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In Vino Veritas - Mercatum - Conventio: Agreements In Wine Trade

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IN VINO VERITAS—MERCATUM—CONVENTIO

Agreements in Wine Trade

By Juli Campagna

THE UNITED STATES CONCLUDED TWO TREATIES related to trade in wine in 2006: one bilateral, one multilateral. These agreements constitute all the wine trade agreements to which the United States is a party.

EU-U.S. Bilateral Wine Trade Agreement

The agreement between the European Community (EC) and the United States on Trade in Wine entered into force on March 10, 2006. This agreement provides for mutual acceptance of existing wine practices and also addresses certain labeling issues. Since 1983, the European Union had been granting and renewing short-term derogations from U.S. wine made with practices they do not recognize. Different regulatory requirements for wine labeling constitute some of the greatest barriers to as well as the highest costs in the international trade of wine.

Nearly 40 percent of U.S. wine imports in 2005 were from the EU countries, for an amount exceeding $2.5 billion. The EU, in turn, purchased over half of U.S. wine exports in 2005, contributing $323 million to our $606 million of wine export revenues.

The European Commission recommended adopting the agreement, citing the importance of the U.S. market for the EC wine sector. The U.S. market is essential to France, Italy, and Spain—Europe's largest producers. Domestic consumption of wine in Europe continues to decline dramatically. In Italy, per capita wine consumption has dropped 50 percent during the past 30 years. France and Spain show very similar trends.

Although most wine produced in these countries is table wine, the only domestic sector growing in all three is the fine wine sector. Young consumers spend significantly more than their parents on wine for special occasions; nevertheless, they drink much less on a daily basis. Young American consumers, on the other hand, are drinking more wine than at any time in history. Table wines fare much better in the United States, for all age groups, than do high-quality wines. The key substantive provisions of the agreement govern the Use of Certain Terms on Wine Labels with Respect to Wines Sold in the United States (article 6) and Names of Origin (article 7). The United States has promised to change the legal status of the following 17 terms on the labels of wine produced and sold in the United States: Burgundy, Chablis, champagne, Chianti, claret, haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, port, retsina, Rhine, Sauterne, sherry, and Tokay. Except for wines that come under the grandfathering provisions of the agreement, only "wine originating in the Community" (meaning, made from grapes wholly obtained in EU territory) may use these names on its labels.

Other than "retsina," all these terms are classified as "semi-generic" under the Internal Revenue Code of 1986 (IRC) at 26 U.S.C. § 5388, as implemented by the Bureau of Alcohol and Tobacco Tax and Trade (TTB) in Title 27, Part 4 (Labeling and Advertising of Wine), of the Code of Federal Regulations (CFR).

The IRC defines semi-generic names as those that show geographic significance but also specify a class and type of wine and lists the place of origin of each of these 17 names, for example, Burgundy (France) and Tokay (Hungary), at 26 U.S.C. § 5388(c). Labels on wine sold in the United States, whether domestic or imported, may not use semi-generic names unless they contain a disclosure statement as to the true place of origin of the wine. Thus, Burgundy produced in New York state must clearly indicate its New York origin in order to comply with current U.S. law. In pursuance of our new treaty obligations, however, unless a current wine comes under the grandfathering provisions explained below, wines labeled, for example, "Tokay of Tennessee" may no longer be imported, stocked, or sold in U.S. commerce.

A generic name, under current TTB regulations, is one that started out with geographic significance but since has

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become generic, and now only designates a class or type of wine and not its geographic origin. Examples under § 4.24(a)(2) are "vermouth" and "sake." As a result, there is no requirement to distinguish sake as *not* coming from Japan, for instance. Many Americans argue that "Chablis" and "champagne," especially if written without capitalizing their initial letters, should be classified as generic rather than semi-generic names.

Grandfathering provisions exempt "any person or its successor in interest" from the new rules on semi-generic labeling names, provided the wine used that name on a label granted a "Certificate of Label Approval" (COLA) by the TTB prior to March 10, 2006. "Person" refers to the brand, rather than to the actual producer or legal owner of that brand, making the exemption a broad one.

(1) appellation of origin, (2) indications of source, and (3) non-generic names of geographic significance.

Sixteen EU member states have obtained protection for their appellations of origin. The European lists are lengthy and highly detailed. The United States has now agreed, for example, to protect the appellations of 451 Italian quality wines and 126 Italian table wines. One designated Italian table wine merits protection whether labeled in the masculine or feminine: "Toscano" or "Toscana." Another designated Italian table wine from the bilingual area in the Dolomites (the Alto Adige) is to be protected in both its Italian and its German names: "Vigneti delle Dolomiti" and "Weinberg Dolomiten." The actual term "table wine" is now reserved for EU wines as well. The EU has agreed to protect 65 U.S. appellations of origin in its territory. The list

Both parties now *guarantee* legal protection to *specific names* of geographic origin.

includes names such as Cayuga Lake, Grand River Valley, Napa Valley, and Yountville.

