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TRADITIONAL TERMS

Teetering Between the TRIPS and TBT Agreements

LLM Thesis

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To my family, friends and Kevin Booth,
for their patience and support.

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ACRONYMS

AO: Appellation of Origin

ARIPO: African Regional Intellectual Property Organization

CAN: Andean Community

CAP: Common Agricultural Policy

DS: Dispute Settlement System

DSU: Dispute Settlement Understanding

EC: European Community

ECCJ: European Community Court of Justice

EU: European Union

GATT: General Agreement on Trade and Tariffs

GATS: General Agreement on Trade and Services

GI: Geographical Indication

IO: International Organization

OIV: International Organization of Vine and Wine

IP: Intellectual Property

MERCOSUR: Southern Common Market

MFN: Most-Favoured Nation treatment

MS: Member State

NAFTA: North America Free Trade Agreement

NT: National Treatment

OI: Origin Indication

PDO: Protected Designations of Origin

PGI: Protected Geographical Indication

SME: Small and Medium Size enterprises

SPS: agreement on Sanitary and Phitosanitary Measures

TBT: Technical Barriers to Trade Agreement

TFEU: Treaty on the Functioning of the European Union

TRIMs: Trade Related Investment Measures

TRIPS: Trade-Related aspects on Intellectual Property Rights

Quality Wines psr: Quality wines produced in a specified region

US: United States of America

WIPO: World Intellectual Property Organization

WWTG: World Wine Trade Group

WTO: World Trade Organization

INTRODUCTION

On June 26 2008, the Delegation of Argentina issued a statement¹ to the Technical Barriers to Trade (TBT) Committee of the World Trade Organization (WTO)² which questioned the utilization of traditional expressions or additional quality terms with respect to wines that the Commission Regulations (EC) No 753/2002 and No 316/2004 of the European Union (EU) foresee.

In this statement, Argentina claimed the rejection of its wines in Europe because the label contained certain terms that were protected by the cited EU regulations as exclusive rights to be used in Spanish by the Kingdom of Spain.

The Republic of Argentina argued that, as terms referring to a certain product or quality features, they do not fall under the scope of Trade-Related aspects of Intellectual Property Rights (TRIPS). Such regulations constitute a virtual “expropriation” of a generic term in the Spanish language. Likewise, they are not a measure that is consistent with the Technical Barriers to Trade (TBT) Agreement as they create an unnecessary and unjustified barrier to international trade and therefore, Argentina requested the revision of the mentioned European regulations.

Research Problem

¹ G/TBT/W/290

² The Technical Committee on Technical Barriers to Trade is an organ that reports to the Council for Trade in Goods.

The case related by Argentina's statement to the TBT Committee is merely a reflection on the polemic and controversy that the European regulations concerning labeling of wine sector trade products and, specifically, traditional terms raise in the international arena.

The EU is a leading wine-producing zone. Wine constitutes one of the main cornerstones of its internal market. Since the 1980s, a decline of wine demand in quantitative terms has threatened the wine market. Nevertheless, an increase in the demand for quality wines has occurred.

Since then, the EU has adopted a strategy of promoting quality wines and information for consumers by protecting their composition, production and presentation through Intellectual Property (IP) law. As stated by the Queen Mary Intellectual Property Research Institute, the protection of traders in "discrete geographical localities evolved in Europe into systems for the protection of geographical indications".

IP has many benefits in addition to the competitive advantage that it gives the holder: IP rights can also provide guarantees in regard to the quality and safety of products; bestow indirect exploitation rights on the holder who thereby may receive indirect revenues; is a cost-free protection mechanism; enhances the structured dissemination of information; facilitates technology transfer, and often constitutes a significant factor in order for small and medium-sized enterprises (SMEs) to obtain financing.³

In this sense, a legal culture surrounding wine IP protection began to expand in Europe. Today, it is one of the most developed and protectionist systems of IP protection in the wine trade, justifying the TRIPS objective, described in Article 7, by which:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."⁴

Recent regulations on wine labeling in the EU have provoked controversy. These labeling regulations rule on the protection of the internationally recognized category of IP rights included in the TRIPS agreement, geographical indications (GI), as well as of other ambiguous rights, such as labeling aspects, which legal nature is vague and undefined.

