine?"* European Economic Review, 2014.

53 See, Rudolf Steiner, The Story of my Life, (Anthroposophical Publishing Co., London, 1928) translated and edited by H. Collison and also What is Biodynamics, A way to Heal and Revitalize the Earth, Seven Lectures, Rudolf Steiner, (Stener Books, 2005), page 107.

54 See, DEMETER INTERNATIONAL, available at < https://www.demeter.net/> accessed July 3, 2020.

with internal cow (or deer) organs buried in the biodynamic soil. That preparation with animal parts raises a pertinent question of whether biodynamic wines are cruelty-free and appropriate for vegans, vegetarians and pescatarians.[55]

It will be necessary to include detailed wine label practice on biodynamic practices to offer consumers an informed decision about the product they will purchase. Consumers adept of purchasing animal-free products such as vegans, vegetarians, beegans, pescatarians or, anyone that prefers to consume animal-free by-products, must be informed that this process is not animal-free. Not to mention that wine label credibility depends on true statements, it is an implied consumer contract between the purchaser of the product and the wine producer, whether the product is biodynamic or organic wine or just wine. The label integrity adds essential information for a better decision-making process for such consumer lifestyle choices.

2.1 *What Is Organic Wine?*

To determine what is an organic wine, one must investigate the definition of what organic food is. Because if natural food is not necessarily organic, then that logic would apply to natural and organic wine. To define organic wine with one definition may be a challenge because one description will not unify all meanings of organic food in the market. For example, two of the most critical government agencies in the world may look at what is organic from different policy propositions.

The *Food and Drug Administration* in the United States does not regulate food labels. Still, the *National Organic Program* created in 2001 by the U.S. Congress does and enforces national standards countrywide. It defines organic as a labelling term, which follows the rules pre-approved by a protocol developed for accredited agencies and organic standards.[56] In short, these standards should consider the percentage of organic ingredients present in the product, a list of ingredients and processing aids, the absence of genetically modified organisms (GMOs), the soil quality, the animal raising practices, the pest and weed control to be awarded a label of organic. For instance,

55 See, DEMETER INTERNATIONAL, available at https://www.demeter.net/what-is-demeter/biodynamic-preparations), accessed March 8, 2020.

56 See, National Organic Program, Agricultural marketing service, The United States of Department of Agriculture, <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> accessed March 7, 2020. See also USDA, Organic, Labelling Organic Wine, Required Elements of a Wine Label, < https://www.ttb.gov/images/pdfs/wine-labeling-guide.pdf> accessed April 11, 2020.

synthetic substances, pesticides and genetic engineering must not be used for organic produce.[57]

The European Union, on the other hand, applies a holistic definition as to what is considered organic because it takes into consideration the environment, the rotation of crops in the soil, and the restricted use of antibiotics for farming.[58] Genetically modified organisms, chemical pesticides or synthetic fertilisers are banned from use in products that are labelled organic products in the European Union.[59]

It is worth mentioning that natural pesticides such as sulphur dioxide were used by ancient winemakers to protect wine from vermins.[60] The use of *Dichlorodiphenyltrichloroethane* (*DDT*), a synthetic compound preparation created in 1874 changed agricultural management and farming drastically because of its toxicity to the environment.[61] DDT is not soluble in water and has a high potential of accumulation in the organic system of plants and humans.[62] DDT is highly regulated, and its use is prohibited.[63]

In 1962, Carlson's research illustrated the detrimental use of synthetic pesticides such as DDT to the environment and human health.[64] Even natural pesticides used in farming activities are not entirely safe.[65]

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57 But exceptions may apply. See, Electronic Code of Federal Regulations, Title 7, Subtitle B, Chapter I, Sub-chapter M, Part 205 National Organic Program, § 205.605.

58 See, Commission Implementing Regulation (EU) n. 203/2012 amending Regulation (EC) N. 889/2008 and N. 834/2007, Official Journal of the European Union.

59 See, Commission Implementing Regulation (EU) n. 203/2012 amending Regulation (EC) N. 889/2008 and N. 834/2007, Official Journal of the European Union.

60 See, Vernon L. Singleton, "An Enologist's commentary on Ancient Wines", in Patrick E McGovern, Stuart J. Fleming and Solomon H. Katz, The Origins and Ancient History of Wine (Gordon and Breach Publishers, 1996) p. 76.

61 See, Center For Disease Control and Prevention, National Biomonitoring Program, Dichlorodiphenyltrichloethane (DDT), Fact Sheet, <https://www.cdc.gov/biomonitoring/DDT_FactSheet.html> accessed April 10, 2020.

62 To make a comparison with toxic waste, see, Mauro Cristaldi, Cristiano Foschi, Germana Szpunar, Carlo Brini, Fiorenzo Marinelli and Lucio Triolo, "Toxic Emissions from a Military Test site in the territory of Sardinia, Italy", published by International Journal of Environmental Research and Public Health, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3709339/> accessed March 8, 2020.

63 See, The World Health Organisation, WHO <https://www.who.int/news-room/fact-sheets/detail/pesticide-residues-in-food> accessed March 8, 2020.

64 See, Elisa Griswold, "How "Silent Spring" Ignited the Environmental Movement", New York Times Magazine published September, 21, 2012,<https://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html> accessed 8 March 2020. See also, Rachel Carlson, The Silent Spring, Mariner Books, 1962.

65 See, Christine A. Bahlai, Yingen Xue, Cara M. McCreary, Arthur W. Schaafsma, Rebecca H. Hallett, "Choosing Organic Pesticides over Synthetic Pesticides May Not Effectively

For harvesting grapes, a particular season or weather can determine whether external factors such as water shortage can affect the taste of a wine produced in extreme weather conditions. Other factors such as climate change, dry *terroir*, excessive humidity affect their local environment and subsequently will change the taste of the wine. A bottle of good wine is not only dependent on a good viticulture plan but also local conditions associated with the soil may have an impact on the final product. At this stage, an accredited label may be a badge of information necessary for a consumer to decide whether these factors or none of them are essential for their informed choices.

2.2 *Certification of Organic Wine*

The process of organic certification is bureaucratic and involves plenty of prescribed procedures and pre-approved attestation for a certification scheme to be eligible for trading under an organic label. According to the elected voluntary programme, there are two types of attestation: self-declaratory and third-party attestation.[66] A self-declaratory attestation is a less intrusive scheme to a business as the producer is responsible for attesting her/his compliance to be registered by the chosen certification label. A third-party attestation is an external compliance process in which a constant micro-management interference in the production cycle is expected to comply with the certified label and its use. An external compliance scheme is attested by independent inspectors monitoring every phase of the production and delivery of the final product. That involves inspecting avoidance of contamination of the organic methods (cleaning of instruments and machinery, for instance); systems and people involved in the human chain to manufacture an organic product or any other interference to create an organic product. Further, a certified organic product must meet an accreditation process informed by local governmental authorities, as well as the required practices of any chosen voluntary label requirements.[67]

Notwithstanding that, every conformity assessment, review, inspection and audit carried out by independent attestation must have records to be stored for

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Mitigate Environmental Risk in Soybeans", *PLOS ONE*, 2010; DOI: <10.1371/journal.pone.0011250> accessed March 8, 2020. But see also Raúl F. Guerrero, Emma Cantos-Villar, Belén Puertas, Tristan Richard, "Daily Preharvest UV-C Light Maintains the High Stilbenoid Concentration in Grapes". *Journal of Agricultural and Food Chemistry*, 2016.

66 See, Eugenio Pomarici, Riccardo Vecchio and Fabio Verneau, "A Future of Sustainable Wine? A Reasoned Review and Discussion of Ongoing Programs around the World" (March 2014), published by Calitatea, Acces la Success Acces la Success, Volume 15, Issue 1, pp. 123–128.

67 See, DEMETER INTERNATIONAL, certification, <https://www.demeter.net/certification> accessed March 8, 2020.

a certain amount of time.[68] Each of these stages is time-consuming for producers. The whole accreditation process can be costly and risky, so making decisions about which label to abide by is a crucial step for any business to thrive. In the case of viticulture, a certification label must convey the correct message to the marketplace to be profitable.

In the European Union, a certification label for organic products, particularly wine, has a detailed set of rules, which are comprehensive. For instance, the use of approved substances as additives or processing aids must be strictly observed to produce organic wine.[69] But then some other aspects are overlooked for standards and regulations such as the presence of Isinglass (which is a substance obtained from the dried swim bladders of fish), Ascorbic Acid, Gum Arabic as their conditions as organic material are not entirely clear.[70]

In Australia, the National Association for Sustainable Agriculture Australia, hereinafter NASAA, certifies Australian organic wine along with the Australian Department of Agriculture National Standards for Organic and Bio-dynamic Produce, hereinafter NS, provide a national standard for the certification of organic wine. Being a national certification guarantees quality control in the Australian marketplace and for exporting to other markets. NASAA has also been involved in providing guidelines for Australian organic wine to be exported to the European Union.[71] Compliance with NASAA and the NS rules are necessary for any Australian winemaker to label Australian wine as an organic product so that it can be sold in the European Union.[72]

There are additional requirements to export Australian organic wine to the European Union, which is a comprehensive list of chemical processes, including peculiar aspects of wine production to be avoided for being labelled as organic wine. For example, the use of filters to produce organic wine is strictly regulated. Filters for organic wine to be sold in the European Union were not

68 Documents preferably should be available for public inspection, for instance, on a website. See, Commission Communication, EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs (2010/C 341/04), 5.2. Evidence, base of scheme claims and requirements, Official Journal of the European Union.