All 27 EU member states as well as all 50 United States are now protected as indications of source.

Germany, France, Italy, Portugal, and Spain also obtained protection for non-generic names of geographic significance such as "liebfraumilch" and "Oporto." Actually, these names already are protected under U.S. law. Unlike with semi-generic names, such as "Chablis" and "champagne," the U.S. does not permit domestic or imported wines to combine non-generic names with nonnative appellations of origin, for example, "Liebfraumilch of Little Rock." By including these names in the terms of the agreement, the EU undoubtedly sought to ensure that they would not slip into semi-generic or generic status. At present, the TTB has exclusive authority to reclassify geographically significant names of wines. The United States has promised to remove the TTB's discretion.

In Industry Circular 2006-1, dated March 10, 2006, the TTB explains how the exemption works for "persons and successors in interest." If Company A produces "Smith Elegance California Cream Sherry," its brand name is "Smith" and its "fanciful name," for purposes of the COLA, is "Elegance." "Sherry" is the class and type of designation, and "California" is the labeled appellation of origin. The producer's goal, of course, is to be able to use the name "Sherry" on the label. As long as Company A does not change the brand name (Smith) or the fanciful name (Elegance), it comes within the exemption. It may change the appellation of origin from "California" to "Napa Valley," and it may delete "Cream." Finally, it may sell its rights in the COLA to other companies, who may continue to use it under these rules.

The United States has agreed to notify the EC in writing of the date that it changes its labeling laws. It has further promised to "take measures to ensure that any wine not labeled in conformity with this Article is not placed on or is withdrawn from the market until it is labeled in conformity with this Article." As of press time, the United States has not enacted any implementing legislation. Neither house of Congress introduced legislation in 2006.

The other key substantive provision, Names of Origin, addresses issues that the United States and Europe have disputed since the Uruguay Rounds: geographic indications. Under the agreement, both parties now guarantee legal protection to specific names of geographic origin. These names will be reserved for the exclusive use of wines produced in the stated regions. The three treaty-protected categories are

Note that wine names such as "Pascal Bouchard" or "Robert Mondavi" are not covered by this treaty. These names are trademark names and come under trademark protection. Like trademarks, geographical indications (GIs) function as source indicators. Unlike trademarks, GIs do not give any one company exclusive property rights. Both advise customers about the quality or taste they can expect from the wine in the bottle. Whereas a trademark represents a business's reputation, a GI represents a region's reputation. The protection sought and granted to the term "retsina" is similar to a protected designation of origin (PDO) in EU law. There is no traditional wine-growing

region in Greece named Retsina. Nevertheless, the name is a traditional non-geographic name that Europeans deem worthy of protection.

GIs actually have existed since antiquity, but they only became a recognized form of intellectual property worldwide in 1995 under section 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). GIs are defined in article 22 of TRIPS as indications that "identify a good as originating in a 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 geographic origin." Article 23 of TRIPS grants special GI protections to wines and spirits. As World Trade Organization (WTO) member states, the United States and the EU are legally bound to protect GIs under the terms of TRIPS.

Interestingly, there is no dispute-settlement provision in the EU-U.S. Bilateral Wine Trade Agreement. The parties resolved to "provide a harmonious environment for addressing wine trade issues" in the recitals, and ended with a joint declaration to resolve their differences through informal bilateral consultations, rather than through formal dispute settlement mechanisms.

This bilateral agreement represents a welcome change in EU-U.S. wine trade relations. The United States staunchly opposed including GIs during TRIPS negotiations, preferring to include only trademarks. Europe obviously prevailed. The European position is hardly surprising, given the strong protections for GIs in the domestic laws of its member states since the 19th century. France passed legislation in 1824 that criminalized producers for falsely designating the geographic origin of goods. The first GI in modern times may well be "Chianti," which was declared as such in 1716 by Grand Duke Cosimo III de' Medici. Certainly since the mid-19th century, when Baron Ricasoli established the Chianti recipe, there has been no doubt concerning the protection of the wine's geographical origin.

Most EU member states are also states parties to the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods. In any case, article 2 of TRIPS, which binds both the EU and the United States, requires members to comply with articles 1 through 12 of the 1883 Paris Convention for the Protection of Industrial Property, as last amended in 1967. Under Article 10 *bis* of the Paris Convention, deceptive use of geographic origin constitutes unfair competition.

In essence, both sides had and have good legal, economic, and cultural arguments for their positions, most of which are beyond the scope of this article. In a 2005 holding in a dispute brought by Australia against the EU, which the United States joined, the *EC—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* case, the WTO also acknowledged both sides. Though the case was not limited to wine, the WTO Dispute Settlement Body held that the substantive law of GI protection in the EU was not inconsistent with TRIPS. It further held, however, that TRIPS does not permit the unqualified coexistence of geographical indications with prior trademarks, as the EU had alleged.

