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A ROSÉ BY ANY OTHER NAME: PROTECTING GEOGRAPHICAL INDICATIONS FOR WINES AND SPIRITS IN CHINA

Mark J. Calaguas[†]

I. Introduction

In November 2005, California Governor Arnold Schwarzenegger paid a three-day visit to Beijing to address cooperation on environmental issues and to promote California's goods and services to the burgeoning Chinese market.¹ One member of the governor's delegation, California Agriculture Secretary A.G. Kawamura, had much to discuss with local political officials.² In particular, Kawamura addressed the state of the trademark "Napa Valley," which has been used to distinguish wines originating from the eponymous region of northern California.³ Controversy has arisen in recent years because of an attempt by a Chinese winery to register "Napa Valley" as a trademark to be used in marketing wines made from domestic grapes and sold to Chinese consumers.⁴ Understandably, the Napa Valley Vintners Association has challenged the registration in Chinese courts on the grounds that China is obligated to recognize the California trademark because it is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") of the World Trade Organization ("WTO").⁵

The argument that the unauthorized use of the "Napa Valley" trademark by Chinese businesses constitutes a violation of TRIPS puts the California vintners in a decidedly awkward position. For years, European food and wine manufacturers have criticized their counterparts in countries like the United States, where immigrants have used production techniques acquired from the Continent to make significant contributions to the economies and cultures of their adopted homelands.⁶ Most European countries afford strong intellectual property protection to goods whose quality and reputation have come to be associated with their

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¹ See *California Gov. Schwarzenegger wraps up 3-day Beijing visit*, ASIAN ECON. NEWS, Nov. 21, 2005, available at http://www.findarticles.com/p/articles/mi_m0WDP/is_2005_Nov_21/ai_n15868257.

² *Id.*

³ *Id.*

⁴ See Mark Silva, Note, *Sour Grapes: The Compromising Effect of the United States' Failure to Protect Foreign Geographic Indications of Wines*, 28 B.C. INT'L & COMP. L. REV. 197, 198-99 (2005) (citing Didier's, *California Winemakers Up in Arms over Chinese "Napa Valley" Wine*, http://www.didiers.net/_news.cfm?ID=578 (last visited Nov. 20, 2004) (on file with author)).

⁵ See *id.* at 199, 208, (citing Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 352-53 (2004)).

⁶ See Peter Gumbel, *Food Fight!*, TIME EUROPE, Aug. 31, 2003, at 2, available at <http://www.time.com/time/europe/magazine/article/0,13005,901030908-480249-1,00.html>.

place of production, a legal apparatus generally referred to as geographical indications (“GIs”).⁷ One manifestation of the GI ethos is *terroir*, a French concept most commonly associated with winemaking and that “claims that the special quality of an agricultural product is determined by the character of the place from which it comes.”⁸

In contrast, Anglo-American jurisdictions afford looser GI protections to goods, usually through pre-existing trademark and unfair competition laws.⁹ Consequently, the treatment of those appellations as generic terms in the United States, among other nations, distresses European countries whose place names are protected under local and European Union (“EU”) law.¹⁰ This phenomenon has persisted even with the promulgation of TRIPS, which contains specific provisions mandating the protection of GIs by all its parties.¹¹

While the controversy over geographical indications has created a split between certain European nations and a bloc consisting of countries in the Americas, Australia, and New Zealand,¹² China’s emerging prominence in the global economy has added a new voice to the debate.¹³ This paper identifies some of the yet-unresolved issues in the realm of GIs and how China stands in relation to those issues. Part II examines the primary approaches to protecting GIs as they vary across legal systems and multinational agreements, with particular focus on the rift between “Old World” (emigrant) nations and “New World” (immigrant) countries. Part III contains a brief history of Chinese intellectual property law while Part IV provides a snapshot of the ascendant Chinese wine market and the legal authorities that regulate the production and sale of wine in China. Finally, Part V surveys the efforts of Chinese authorities to protect GIs on the domestic and global levels and concludes that more robust protections would not only bring China closer into compliance with its international obligations, but also yield greater benefits to both the local Chinese wine industry and the world market.

⁷ See generally Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT’L & COMP. L. 309 (1999) (citing Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22(1), Apr. 15, 1994, 33 I.L.M. 1197 [hereinafter TRIPS]).

⁸ Daniel W. Gade, *Tradition, Territory, and Terroir in French Viniculture: Cassis, France, and Appellation Contrôlée*, 94 ANNALS ASS’N AM. GEOGRAPHERS 848, 848-49 (2004); see also Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUD. 127, 131 (2003) (“[h]istorically, *terroir* refers to an area or terrain, usually rather small, whose soil and microclimate impart distinctive qualities to food products.”).

⁹ Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 86 TRADE-MARK REP. 11, 20-21 (1996).

¹⁰ Barham, *supra* note 8, at 128.

¹¹ See generally Lindquist, *supra* note 7 (discussing TRIPS arts. 22-24).

¹² See Gumbel, *supra* note 6, at 2.

¹³ See Jose Manuel Cortes Martin, *TRIPS Agreement: Towards a Better Protection for Geographical Indications?*, 30 BROOKLYN J. INT’L L. 117, 142 (2004) (outlining proposals submitted to the WTO by Hong Kong and China regarding an international system for registering GIs).

II. Geographical Indications: A Background

One of the oldest methods of distinguishing products from one another,¹⁴ GIs are a form of intellectual property akin to (and in some jurisdictions, a subset of) trade and service marks.¹⁵ Generally speaking, GIs “confer to all producers from a given geographical area the exclusive right to use a distinctive sign to identify their products if they possess a given quality, reputation, or other characteristic attributable to their geographic origin.”¹⁶ GIs are similar to trademarks in that they denote both a product’s quality and source.¹⁷ Unlike trademarks, GIs can be valid for an indefinite period of time¹⁸ and are accessible to any producer operating within the protected geographic region.¹⁹ Because the ownership of rights is regionalized, GIs “ensur[e] that . . . economic benefits . . . are spread along the supply chain, including to the producers who supply raw materials.”²⁰ Oftentimes, trade organizations supervise quality control and ensure accurate labeling of protected products,²¹ such as the *Consorzio per la Tutela del Formaggio Gorgonzola*, which represents manufacturers of Italian-made Gorgonzola cheese,²² and the *Comité Interprofessionnel du vin de Champagne*, which protects the interests of vintners in France’s famed Champagne region.²³

A. Traditional Domestic Approaches

The manner by which GIs are protected, if at all, depends on the jurisdiction. While some countries recognize GIs as a *sui generis* category of intellectual property rights,²⁴ others regulate them under various umbrellas, such as trademark law, unfair competition law, or product labeling and advertising regula-

¹⁴ Conrad, *supra* note 9, at 11.

¹⁵ Martin, *supra* note 13, at 117.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ SERGIO ESCUDERO, SOUTH CTR. FOR INT’L ENVIRONMENTAL LAW, INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS AND DEVELOPING COUNTRIES 36 (2001).

¹⁹ BRUCE A. BABCOCK & ROXANNE CLEMENS, MIDWEST AGRIBUSINESS TRADE RES. & INFO. CTR., GEOGRAPHICAL INDICATIONS AND PROPERTY RIGHTS: PROTECTING VALUE-ADDED AGRICULTURAL PRODUCTS 4 (2004), available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/04mbp7.pdf>.

²⁰ *Id.*

²¹ *Id.*

²² The consortium attracted attention in 1994 when it sought to prevent Austrian producers from marketing a certain type of blue cheese called “Cambozola.” Although the European Court of Justice decided five years later that the Cambozola name did evoke the protected GI for Gorgonzola, the tribunal did not address the issue of whether its use should be discontinued. See Jenny Mosca, Recent Development, *The Battle Between the Cheeses Signifies the Ongoing Struggle to Protect Designations of Origin Within the European Community and in the United States in Consorzio per la Tutela del Formaggio Gorgonzola v. Kaserei Champignon Hofmeister GmbH & Co. KG*, 8 TUL. J. INT’L & COMP. L. 559, 584-88 (2000).

²³ See *Le Champagne: The Official Website for Champagne Wines*, http://www.champagne.fr/en_indx.html (last visited Jan. 10, 2006).