69 See, Regulation (EC) n. 834/2007, article 21 and the Commission Implementing Regulation (EU) n. 203/2012 which amends Regulation (EC) n. 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) n. 834/2007(complete rules on organic wine).

70 See, NASAA Certified Organic, Additional Requirements for Wine to the EU (EU n. 203/2012).

71 See, NASAA Certified Organic, Additional Requirements for Wine to the EU (EU n. 203/2012).

72 See, NASAA Certified Organic, Additional Requirements for Wine to the EU (EU n. 203/2012).

permitted to have more than 0.2 micrometres in diameter, which appears to be of utmost importance.[73] Other particularities that are described in the process of labelling an organic wine to be considered under an organic certification label in the European Union are extremely complex. For instance, heating treatments with temperature variation prescribed as not exceeding 70° Celsius or no physical elimination or reduction of sulphur dioxide by physical processes and other chemical processes as described with scientific precision.[74]

The Australian Grape and Wine Authority prescribes a declaration statement that requires notice of allergen ingredients on all wine labels; these would include most of the animal products a bottle of organic wine may have, which can cater for most dietary requirements.[75]

Again, the process of organic viticulture certification is not a simple matter. Having grapes certified as organic by NS under the equivalence to National Standards for Organic and Bio-dynamic Produce (DOA) and a list approved by the EU n. 203/2012, on ANNEX VIIIa, which should be recorded as evidence of compliance with all the guidelines must be consistent for five years.[76] Evidence includes the number of litres produced, the wine category exported as organic and the year of production of the organic wine labelled as such.[77]

Labelling requirements are set in a European Union logo manual which is to be followed *stricto sensu*. That said, Australian wine law is also stringent. Australian wine labels attached to the bottles are a full contract with the purchaser. In essence, it is an offence to sell, export, or import any wine with a false or misleading description or presentation applicable to geographic indications and related matters.[78] Label security and goodwill are acquired by the consumer's perception of what he or she is purchasing the quality claimed on

73 See, Commission Implementing Regulation (EU) n. 203/2012 of 8 March 2012, article 29d, (3), (b), Official Journal of the European Union.

74 See, NASAA Certified Organic, Additional Requirements for Wine to the EU.

75 See, Compliance Guide, Australian Grape and Wine Authority, Australian Government, June 2016, p. 10).

76 See, Commission Implementing Regulation (EU) n. 203/2012 of 8 March 2012, Article 29d, (2) (b), Official Journal of the European Union, (which is amending article 95, paragraph 10 for five years of recorded evidence related to organic grapes for organic wine and ANNEX VIIIa).

77 See, Commission Implementing Regulation (EU) n. 203/2012 of 8 March 2012, Article 29d, (2) (b), Official Journal of the European Union, (which is amending article 95, paragraph 10 for five years of recorded evidence related to organic grapes for organic wine and ANNEX VIIIa.

78 See, Australian Wine and Brandy Corporation Act 1980 (Note that before 31 July 2012 grapes were not eligible to be labelled as "Made from Organic Grapes" in the European Union).

the product. The possibility of committing a criminal offence by incorrectly labelling a bottle of wine is a deterrent against fraud and product manipulation. Labels for organic wine are crucially important for groups that are vulnerable to claims such as animal-free by-products, which biodynamic wines may not be able to claim.[79]

In short, organic products must ensure clarity for consumers, transparent information about the processes involved and, the nature and origin of the product to allow fair competition among producers and to establish the conditions to use a trade mark associated with organic wine. Therefore the label becomes a badge of goodwill that one acquires via reputation and prestige to attach to their trade mark. Thus a trade mark also receives status from the certification label to become an item of consumption.

However, wine production of any kind must follow a detailed procedure with documented evidence of any additives or substance in use. But how much is enough to claim something is organic is a matter of public policy at the national and international level. Take the case of organic grapes that are a pre-requisite to produce organic wine. In the European Union, a change in the legislation made it possible to have wine labelled as "wine made from organic grapes" but cannot bear the "Organic logo of the EU".[80] As a result "certified grapes" do not necessarily indicate that the fermented juice produced is necessarily organic wine in the European Union, which is confusing.[81]

Strict compliance with rules for label credibility on organic wine is necessary to promote less confusion among consumers and ensure trust in the product acquired. Otherwise, the label becomes a tarnished indication of what is claimed. It is always pertinent to remember that wine is the only food product that has no short-term validity; being vintage is of economic advantage. Therefore, contamination and other substances added to the final product must be strictly controlled.

For example, lead-based capsules or foil used on grapevine products, a measurement of alcohol strength in the final product, the indication of sugar added in the process of fermentation to produce wine, the name of the grape variety used for blending are essential. Also, rules on specific bottle shapes to store

79 White wine preservatives are sourced from Isinglass, so pescetarians should be aware of the presence of this product in their white wine. Biodynamic wines have the compost mixture made of animal internal organs.

80 See, Commission Implementing Regulation (EU) n. 203/2012, article 29d, (d), 2, (b) (concerning article 95, paragraph 10a), Official Journal of the European Union.

81 See, Commission Implementing Regulation (EU) n. 203/2012, article 29d, (d), 2, (b) (concerning article 95, paragraph 10a), Official Journal of the European Union.

wine and provenance are elements detailed in minutia by the legislation of the European Union. That shows quality control. Other exceptions are altering an organic wine composition due to climate change, as weather can alter natural wine preservation and taste by adding sulphur dioxide.[82]

One of the critical goals of European Union rules for organic wine is to avoid misleading any consumer by purchasing a product under a confusing brand. It can expose someone to allergens which are undesirable and pose a health risk.[83]

In the United States, the United States Department of Agriculture (USDA) enforces the National Organic Program which defines organic food as to exclude methods for producing food with genetic engineering, ionising radiation, and sewage sludge.[84] Generally, all organic wines to be USDA certified are not allowed to use added sulphites in production.[85] On the other hand, water and salt are not considered components eligible for organic evaluation, so that these are not certified as such and can be added in the process with no label information.[86]

2.3 *Definition of Organic Production, Including Wines*

What is organic? Does organic refer to just the product or its by-products used in the process of creating the final product as well? If one is looking into the holistic process of producing an organic wine and, particularly a biodynamic wine, then consumers should look at the vine cultivation, the harvesting of the grapes, and the preparation of the soil for such products. For instance, the production of biodynamic wines involves a controversial step of soil preparation with animal internal organs to fertilize the soil.[87] These are nutrients, but

82 See, Commission Implementing Regulation (EU) N. 203/2012, (8), Official Journal of the European Union, (regarding sulphur dioxide quantity measurable according to the weather conditions in some wine-growing regions).

83 See, L9, Volume 62, Regulations, Commission Implementing Regulation (EU) 2019/33 of 17 October 2018 supplementing Regulation (EU) n. 1308/2013 of the European Parliament and the Council, Official Journal of the European Union, (which deals with applications for protection of designations of origin, geographic indications and traditional terms in the wine sector, the objection procedure, restrictions of use, amendments to product specifications, cancellation of protection, and labelling and presentation).

84 See, Agriculture Marketing Service, Organic Production & Handling Standards, the United States Department of Agriculture, <https://www.ams.usda.gov/publications/content/organic-production-handling-standards≥ accessed March 8, 2020.

85 See, Agricultural Marketing Service, Guidelines for Labelling Wine as "Made with Organic and Non-Organic Ingredients", Sulphite Statement, The Department of Agriculture.

86 See, Agricultural Marketing Service, Guidelines for Labelling Wine as "Made with Organic and Non-Organic Ingredients", Sulphite Statement, The Department of Agriculture.

87 See, Rudolf Steiner, *What is biodynamics?* Hugh J. Courtney and Marcia Merryman Means (eds) (SteinerBooks 2005) (for an explanation of Rudolf Steiner's lectures edited by Hugh

the procedure of adding animal nutrients maybe not be suitable for those that aspire to consume animal-free products. One may raise an objection to animal use based on cruelty claims.[88] Either way, the consumer must know that the by-product is animal-sourced. It must be one of the unknown secrets of the biodynamic farming process which is fully available on Steiner's spiritual-scientific methods to consumers but not so much detailed on what animal parts are used.[89]

In the preparation of biodynamic wines, the soil is treated with animal parts mixed into the earth for mineral enrichment. These minerals provide nutrients to the growth of biodynamic grapes, and consequently, an expected unique taste to the biodynamic wine is claimed by the adepts of biodynamic wine produce. The whole biodynamic process of cultivation, harvesting, winemaking and delivery of the final product comes from this biodynamic *terroir* as Steiner had envisioned back in 1924.[90] Having accepted the holistic process of cultivation as an integral part of the biodynamic method, one could assume that animal-free product is not a claim to be considered for the biodynamic process that produces biodynamic wines.

Therefore, biodynamic wine is not suitable for vegans and vegetarians, most likely to pescatarians also. It raises the question of label integrity and disclosure of processes and additives affixed on biodynamic wine bottles explaining the biodynamic process and the animal product involved to manufacture biodynamic wines. Biodynamic wines are considered the ultimate level of organic farming due to a positive view of Steiner's farming legacy. However, biodynamic wines contain by-products from animals in its production, which may be an issue for those consumers that claim a lifestyle free of animal products and by-products.