³ Positive aspects of Intellectual Property Rights, Electronic source: ec.europa.eu/trade

⁴ Article 7 TRIPS Agreement

If traditional terms were fully accepted under IP rights, their international protection would be justified under the TRIPS. To date, traditional terms are not formally covered by the TRIPS and no apparent interest by the EU insinuates that this situation would change.

The EU holds that traditional terms are part of labeling regulations, and not part of IP law.⁵ Traditional terms, even while not being an “official” legal category within the framework of IP rights, regulate certain aspects related to wine as an IP right. The strict standards that the EU ruled in regard to these rights are considered by some scholars as a measure inconsistent with the TBT agreement and the General Agreement on Trade and Tariffs (GATT) in the context of the WTO.

Several countries, such as Argentina, have held consultations and address communications to the TBT Committee in regard to inconsistency of these regulations with the commitments of the WTO.

As a result of the reactions produced by EU regulations protecting wine at the multilateral *arena*, the EU has opted for modify the regulations, and for sign bilateral treaties with the most important wine producers in order to reach an adequate level of protection for its economic interests derived from the protection of traditional terms.

In any case, the controversy surrounding the justification of traditional terms continues, as there is an inconsistency between the European internal regulations of traditional terms, the requirements established for imported products, the protection reached in international treaties and the declarations of the EU on the nature of traditional terms. The internal treatment and regulation of traditional term standards are as almost equal to those of IP rights, while in the multilateral arena the EU accepts that traditional terms are not within this category of rights.

Hypothesis

The hypothesis defended is consistent with the opinion expressed by Argentina in the statement in the case *Regulation on Certain Wine Sector Products*, held at the TBT

⁵ Notification of technical regulations, Brussels 9 September 2008, European Commission- Enterprise and Industry Directorate-General (ENTRE/C/3/ - JGS/BL – D(2008) 28169

Committee, in the WTO.⁶ The European regulation on labeling wine requirements is not consistent with legal international standards of transnational trade.

The measures concerning traditional terms in the *Commission Regulations (EC) No 479/2008 of 29 April 2008 on the common organization of the market in wine*, and *No 607/2009 of July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labeling and presentation of certain wine sector products*, are not IP rights and, as a consequence, they are inconsistent with the General Agreement on Trade and Tariffs (GATT) and the TBT Agreement.

Methodology

The methodology will be based on normative comparison supplemented by case law, and the analysis of academic theory.

The sources and materials used to write this thesis are a combination of legal norms (European regulations and international treaties), case law, legal doctrine and economic studies.

As it was developed in the Research Problem, the aim of this thesis is not to comment the cases held at the TBT Committee against the European regulations concerning wine trade, but to analyze the legal nature of traditional terms, which is the hardcore of the problematic implications for international trade of this European regulation

For this reason, the statements and the cases held on the TBT Committee will be taken just as a starting point to develop the analysis of the European regulation of traditional terms and its legal nature, but not as a matter of study.

In relation to the structure and development of the reasoning, Chapter One tackles the historical development of the legal protection of wine. Current political, legal and economic situations are the results of history. For this reason it is important to take into

⁶ DS 263 case on the Committee on TBT

account the wine sector's historical development in order to glean understanding of the present discussions.

Chapter Two analyzes the subject of traditional terms and the norms in which are regulated. Following, Chapter Three describes the international norms that deal with IP rights and trade restrictive measures at the multilateral level, and then, the bilateral treaties that the EU have signed on traditional terms, concretely with the Republic of Chile, Australia, South Africa and the United States (US).

In Chapter Four, the main theories in the legal, philosophical and economic sphere on the nature of IPR will be broadly examined.

All this reasoning will bring us to determine the legal nature of traditional terms, which is a mandatory step to determine the position of traditional terms in the current international trade system.

1. HISTORICAL BACKGROUND OF WINE LEGAL PROTECTION

“There is nothing new under the sun.”

(Greco-Roman quotation)

The current interest in classifying wine into legal categories has always been present in the human mind. The will to singularize products by their geographical origin has been an effective commercial strategy since the beginnings of our civilization.

Geographical and social factors contributed to the fact that, historically, the European Mediterranean basin controlled the global wine market. The result of this situation of European dominance is that regulation of the international trade on wine has traditionally been a reflection of European resolve and whatever situation was convenient for its wine market.