²⁴ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 14:1.1 (2005); see also Bernard O’Connor, *Sui Generis Protection of Geographical Indications*, 9 DRAKE J. AGRIC. L. 359 (2004) (comparing the various laws of countries that provide stand-alone protection to GIs).

tions.²⁵ Although there are myriad approaches to GIs worldwide, the unifying principles behind GI protection in any case are to provide consumers with accurate product information and to ensure fair trade practices among producers and merchants.²⁶ One particular concern is the problem of outside manufacturers free-riding on the name and reputation that producers in protected regions have spent years cultivating for their goods.²⁷

The most comprehensive approach to protecting GIs is the system of appellations of origin, which is commonly employed by countries that subscribe to the civil law tradition.²⁸ France became the first country to enact legislation protecting GIs in 1824,²⁹ and over the years GIs in Europe have been applied to agricultural products such as cheese, ham, and most notably, wines and spirits.³⁰ French law protects GIs primarily through indications of source (“*indications de provenance*”) and appellations of origin (“*appellations d’origine contrôlées*” or “AOC”).³¹ Protection under the former is more basic than the AOC system, which was established by the Decree of 30 July 1935.³² AOCs can only be granted to products via court judgment or administrative action.³³ The *Institut National des Appellations d’Origine* (“INAO”) regulates the registration system in coordination with the local syndicates that represent the interests of various producers.³⁴

Unlike the Romanistic system, the Anglo-American system affords protection to GIs primarily through trademark laws.³⁵ In fact, the United States does not

²⁵ Conrad, *supra* note 9, at 14.

²⁶ *Id.*

²⁷ BABCOCK & CLEMENS, *supra* note 19, at 10.

²⁸ Conrad, *supra* note 9, at 17. The most high-profile GI proponents include France, Spain, Italy, Germany, and Switzerland. *Id.* at 12.

²⁹ 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*, 22 U. PA. J. INT’L ECON. L. 107, 108 (2001) (citing Lindquist, *supra* note 7, at 312).

³⁰ Conrad, *supra* note 9, at 12.

³¹ *Id.* at 17-18.

³² *Institut National des Appellations d’Origine*, Presentation—English Version: History and concepts, http://www.inao.gouv.fr/public/contenu.php?mnu=350&pageInc=textesPages/History_and_concepts350.php (last visited Apr. 10, 2006). The phylloxera crisis of the 1870s almost wiped out France’s grape vines and paved the way for government intervention in the wine industry. The Law of August 1, 1905 authorized the carving out of territories whose products would benefit from GI protection on the administrative level, although it did not address issues of quality control. This approach proved ineffectual—wine growers were particularly unhappy and staged demonstrations in the ensuing years. The courts were later entrusted with delineating the protected areas under the Law of May 6, 1919, again producing unsatisfactory results. The Decree of 30 July 1935 finally “combin[ed] the administrative, legal and professional aspects” of GI protection and established the present AOC system under the INAO. *Id.*

³³ Conrad, *supra* note 9, at 18.

³⁴ See *Institut National des Appellations d’Origine*, Presentation—English Version: INAO and its assignments, http://www.inao.gouv.fr/public/contenu.php?mnu=351&pageInc=textesPages/INAO_and_its_assignments351.php (last visited Jan. 21, 2006); see also Barham, *supra* note 8, at 133-35 (providing an overview of the AOC administrative process).

³⁵ See Conrad, *supra* note 9, at 20-21; McCARTHY, *supra* note 24, § 14:1.1; BABCOCK & CLEMENS, *supra* note 19, at 2.

have a legal regime separate from trademark law to address GIs.³⁶ The closest analogue to GI protection under U.S. trademark law is the certification mark.³⁷ A certification mark is “any word, name, symbol, device, or any combination, used or intended for use in commerce with the owner’s permission by someone other than its owner, to certify, among other things, regional or other geographic origin.”³⁸ Usually, the owner is a state department of agriculture or a commodity organization engaged in the promotion of multiple agricultural products that are not related to each other.³⁹ As long as the registered name remains geographically descriptive, it cannot be considered a generic term.⁴⁰ Examples of U.S. certification marks include “Wisconsin Real Cheese” for cheese produced in the state of Wisconsin, “100% Kona Coffee” for coffee grown within certain parts of Hawaii, and “Vidalia” for onions raised in one of twenty counties in Georgia.⁴¹

B. International Protection

Although TRIPS represents the broadest and most recent attempt to extend protection of GIs on a global level, several multilateral conventions addressing issues of product provenance in international commerce had already been in force. Those three instruments have enjoyed varying levels of success and consist of the following: the Paris Convention for the Protection of Industrial Property (“Paris Convention”),⁴² the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (“Madrid Agreement”),⁴³ and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (“Lisbon Agreement”).⁴⁴

1. Multilateral Conventions

Over the years, several multilateral conventions have emerged to deal with the protection of GIs. The first multiparty agreement to recognize GIs was the Paris Convention of 1883, wherein member nations agreed to “seize or prohibit imports with false indications of source, producer, manufacturer, or merchant.”⁴⁵

³⁶ McCARTHY, *supra* note 24, § 14:1.1.

³⁷ BABCOCK & CLEMENS, *supra* note 19, at 2.

³⁸ *Id.* at 2-3.

³⁹ *Id.* at 3.

⁴⁰ Conrad, *supra* note 9, at 21.

⁴¹ BABCOCK & CLEMENS, *supra* note 19, at 3.

⁴² Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305, available at http://www.wipo.int/clea/docs_new/pdf/en/wo/wo020en.pdf.

⁴³ Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Apr. 14, 1891, 828 U.N.T.S. 389, available at http://www.wipo.int/treaties/en/ip/madrid/trtdocs_wo032.html [hereinafter Madrid Agreement].

⁴⁴ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, reprinted in 3 Stephen P. Ladas, Patents, Trademarks and Related Rights: National and International Protection 1954 (1975), available at http://www.wipo.int/lisbon/en/legaltexts/lisbon_agreement.htm [hereinafter Lisbon Agreement].

⁴⁵ Lindquist, *supra* note 7, at 314.

The protection extended by the Paris Convention, which was quite basic and covered only cases of "serious fraud," led more than 117 countries to sign the original instrument, including the United States.⁴⁶ In its current form, the Paris Convention "prevents only the importation of goods containing false indications of geographic origin and is no longer applicable to indications of geographic origin that are merely misleading or 'liable to mislead.'"⁴⁷

The Madrid Agreement of 1891 provided for stronger GI protections than the Paris Convention.⁴⁸ The Madrid Agreement was designed to "prevent the dilution of geographical indications into generic terms"⁴⁹ by prohibiting the use of GIs "capable of deceiving the public," in addition to blocking the importation of goods that utilize false or deceptive indications.⁵⁰ In 1934, Article 3*bis* was added, which barred the use of false representations not only on products themselves, but also in promotional materials.⁵¹ Furthermore, an additional provision in Article 4 prevents member countries from treating GIs covering wines as generic terms.⁵² Because of the stringent mandated protections, the Madrid Agreement has attracted only thirty-one signatories and thus wields limited influence.⁵³

A later effort to shore up effective protection for GIs, the Lisbon Agreement, was unveiled in 1958 and proposed a system for the international enforcement of GIs.⁵⁴ First, the Lisbon Agreement called for a worldwide registry for appellations of origin, administered under the auspices of the World Intellectual Property Organization ("WIPO") and modeled after the Madrid Agreement Concerning the International Registration of Marks.⁵⁵ Once registered, the appellation of origin enjoys protection in all member countries, who must pass domestic laws to prohibit not only imitative products, but goods bearing a protected indication followed by the qualifiers "like," "type," or "style."⁵⁶ Additionally, the convention also provides that as long as an appellation is protected in the country of origin, it may not be considered generic in any other member state.⁵⁷ Because of these stringent demands, the Lisbon Agreement has been received favorably by even fewer nations than the Madrid Agreement.⁵⁸

⁴⁶ Goldberg, *supra* note 29, at 112 (citing Conrad, *supra* note 9, at 22 n.62).

⁴⁷ *Id.* at 113 (citing Lee Bendekgey & Caroline H. Mead, *International Protection of Appellations of Origin and Other Geographic Indications*, 82 TRADEMARK REP. 765, 781 (1992)).

⁴⁸ Lindquist, *supra* note 7, at 314-15.

⁴⁹ Goldberg, *supra* note 29, at 113 (citing Madrid Agreement).

⁵⁰ Lindquist, *supra* note 7, at 315.

⁵¹ Goldberg, *supra* note 29, at 113 (citing Conrad, *supra* note 9, at 25).

⁵² *Id.* at 113-14 (citing Conrad, *supra* note 9, at 25).

⁵³ *Id.* at 113 (citing Conrad, *supra* note 9, at 23 n.64).

⁵⁴ *Id.* at 114 (citing Lisbon Agreement).

⁵⁵ *Id.* at 114 (citing Conrad, *supra* note 9, at 26).

⁵⁶ Martin, *supra* note 13, at 125.

⁵⁷ *Id.*

⁵⁸ See *id.*; Lindquist, *supra* note 7, at 315. One main objection by the United States was the possibility that American courts would be bound by decisions handed down in foreign jurisdictions. Conrad, *supra* note 9, at 28.