Ideally, an organic wine definition would involve some form of indigenous grapes, if not all native grapes from a given locality. Wild grapes are natural to their environment, requiring less adaptation. If a consumer of organic wine

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Courtney). The only book Rudolf Steiner wrote himself is The Story of my Life in 1928. See, Rudolf Steiner, *The Story of my Life*, (Anthroposophical Publishing Co., 1928).

88 See, Rudolf Steiner, *What is biodynamics?* Hugh J. Courtney and Marcia Merryman Means (eds), (SteinerBooks, 2005) (for an explanation of Rudolf Steiner's lectures edited by Hugh Courtney), p 124 (no use of refused slaughterhouse cow horns should be part of the biodynamic manure).

89 See, Rudolf Steiner, *What is biodynamics?* Hugh J. Courtney and Marcia Merryman Means (eds), (SteinerBooks, 2005) (that the living organism has forces that are from inside and outside and surrounded by other forces, so the spiritual balance is necessary).

90 See, DEMETER International website, <https://www.demeter.net/what-is-demeter/history> accessed March 8, 2020.

values locally sourced goods such as wild grapes, an organic grape must be an indigenous grape. One could safely assume that indigenous grapes having survived in their natural habitat for so many generations with minimal human intervention are less prone to pests. By contrast, genetically manipulated vines would require a fair amount of pest control.

Domesticated grapes via introgression of species by natural propagation that are naturally selected have the most robust genes, which brings diversity to the species. As vines are one of the most ancient crops to propagate in the wild, one assumes that the most vigorous plants will survive; therefore, minimal exposure to pesticides from cultivation to the harvest stage is expected. To be an indigenous grape means to be a domesticated grape as well.[91]

There are plenty of well-known indigenous grapes around the world. *Vitis californica*, *Vitis arizonica and Vitis giardiana Munson* found in California and western parts of the United States as well as *Vitis vinifera* from Georgia are good examples of indigenous grapes.[92] Some of these indigenous grapes have cross-pollination that occurs by seed-planting spread instead of rooting of twigs and grafted rooted plants, for instance. A wine of *Vitis californica* grapes has seldom been considered as having a similar reputation as the European varieties. Still, *Vitis californica, Vitis arizonica* and *Vitis girdiana Munson* are indigenous grapes being organic in the sense of belonging to their locality.[93]

It would be relatively straightforward to certify grapes by their native origins like *Vitis californica* or *Vitis girdiana.*[94] Ideally, certified native grapes should be a product of preservative-free vineyards that produce it, with minimal human or chemical intervention in the process of storage and

91 See, Sean Myles, Adam R. Boyko, Christopher L. Owens, Patrick J. Brown, Fabrizio Grassi, Mallikarjuna K. Aradhya, Bernard Prins, Andy Reynolds, Jer-Ming Chia, Doreen Ware, Carlos D. Bustamante, and Edward S. Buckler, "Genetic Structure and Domestication history of the grape", published by Proceedings of the National Academy of Science of the United States of America, March 1, 2011, <https://doi.org/10.1073/pnas.1009363108> accessed March 8, 2020.

92 See, Global Biodiversity Information Facility, Classification, Species, https://www.gbif.org/species/105743547/verbatim accessed April 11, 2020.

93 See, Daniel Zoharty, "Domestication of the Grapevine Vitis Vinifera in the Near East", in The Origins of and Ancient History of Wine edited by Patrick e. McGovern, Stuart J. Fleming and Solomon H. Katz (Gordon and Breach Publishers, 1996) pp. 26. See, also United States Food and Drug Administration, Food Label and Nutrition, Use of the term Natural on Food Labelling, https://www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling accessed April 11,2020.

94 See, A.J. Winkler, J.A. Cook, W.M. Kliewer and L.AA. Líder, *General Viticulture*, (University of California Press, 1962, 1974), pp. 29–58.

delivery to be sold to the final consumer. That is, in fact, achievable with indigenous grapes grown in the wilderness. The problem is, what is organic in one part of the world is not considered organic produce in another part of the planet.

On the other hand, a bottle of biodynamic wine is organic *per se*, as it includes organic by-products; nonetheless, a claim that it does not involve animal by-products is problematic. Indeed, a biodynamic process that produces organic wine uses animal parts for its *terroir* treatment. If organic or biodynamic wines are to appeal to vegans and vegetarians as consumers, then the whole label guidelines for biodynamic and organic may have to include more substances and procedures that are required for these products.

3 Trade Marks for Organic Wines, Certification Marks and Labels: Reputation, Brand and a Deceptive Attitude to Transparency

Trade marks are an intellectual property right via a registration that distinguishes the products or services from a company or individual in commerce. Once a trade mark is registered in a Member country, the Paris Convention permits the trade mark to be filed in another Member country in which the product will be commercialised, according to the trade mark's priority date.[95] A trade mark is a source indicator for consumers.

Recognising symbols is a large part of our daily lives. Symbols express the goodwill of whoever produces products and have their mark on it. Consistent with this logic, Judge Frankfurter observed: "the owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol".[96] Indeed, that *symbol* is what differentiates trade marks from certified marks: their distinctive source. Trade marks associate a sign with a badge of origin; certified marks associate products with verified sources as well as pre-approved procedures that allow eligibility to be a certified product and producers.

95 See, Paris Convention for the Protection of Industrial Property, 6quinquies, (B)(2), The World Intellectual Property Organization, <https://wipolex.wipo.int/en/text/288514> accessed March 9, 2020.

96 See, *Mishawaka Rubber & Woolen MFG Co. v. S.S.Kresge Co.* n. 649, 316 U.S. 203 (62 S. Ct. 1022, 86 L. Ed. 1381)<https://www.loc.gov/item/usrep316203/> accessed March 8, 2020.

Most products must have a label whose primary purpose is to educate the purchaser about the product use. Consumers want to be sure about the origin of purchased products, so labelling legislation requirements assure that consumers are protected from deceptive products in the marketplace.[97] For instance, Halal and Kosher food caters for Muslim and Jewish consumers, respectively, these consumers rely substantially on the mode of production, on certified companies that produce accredited food following pre-determined religious rules for food consumption. In short, a label and a certification mark represent the adoption of voluntary schemes of compliance to pre-determined standards, whether for religious reasons or for a legislative framework that ensures quality and ultimate satisfaction for the consumer.

Generally, food and beverages are labelled to inform consumers of potentially allergic ingredients, harmful chemicals present in the production or contact with allergens in the production stage. Overall, it is for food safety that a label must be a detailed source of information, for instance, cautioning a user about some effects that may occur with food ingestion so that consumers would evaluate products that involve human consumption. Food safety means label uniformity to promote mutual understanding, between producer and consumer.

Labels are also a badge of origin for products and services. If one considers the wine sector, in which appellations are crucial for grapes names, for a vineyard to be included in a unique location that means that the label is an *indication of origin.*[98]

Labels as a regulatory arrangement have different purposes and enforceability than trade marks. For instance, in the European Union to promote uniformity in inspected quality characteristics of a product, one must verify the aggregated value bestowed on the product by natural resources utilised in the production. Some of the aspects considered are: a traditional culture associated to heritage is attested, a particular environment such as *terroir*, geographic conditions or microclimates are taken into account for the product to be manufactured so that it becomes *that product* made in that region. Some examples of label regulations are Protected Designation of Origin (PDO),

97 See, Stefano Inama, "GIs Beyond TTIP: Death or Victory for the "Living Cultural and Gastronomic Heritage?", published by Journal of World Trade 51, n. 3, (2017) p. 473, 477.

98 See, Stefano Inama, "GIs Beyond TTIP: Death or Victory for the "Living Cultural and Gastronomic Heritage?", published by Journal of World Trade 51, n. 3, (2017) p. 486 (Why the US has been re-evaluating their strategy on GIs as a consequence of California wine produce).

Protected Geographical Indication (PGI) and Guaranteed Traditional Speciality (GTS), among many other regulatory schemes listed on the International Organization for Standardization (ISO). They serve the purpose of identifying performance indicators.[99] For being organic wine, environmental and sustainabilities practices are essential indicators of compliance with sustainable practices. Some examples are EMS Environmental Management System ISO 14001, Certified California Sustainable Vineyard and Winery (CCSW), Sustainable Winegrowing New Zealand (SWNZ), Sustainable Australia Winegrowing McClaren Vale, and for biodynamic wine, DEMETER®.[100]

Products under any of the labels above should follow strict regulations to maintain these certification schemes, except wine labels.[101] It is a novelty to associate sustainable wine with organic methods commercially orientated to produce *organic* wine. Therefore, a certification mark would be preferable for organic wines over any other intellectual property protection.

Further, the process may have variegated standards of certification for different organisations, which may change the rules for the production of organic wine under their label. Ultimately, that affects the final product and the consumer's perception of what is organic in the market.[102] It is instead a perception from consumers and deception created by labels that pre-determines whether a wine product is worth a label as organic or a certification mark that attests all phases of production as certified organic.[103]

The experience in the United States with the certification mark is problematic. In essence, it is considered to be lenient towards uniformity in procedures,

99 See, Richard Bonsi, A.L. Hammet, Bob Smith, "Eco-Labels and International Trade: Problems and Solutions", Journal of World Trade 42 (3), p. 411),<https://www.researchgate.net/publication/286893414_Eco-labels_and_international_trade_Problems_and_solutions> accessed March 8, 2020.