In recent times, an emerging new group of wine producers, associated under the World Wine Trade Group (WWTG), has changed the panorama of the international wine trade. It is the first time that a powerful group, with negotiating power on the international wine scene, has questioned Europe’s traditional power in this sector.

1.1. Historical Origins – the Ancient Era

Wine is an alcoholic drink made from fermented grape juice.⁷ Wild grapevine is a plant species indigenous to the Caspian region and the Balkans. Vestiges of cultivated grapevine (*Vitis vinifera L.*) from the Sumerian civilization in the Mesolithic Era have been discovered in the region of Anatolia. Later traces of vines and grape seeds from the Early Bronze I period have been found in the Mediterranean countries of France and Italy.⁸

Classical texts written in Hebrew and Aramaic explain the methods by which grapevines were grown in Ancient Mesopotamia. They explain how grape juice was extracted and processed to become wine.

Early on, wine was drunk mixed with spices and perfumes. From the Middle East, the technique of winemaking expanded into Phoenicia and Crete, and afterwards, to Greece and southern Italy. It was thanks to the Greeks from Asia Minor and the Romans that wine reached Spain and Great Britain.

The first written evidence establishing the use of indications of origin in wine appear in Egyptian hieroglyphs and in the Bible. Eating and drinking used to define the configuration of social groups, so the quality and prestige of wine was quite a significant subject. This fundamental importance of wine in the Mediterranean region is illustrated by Rafael Frankel's words: "Wine is an essential product of the dry farming in the Mediterranean area and not only does it comprise a basic component in the human diet and play a crucial role in the economic history of the region, but it is also an integral part of cultures, languages, religion, literature, art, customs and folklore."⁹

1.2. The Middle Ages

Until the beginnings of the Industrial Revolution, the main traded products were primary products. Due to the superior quality of some of these products due to the climate and geology conditions and local or indigenous techniques, the indication of the geographical

⁷ Oxford University Press online dictionary. (electronic resource: www.oxforddictionaries.com)

⁸ Rafael Frankel, *Wine and Oil Production in Antiquity in Israel and Other Mediterranean Countries* (Sheffield: Sheffield Academic Press, 1999), 35.

⁹ Rafael Frankel, *Wine and Oil Production in Antiquity in Israel and Other Mediterranean Countries* (Sheffield: Sheffield Academic Press, 1999), 38.

origin of goods, by the name of the original place of production of the product or collection of the raw material, was the first mark.¹⁰

In the Middle Ages, wine continued to be a fundamental product in the Mediterranean diet. The prestige of wines and other manufactured products began to be well considered, and trademarks and other commercial distinctive signs began to gain in relevance.

In Europe, producers were clustered around associations that allowed them to give the name of the group, town, region or city to their products if they agreed and worked to the quality standards of the association prescribed, and if the products originated in that place. This kind of corporate distinction, bestowed on products made in accordance with the “technical prescriptions of the Art” of a specific group of artisans, is nowadays considered to be the origin of current distinctive signs.

The development of this kind of “corporate trademarks” continued, and the reputation of certain localities in Europe as the best producers of a specific product expanded. All of these factors contributed to the progressive creation of the concept of Appellation of Origin (AO). A remarkable affirmation of this is the awarding of the right of exclusive use of specific place names. For instance, in the 14th century, King Charles V gave inhabitants of the town of Roquefort their town’s name as a way of distinguishing the cheese made in the region’s caves.

During this period wine continued to be one of the most profitable products in western European markets and, as a consequence, the economic impact that the wine trade has had on European society has been a determining factor on the welfare of many European regions. In these times, wine was traditionally produced in small and medium-sized plantations, around which small communities of wine producers grew up, configuring a model of small rural communities of producers in Europe. It was not until the 18th century, when the old wine-producing countries – France, Germany, Italy, Portugal and Spain – consolidated their fame¹¹, that wine began to be valued as it is today: a direct product of grape juice, the flavor and taste of which is a result of an ageing process without additives that does not adulterate the base product.

¹⁰ *The relationship Between Intellectual Property Rights (TRIPS) and Food Security*, Queen Mary Intellectual Property Research Institute, June 2004.