2. Regional Protection

Not surprisingly, the European Union has been proactive in its efforts to protect GIs on a regional level. Council Regulation No. 2081/92 of July 1992 (“Regulation 2081/92”)⁵⁹ established a framework that recognizes two types of GIs, Protection of Designations of Origin (“PDO”) and Protection of Geographical Indication (“PGI”).⁶⁰ PDO status signifies that a product is “produced, processed, and prepared within the *specified geographical area*, and the product’s quality or characteristics are ‘*essentially due to that area*.’”⁶¹ Meanwhile, products designated PGI are “produced, processed, or prepared in the geographical area, and the quality, reputation, or characteristics are *attributable to that area*.”⁶² PGI designations thus imply a looser connection between a product’s attributes and the land where it was produced than PDOs.

Wines and spirits enjoy special protection apart from Regulation 2081/92. Champagne first received attention in 1985 when Council Regulation 3309/85 restricted use of the term “*methode champenoise*,” the time-honored process by which sparkling wine is produced, to those wines actually made in the Champagne region.⁶³ Although this legislation does not constitute a GI protection *per se*, it nevertheless shields consumers from deceptive marketing practices while advancing the interests of vintners from Champagne.⁶⁴ Full-fledged GI protection came later with the enactment of Council Regulation No. 823/87,⁶⁵ which addressed the issue of “quality wines, their designations, and the rights of producing states to protect them.”⁶⁶ Notably, the regulation allows member states to impose standards even more rigid than those outlined by EU law.⁶⁷

The commitment to intellectual property protection espoused by the North American Free Trade Agreement (“NAFTA”) also extends to GIs.⁶⁸ The accord defines a geographical indication as “any indication that identifies a good as originating in the territory of a . . . [member country], or a region or locality in that territory, where a particular quality, reputation, or other characteristic is essentially attributable to its geographic origin.”⁶⁹ Article 1712 also prohibits indications that mislead the public about a product’s true place of origin and

⁵⁹ Council Regulation 2081/92, 1992 O.J. (L 208) 1, art. 1.

⁶⁰ BABCOCK & CLEMENS, *supra* note 19, at 3-4.

⁶¹ *Id.* at 4 (emphasis added).

⁶² *Id.* (emphasis added).

⁶³ Michael Ryan Benedict, Note, *Souring La Dolce Vita? Has European Union Regulation Ruined Italian Cuisine or is There Hope Yet for Traditional Products?*, 21 B.U. INT’L L.J. 373, 383 (2003) (citing Council Regulation 3309/85, 1985 O.J. (L 320) 9).

⁶⁴ *Id.* (citing Opinion of Advocate General Mancini in Case 407/85, 3 Glocken GmbH v. USL Centro-Sud, 1988 E.C.R. at 4261, § 9, P 3).

⁶⁵ Council Regulation, 823/87, 1987 O.J. (L 84) 59.

⁶⁶ *Id.*

⁶⁷ Benedict, *supra* note 63, at 389 (citing Council Regulation, 3309/85, art. 18, 1985 O.J. (L 320) 9).

⁶⁸ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1712, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=168 (last visited Apr. 10, 2006) [hereinafter NAFTA].

⁶⁹ *Id.* art. 1721.

mandates member states to provide for legal remedies against unfair competition.⁷⁰ The goods protected as “distinctive products” under NAFTA include Tennessee whiskey, Canadian whiskey, Kentucky bourbon, mezcal, and tequila.⁷¹

3. *The WTO and TRIPS*

During the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”), the precursor to the WTO, intellectual property rights were a highly contested area, with the United States pushing for rigorous intellectual property protections to complement the lowering of barriers to the global movement of goods and services.⁷² Nations that were primary exporters of intellectual property thus gained a victory with the inclusion of TRIPS as an annex to the treaty creating the WTO.⁷³ TRIPS obligates WTO member states to enact adequate domestic intellectual property legislation, as well as provides for dispute resolution mechanisms between party states.⁷⁴

Three whole TRIPS articles were devoted to the issue of GIs at the behest of a number of European nations that had been clamoring for worldwide GI protection.⁷⁵ Because GIs for wines and spirits in particular had already enjoyed protection in those European countries, their inclusion presented one of the biggest obstacles to the passing of TRIPS.⁷⁶ A weaker, trademark-based approach advanced by the United States, Canada, and Australia ultimately lost out, resulting in stronger protections for wines and spirits than for other goods under TRIPS.⁷⁷ On the whole, TRIPS represents a “monumental step forward in the area of GIs” because it is “the first widely-accepted international treaty in which all signatories are bound to protect GIs through substantive provisions and to enforce its application according to minimum standards.”⁷⁸

⁷⁰ *Id.* art. 1712.

⁷¹ See ESCUDERO, *supra* note 18, at 35. Interestingly enough, tequila’s protected status inspired a series of claims of unfair competition by Mexican liquor manufacturers against U.S. producers of low-priced margarita-flavored malt beverages, on the grounds that an alcoholic drink bearing the name “margarita” is only genuine if it contains tequila. See generally Linda E. Prudhomme, Comment, *The Margarita Wars: Does the Popular Mixed Drink “Margarita” Qualify as Intellectual Property?*, 4 Sw. J. L. & TRADE AM. 109 (1997) (analyzing the nature and validity of the Mexican claims).

⁷² Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 296 (1996).

⁷³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf; see also Gustavo Bravo, *From Paris Convention to TRIPS: A Brief History*, 12 J. CONTEMP. LEGAL ISSUES 445, 448-49 (2001).

⁷⁴ *Id.* at 449.

⁷⁵ Conrad, *supra* note 9, at 29-30.

⁷⁶ *Id.* at 31. Ironically, the United States and the nations of the European Community (“EC”) had been firm in their mutual stance toward strong intellectual property protections across WTO member countries. It was only when the EC nations and Switzerland advocated for the protection of wines and spirits did the pronounced rift between Western nations develop. *Id.* at 30-31.

⁷⁷ Lindquist, *supra* note 7, at 316.

⁷⁸ Martin, *supra* note 13, at 126.

a. *Provisions for Protecting GIs*

Article 22 of TRIPS, which incorporates provisions of both the Paris Convention and Lisbon Agreement,⁷⁹ 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,” and prohibits the use of false designations of origin.⁸⁰ Member states must refuse to register or invalidate any trademark that includes a GI on goods not truly from the protected area or a GI that is likely to mislead the public.⁸¹ Although Article 22 protects only products for which a relationship between their qualities or characteristics and place of origin can be shown, it does not provide a test to determine what is “essentially attributable.”⁸²

Article 23 provides a stronger level of protection for wines and spirits. Not only does it prohibit wines or spirits that do not truly originate from the protected area from bearing GIs, but it also precludes the use of qualifying terms that would make the invocation of a GI technically correct but still misleading, such as “‘type,’ ‘kind,’ ‘style,’ ‘imitation’ or the like.”⁸³ Member states also may not register trademarks that are primarily geographically descriptive.⁸⁴ Additionally, Article 23(3) addresses the issue of homonymous GIs by leaving it to member states to determine how to distinguish between identically sounding place names.⁸⁵ Finally, Article 23(4) provides for future negotiations to establish a multilateral notification and registration system for wine GIs.⁸⁶

Article 24 contains exceptions to the previous two articles in addition to calling for future negotiations to increase protections for GIs for wines and spirits.⁸⁷ A member may allow the labeling of products without regard to GI status if the name has already been in use at least ten years prior to April 15, 1994, or in good faith prior to that date.⁸⁸ For trademarks that are similar or identical to currently protected GIs, the application for registration must have been made in good faith, or rights must have been acquired in good faith, either before 1994 or before the GI receives protection in the country of origin.⁸⁹ Member states also agreed not to lessen protection for GIs that existed in their countries prior to the establishment of the WTO.⁹⁰

⁷⁹ Lindquist, *supra* note 7, at 316.

⁸⁰ TRIPS, *supra* note 7, art. 22(2).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* art. 23(1).

⁸⁴ *Id.*

⁸⁵ Goldberg, *supra* note 29, at 121 (citing TRIPS, art. 24(4)).

⁸⁶ TRIPS, *supra* note 7, art. 23(4).

⁸⁷ Martin, *supra* note 13, at 138 (pointing out that the “[m]inisters did not distinguish between wines and spirits despite their competence to do so.”).

⁸⁸ TRIPS, *supra* note 7, art. 24(4).