100 Wine merchants are selling information about sustainable wine online via subscription. Any internet search engine can take you to a myriad of wine sellers online for ISO labels. Just type "International Organisation for Stamdardisation (ISO) for organic wine". You will find difficult to separate the wheat from the shaft.

101 I found only one wine merchant based in Singapore that identified biodynamic wines as not suitable to vegans and vegetarians. See, Wine-Family.com (for ISO labels and information about biodynamic wines).

102 See, Jeanne Fromer, "The (Un)regulated Certification Market, Stanford Law Review", Volume 69, January 2017, pp.19–21, 23, 28–29, 31,<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910564> accessed March 8, 2020.

103 See, Benno Buehler and Florian Schuett, "Certification and minimum quality standards when some consumers are uniformed", European Economic Review, published by Elsevier in 2014, pp. 494, 505. (government certification is the correct incentive for a certifier to enforce and certification scheme, honestly).

vague in their certification standards which can be "redefined" by certifiers to exclude some products and businesses subjectively.

Consequently, certification marks may be easily manipulated to exclude some companies from acquiring a chosen label of certification.[104] There is also an economic incentive for certifiers to provide accreditation for goods as there is a contractual agreement for being a member of a certified label.[105] In the US, the approach to certification marks is problematic, restrictive, and deemed particularly unreliable in the control and management of the certified product.[106] For certified products, confusion between the consumers' perceptions of what they are buying and what the label says about the product is highly plausible. If understanding the purpose of a label becomes a problem for consumers, the product will achieve less credibility and trust.

Generally, the public should be able to recognisable a label by the registered mark and the certification identifier along with its affordability.[107] In the case of organic wine, the definition of what qualifies as *organic* is flexible to accommodate different private label schemes. There are standards for organic produce that may be pesticide friendly instead of pesticide-free; or non-certified grapes; additives may include animal derivative products like yeast mannoproteins, or processing aids like egg white or milk products.[108] In the case of biodynamic wines, the *terroir* may have had animal by-products such as bladder of a male red deer, intestines, and horns to enrich the outcome of the manure.[109] For exports, it is a complex task to abide by different labelling guidelines. If countries lack mutually recognisable labels and

104 See, also Jeanne Fromer, "The (Un)regulated Certification Market, Stanford Law Review", Volume 69, January 2017, p. 18.

105 See, also Jeanne Fromer, "The (Un)regulated Certification Market, Stanford Law Review", Volume 69, January 2017, pp.35–36.

106 See, also Jeanne Fromer, "The (Un)regulated Certification Market, Stanford Law Review", Volume 69, January 2017, pp. 12–13.

107 See, Richard Bonsi, A.L. Hammett and Bob Smith, "Eco-labels and International Trade: Problems and Solutions" 2008, p. 427, <https://www.researchgate.net/publication/286893414_Eco-labels_and_international_trade_Problems_and_solutions> accessed March 8, 2020.

108 See, Additives, Compliance Guide, Wine Australia for Australian Wine Producers, Australian Grape and Wine Authority, p. 6 <https://www.wineaustralia.com/getmedia/81cbe0c6-491b-46ed-8b82-4f5af51c44d4/Wine-Australia-Compliance-Guide-June-2016.pdf> accessed March 8, 2020.

109 See, Rudolf Steiner, What is Biodynamics? A Way to Heal and Revitalize the Earth, Seven Lectures (SteinerBooks, 2005), pp. 113, 116–119, 121–126, 128–130, 133, 139, 141–144, 146, 150, 152, 154.

certification standards, uncertainty on what should be accredited as organic eventually erodes equivalence and transparency in label claims.

Moreover, the consumer must be able to rely on a displayed organic label to make a conscious purchase no matter where they live. In some countries, the mandatory labelling requirement will monitor compliance with an organic viticulture wine that conveys the *true nature* of the product to be imported for internal consumption.

Exporting organic wine to the European Union means that certified grapes for that market would not have their appellation recognised in the certification scheme, which is one of the elements that oenophiles appreciate the most. Ingredients and by-products in the winemaking process are what consumers look for in organic wines. Therefore, it is not a stretch of the imagination to suggest that organic wines are supposed to be produced by local communities and regulated by a governmental agency for exportation purposes, to ensure an accurate disclosure of ingredients.

A clear definition of organic and biodynamic wine could include a disclosure of every step of the production process, with strict guidance on by-products present in the wine bottle. If an animal by-product is used to cultivate and grow certificated grapes for the production of a biodynamic wine or a fish bladder is present in a white wine bottle, it must be labelled for credibility and transparency for consumers. Certified labels for organic and biodynamic wine should be accountable to consumers, maintaining label integrity, and ensuring compliance is achieved. As a result, the market would be more transparent, less deceptive, thus making it more about consumers than the marketing itself.

4 Conclusion

Organic wines may be designed for a new trend within the consumer market, but organic labelling must be strengthened in order to ensure maximum consumer confidence. Current labeling on organic wines is not living up to consumer expectations, so winemakers and regulators must ensure a full disclosure of additives, pesticides and animal use in the manufacturing processes of biodynamic wines.

Defining what organic wine production is means describing any additives or by-product, natural or otherwise, present or created in the winemaking process. This should also include all of the procedures and methods involved in the final product. A certified organic label that would harmonise all regulations and national protocols would be optimal for consumers worldwide. Ideally, an organic label must comprise a full disclosure of ingredients and by-products

used in the manufacturing of organic wine. For now, the legal status of what is truly organic wine will remain as opaque as ever.

The entire processing chain, from seedling to bottling, provides ample opportunity to find a non-organic element or two, and plenty of human intervention. With a myriad of national standards, and conflicting perspectives on the legitimacy of overt state intervention and standardisation of traditional organic winemaking practices, it becomes a challenging task to agree upon a universal definition of what is, specifically, an entirely organic winemaking process. The inspection of the label is a must and detailed examinations must be carried out to eliminate traces of contamination, including those in the water used to irrigate orchards, and which are used to cleanse the components used in the biodynamic winery. To trace back all the steps of production is not always an easy and economically viable choice for all producers of organic wine. It must be a compromise or a subjective test of which wine is *more* organic than others. But that is as subjective as asking if my lawn is greener than yours, as it may indeed be greener, or simply just appear to be. Without independent verification, how can one ever truly tell?

CHAPTER 26

In Vino Veritas

Blockchain as a Viable Solution for Combating Counterfeit Wines in China

Jerry I-H Hsiao

1 Introduction

Vine cultivation in China goes as far back as the Zhou dynasty (ca. 1100–256 BC), where indigenous wines within the royal gardens are said to have existed.[1] Wine, produced from fermented grapes, has been produced in China since around the Han dynasty (206 BC–220 AD), when high quality grapes came to this region.[2] Today, China is on the radar for many countries as the most lucrative opportunity in the global wine market.[3] Forty years of explosive economic growth has helped to create millions of middle class households. With improvements in living standards and the change of lifestyle, drinking wine has become popular among the better-off Chinese citizens. China imported $3.91b of wine in 2018 which makes it the fourth largest wine importing country after the United States (US), the United Kingdom and Germany.[4] China is now the world's largest consumer of red wine, ahead of France; China consumed 155 million nine-liter cases whilst France drank 150 million nine-liter cases.[5] The domestic wine production has also expanded immensely: China has produced over 900 million liters of grape wine in 2018 and had the second largest vineyard area worldwide.[6] Most prominent vineyards are located in Ningxia, Shandong, Hebei, Jilin, Shanxi, and Shaanxi provinces as well as

1 Toby Bull, 'The Grape War of China: Wine Fraud and How Science Is Fighting Back', (2015) 13 J. ART CRIME 89.

2 Agne Blazyte, 'Wine industry in China', *STATISTA* (Nov 14, 2019), <https://www.statista.com/topics/5036/wine-industry-in-china/>.

3 See Chris Mercer, 'China Wine Potential Beats US, Says NZ Estate Owner', *DECANTER* (Oct. 8, 2013), <http://www.decanter.com/news/wine-news/584438/china-wine-potentialbeats-us-says-nz-estate-owner>.

4 Blazyte (n 2).

5 SCMP, 'China No.2 Buyer of Pricier Wines', *South China Morning Post*, World Section, 9 April 2014.

6 Blazyte (n 2).

 | DOI:10.1163/9789004438316_027

around Beijing and Tianjin.[7] Today, grape wine is a trendy symbol of social status, luxury, as well as "healthy alcohol".[8]

Faced with increasing demand for both domestic and foreign wine, the issue of counterfeit wines has been drawing increasing attention. In order to tackle this issue, China has responded with more rigorous laws and regulations; however, the result is not satisfying due to weak legal implementation and enforcement. Furthermore, the lack of traceability and transparency regarding supply chain for wines further complicates the issue. Scholars have suggested that, where trust on the legal system is breaking down or insufficient, blockchain can complement and extend the existing trust architecture.[9] Often the problem in the current environment is that centralized arrangements cannot scale effectively enough, preventing desirable solutions.[10] Where the blockchain powers new markets, it often does so in ways that are complementary to existing legal arrangements. Thus, this chapter identifies how blockchain could be a viable solution to counterfeit wines in China by discussing its potential benefits and challenges. If successful, China's example could stand out as a role model on fusing law and technology to protect consumers and illustrate how the operation of supply chain could be fundamentally changed. This chapter is divided into five sections. Section 1 provides the general background of this chapter. Section 2 identifies the issue of counterfeit wines in China, the current legal environment and methods to tackle counterfeit wines prior to blockchain adoption. Section 3 then proceeds to introduce blockchain and its main features. Some examples on the use of blockchain to prevent counterfeit wines are addressed. Section 4 identifies three issues that need to be resolved for blockchain to maximize its potential. Section 5 concludes.