¹¹ Miguel Angel Giaciti, “Tendencia Mundial del Consumo de Vinos y Visión Estratégica de los Países Productores” (paper presented at the OIV Congress, Hofburg, Vienna, Austria 4-9 July 2004).

With the passing of the centuries, this specialization process continued. Due to the increase of commercial relations and the emergence of nation-states in western Europe, these appellations of origin became more and more significant, as they were an effective mechanism that permitted the European consumers to associate the quality of a product with its geographical origin. It is remarkable to note that in the 19th century, France established norms banning the use of the name of a region to name a wine which was not produced there.¹²

When the *phylloxera* attacked France and other European countries in 1870s, there was a decrease in wine production. Territories in the south of the country recovered from the disease sooner than those in the north, the home of high-quality, prestigious wines. Some southern French wine cellars of lower quality saw an opportunity to increase their sales and began to sell enormous quantities of beverages called “wine”, produced by fraudulent techniques. In addition, many wine makers usurped the well-recognized names of *Bordeaux* and *Bourgogne*. This situation of unfair competition and usurpation contributed to the generation of a state of dissatisfaction among French winemakers, who demanded state protection. The State reacted, and began to regulate what are known as *Appellations d’Origine* (AO, Appellation of Origin).

The first time a State granted an AO was in France, in 1887, to the *Syndicat des Grands Marquis de Champagne* to ensure exclusive use of the name *Champagne* in relation to the special characteristics of its sparkling wine.

The good reputation of French wines and the linking of their quality with a particular territory meant that France placed a lot of importance on the concept of AO. This concept quickly spread through western Europe, creating a new niche of market based on the quality and prestige of wine, which adopted AO registration systems for wines and other alcoholic beverages first, then for other products.

¹² Cristina Errázuriz Tortorelli, “Geographical Indications and Appellations of Origin – Intellectual Property in Progress,” in *Revista Chilena de Derecho* 37 n° 2 (2010): 207-239.

1.3. Colonialism, the Expansion of Wine and the Clash of Protection Systems

Europe exported the culture linked to wine production to other countries and continents during the colonialist period. Not only vines and production methods were exported to colonies of the European empires, but also techniques and materials. Also, the consideration of wine as an important part of the culture was transmitted by colonizers and European migrants to these overseas territories.

In Australia, for example, European agricultural methods were adopted thanks to the colonization and establishment of European migrants¹³. In Chile, sparkling wine is almost identical to *champagne*, because the grapevines and production techniques were introduced by a French monk, who brought plants from France, cultivated them in similar, almost equal geographical and meteorological conditions as in France, and used the same techniques as were used in France to produce it.¹⁴

In the countries in which wine production is relatively new, basically, in the Americas, Oceania and Africa, IP aspects related to wine tend to be protected under the category of trademark. The AO system established in Europe centuries ago was foreign to these new wine traditions, and they adopted a system of wine protection based on the trademark approach.

In these countries, courts have created a long jurisprudential history in order to remedy the minimum requirements of trademark law and unfair competition law to find a solution to cases where the European figure of AO explodes, i.e. by the tort of *passing-off*¹⁵, a civil action that permits enforcement of unregistered trademark rights.

Trademark law and AO institutions have many points in common, although many differences that made their coexistence a matter of conflict. The original point of convergence of both institutions is the fact that both are founded on the requirement of

¹³ Malcom Voyce, "Geographical Indications, the EU and Australia: A Case Study on "Government at a Distance" through Intellectual Property Rights." In *Macquarie Law Journal* 7 (2007): 155- 165.

¹⁴ Fernando González Botija, "Novedades Normativas de cara a la reforma de la OCM del Vino", in Ángel Sánchez Hernández (coord.), *Aspectos de la Normativa Agraria en la Unión Europea y América Latina. Cuadernos de Derecho Agrario* nº3 (2006): 86.

¹⁵ Stephen P. Ladas, *Patents, Trademarks and Related Rights. National and International Protection*, Vol.III. (Massachusetts: Harvard University Press, 1975).

identification that derives from the market economy, where depersonalization of producers and consumers requires distinctive signs to individualize products. The interaction of both systems in international trade and law is an interesting subject that raises passions through case law, doctrine and scholars.