⁸⁹ *Id.*

⁹⁰ TRIPS, *supra* note 7, art. 24(3).

b. *The Battle Over GIs*

As previously mentioned, GI protection for wines and spirits has been a source of controversy among the various parties to TRIPS. Many European nations favor robust protections that reflect domestic intellectual property regimes, while countries from the New World decry efforts to introduce such measures on a worldwide basis as unduly restrictive of trade.⁹¹ Jose Manuel Cortes Martin has identified the main proponents of strong GI protection as “emigrant” nations, among which include the EU member states, Switzerland, and certain Eastern European states.⁹² On the other hand, the “immigrant” nations comprise the United States, Australia, New Zealand, and countries in Latin America.⁹³ Historical patterns of migration have led to divergent views on GIs, as immigrant nations like the United States and Australia received large numbers of Europeans during the nineteenth century.⁹⁴ In the realm of winemaking, immigrants brought with them vine cuttings and production techniques, thus enabling new domestic industries to flower.⁹⁵ Not surprisingly, these New World wines began bearing the GIs of the European regions to which their patrimony traced.⁹⁶

Observers have noted other political and socioeconomic factors that have contributed to the controversy over GIs.⁹⁷ For example, the cultures of Mediterranean Europe tend to regard the idea of “quality” as “compris[ing] ‘the flavor, the excellence, and the authenticity of the land.’”⁹⁸ The perhaps less romantic view that prevails in Anglo-American countries equates quality with security, with a regularity that follows a trademark more closely than it does a geographical indication.⁹⁹ The idea that trademarks are the most appropriate way of protecting the goodwill of products originating from particular geographic regions also reflects the American concept of private property.¹⁰⁰ In addition, countries like France have been much more willing than the United States to grant its farmers certain monopoly powers to consolidate production and protect their interests.¹⁰¹ Finally, “the American right of commercial free speech may also be a bar to full acceptance of geographical indications.”¹⁰²

⁹¹ See Gumbel, *supra* note 6.

⁹² Martin, *supra* note 13, at 127-28.

⁹³ *Id.* at 128.

⁹⁴ Lindquist, *supra* note 7, at 313.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Mosca, *supra* note 22, at 594.

⁹⁸ *Id.* The subjective nature of what constitutes “quality” is a problematic determination in and of itself. See DWIJEN RANGNEKAR, *THE SOCIO-ECONOMICS OF GEOGRAPHICAL INDICATIONS* 25 (2004) [hereinafter RANGNEKAR, *THE SOCIO-ECONOMICS OF GEOGRAPHICAL INDICATIONS*], available at http://www.iprsonline.org/unctadictsd/docs/CS_Rangnekar2.pdf.

⁹⁹ Mosca, *supra* note 22, at 594.

¹⁰⁰ Barham, *supra* note 8, at 129 (“[o]n a deeper level, geographical indications as a form of intellectual property challenge the law, culture and economic logic of American business, oriented as it is towards liberal economic theory based on individual ownership.”).

¹⁰¹ Mosca, *supra* note 22, at 594-95.

¹⁰² *Id.* at 595.

As such, the European GI regime has come under fire for its protectionist nature. Indeed, Regulation 2081/92 states that its purposes include “the diversification of agricultural production” and “the promotion of products having certain characteristics that could be of considerable benefit to the rural economy.”¹⁰³ Such language proclaiming a desire to improve the incomes of farmers and stabilize the agrarian population has led critics to conclude that instead of being mere tools of consumer protection law, GIs are in fact de facto subsidies that advance the EU’s ever-controversial Common Agricultural Policy (“CAP”).¹⁰⁴

European producers also stand to reap the greatest advantage in a worldwide GI regime because, after all, the very notion of GI protection is European in origin.¹⁰⁵ However, some commentators have reevaluated TRIPS as a potential boon for developing economies because GIs may be the only intellectual property right that can protect traditional knowledge.¹⁰⁶ Such is one possible endpoint to the question, “[s]hould Chianti be denied the protection afforded Pepsi simply because Chianti has a longer history?”¹⁰⁷

The United States and the EU in particular have come to loggerheads over the issue of GIs in relation to wines. The United States Bureau of Alcohol, Tobacco, and Firearms (“ATF”), which oversees GIs for wines and spirits, extends GI protection over wine names based on their categorization as either generic, semi-generic or non-generic.¹⁰⁸ The middle category has proven the most problematic, as it allows the use of certain European GIs on American-made wine as long as the labels are objectively correct about the wine’s true origin.¹⁰⁹ At the behest of the U.S. wine lobby, the ATF regulations were codified into federal law in 1997, which prompted EU officials to decry the legislation as a violation of TRIPS.¹¹⁰ The controversy raged on for several years, and in late 2005, the United States and the EU announced an agreement that limits the use of some semi-generic terms by U.S. winemakers in return for the EU’s recognition of certain American winemaking practices.¹¹¹

¹⁰³ See Council Regulation 2081/92, *supra* note 59, at Preamble.

¹⁰⁴ Goldberg, *supra* note 29, at 144-45 (citing Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France’s Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29, 62 (1996)).

¹⁰⁵ “Until now, protection of geographical indications seems to especially favour some European countries because they have created not only the most geographical indications known to date, but also the legal system to protect them domestically, specially in some specific sectors (such as wines and foodstuffs).” ESCUDERO, *supra* note 18, at 34.

¹⁰⁶ *Id.* at 33-34; see also DWIJEN RANGNEKAR, THE INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS: THE ASIAN EXPERIENCE (2004) [hereinafter RANGNEKAR, THE INTERNATIONAL PROTECTION], available at http://www.iprsonline.org/unctadictsd/dialogue/docs/Rangnekar_2004-11-08.pdf.

¹⁰⁷ Benedict, *supra* note 63, at 375.

¹⁰⁸ See Lindquist, *supra* note 7, at 326.

¹⁰⁹ *Id.* Examples include Burgundy, Chablis, Champagne, Chianti, Madeira, Port, Sauterne, and Sherry. *Id.*

¹¹⁰ *Id.* at 329.

¹¹¹ Press Release, Office of the U.S. Trade Rep., United States and European Community Reach Agreement on Trade in Wine (Nov. 15, 2005), available at http://www.ustr.gov/DocumentLibrary/Press_Releases/2005/September/United_States_European_Community_Reach_Agreement_on_Trade_in_Wine.html.

III. Intellectual Property Law in China: An Overview

Although China has been called “one of the oldest innovators of trademarks in the marketplace,” “[g]overnment involvement in intellectual property protection has only recently developed.”¹¹² Despite China’s continuing reputation as a laggard in the realm of intellectual property protection, it “has enacted broad reaching legislation in a shorter period than any nation in modern history.”¹¹³ After centuries of informal use in the marketplace, trademarks were officially recognized under the law by the Qing Dynasty in 1904 and by the Nationalist government in 1931.¹¹⁴ Later, the Communist-led government of the People’s Republic of China adopted the Provisional Regulations on Trademark Registration in 1950 and the Provisional Implementing Regulations on the Registration of Trademarks in 1951.¹¹⁵ The Chinese government promulgated the Principals and Methods of Implementation of the Administration of Unregistered Trademarks and the Opinions on the Administration of Trademarks in 1953.¹¹⁶ Together, this body of trademark regulation established a first-to-file registration system that still endures to this day.¹¹⁷ In 1963, the China State Council issued new regulations superseding the ones from the previous decade and providing for the establishment of regulatory agencies to supervise the quality of goods bearing trademarks.¹¹⁸

The economic reforms ushered in by Deng Xiaoping in 1977 were coupled by changes in China’s legal system, including the area of intellectual property.¹¹⁹ Reflecting the government’s newfound openness to foreign investment, U.S. trademarks were allowed registration in China for the first time since 1949.¹²⁰ The 1983 Trademark Law of the People’s Republic of China (“Trademark Law”), which incorporated the objectives of the 1950 and 1963 regulations,¹²¹ accomplished the following goals: “1) it replaced all of China’s previous trademark legislation; 2) it created an ‘administrative framework’ for the registration of trademarks; 3) it enumerated the rights of trademark owners; 4) it defined what comprises trademark infringement; and 5) it afforded fundamental remedies for victims and penalties for those whose conduct comprised infringement.”¹²² Notably, the 1983 Trademark Law provided that a mark must be “distinguisha-

¹¹² Scott A. McKenzie, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 529, 549 (1998-99).

¹¹³ Charles D. Paglee, *Chinese Trademark Law Revised: New Regulations Protect Well-Known Trademarks*, 5 U. BALT. INTELL. PROP. L.J. 37, 37 (1997).

¹¹⁴ *Id.* at 38.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 39.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ McKenzie, *supra* note 112, at 554.

¹²⁰ Paglee, *supra* note 113, at 39.

¹²¹ *Id.* at 40.