2 Wine in the Chinese Context

Counterfeit wine in China has been making headlines around the globe, for example, London Telegraph headline reads, "Red Alert Over Bordeaux Wine Fraud",[11] while a CNN.com headline laments the "Counterfeits in the Grape

7 Blazyte (n 2).
8 Blazyte (n 2).
9 Kevin Werbach, 'Trust, but Verify: Why the Blockchain Needs the Law', (2018) 33 BERKELEY TECH. L.J. 487, 536.
10 Werbach (n 9) 536.
11 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-winefraud.html>.

Wall of China".[12] Therefore, it is no surprise that around 44% of Chinese consumers are worried about counterfeiting, and do not know whether the wine they are drinking is authentic or not.[13] More shockingly is that according to consultancy firm estimations, between 50%-70% of wine sold in China is fake. More than 90% of the Chateau Lafite bottles found are counterfeit products, with two million bottles supposedly sold in China yet the Chateau only supplies the whole of Asia with 80,000 bottles.[14]

2.1 *Issues of Counterfeit Wine*

Counterfeit wine is infiltrating the Chinese market at an alarming pace.[15] The reason counterfeit wines have emerged in China so suddenly and with such gusto is the increased desire for wine in the Chinese market.[16] The sheer volume of counterfeit wine in China makes it difficult for wine sellers to monitor the purity of their wines once the goods enter domestic Chinese commerce.[17] Back in 2010, Chinese State media, the CCTV 1 channel, reported that five wineries in the Changli district of Hebei province were suspected of selling fake wine and counterfeiting famous local brands. When tested, some were found to contain only 20% fermented grape juice, whilst others had no grape origins at all – only sugar water mixed with chemicals, like coloring agents and flavoring.[18] In 2017, police in Shanghai seized 14,000 bottles of counterfeit Penfolds, worth over USD1 million. Five months later in Henan Province, police busted another 50,000 fake bottles, worth over USD2.8 million.[19] A counterfeit bottle

12 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-winetastings?s=PM:WORLD>.

13 Wine Intelligence, 'Is Your Back Label Right for China?' *White Paper. WINE INTELLIGENCE* (Aug, 2013), <https://www.wineintelligence.com/wp-content/uploads/2013/08/Wine-Intelligence-Whitepaper-China-Back-Labels-2013.pdf>.

14 Daxue Consulting, 'The Chinese Red Wine Market Both Promising and Difficult' (2014), <www.daxueconsulting.conchinesered-wine-market/>.

15 See David Pierson, 'Pricey Counterfeit Labels Proliferate as China Wine Market Booms', *L.A. TIMES* (Jan. 14, 2012), <http://articles.latimes.com/2012/jan/14/business/la-fi-china-counterfeitwine-20120115>.

16 Vey Wong, 'Betting on Chinese Wines Could Bring More Cheer for Investors', *H. K. ECON. J.* (Feb. 18, 2011), <http://www.ejinsight.com/template/eng/news/jsp/detail.jsp?dnewsid=128&titleid=6750>.

17 Malcolm Moore, 'Empty Wine Bottles Sell for £300 in China', *TELEGRAPH* (Jan. 7, 2011), <http://www.telegraph.co.uk/foodanddrink/wine/8246212/Empty-wine-bottles-sell-for-300-in-China.html>.

18 Bull (n 1) 92.

19 Steve Rogerson, 'VeChain Blockchain Tackles Counterfeit Wines in China', (Aug. 13, 2019), <https://www.iotm2mcouncil.org/vechwine>.

of wine can be difficult to spot and remove from the marketplace.[20] In the usual counterfeiting plot, counterfeiters in China obtain possession of authentic, empty wine bottles and then refill them with lower quality wines, so the consumer may not even realize he or she is drinking a knock-off.[21]

The phenomenon of wine counterfeiting, however, is not unique to modern day China, but can be traced back to Ancient Rome.[22] Adulteration practices include mixing genuine wine with fake wines[23] or adding dirt and smoke into wine in order to make it seem old.[24] In first century of the Roman Empire, concerns over the adulteration of wine were so great that one eminent scientist was driven to exclaim, "so many poisons are employed to force wine to suit our taste-and we are surprised that it is not wholesome!" When discussing counterfeiting, it is important to remember that fakes and forgeries are not tautological. A fake is a genuine object that has been tampered with for the purpose of deception. This means a bottle in which the contents do not match the label – for example, pouring cheaper wine into a bottle with a label that imitates the good wine or taking a bottle of an inferior, less expensive vintage and relabeling it with a better, more expensive vintage.[25] A forgery is an object made in fraudulent imitation of something – bottles and labels that are an attempt to copy the real thing. Forgeries vary in their ingenuity. Some are very crude relying on photocopied labels, while others are much more sophisticated.[26] Nevertheless, it is relatively easy to forge or fake wine. All you need is a bottle, a label, and some wine, all of which can be readily and inexpensively obtained.[27] Thus, counterfeit wines could lead to dilution of legitimate brands, harming their producers while receive an unfair advantage, benefitting from the reputation they are weakening.'[28]

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20 Beaufortninja, 'The Problem of Counterfeit Wine in China', *WANDERING AM. TRAVELBLOG* (May 14, 2012), <http://wanderingamericantravelblog.com/2012/05/14/the-problem-ofcounterfeit-wine-in-china/> (even an experienced wine-drinker may not realize he or she has purchased a counterfeit without closely scrutinizing the label).

21 Pierson (n 15).

22 James F. Bush, 'By Hercules – The More Common the Wine, the More Whole – Science and the Adulteration of Food and Other Natural Products in Ancient Rome', (2002) 57 FOOD & DRUG L.J. 573, 580.

23 Stuart George and Noah Charney, 'Excerpt from the Wine Forger's Handbook', (2015) 14 J. ART CRIME 101.

24 Bush (n 22) 581.

25 George (n 23) 103.

26 George (n 23) 103.

27 George (n 23) 103.

28 Michael Blakeney, Proposals for International Criminal Enforcement of Intellectual Property Rights, in THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS:

2.2 *Regulation of Wine in China*

There are two key legal realms under which counterfeit food manufacturers, producers, and sellers can be prosecuted in China. The first is China's food safety laws and the second is trademark law.

2.2.1 Food Safety Law

National food safety standard systems provide the backbone for supervision of wine products in China. In 1984, the former Department of Light Industry released QB 921–84 Wines and Their Test Methods. The implementation marked the beginning of standardized manufacture of wines in China. Before QB/T 1980–1994 Half Base Wine expired on 1 Jul 2004, water-blended fruit wines were permitted for sale in China and could be labeled as wine. Following this China began more reform of wine-related standards and rules, including the drafting of new standards and provisions. According to the White Paper on China's Food Safety issued in 2007 by the State Council Information Office, China has a complete law regime. By then, the total number of food-related laws, regulations and regulatory documents by government agencies at ministerial level or above amounts to more than 800 instruments. If all types of food standards are included, there are more than 3,000 laws, regulations, rules and standards in China. On 24 April 2015, the 14th Meeting of the Standing Committee of the 12th National People's Congress deliberated and adopted the newly amended Food Safety Law, according to Article 15 of Food Safety Law, food means any substance that has been processed or not processed that is suitable for eating and/or drinking, which also includes wine.[29]

The latest amendment to Food Safety Law in 2015 aims to establish a national traceability mechanism for food safety, where all producers and distributors must establish a traceability system. According to Article 42 of Food Safety Law, "food producers and distributors shall establish the traceability system for food safety in accordance with this Law so as to ensure food traceability. The State shall encourage food producers and distributors to collect and preserve production and distribution information and to establish the traceability system for food safety by means of information technology". This is an adoption of the "farm-to-fork" approach.[30] The characteristics of this approach include: first, it

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COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION 30 (Christoph Antons ed., 2011).

29 It also includes substances used as food and traditional Chinese medicine, but excluding substances solely used as medicine.

30 Jessica Vapnek, 'Legislative Implementation of the Food Chain Approach', (2007) 40 VAND. J. TRANSNAT'L L. 987, 995–996.

is holistic, addressing food safety in the entire food chain; second, the food chain approach is preventive; third, the food chain approach is risk-based, meaning that resources are allocated to combat the hazards that pose the greatest threat to public health, and where the potential gains from preventive action are greatest; the fourth and final characteristic of the food chain approach is that it posits food safety as a shared responsibility, assured through the combined efforts of all the private and governmental actors participating in the food chain.[31]

2.2.2 Trademark Law

In addition to food safety laws, the right to protect the quality, integrity, and identity of a particular wine is recognized at the global level as an intellectual property right, particularly trademark laws and are protected within China by several criminal laws.[32] In China, producing and/or selling fake wine may result in at least one criminal charge which includes the crime of knowing or unknowing trademark infringement, a crime based on forging and manufacturing or manufacturing and selling another's trademark without his or her permission, and the crime of passing-off inferior or shoddy goods.[33] Victims of trademark infringement, or counterfeiting, may bring a civil case or administrative enforcement against the counterfeiter, which may or may not result in criminal proceedings.[34] Therefore, counterfeit food producers could be prosecuted for trademark infringement if the fake food is sold under the name of a registered mark or brand, and the legitimate manufacturer seeks to recover damages to reputation and otherwise.[35] However, trademark law protection is limited if the counterfeit wines are not sold under a protected mark.