1.4. Current Situation

As a result of globalization, wine has become an universal goods and is valued as an all-round, popular drink. The great success of wine exportations and the glamour surrounding wine are proof. Wine is no longer a product produced exclusively in Europe; it can now be considered a global commodity with a generalized culture.

As a result of commercial exchanges, the separate legal traditions protecting wine have clashed. With the increase in commercial exchange, wines coming from foreign countries are sometimes named and sold under European protected AO. This has led to situations of unfair competition, such as the “pirate” products which make their profit from the fame of European AO and increase their sales thanks to the marketing effects of this institution, in detriment of the good name of European products, which are usually better quality or, at least, have differing characteristics which consumers associate with the name.

The AO protection system is based on exclusive rights of use of determined names registered in national registers, where the principle of territorial protection is an essential limitation to fraud and piracy from products imported from abroad. As a way of solving this problem of territoriality, European countries have made efforts to impose the concept of AO abroad through bilateral and multilateral treaties, and the register of their AO in foreign countries and multilateral instruments.

Front to the European success to achieve its objectives of AO protection abroad, the countries that have traditionally protected IP wine through trademarks, claim that the whole international protection system for the trade-related aspects of wine IP is founded on the

European conception of AO creating a “cultural imperialism”¹⁶. The fact that these systems are founded on basis of the AO institutions creates a situation of European supremacy and inequity, due to unequal access to AO registration.¹⁷

¹⁶ Interview with Federico Mekis, “Fuerte Unión frente a Europa de los Vinos del Nuevo Mundo”, 25 September 2005. (electronic source: www.elmundovino.com)

¹⁷ Guadalupe Rodríguez Gómez, “El Derecho a ostentar la Denominación de Origen,” in *Desacatos* (15-16, 2004, 171-196).

2. TRADITIONAL TERMS

2.1. Introduction

The use of certain terms and expressions to describe wine quality products is a long established practice in the European Union (EU).¹⁸ The traditional terms are expressions that are used to designate the production or ageing method, a quality, color or type of place, or a particular event linked to the history, of the product with a protected designation of origin or geographical indication.”¹⁹

As was stated in other chapters, interest in protecting consumers and fair competition through a quality-based market, as well as the improvement of the European wine market, has driven the EU to harmonize labeling requirements in the wine sector and create a marketing strategy based on it.²⁰

As a consequence, the EU has placed a great deal of importance on the protection of traditional mentions, justifying their existence in terms of protecting the legitimate interests of consumers and producers, in the context of achievement of the internal market.

The definition, characteristics, requirements and legal protection of traditional mentions were first regulated in the *Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organization of the market in wine* (EC No 1493/1999), which application is specified by the *Commission Regulation (EC) No 753/2002 of 29 April 2002 laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, designation, presentation and protection of certain wine sector products* (EC No 753/2002), and its amendments.

¹⁸ Whereas clause No 12 of the Commission Regulation (EC) No 607/2009.

¹⁹ Article 54.1 of the Council Regulation (EC) N° 479/2008.

The validity of these regulations was questioned by several core countries within the World Trade Organization (WTO), specifically as measures constituting unfair technical barriers to trade (TBT). The unclear system of norms that result from the amendments consequence of these processes in the TBT Committee, as well as the ascertainment that the aims of these norms in relation with the enhancement of the internal market of wine was not being achieved, entrained the reorganization of the EU wine market.

The cited previous norms were derogated and substituted by the *Council Regulation (EC) N° 479/2008 of 29 April 2008. On the common organization of the market, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 (EC No 479/2008), and the Commission Regulations (EC) 436/2009, 606/2009 and 607/2009.*

The EC No 479/2008 and the EC No 607/2009 clarified the status and regulation of the institution of traditional terms that in the previous regulation was very confusing. In this chapter, an analysis of the main features of this institution defined by these regulations will be developed. The aim of the EU Regulations examined are to convey information to the consumers about particularities and quality of wines complementing GI through the use of certain protected terms, in order to ensure the working of the internal market and fair competition and to avoid consumers being misled, those traditional terms should be protected in the EC,²¹ always keeping in mind the significant effects on the marketability of wine that these terms can have in consumers attitudes.²² Also in article 33 in Chapter III on *Designations of origin, geographical indications and traditional terms* is established that the rules relating to designations of origin, geographical indications and traditional terms will be based on:

- a. The protection of the legitimate interest of consumers and producers;
- b. The smooth operation of the internal market;
- c. The promotion of the production of quality products, whilst allowing national quality policy measures.