¹²² McKenzie, *supra* note 112, at 553.

ble, must not include domestic or foreign government related words or designs, and must not be 'detrimental to socialist morality or customs, or having other harmful influences.'"¹²³

In July 1994, the State Council reaffirmed its commitment to intellectual property rights in the Decision on Further Strengthening the Work of Intellectual Property Protection, which proclaimed, "the protection of intellectual property is a component part of the policy of reform and opening of China and an important system for promoting the prosperity and development of scientific, technological and cultural undertakings and ensuring the normal operation of the socialist market economy."¹²⁴ The Trademark Law and its implementing regulations underwent changes in 1993, and in 1996, the State Administration of Industry and Commerce promulgated regulations specifically protecting well-known trademarks.¹²⁵

On the international front, China became a member of the World Intellectual Property Organization in 1980, paving the way for its entrance into a host of international agreements throughout the next two decades, including the Paris Convention in 1985.¹²⁶ On December 11, 2001, China acceded to the WTO and thus also became a party to TRIPS.¹²⁷ In order to bring its laws into compliance with TRIPS, China enacted a series of intellectual property reforms, such as the 2001 amendments to trademark, patent, and copyright laws.¹²⁸ The globalization of China's intellectual property regime has also produced greater transparency in that relevant laws are now more accessible to the general public.¹²⁹

In addition to developing a fairly sophisticated system for recognizing intellectual property rights, China has also taken the step of creating a novel way to enforce those rights.¹³⁰ A brand-new system of courts designed to settle controversies arising out of patent, trademark, and copyright law was established in 1983.¹³¹ Proponents of these courts look to the judges and the specialized training they receive as a way of instilling confidence in China's fledgling intellectual property regime.¹³² Although the enforcement mechanisms currently in place have been criticized as woefully inadequate, "the progress that has been made . . . represents quite a significant shift toward a new philosophy for this powerful nation."¹³³

¹²³ Paglee, *supra* note 113, at 40.

¹²⁴ An Qinghu, *Well-Known Marks & China's System of Well-Known Mark Protection*, 95 TRADE-MARK REP. 705, 711 (2005).

¹²⁵ See Paglee, *supra* note 113, at 52.

¹²⁶ *Id.* at 42.

¹²⁷ See Jonathan Mark W.W. Chu, *Not Enough? An Examination of China's Compliance with the Intention of the TRIPS Accord*, 8 VJ 281, 285 (2004).

¹²⁸ *Id.* at 283.

¹²⁹ *Id.* at 293.

¹³⁰ McKenzie, *supra* note 112, at 554.

¹³¹ *Id.*

¹³² *Id.* In this respect, China has been characterized as exceeding the minimum requirements of TRIPS. See Chu, *supra* note 127, at 295.

¹³³ McKenzie, *supra* note 112, at 554.

IV. China's Wine Industry: History and Growth

Although the modern Chinese wine industry is still in its infancy, wine production began before the Han dynasty (206 B.C. to 220 A.D.).¹³⁴ In 138 B.C., an envoy for Emperor Han-Wu brought viticultural knowledge and winemaking techniques from China's western region back to the emperor, who then provided for the growing of grapes and the manufacture of wine at the imperial palace in Shaanxi province.¹³⁵ Wine production would eventually reach a zenith during the Yuan dynasty (1271 to 1368).¹³⁶ The Yuan rulers, who were Mongols, greatly prized wine and even mandated that worshipers who made sacrifices at temples use wine as their offering.¹³⁷ Winemaking languished until 1892, when a Chinese expatriate, Zhang Bishi, introduced grapes and machinery to China from the West.¹³⁸ Zhang Yu Wine Company, which Zhang established in Yantai, Shandong province, is credited as the first modern Chinese winery.¹³⁹ Unfortunately, war and other political upheavals during the first half of the twentieth century forestalled significant development until the last ten to twenty years.¹⁴⁰

Like all the other aspects of China's transitional economy, the recent growth in wine production has been fostered with government intervention. In particular, this regulation can be attributed to a combination of paternalism and agricultural policy. The Communist authorities first looked with favor upon wine in 1987, after Professor Guo Qichang of the China National Research Institute of Food and Fermentation Industries spearheaded an effort to modernize production techniques.¹⁴¹ In 1996, Premier Li Peng declared that wine be served at state banquets instead of *baiju*, a traditional liquor made from grain alcohol and imbibed in shot form.¹⁴² Subsequently, the local press also began touting the salubrious effects of wine consumption.¹⁴³ The portrayal of wine as an alcoholic alternative that promotes health was reflective of the "Chinese government[']s view [of] hard liquor as a health and social problem."¹⁴⁴ In addition to promoting health, however, Beijing's goodwill toward grape wine also achieved the government's

¹³⁴ CANADIAN EMBASSY, BEIJING, *THE WINE MARKET IN CHINA* (2003), available at <http://atn-riae.agr.ca/asia/e3263.htm> (last visited Oct. 16, 2005) [hereinafter *WINE MARKET IN CHINA*].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Birth of Modern Wine Industry, <http://www.winechina.com/en/overview/h2.asp> (last visited Apr. 6, 2006).

¹³⁹ See *WINE MARKET IN CHINA*, *supra* note 134.

¹⁴⁰ *Id.*

¹⁴¹ M. David Levin, *China Wants Wine*, *WINE BUS. ONLINE*, Aug. 1, 2002, <http://www.winebusiness.com/SalesMarketing/webarticle.cfm?AID=58140&ISSUEID=58127> [hereinafter Levin, *China Wants Wine*] (last visited Nov. 25, 2005).

¹⁴² Hannah Beech Qingdao, *Chinese Wine Goes Down Slowly*, *TIME ASIA*, Aug. 21, 2000, http://www.time.com/time/asia/features/ontheroad/china.weihei_sb1.html (last visited Nov. 25, 2005).

¹⁴³ See *WINE MARKET IN CHINA*, *supra* note 134.

¹⁴⁴ David Swartzentruber, *Protecting the Liquor Industry*, *BANGKOK POST*, Aug. 14, 2005, available at 2005 WLNR 12848425.

goal of allocating a greater amount of the rice harvest from the manufacture of rice wine to the production of food.¹⁴⁵

Not only has the government's stamp of approval been a boon for Chinese winemakers, but consumer tastes have been driving demand. In September 2005, Ernst & Young issued a report finding that "annual sales of luxury goods in China were about \$2 billion, with an annual growth rate expected to reach 20% by 2008."¹⁴⁶ Indeed, a consultant at that firm predicts that by 2015, China will have become the second-largest market for luxury goods behind Japan.¹⁴⁷ The primary force behind this rising tide of conspicuous consumption has been the *xinguizu*, the so-called "new nobles" that comprise the newly-moneyed urban class.¹⁴⁸ As budding wine connoisseurs, the *xinguizu* have been described thusly:

To most of the *xinguizu*, wine is a symbol of their new success and worldliness. Wine knowledge is also a crucial skill for these young business leaders when they take clients out to dinner at high-end restaurants

.....

The profile of the average [wine] buyer is someone working for a joint venture, or for a wholly owned foreign enterprise, or one of the up-and-coming local companies," says Don St. Pierre, president of importer ASC Fine Wines. "It is someone in their mid-20s to mid-30s, and someone who is aspiring to a more sophisticated lifestyle, [which usually includes] driving a car, owning an apartment and drinking wine in a restaurant, as opposed to beer or spirits."¹⁴⁹

The wine industry has also been a vocal proponent of China's membership in the WTO.¹⁵⁰ The prospect of increased exports of high-quality grapes, decreased costs of equipment, and easier access to technology were among the motivations that led industry leaders to support lowered barriers to international trade.¹⁵¹

¹⁴⁵ Mike Dunne, *Wooing the Chinese, Those Lovers of Beer*, MIAMI HERALD, Dec. 8, 2005, at E32; M. David Levin, *Finding a Foothold in the Chinese Market*, WINE BUS. ONLINE, Oct. 1, 2004, <http://www.winebusiness.com/SalesMarketing/Webarticle.cfm?AID=94103&IssueId=94040> [hereinafter Levin, *Finding a Foothold*].

¹⁴⁶ Shadow Lau, *Supping Wine, Chinese Style*, ASIA TIMES ONLINE, Nov. 1, 2005, http://www.atimes.com/atimes/China_Business/GK01Cb05.html.

¹⁴⁷ *Id.* Another analysis on the burgeoning market for high-end goods in China reports, "[T]he traditional mindset [of] frugality over style of [the] Chinese is changing fast, 'and will never come back,' said Elizabeth Ponsolle, [French luxury goods brand association] Comité Colbert's chief executive officer." *Chinese Enjoying the Good Life*, BUS. DAILY UPDATE, May 10, 2005. For more detailed treatment of the idiosyncrasies of the Chinese luxury goods market, see Susan Xiao, *What are the Critical Success Factors for Luxury Goods Companies Looking to Expand in China?*, FIN. TIMES, Dec. 16, 2005, available at 2005 WLNR 20379648.

¹⁴⁸ Mark Graham, *China's Wine Revolution*, WINE SPECTATOR, Nov. 30, 2005, at 70-71.

¹⁴⁹ *Id.* at 71. Traditionally, the status conferred by wine ensured that bottles were mostly purchased as gifts and not for everyday consumption. See Levin, *Finding a Foothold*, *supra* note 145; see also Graham, *supra* note 148, at 66 (noting that gift boxes containing wine "are often re-gifted several times" and that "[s]ometimes bottles are displayed on a kitchen shelf, where they will remain for years as symbols of their owner's sophistication.").