With a seemingly robust food safety law and trademark law, what are the underlying reasons driving China's wine counterfeiting issues? Some argued that China has failed to implement a reliable framework to prevent and punish counterfeiting.[36] Critics also argue that China lacks the technical and institutional capacity to enforce the laws that the state has promulgated.[37]

31 Vapnek (n 30).
32 Emily Kehoe, Combating the Counterfeiting Woes of the Wine Seller in China, 53 IDEA 257,260 (2013).
33 Kehoe (n 32).
34 Robert W. Jr. Kerns, The Counterfeit Good Crisis in China: A Systemic Problem and Possible Solutions, 41 N.C. J. INT'L L. 573, 579 (2016).
35 Kerns (n 34).
36 Kehoe (n 32).
37 Ina Ilin-Schneider, China's Food Industry in Crisis: A Detailed Analysis of the FSL and China's Enforcement Obstacles 17 (Seton Hall Univ. eRepository, Paper No. 247, 2013).

Furthermore, certain provisions within China's laws leave the door open for less severe, low-grossing, food and trade crimes that are able to escape punishment.[38] Therefore, merely legislating and regulating is insufficient. China' real legal challenge is not within law enactment but rather law enforcement and compliance.[39] The widespread production and distribution of contaminated and fake foods leads the Chinese consumer to distrust the market, distrust service providers, distrust law enforcement officers, distrust the law and legal institutions.[40] It is hoped by the advent of blockchain, technology could complement the law to solve the issues described. The following section explains the different measures used by industries to prevent counterfeiting wine and how industries are experimenting with the use of blockchain to increase traceability and transparency.

2.3 *Anti-Counterfeiting Methods without Blockchain*

In recent times, the wine industry has been paying more attention to prevent counterfeit wines by enabling traceability in the wine supply chain. Traceability is a method through which anyone would be able to verify the overall process including raw materials, transport and storage conditions, processing, distribution, and sales in the wine supply chain.[41] Despite the vast sums generated by the top wine producers and merchants, there is no funding for research into counterfeit wine. Individual wine estates do use various methods to counter forgers: Chateau Margaux, for example, has incorporated an anti-fraud seal on all of its bottles since March 2010. The prooftag seal runs between the capsule and the bottle, and has a reference number and a unique pattern, both of which can be tracked on Margaux's website.[42] McHenry Hohnen, Australian small premium wine producer, is trialing an App that is the result of collaboration between Western Australia-based Linkar Group, and the Guangdong Guangxin Information Industry Development Company (China). It incorporates a new label featuring a

38 Kerns (n 34) 586.

39 Jason J. Czarnezki, Lin Yanmei and Cameron F. Field, 'Global Environmental Law: Food Safety & China', (2013) 25 GEO. INT'L ENVTL. L. REV. 261,274.

40 Yunxiang Yan, 'Food Safety and Social Risk in Contemporary China', (2012) 71 J. ASIAN STUD. 705, 719.

41 Kamanashis Biswas, Vallipuram Muthukkumarasamy and Wee Lum Tan, 'Blockchain Based Wine Supply Chain Traceability System', *FUTURE TECHNOLOGIES CONFERENCE* (*FTC*) (2017) 56.

42 George (n 23) 105.

scan-able code, which allows a tracing system to be activated and the ability to have the wines tracked.[43]

Isabel *et al* proposed a wine supply chain traceability system that uses both RFID (radio-frequency identification) tags and Wireless Sensor Networks.[44] A wireless sensor network was deployed in the vineyard to collect meteorological data and plant health information, whereas RFID tags are used to record data of harvesting, decantation, fermentation, and conservation processes. One of the major concerns in the existing traceability system is authenticity of the source information since it is easy to reproduce or forge the information at any time. For example, bottles for more renowned and expensive wines are often accompanied by fake provenance histories.[45] Thus, the wine industry needs a solution to ensure authenticity and provenance of every bottle of wine it produces.[46] Despite the efforts, some scholars are pessimistic about the different forms of technology available, as they believe any "solution" will typically last for six to twelve months before fraudsters have found a way round it and it might be easier to send a manned mission to Mars than to find a foolproof and universally acceptable anti-counterfeiting method for fine wine.[47] However, according to Maureen Downey, a wine fraud specialist, the real issue lies in the fact that all of these measures require a potential buyer, or their agent, to be in direct proximity of the bottle to inspect and assure authenticity, but usually not knowing where to look for before they make the purchase. In Downey's view, it is pointless even for the most robust antifraud, if not connected to a meaningful ledger which can be accessed by a potential buyer before she makes the purchase. However, she believes that blockchain could address all the issues at hand.[48]

43 Shaw, L, " App to Combat Fake Wine in China Developed", *THE DRINKS BUSINESS* (2014), <http://www.thedrinksbusiness.com/2014/04/app-to-combat-fake-wine-in-china-developed/>.

44 I. Expósito, J. A. Gay-Fernandez and I. Cuiñas, 'A Complete Traceability System for a Wine Supply Chain Using Radio-Frequency Identification and Wireless Sensor Networks' [Wireless Corner], (2013) 55 IEEE ANTENNAS and PROPAGATION MAGAZINE 255–267.

45 Biswas (n 41) 56.

46 Biswas (n 41) 56.

47 George (n 23) 105.

48 Maureen Downey, 'How Will Blockchain Technology Change Wine?' *BLOCKCHAIN EXPO* (Oct, 16, 2018), < https://www.blockchain-expo.com/2018/10/blockchain/how-will-blockchain-technology-change-wine/>.

3 Blockchain – a New Technology to Combat Counterfeit Wine

A centralized system, with a governing third party, was until recently the only conceivable way to achieve data and transaction transparency. However, the truth is that no single organization can be responsible for making data throughout a whole supply chain transparent. The fundamental problem regarding China's wine supply chain is that the retail channel is opaque, lacking transparency and traceability for both retailers and consumers.[49] Billy Chan, co-founder of DripChina in Shanghai, estimated that 70% of alcohol bottles sold in China are fake, causing various economic and health concerns.[50] Billy believes that blockchain is a traceability interface which enables brands to trace their products across the market. Hence, blockchain can make the supply chain transparent starting from the grape in the farm all the way to the hand of the consumer-a grape to glass approach. In a nutshell, blockchain technology – essentially a form of distributed electronic ledger allegedly immune to forgery and errors – is being hailed as the next disruptive leap forward in data sciences, on par with the advent of the internet itself.[51]

3.1 *Blockchain Demystified*

A blockchain is a kind of distributed ledger. It is "distributed" in that there is no master copy. Any participant in the network can maintain an instantiation of the ledger, yet be confident it matches all the others.[52] Currently, there are two main types of blockchains: public and private.[53] A public blockchain is an open ledger with permissionless access, where actors in the network are anonymous and do not need to have any previous relationship with the ledger. The advantage of public blockchain is that no individual or entity is able to control the information on the ledger and, therefore, the

49 Emilie Steckenborn, 'Can Blockchain Solve Fake Goods Entering the Market?', *BOTTLED IN CHINA* (Oct. 28, 2018), <https://www.bottledinchina.com/blockchainobottledinchina>.

50 Steckenborn (n 54).

51 Laura Shin, 'How the Blockchain Will Transform Everything from Banking to Government to Our Identities', *FORBES* (May 26, 2016), <https://www.forbes.com/sites/laurashin/2016/05/26/how-the-blockchain-will-transformeverything-from-banking-to-government-to-our-identities/#17ed4cfc558e>.

52 For a more comprehensive overview of blockchain technology one can refer to, for example, Jean Bacon et al., 'Blockchain Demystified: a Technical and Legal Introduction to Distributed and Centralized Ledgers', (2018) 25 RICH. J.L. & TECH. 1.