By concluding the EU-U.S. Bilateral Wine Trade Agreement, the parties are fulfilling their international law duties, under article 24 of TRIPS, "to enter into negotiations aimed at increasing the protection of geographical indications under Article 23" (the specific wine and spirit protection provisions). Spirits have not been included, nor has the full breadth of wine. Nonetheless, the agreement is a serious attempt by the parties to limit squabbles and provide more certainty for all parties in the multibillion-dollar, multibillion-euro wine trade business.

This agreement does not mean that both sides will live happily ever after. Indeed, the United States has expressly stated that the geographic names and terms included in the agreement do not meet its definition of intellectual property and that it does not have to confer or recognize any intellectual property rights in them. This is out of step with both European and international law. At the same time, the United States has specifically agreed, in the Joint Declaration, to enter into a future dialogue on this very position. Dialogue, cooperation, and good faith are terms that pervade the agreement. Now if we can just get that implementing legislation in place.

> The *geographic names and terms* included in the agreement do not meet the U.S. *definition* of *intellectual property.*

The World Wine Trade Group Agreements

The World Wine Trade Group (WWTG) countries did not have any fences to mend when they concluded the Agreement on Requirements for Wine Labeling in Sep-

tember 2006. The WWTG member countries are Argentina, Australia, Canada, Chile, Mexico, New Zealand, South Africa, and the United States. This group dates back to June 1998 when their governments and wine industry representatives met in Zurich to discuss and plan wine trade development in light of the WTO.

Australia backed the United States during the Uruguay Rounds in opposing geographical indications for purposes of wine trade. While most TRIPS negotiations divided along the lines of developing and developed countries, GIs divided the "New World" and the "Old World." New World countries present at the Zurich meeting all supported unsubsidized wine production, exporters, and markets. Under the Common Agricultural Policy, the EU subsidizes wine production the same way the United States subsidizes corn: heavily.

The terms of trade in wine among WWTG members are actually set forth in two treaties. The first agreement, the 2001 Mutual Acceptance Agreement on Oenological Practices (MAA), deals with wine-making practices and has full treaty status in all eight countries. The parties to the MAA mutually accepted each other's laws, regulations and requirements regulating wine-making practices.

Although the WWTG members did not finalize their Wine Labeling Agreement until September 2006, they had been working within the framework of an earlier, nonbinding declaration made in October 2000, the Statement of Principles on Wine Label Requirements, also known as the Sonoma Principles. In the Sonoma Principles, they acknowledged their wish to facilitate international trade in wine in accordance with the WTO, and recognized that wine labels should be designed to meet the various needs of consumers, producers, and regulators and be mutually accepted by wine-trading countries. Essentially, all information was to be clear, accurate, truthful, and not misleading. Terms such as percentage of alcohol, and how to express it, as well as content volume, and how to express it, were to be mutually accepted. Wine producers, declared the Sonoma Principles, "should be free to label their products as they see fit subject to TRIPS and applicable laws on geographical indications and intellectual property." The provisions of the 2006 WWTG Labeling Agreement embody the Sonoma Principles.

Both WWTG agreements set up a council to manage the agreement and provide for dispute resolution. When a dispute arises, each country has a duty to provide representatives from their relevant governmental agencies who have actual expertise in the matter disputed.

Australia and Argentina increased their exports by over five percent between 2004 and 2005. Although the United States actually decreased its worldwide exports during the same period, all WWTG countries, including the United States, increased their exports to each other as a percentage of total export volume during this time. At 30 liters in 2005, Argentina has the greatest per capita domestic consumption of any of the WWTG countries. Australia is close behind. The United States significantly lower than the other group members, consuming less than ten liters per capita in 2005 (a record high). Nonetheless, U.S. wine consumption continues to grow, and the market is huge, dwarfing all other WWTG countries in total wine consumption. We consumed 2.5 billion liters in 2005.

Chile, a key wine-trade partner of the United States, regrets that Americans will not try (or at least will not purchase) its fabulous fine wines. Nonetheless, Americans are hooked on Chilean table wine. Europe has a glut of table wine and an ever-declining domestic consumer market. France continues to lose market share to New World wines in the United States. If the dollar continues to weaken against the euro, unfortunate European wine producers will need all strategies available to make sure that table-wine-drinking Americans buy their goods. ✦

BRIEFLY NOTED

ITLOS Forms New Chamber for Maritime Delimitation Disputes

The International Tribunal for the Law of the Sea (ITLOS), located in Hamburg, Germany, has formed a standing special chamber to deal with maritime delimitation disputes under article 15 of the tribunal's statute. The new Chamber for Maritime Delimitation Disputes will handle maritime delimitation disputes concerning the interpretation or application of any provision of the United Nations Convention on the Law of the Sea, which the involved parties must agree to submit to the chamber, and concerning any other agreement that confers jurisdiction on ITLOS. Further information about the tribunal and the chamber is available at *www.itlos.org*. ✦