¹⁵⁰ *China's Wine Industry Needs WTO*, SINOCAST CHINA BUS. DAILY NEWS, Nov. 26, 2001, available at 11/26/01 ASIAPRTDLYN 00:00:0 (Westlaw).

¹⁵¹ *Id.*

When China finally acceded to the WTO in 2001, local producers had cause for celebration, as illustrated by the remarks of Liu Yuan, Secretary-General of the China Liquor Commerce Association, "China's entry into the WTO will promote the prosperity and development of the country's economy, stimulating demand for wine and spirits in the domestic market and creating business opportunities for both domestic and foreign firms."¹⁵² For importers of wine, however, the much-touted reduction in tariffs has not led to more competitive pricing for foreign products.¹⁵³

Nevertheless, foreign producers have been keen to capitalize on the Chinese market ever since the early days of the wine renaissance. During the 1980s, companies like Rémy Cointreau and Seagrams entered into joint ventures with government-controlled entities and infused the local industry with new technology and vine cuttings.¹⁵⁴ In 1996, the United States sent its first official delegation of viticulturists and enologists to China since 1949.¹⁵⁵ Eight years later, the U.S. Department of Agriculture awarded a grant to the California Association of Winegrape Growers to conduct comprehensive research on the production, marketing, and sale of wine in China.¹⁵⁶ Companies from other leading wine producing nations such as Australia, Spain, and Italy have also made significant inroads over the years.¹⁵⁷

Considering the growth potential of the Chinese wine market, local producers have their work cut out for them.¹⁵⁸ Estimates from 2004 peg the market at 200 million consumers, with red wine as the preferred variety.¹⁵⁹ Total domestic pro-

¹⁵² *Wine Industry Toasts WTO Accession*, CHINA DAILY, Dec. 10, 2001, available at <http://www.china.org.cn/english/23373.htm>.

¹⁵³ Although tariffs on foreign wine were slashed drastically from sixty-five percent to fourteen percent in 2005, the government continues to impose a harsh value-added tax in addition to a consumption tax. See *Low Tariffs Help Foreign Wines Pour In*, BUS. DAILY UPDATE, Jan. 10, 2005; Graham, *supra* note 148, at 72.

¹⁵⁴ See Graham, *supra* note 148, at 64.

¹⁵⁵ Stephen Reiss, *The Chinese Wine Market, an Industry Analysis*, <http://www.wineeducation.com/chinadet.html> (last visited Nov. 25, 2005).

¹⁵⁶ See Levin, *Finding a Foothold*, *supra* note 145.

¹⁵⁷ In 2004, Australia sold US\$6 million worth of bottled wine to the Chinese, placing it just behind the French as the largest source of imported bottled wine. See Graham, *supra* note 148, at 72. Spain is the leading source of imported bulk wine in China, while Italian wineries continue to market their wares aggressively. See Levin, *China Wants Wine*, *supra* note 141; Sella & Mosca Winery *Confident of Success*, BUS. DAILY UPDATE, May 31, 2005; *Italian Promote Food Culture in China*, BUS. DAILY UPDATE, May 31, 2005; Carla Binswager, *Italian Producers Set Out to Conquer China*, DECANTER, Nov. 14, 2001, <http://www.decanter.com/news/46582.html>.

¹⁵⁸ See Graham, *supra* note 148, at 62 ("[M]ore than 400 Chinese wineries are now in business, all hoping to profit from the fact that the Chinese believe wine to be a healthy beverage and consider red a lucky color.").

¹⁵⁹ See Levin, *Finding a Foothold*, *supra* note 145; Rose Murray Brown, *Wine in China*, WINE INTERNATIONAL, May 20, 2005, <http://www.wineint.com/story.asp?storycode=1817>. The estimate discounts the "large number of agricultural workers, peasants and lower paid industrial workers who might never think of buying a bottle of wine" from China's total population of almost 1.4 billion people. Levin, *Finding a Foothold*, *supra* note 145. Cabernet Sauvignon dominates red grape plantings because of its ability to withstand the harsh climate in production areas like Hebei. Brown, *supra*.

duction rose 14.8 percent during the same year.¹⁶⁰ China can actually boast of more land devoted to grape vineyards than Australia,¹⁶¹ with main wine producing regions including the Yellow River Valley, the coastal area east of Beijing, Inner Mongolia, and far western desert provinces such as Xinjiang.¹⁶² As of early 2005, around sixty percent of the market was controlled by four local wineries: Changyu,¹⁶³ Great Wall, Tonghua, and Dynasty.¹⁶⁴ Not surprisingly, the cities of Beijing, Shanghai, and Guangzhou account for the bulk of sales.¹⁶⁵ The rising profile of Chinese wines over the years has led local producers to consider wooing foreign consumers.¹⁶⁶

Despite the dynamism embodied by the current domestic wine market, the local industry still has many obstacles to overcome. Quality wines remain prohibitively expensive and therefore accessible only to the economic elite,¹⁶⁷ while the lower end of the market has endured a history of inferior products flooding the sector.¹⁶⁸ Indeed, the overrepresentation of wines from the latter category may have led to idiosyncratic drinking practices such as adding Sprite, lemonade,

¹⁶⁰ See *China's Wine Production Up in 2004*, PEOPLE'S DAILY ONLINE, Mar. 29, 2005, http://english.people.cn/200503/29/eng20050329_178631.html.

¹⁶¹ See Brad Norington, *China Ferments Wine Export Threat*, AUSTRALIAN, Aug. 1, 2005, at 14, available at 2005 WLNR 12044862.

¹⁶² See Graham, *supra* note 148, at 66.

¹⁶³ In 2005, the private sector lending arm of the World Bank, International Finance Corporation, announced its acquisition of a ten percent interest in the Changyu Group for \$17.6 million. *IFC Buys 10 Pct Stake in Chinese Wine Maker for US\$17.6 Mln*, ASIA PULSE, May 19, 2005.

¹⁶⁴ See *Low Tariffs Help Foreign Wines Pour In*, *supra* note 153.

¹⁶⁵ See *Chinese Red Wines Gaining Acceptance*, CHINA WINE ONLINE, Aug. 25, 2005, <http://www.winechina.com/en/news/readNews.asp?CID=1&NewsID=57>.

¹⁶⁶ In 2002, the China Vintage Industry Association began negotiations for China's entry into the international wine association, *Organisation Internationale de la Vigne et du Vin* [International Organisation of Vine and Wine] ("OIV"). See *Chinese Wine Industry in Line with International Line*, SINOCAST CHINA BUS. DAILY NEWS, Aug. 6, 2002, available at 8/6/02 ASIAPRTDLYN 00:00:00 (Westlaw). See also the OIV Web site, <http://www.oiv.int/uk/accueil/index.php> (last visited Feb. 12, 2006). Norington, *supra* note 161 (noting China's potential to provide competition to its neighboring international wine powerhouse, Australia).

¹⁶⁷ See Qingdao, *supra* note 142 ("[A] 1998 Huadong chardonnay is priced at \$13, while the average monthly wage in rural [wine-producing province] Shandong is little more than \$20").

¹⁶⁸ Andrew Thomson and Jeanine Marshall of the Australian law firm Minter Ellison reported in April 2005:

According to the Xinhua news agency, in March 2005 the National Industry and Commerce Bureau announced the results of a quality testing program for ten food and beverage groups, including tests performed on 93 wine companies in 16 cities. The Bureau reported that among the ten groups surveyed wine had the lowest compliance rate at only 66.3%.

In order to reduce production costs many companies deliberately reduced the content of grape juice in their wine, making wine that failed to reach the stipulated quality standard. Some companies merely use flavour essence, pure ethyl alcohol, sweetening agents and water to produce a beverage. In many wines tested the food additive content exceeded allowable levels or producers used banned additives such as soluble saccharin and chemical sweetening elements.