53 Jayachandran, P. 'The Difference between Public and Private Blockchain." Blockchain Unleashed: *IBM BLOCKCHAIN BLOG*, (May 31, 2017), <www.ibm.com/blogs/blockchain/2017/05/thedifference-between-public-and-private-blockchain/>.

system is neutral, Bitcoin serves an example for the public blockchain. A private blockchain is a closed ledger with permissioned access, where users are identified and transactions are validated and processed by actors that are already known by the ledger.[54] Instead of anonymous participants, permissioned distributed ledgers use already authenticated legal entities to validate transactions, if one acts maliciously, she can be penalized and ejected from the network. Thus, private blockchain operates on a trade-off where censorship-resistance is sacrificed for legal accountability, while still operating without intermediaries.[55]

In Nakamoto's original envision, each transaction, or block, is authenticated by a network of computers before it is added to the chain of all prior transactions using cryptographic techniques and a large amount of computing power.[56] Many nodes merely validate blocks while some nodes-miners-compete with each other to obtain a reward for finding a block. The reward for finding a block is newly minted bitcoins, distributed only when there is consensus among the nodes that the miner has found the block.[57] Mining nodes find blocks by computing random numbers against selected transactions (hashes) until a solution is found to a complex math problem that can only be solved by trial and error.[58] The provision of a solution is "proof-of-work",[59] all the transactions used in finding the solution make up the next block of transactions in the blockchain.[60] This required work from miners is what secures the bitcoin blockchain.[61] This allows blockchain to have the ability to track ownership and transfers of property without need of a trusted intermediary. Thus, blockchain solves an old problem of how do two parties conduct an online transaction without knowing or trusting each other and without the need for a trusted third-party intermediary?[62] Blockchain's decentralized attribute and

54 Swanson, T. 'Consensus-As-A-Service: A Brief Report on the Emergence of Permissioned, Distributed Ledger Systems' (April 2015), <www.ofnumbers.com/wp-content/uploads/2015/04/Permissioned-distributed ledgers.pdf>.

55 Swanson (n 54).

56 John Lanchester, When Bitcoin Grows Up, LONDON REV. OF BOOKS (Apr. 21,2016), https://www.1rb.co.uk/v38/n08/john-lanchester/when-bitcoin-grows-up.

57 SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 3–4 (2008), <https:/Ibitcoin.org/bitcoin.pdf.Nakamoto>.

58 Nakamoto (n 57) 3.

59 Nakamoto (n 57) 5.

60 Nakamoto (n 57) 3.

61 Proof-of-work is known for high energy consumption, poor cost efficiency and slow transaction speed.

62 Nakamoto (n 57).

permanency,[63] combined with its incorruptibility (or quasi incorruptibility),[64] makes its applications potentially disruptive.[65]

3.2 *Characteristics of Blockchain*

3.2.1 Data Encryption[66]

One key feature of blockchain is the encryption of information by transforming one piece of data into another using a mathematical algorithm so that the original data is obscured and can only be accessed by interested recipients.[67] Blockchain technology usually uses the encryption method known as cryptographic hashing. When a transaction is submitted, the contents of that transaction plus a few pieces of metadata are encrypted using a mathematical algorithm. The output is known as the hash, a short digest of the data. An electronic record runs through the cryptographic hashing algorithm using a particular key will always produce the same hash. Any change in the document will cause the hash to be significantly different.[68] It is important to note that since the hash is merely a short digest of the original, it is not possible to decrypt a hash and produce the original document, but it is possible to use the hash to verify a copy of a transaction or document maintained outside of the blockchain.[69]

3.2.2 Verification of Transactions

A blockchain user or group of users will cryptographically hash the record of any transaction, which is then broadcast to the network as the evidence that a particular transaction has occurred. Individual network nodes receive the broadcast will begin the process of ensuring that it is valid in accordance with the protocol of that particular blockchain.[70] The anonymity of participants in public blockchain and the identity of users in private blockchain make the process for verifying the transactions quite different from each other. As discussed, in public blockchhain, miners verify through proof of work. In private

63 Primavera De Filippi & Aaron Wright, Decentralized Blockchain Technologyand the Rise of Lex Cryptographia (Mar. 10, 2015),https://ssrn.com/abstract=2580664.

64 Nakamoto (n 57).

65 Danny Bradbury, The Problem with Bitcoin, 11 COMPUTER FRAUD & SECURITY 5 (2013).

66 Encryption is a subset of cryptography used to make information unreadable without possession of a key.

67 JAMES CONDOS et al., *BLOCKCHAIN TECHNOLOGY: OPPORTUNITIES AND RISKS Ch. 5* (2016) 7.

68 Condos (n 67) 7.

69 Condos (n 67) 7.

70 Condos (n 67) 7.

blockchain, proof of work might not be required, rather, with pre-selected miners and a block is added to the chain if and only if it is verified by the majority number of miners.[71] Each party to a transaction has two keys: a public key, which is known to the world, and a private key, which is kept secret.[72] These keys are digital certificates stored on the user's computer systems that allow for the encryption of data.[73] Upon receiving a block, the miners have to decrypt the encrypted information as well as check the identity of the requester before validating the block.[74] Anyone who knows the relevant algorithms and the public key can conclude, with near certainty, that someone who knew the private key corresponding to the public key must have performed the encryption.[75] Once a requisite number of computers (nodes) agree that a set of transaction is valid, that transaction will be added to the chain as a block.[76]

3.2.3 Immutability

Once a transaction is recorded, it cannot easily be changed, a property known as immutability.[77] Early deployments of blockchain technology to facilitate reliable record-keeping in business enterprises have tested its potential in combatting both fraud and theft, as well as its potential in assuring quality in a supply chain context.[78] The security of blockchain technology hinges on strong cryptographic schemes that verify and chain together every block of transactions. An attacker would have to compromise 51% of the systems to surpass the hashing power of the target network.[79] Thus, it is computationally impractical to tamper with transactions stored in a blockchain. In the word of its pseudonymous creator or creators, blockchain is "a system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party".[80]

71 Biswas (n 41) 58.
72 Condos (n 67) 8.
73 Condos (n 67) 8.
74 Biswas (n 41) 59.
75 Michael Abramowicz, Cryptocurrency-Based Law, 58 ARIZ. L. REV. 359, 372 (2016).
76 Condos (n 67) 8.
77 Werbach (n 9) 503.
78 See Heather Clancy, 'The Blockchain's Emerging Role in Sustainability', *GREENBIZ* (Feb. 6, 2017), <https://www.greenbiz.com/article/blockchains-emerging-rolesustainability>.
79 Biswas (n 39) 57.
80 Nakamoto (n57). (Satoshi Nakamoto is the name used by the presumed pseudonymous person or persons who developed bitcoin and the first blockchain database).

3.2.4 Traceability

A blockchain based wine supply chain traceability system records detailed information of all processes in an immutable and incorruptible database. The blockchain based traceability system incorporates the transactions of all primary entities in the chain comprise of the grape growers, wine producer, bulk distributor, transit cellar, filler/packer, finished goods distributor, wholesaler, and retailers.[81] In the wine supply chain, an ID number is used to uniquely identify each participant in the system, the grape grower generates the genesis block and adds the required information. The block is verified by the majority number of miners in the system before the next block being added to the chain. This procedure is followed by the bulk distributor, transit cellar, filler/packer, finished good distributor, wholesaler, and retailer in order to include their transactions in the chain.[82] The inclusion of batch ID and hash of previous block are used to trace back all related information and the data flow from the retailer to the grape grower. Since the details of a sold wine is recorded in the blockchain, it is not possible to sell the same item twice, making wine counterfeiting impossible.[83] Hence, a purchaser can verify the provenance and authenticity of the wine by inputting the product ID into the system which can traces back all transactions made by different entities in the supply chain, providing transparency before making the purchase.

3.3 *Blockchain in Action*

Today, wine industry around the world, have begun to embrace blockchain technology to fight counterfeit wines. For example, in China, Shanghai'sWaigaoqiao Direct Imported Goods (DIG) partnered with Price Waterhouse Cooper (PwC) and BitSE to deploy an Ethereum-based platform called VeChain for imported wine distribution in China.[84] In Italy, adulteration of wine and fake labels on wine bottles have been causing Italian wine industry €2 billion annually. This is why La Vis, one of the biggest wine producers in Italy, has also become one of the first to sell blockchain certified wine using EY Ops Chain.[85] EY Ops Chain introduces a smart label with a unique QR code that consumers can scan. By

81 Biswas (n 41) 59.
82 Biswas (n 41) 59.
83 Biswas (n 41) 59.
84 Hrishi Poola, Blockchain Wine, *JANCIS ROBINSON* (Feb. 8, 2018), < https://www.jancisrobinson.com/articles/blockchain-wine.
85 Giuseppe Perrone, 'Restoring Trust in the Wine Industry-From Grape to Glass', EY GLOBAL (2018), <https://www.ey.com/en_gl/global-review/2018/retoring-trust-in-the-wine-industry>.

scanning the code, a consumer is able to learn the DNA of the wine, when the grape was harvested, how the wine was treated, bottling date, etc.[86] The data is captured during each stage of the wine making process, using a mix of manual records and automated tools such as Internet of Things (IoT), and then recorded on to blockchain. In addition, the blockchain also records the status of the wine, when it moves along each different actors along the supply chain.[87]

Chainvine is another company trying to use IoT and blockchain to combat fake wines.[88] Chainvine first partners with winemakers and merchants to put on IoT devices and a QR code on each new bottle which are scanned by the vineyard and adds to Chainvine's blockchain database. When the bottles are first sold, the wine makers mark them as in transit, scanned by customs as they move along the supply chain and the sensors in the IoT devices monitor the bottles subsequent locations and conditions in which they are kept, including temperature and humidity.[89] Chainvine could also access to older bottles in existing blockchain-enabled wine databases, so the same information could also be collected from wines stored in customer's cellars. More importantly, the system allows the wine to be marked as consumed, preventing the reuse of bottles or labels to be fraudulently resell to others.[90]

In Japan, in order to fight Asian counterfeits, Japanese sake makers also adopt blockchain into their business. "SAKE Blockchain", which has been developed by EY Japan, plans to launch a blockchain traceability system for Japanese sake- an alcoholic beverage made from fermented rice, sharing information including origin and delivery records that will help brewers and producers differentiate their authentic products from counterfeits.[91] The data to be shared on the Sake blockchain include its ingredients, information on where it was brewed, as well as details of quality control along the distribution chain, including temperature records. In addition, the end consumer will be able to check the brewer's history and will even receive recommendations of food to pair with the products by scanning a QR code on the bottle using a smartphone.[92]

86 Perrone (n 85).

87 Perrone (n 85).

88 Mathew Vincent, 'How Smart Tech Could Put a Stop to Wine Fraud', *FTWEALTH* (Oct 18, 2019),<https://www.ft.com/content/e9f22342-d926-11e9-9c26-419d783e10e8>.