MINTER ELLISON, CHINA WINE BRIEFING PAPER 2 (2005), available at http://www.minterellison.com/public/resources/file/ebe4db0bfff37e2/ChinaWineBriefing_Apr05.pdf [hereinafter WINE BRIEFING PAPER]. Some producers, such as Suntime International admit that their focus is not on quality, but rather "simply to get China to drink more wine." Aryn Baker, *Château China 2005*, TIME EUROPE, Mar. 28, 2005, available at <http://www.time.com/time/europe/globalbiz/050328.china.html>. This strategy of course may be questionable as "part of wine's appeal . . . is the aura of sophistication it confers upon the would-be connoisseur." *Id.*

or other garnishes to counteract the harsh taste of those beverages.¹⁶⁹ The current upswing in domestic production gives those committed to improving the reputation of Chinese wines a cause for concern, as “many investors see wine-making simply as a booming market rather than an art, and after shelling out for top-of-the-range imported equipment—a feature of most serious Chinese vineyards—they want their money back.”¹⁷⁰ As such, China still lacks a robust wine culture and its domestic wines have yet to develop a distinctive identity that would enable them to compete seriously on an international scale.¹⁷¹ Nevertheless, the transformation of China into a formidable nation of vintners and wine connoisseurs is not an unreasonable scenario, as the 2008 Olympic Games in Beijing are expected to stimulate wine consumption and vast swathes of fertile grape-growing territory remain undiscovered.¹⁷²

As a reflection of the growing maturity of local winemaking practices, laws and regulations directly affecting the manufacture and marketing of wine in China have undergone an evolution in recent years. In 1994, the Chinese government promulgated the Chinese National Standard for Wine (GB/T15037-94).¹⁷³ The standard provided a baseline from which to measure properties such as external appearance, fragrance, flavor, and physical and chemical components.¹⁷⁴ For example, a minimum “real grape content” was designed to ensure that only wine made from real grapes could be labeled “wine” (or *putao jiu*).¹⁷⁵ White wine had to contain at least fifteen grams of real grape juice per liter, with a minimum of seventeen grams per liter for red, rosé, and fragrance-added wine.¹⁷⁶ Most wines were limited to an alcohol content of seven to thirteen percent by volume, while sweet and fragrance-added wines were mandated to comprise eleven to twenty-

¹⁶⁹ See *Chinese Wine: Now Without the Lemonade*, MSNBC.COM, Oct. 31, 2005, <http://msnbc.msn.com/id/9876638/> (“[A] slice of onion or lemon, some ice-cubes or a mixer of lemonade are some of the tricks Chinese wine drinkers use to help a glass of red slip down.”); Graham, *supra* note 148 (“[U]ntil recently, it was common to find Chinese wine on store shelves packaged with, or even simply taped to, a bottle of Sprite or tonic water.”).

¹⁷⁰ *Chinese Wine: Now Without the Lemonade*, *supra* note 169.

¹⁷¹ See *Hand-Picked for Perfection*, STANDARD, Jan. 29, 2005; *China: Wine Industry Needs to Catch Up*, CHINA DAILY, Oct. 17, 1999, available at 1999 WLNR 4592135. Praise for Chinese wines among foreigners remains relatively muted. As part of its November 30, 2005, issue devoted to emerging wineries in China, *Wine Spectator* conducted a tasting of Chinese wines wherein the highest-rated wine scored an 84 out of 100. Mitch Frank, *A Taste of China*, WINE SPECTATOR, Nov. 30, 2005, at 85. Reporting on the wines he tasted while on the California trade mission to China that took place in late 2005, Todd Zapolski of Napa Valley’s Girard Winery remarked, “I didn’t see anyone gag or spit.” Dunne, *supra* note 145. These less than flattering results correlate with the decision of California winemakers to downplay the competitiveness of Chinese wines for the time being at a symposium in Fresno in late 2005. See Dennis Pollock, *China Wine Threat Diminished*, FRESNO BEE, Dec. 2, 2005, at C1, available at 2005 WLNR 19448092.

¹⁷² See Levin, *Finding a Foothold*, *supra* note 145; Jancis Robinson, *The Vinification of China*, Oct. 11, 2003, <http://www.jancisrobinson.com/wineneeds/jr7008>.

¹⁷³ WINE BRIEFING PAPER, *supra* note 168, at 7; *Wine Industry Toasts WTO Accession*, *supra* note 152.

¹⁷⁴ WINE BRIEFING PAPER, *supra* note 168, at 7-8.

¹⁷⁵ *Id.* at 8 n.5.

¹⁷⁶ *Id.* at 8.

four percent.¹⁷⁷ Dry and semi-sweet wine should embody a “pure and clean, elegant taste” and aerated sparkling wine had to impart a “clean, happy, pure” flavor.¹⁷⁸

Proposals to revise the National Standard appeared in 2005, incorporating regulations enforced by the *Organisation Internationale de la Vigne et du Vin* (“OIV”).¹⁷⁹ The categories of classified wines have been expanded to include premium wine, ice wine, high fermentation wine, filtered wine, low-alcohol wine, non-alcoholic wine, and mountain wine.¹⁸⁰ The minimum real grape content of white wine and red wine has been raised to sixteen and seventeen grams per liter, respectively.¹⁸¹ The requirement that a wine’s characteristics be “prominently and clearly labeled” has been elaborated to mandate that labels “have description of wine variety and product type, and should have special characteristics and style.” Also notable is the abolition of a maximum alcohol content.¹⁸²

V. China and GIs: Problems and Proposals

While the new National Standard for Wine broadly addresses basic compositional qualities of fermented grape beverages, there remains much to be resolved in the area of intellectual property rights,¹⁸³ including GIs. China does not have a sui generis law on GIs, but rather enforces GI protection through trademark, unfair competition, and consumer protection law.¹⁸⁴ Protection of agricultural products based on geographic origin first began in 1995¹⁸⁵ and as of July 2005, 110 products had been granted such protection.¹⁸⁶ In preparation for China’s entry into the WTO, the Regulations for the Protection of Products of Regions of Origin were promulgated on August 17, 2000, which resulted in Shaoxing wines

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 7.

¹⁷⁹ *Id.* at 9; see also OIV, *supra* note 166.

¹⁸⁰ WINE BRIEFING PAPER, *supra* note 168, at 9.

¹⁸¹ *Id.* at 10.

¹⁸² The minimum content requirement of seven percent alcohol by volume, however, has been retained. *Id.*

¹⁸³ Interestingly enough, wine industry practices played an early role in the protection of well-known trademarks. In the late 1980s, the Administration of Industry and Commerce in HangZhou City blocked the production of TianXia Jing brand wine because the product was sold in containers that were aesthetically similar in design to boxes used to package Marlboro cigarettes manufactured by Phillip Morris. The Marlboro case was notable because the State Administration for Industry & Commerce extended protection to a well-known foreign trademark, which surpassed China’s basic obligations under the Paris Convention and was actually more in line with standards promulgated by TRIPS, which had yet to take effect in China. See Pagle, *supra* note 113, at 70-71; Qinghu, *supra* note 124, at 708.

¹⁸⁴ BERNARD O’CONNOR, THE LAW OF GEOGRAPHICAL INDICATIONS 290 (2004).

¹⁸⁵ *Oranges Are Not the Only Fruit*, CHINA DAILY, Oct. 25, 2004, available at 2004 WLNR 11961712.

¹⁸⁶ *Chinese Farmers Urged to Establish Regional Trademarks*, ASIA PULSE, July 12, 2005. In 1998, Florida oranges became the first and only foreign product registered for GI protection in China. See *Oranges Are Not the Only Fruit*, *supra* note 185.

being the first product designated a “product of a region of origin.”¹⁸⁷ Pursuant to the regulations, Shaoxing wines can only be made “from raw materials and with traditional techniques that originated in Shaoxing, an area of East China’s Zhejiang Province.”¹⁸⁸

In 2001, an amendment to the Trademark Law provided the first official definition of GIs, which are classified as “indications that identify a good from the territory where a given quality, reputation or other characteristic of that good is essentially attributable to the natural or human elements of that territory.”¹⁸⁹ Geographical indications can be protected either as collective marks, which are available to members of particular industrial or commercial organizations, or through certification marks, which act as a seal of approval from the regulatory body that inspects the goods or services in question.¹⁹⁰ Geographical indication protection is also available under the Regulation on Protection of Products of Geographical Indications, which became effective on July 15, 2005, and is administered by the State General Administration of Quality Supervision, Inspection and Quarantine.¹⁹¹ Although the regulation imposes penalties for infringement, such as fines and the cancellation of offending trademarks, the administrative processes leave room for subjective decision-making, prompting observers to “hope[] that further objective criteria will be established and made public in the near future.”¹⁹² While the aforementioned measures represent a demonstrated commitment by China to fulfill its intellectual property obligations as a new member of the WTO, one major area where China is lacking is in the protection of GIs for wines and spirits as mandated by Article 23 of TRIPS.¹⁹³

A restrained approach to GI protection has also been evidenced in China’s contribution to the negotiations over Article 24’s proposed multilateral GI registry. Three main approaches have been submitted to the WTO thus far.¹⁹⁴ One is spearheaded by the EU and provides for a comprehensive registration system that is compulsory in nature and provides unconditional GI protections across all member countries, except in cases where a party has successfully rebutted the presumption of validity created by the registration of a GI.¹⁹⁵ A voluntary registry that would in essence function as an informational database has been champi-

¹⁸⁷ *China Protects Its Prized Yellow Wine*, CHINA DAILY, Feb. 1, 2000, available at 2000 WLNR 5283779. Shaoxing wine is actually not a grape wine, but rather made from rice and wheat. *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ O’CONNOR, *supra* note 184, at 291.

¹⁹⁰ *Id.* at 292.

¹⁹¹ See Matthew Murphy, *China Provides Further Protections of Geographic Indications*, MONDAQ BUS. BRIEFING, July 29, 2005, available at 2005 WLNR 11930571.