89 Vincent (n 88).

90 Vincent (n 88).

91 Nana Shibata, Japan Sake Makers to Adopt Blockchain to Fight Asian Counterfeits, *NIKKEI ASIAN REVIEW* (Mar 21, 2020), < https://asia.nikkei.com/Business/Technology/Japan-sake-makers-to-adopt-blockchain-to-fight-Asian-counterfeits>.

92 Shibata (n 91).

4 Ways Forward for Wider Blockchain Adoption

With the hype and potential surrounding blockchain, it is still an immature technology, issues remain with needs to be resolved before blockchain becomes an integral part of supply chain. Some of the basic concerns a company will consider before adopting the technology include the maturity of the technology, the amount of switching cost, whether this technology could be deployed at scale and which blockchain company could provide a reliable and trust worthy enterprise solution.[93] Once the decision of adopting blockchain has been made, industries have to consider about the details of implementation, which are further discussed below.

4.1 *Blockchain Transparency, Interoperability and Data Accessibility*

Blockchain operates under the assumption that transparency will lead to accountability. In the case of wine supply chain disclosure regimes, the primary goal is to pressure companies to conduct a high level of due diligence on their suppliers and product, with the ultimate aim of preventing wine counterfeiting. Ideally, supply chain disclosures would lead consumers to make more informed decisions that would drive companies to change their behavior.[94] In order to enhance transparency, as discussed earlier, industries might opt for either a public or private blockchain platform, which will require interoperability between ledger types.[95] Data portability between different ledgers requires clear standards on data protection to determine how data should be stored and shared between public and private blockchains.[96] In addition, data accessibility for blockchains is a key challenge, as transparency is a key feature of blockchains, there should be careful consideration of the types of data that should be protected and disclosed, and how blockchains can be developed to incentivize data sharing by supply chain actors.[97] For companies adopting the private blockchain, the issue of privacy might be easier to resolve, as private blockchains with cryptographic schemes, sensitive information can be kept secret by encrypting them using a pre-distributed secret key whereas public

93 Brant Carson et al, Blockchain Beyond the Hype: What is the Strategic Business Value? *McKINSEY* (June 2018), <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/blockchain-beyond-the-hype-what-is-the-strategic-business-value>.

94 Richard Craswell, 'Static Versus Dynamic Disclosures, and How Not To Judge Their Success or Failure', (2013) 88 WASH. L. REV. 333, 334.

95 MISCHA TRIPOLI and JOSEF SCHMIDHUBER, *EMERGING OPPORTUNITIES FOR THE APPLICATION OF BLOCKCHAIN IN THE AGRI-FOOD INDUSTRY* (2018), 21.

96 Tripoli (n 95) 21.

97 Tripoli (n 95) 21.

information can be stored in plain text.[98] In order to enhanced market transparency, it is important that key data is actually accessible. By adopting blockchain technology, there is a need for standardized reporting systems, creating a common technology platform, and most importantly, supplier education to improve their supply chain transparency.

4.2 *Blockchain Readability and Consumer Confidence*

Through enhancing transparency, there is also a need for companies to make sure how to enhance the readability of the information to the relevant consumers. A significant body of literature has focused on whether the public reads, understands, or trusts disclosures, and whether the public uses disclosures to enhance their decision-making.[99] Aside from issues of illiteracy, disclosures may be unreadable because of an "overload problem" from disclosures being too complex and copious for consumers to handle.[100] In addition, public may not read disclosures because of an "accumulation problem" from consumers being confronted with so much information from so many disclosures that it is difficult for them to remember, interpret, and apply that information.[101] Studies have also shown that the source of information considered least trustworthy by the public is information disclosed by companies.[102] This suggests that while asking companies to disclose information may be the cheapest form of regulation, it is also perhaps the least likely to improve consumer confidence (especially if the information disclosed is not independently verified by a third party).[103] Consumer confidence should be boosted by public blockchain since it is built on the concept of verification of transactions without the need of a trusted party. However, since in private blockchain, trusted third parties are necessarily present, whether the level of consumer confidence differs between public and private blockchain could be an interesting point for future research.

4.3 *Resolving the Issue of the "Last Mile"*

Record accuracy and trustworthiness is critical to the usefulness of the record.[104] The measure of trustworthiness is based on reliability, accuracy and

98 Biwas (n 41) 60.

99 Adam S. Chilton and Galit A. Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes', (2017) 53 STAN. J. INT'L L. 1,21.

100 OMRI BEN-SHAHAR and CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014) 8–9.

101 Chilton (n 99) 22.

102 Chilton (n 99) 42.

103 Chilton (n 99) 42.

104 Condos (n 67) 10, n.7.

authenticity of the record.[105] Blockchain technology does not address the reliability or accuracy of a digital record. Instead, it can address a record's authenticity by confirming the part or parties submitting a record. Blockchain offers no assistance in terms of reliability or accuracy of the records contained in the blockchain.[106] In other words, blockchain could be used to verify that a record has been input, when and the content but it could not be used to verify whether the content is authentic or not. If the technology works flawlessly, fundamental problems persist including human fallibility and corruption when creating the underlying records and enforcing consequences.[107] No matter how allegedly tamper-proof it may be, data verification is only useful if the original record is reliable. Nothing about blockchain technology eliminates conventional problems of establishing the nature of reality at the origin of a supply chain.[108] When a certification is first created – at the point where an individual inspects and certifies – how can anyone be sure the certifying individual has not been bribed or coerced?[109] The issue of the "Last Mile" has been investigated more thoroughly in the US by the State Government of Vermont via a cost-benefit analysis to switch to a blockchain recoding system.[110]

Vermont's original application protocol, however, relied on multiple human inputs in order to assure accuracy: multiple individuals agree to the transaction and the algorithm only verifies and transfers the funds.[111] The permanency of a blockchain can make record-keeping more complicated than the current system because multiple trusted individuals would be required to assure the accuracy of permanent entries.[112] However, the use of trusted individuals seemingly undermines the primary purpose of blockchain technology, which is to make an accurate and publicly accessible immutable record of transactions without the need for trusted third parties in order for individuals to conduct

105 Condos (n 67) 10.

106 Condos (n 67) 10.

107 The Economists, 'The Great Chain of Being Sure about things', *THE ECONOMIST* (Oct. 31, 2015), <https://www.economist.com/news/briefing/21677228-technology-behind-bitcoin-lets-peoplewho-do-not-know-or-trust-each-other-build-dependable>.

108 Victoria Louise Lemieux, 'Trusting Records: Is Blockchain Technology the Answer?', (2016) 26 RECORDS MGMT. J. 110, 128.

109 Adam Sulkowski, 'Blockchain, Business Supply Chains, Sustainability, and Law: The Future of Governance, Legal Frameworks, and Lawyers', (2019) 43 DEL. J. CORP. L. 303, 322.

110 Condos (n 67).

111 Condos (n 67) 20.

112 Anton I. Badev and Matthew Chen, *Bitcoin: Technical Background and Data Analysis*, Board of Governors of the Fed. Res. Sys. Fin, and Econ. Discussion Series (2014) 12 (unpublished working paper).

and publicly record such transactions.[113] The ultimate solution as some blockchain entrepreneurs offered is the hope that autonomous sensing equipment and artificial intelligence will develop to a point that non-corruptible and 100% reliable hardened equipment will take the place of human inspectors and certifiers.[114]

5 Conclusion

Blockchain technology is a novel and experimental technology. It provides a reliable way of confirming the party submitting a record to the blockchain, the time, date and the contents of the record at the time of submission, therefore eliminating the need for third party intermediaries. By incorporating blockchain, the wine supply chain is finally open for inspection by those interested, including both the government regulatory agencies and consumers. Through this approach, blockchain provides a map of suppliers, indicating which materials or processes a supplier is involved with and enables governments to organize wine producers and distributors, inspection and certification institutions, wine industry and consumers' associations, and news media to exchange information about wine safety risk assessment and supervision and administration of wine safety.[115] Thus, blockchain opens up the wine supply chain black box to enhance traceability and transparency, and a step forward to combat wine counterfeiting. However, as identified in this chapter, despite the hype in adopting blockchain, several issues remained particularly the issue of the "Last Mile." Blockchains are systems designed, implemented, and used by humans, therefore, technology alone will not be the only and final solution. As indicated in the beginning of the chapter, blockchain will complement the law to rebuilt trust, as a promising technology much is still needed to be explore and refine for the technology to release its full potential as a viable solution to counterfeit wine issues in China.

113 Condos (n 67) 15.
114 Sulkowski (n 109) 323, n. 111.
115 See Article 23 of the Food Safety Law (2015) which promotes public-private collaboration.

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