¹⁹² *Id.*

¹⁹³ See Yahong Li, *The Wolf Has Come: Are China’s Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77, 88 (2002) (“[N]o legislation has been implemented to allow for such protection.”).

¹⁹⁴ For a comparison of the three proposals in the most current forms, see Council for Trade-Related Aspects of Intellectual Property Rights, Side-by-Side Presentation of Proposals (Sept. 14, 2004), TN/IP/W/12, available at <http://docsonline.wto.org/DDFDocuments/t/tn/ip/W12.doc>.

¹⁹⁵ See WTO, Geographical Indications—Background and the Current Situation, http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited Feb. 13, 2006).

oned by the United States, along with Australia, New Zealand, Japan, and most Latin American nations.¹⁹⁶ A third proposal advanced by Hong Kong and China is a compromise that maintains the rebuttable presumption of the validity of registered GIs, albeit in a more limited form, and only in WTO member countries that choose to participate in the system.¹⁹⁷

The EU proposal, which has been dubbed the “maximalist” approach, discourages free-riding on the reputation of registered GIs by shifting the burden of proof to parties challenging those GIs.¹⁹⁸ Thus, rights-holders are spared from the prospect of having to build their case in a faraway forum under a foreign legal system, an “inconvenience [that] would threaten the Members’ clear intention to provide Article 23-level protection to GIs for wines and spirits.”¹⁹⁹ The so-called “minimalist” U.S.-led proposal, on the other hand, has been criticized for its narrow scope in that it is “limited to creating a record rather than a true registration, as it only refers to legal effects under national legislation.”²⁰⁰ This trademark-based system that constitutes a “political commitment without legal force” would be ineffectual in “protect[ing] GIs against abusive use in translated form, in connection with modifiers such as ‘like,’ ‘kind,’ ‘style,’ ‘type,’ or ‘imitation,’ or in conjunction with the true origin of the producer.”²⁰¹

Although the Hong Kong/China proposal is stronger than the U.S. approach, this compromise is actually more minimalist in nature because it depends on voluntary participation by WTO member states. Additionally, the proposed registry is still rooted in a trademark mentality that fails to recognize the unique nature of GI rights.²⁰² The renewable ten-year terms of protection advanced by the plan unnecessarily diverge from TRIPS, which does not require the renewal of GIs.²⁰³ Thus, a renewal-based system might turn out to be more costly because of the administrative burdens it entails.²⁰⁴ Because GI protection under TRIPS is relatively expansive, reliance on trademark law alone is insufficient in attacking the problems TRIPS was designed to resolve.

While recent developments have illustrated China’s expressed commitment to protecting GIs on a domestic and international level, these goals would be better realized under a *sui generis* GI system that stands apart from conventional trademark law. First, the current system of protecting GIs under either trademark laws or administrative rules encourages inefficient enforcement as “the duality of protection systems has raised concerns about inter-departmental coordination.”²⁰⁵ Thus, a separate system designed to deal just with GI rights would eliminate the

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Martin, *supra* note 13, at 155, 160.

¹⁹⁹ *Id.* at 160.

²⁰⁰ *Id.* at 148-49.

²⁰¹ *Id.* at 150, 152-53.

²⁰² *Id.* at 154.

²⁰³ Martin, *supra* note 13, at 154.

²⁰⁴ *Id.* at 154-55.

²⁰⁵ RANGNEKAR, *THE INTERNATIONAL PROTECTION*, *supra* note 106, at 15.

patchwork of overlapping jurisdictions and regulations. Not only would such a system bring China into full compliance with TRIPS, it would likely produce a value-added effect on Chinese products. For example, recognition of GIs registered in foreign countries gives producers in those states recourse against imitators and pirates in China.²⁰⁶ At the same time, Chinese producers could rely on those same provisions to ensure that their own goods would be protected against free-riding.²⁰⁷ This reciprocity between nations discourages difficult situations as exemplified by the Napa Valley case, wherein a state finds itself having to argue against the kind of infringements that it has allowed its own citizens to commit.

While Chinese goods have yet to command the kind of international prestige that is already attached to products from Europe and North America (especially in the market for quality wines), a strong domestic GI regime can serve as a powerful marketing tool.²⁰⁸ Modern consumers have become increasingly sophisticated about the food they buy as a result of “[i]ncreased knowledge about links between diet and health, awareness of quality characteristics, and access to information on new production and processing techniques.”²⁰⁹ Thus, more defined indications of a good’s quality enable that product to transcend commodity status and command a premium price.²¹⁰ This is especially true for a product like wine, whose very image is tied with the place of geographic origin.²¹¹ Indeed, the increasing popularity of local estate-branded wines in China will only drive the need for more specific GIs considering that “in international practice the geographical indication of a wine can largely determine the quality of the wine, its price, flavour, and style.”²¹² Although the image of Chinese wine still needs much rehabilitation, an improvement in quality is inevitable in the coming years. Future success will certainly depend on a well-executed marketing campaign, the aims of which should be facilitated by sui generis GI regime similar to those

²⁰⁶ Indeed, the wine industry has felt the effects of intellectual property rights violations in China. The Chinese distributor of Mouton-Cadet wines revealed that bottles bearing that brand underwent a design change in order to thwart counterfeiters. See Graham, *supra* note 148, at 74. Reportedly, empty bottles of first-growth Bordeaux also command a market in Guangzhou. *Id.*; see also Michele Shah, *Valpolicella Protects Its Names from Chinese and Australian ‘Pirates,’* DECANTER, Jan. 8, 2003, <http://www.decanter.com/news/46214.html>.

²⁰⁷ See *China Protects Its Prized Yellow Wine*, *supra* note 187 (reporting that at the time Shaoxing wine received protected status in 2000, two-thirds of the drink found on the world market was actually being produced in Japan and Taiwan).

²⁰⁸ See BABCOCK & CLEMENS, *supra* note 19, at 2, 7.

²⁰⁹ Christos Fotopoulos & Athanasios Krystallis, *Quality Labels as a Marketing Advantage: The Case of the “PDO Zagora” Apples in the Greek Market*, 37 EUROPEAN J. MARKETING 1350, 1350-51 (2003); see also Lindquist, *supra* note 7, at 336; Goldberg, *supra* note 29, at 141.

²¹⁰ See BABCOCK & CLEMENS, *supra* note 19, at 13; *Chinese Farmers Urged to Establish Regional Trademarks*, ASIA PULSE, July 12, 2005; *Geography an Important Role in Trademarks*, CHINA DAILY, Oct. 25, 2004, available at 2004 WLNR 11961877; *Original Idea for Farmers*, CHINA DAILY, July 18, 2003, available at 2003 WLNR 9227969.

²¹¹ See Lindquist, *supra* note 7, at 336.

²¹² WINE BRIEFING PAPER, *supra* note 168, at 3.

employed in European countries.²¹³ Coordination of the part of government authorities, producers, and merchants can fully capitalize on the potential benefits available under the current global intellectual property regime.²¹⁴

VI. Conclusion

As China has undergone increased integration into the world economy, its obligations in protecting intellectual property rights have become more complex. Despite China's strident efforts in recent years to harmonize its laws with international standards, much work has to be done across the board and in the area of geographical indications in particular.²¹⁵ The current reliance on trademark law is insufficient to fully provide the protections envisioned by TRIPS. The growing profitability and cultural impact of China's domestic wine industry ensures that Chinese lawmakers will have to take a more proactive stand on protecting geographical indications for wines and spirits, a class of goods deemed so unique as to warrant special treatment by WTO members. While the leading wine-producing countries have the most to gain from stronger GI protection in the short term, a far-sighted view of global trade will take into account all that China has to gain from its own products. Although "Chinese wine" may seem like a novelty right now, it has all the potential to join the ranks of wines once ignored by the Eurocentric marketplace, such as those of Australia, South Africa, and Chile. When that day comes, Chinese vintners deserve the kinds of protections now enjoyed by their more established counterparts around the world.

²¹³ See RANGNEKAR, THE SOCIO-ECONOMICS OF GEOGRAPHICAL INDICATIONS, *supra* note 98, at 28 (noting that an effective GI regime depends on consumer awareness of what standards mean).

²¹⁴ Tomer Broude has attempted to deconstruct the economic and cultural assumptions that underpin modern GI schemes, thus proposing that systems of GI protection should be limited in scope and executed only with the support of empirical evidence of perceived market benefits. *See generally*, Tomer Broude, *Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PA. J. INT'L ECON. L. 623 (2005).

²¹⁵ Perhaps one positive indication of China's increasing support for GIs was the convening in Hangzhou in late 2005 of the second general assembly meeting of the Organisation for an International Geographical Indications Network (OriGIN), a recently-formed trade association devoted to promoting GIs worldwide. *See* OriGIN Events: Hangzhou (China), November 2005, <http://origin.technomind.be/299.0.html> (last visited Aug. 9, 2006).