Finally, the EU, keeping in mind that restricting packaging of a wine sector product with a designation of origin or a geographical indication, or operations connected with the presentation of the products to a defined geographical area constitute a restriction on the free movement of goods and freedom to provide services, establishes that, following the

²¹ Whereas clause No 38 of the Regulation (EC) No 479/2008.

²² Whereas clause No 39 of the Regulation (EC) No 479/2008.

European Case-law of the Court of Justice, such restrictions may be only imposed if necessary, proportionate and suitable to protecting the reputation of the designation of origin or geographical indication.²³

2.2. Objective Scope

The scope of the Regulation (EC) No 479/2008 is defined in its article 1, and includes those products referred to in part XII of Annex I of the *Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products*:

Grape juice (including grape must), other grape musts, other than those in fermentation or with fermentation arrested otherwise than by the addition of alcohol, wine of fresh grapes, including fortified wines; other grape musts, fresh grapes other than table grapes, wine vinegar, piquette, wine lees and grape marc.

When defining traditional terms, the Regulation (EC) No 479/2008 reduces the objective ambit to the products referred to in Annex IV, by remission of article 33.1, which are: Wine, Liqueur wine, Sparkling wine, Quality sparkling wine and Quality aromatic sparkling wine, Semi-sparkling wine, Aerated semi-sparkling wine, Partially fermented grape must, Wine from raisined grapes, and Wine of overripe grapes. In relation to the objective ambit of the implementation regulation (EC) No 607/2009, the norm also defines its objective boundaries in relation to the products referred to in article 33.1 of the Regulation (EC) No 479/2008.

²³ Whereas clause No 5 of the Regulation (EC) No 607/2009.

2.3. Definition

According to Article 54 there are two types of traditional terms; those who designate:

- a. that the product has a protected designation of origin or geographical indication under Community or Member State law;
- b. the production or ageing method or the quality, color, type of place, or a particular event linked to the history, of the product with a protected designation of origin or geographical indication.

The definition established in this new norm clarifies the previous definitions of the concept, although it continues to be very broad and imprecise.

2.4. Protection

Regulation (EC) No 479/2008 establishes in a general way that traditional terms shall be protected in Member States (MS) against unlawful use and against becoming generic in the Community.²⁴

The specific protection granted to traditional terms is defined in article 40.2 of the Regulation (EC) No 607/2008 for terms listed in Annex XII against:

- a. Any misuse even if the protected term is accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation”, “flavor”, “like” or similar.
- b. Any other false or misleading indication as to the nature, characterization essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to it.

²⁴ Article 40.2 Regulation EC No 607/2009.

- c. Any other practice liable to mislead the public, in particular to give the impression that the wine qualifies for the protected traditional for such a traditional term.²⁵

This manner of protection is the typical protection extended by international treaties and European regulations to GI and other IP rights concerning the geographical origin of products, for instance the 1975 WIPO Model Law on geographical indications, or Article 3 of the International Convention on the Use of Appellations of Origin and Denominations of Cheese (“Stresa Convention”) of 1951.

In relation to the enforcement of protection, in a general way Regulation (EC) No 479/2008 establishes a positive obligation to the MS to take the necessary steps to stop unlawful use of traditional terms within them territories. Article 43 of the regulation (EC) No 607/2009 goes further establishing, in addition, the obligation to competent national authorities to enforce the dispositions of the regulations and to stop the marketing, including any export, of the products does not accomplishing them.

2.5. Procedure

The Regulation (EC) No 607/2009 foreseen the different procedures that competent authorities of MS or representative professional organizations²⁶ may follow in order to submit an application to the Commission for the appreciation of a traditional term, to object procedures and to cancel a traditional terms. Then, in Annexes VII to IX, the application forms are annexed to the Regulation.

²⁶ According to article 29.2 Regulation (EC) No 607/2009, *representative professional organization* are “any producer organization or association of producer having adopted the same rules, operating in a given or more wine designation of origin or geographical indication area(s) where it includes in its membership at least two thirds of the producers in the designation of origin or geographical indications area(s) in which it operates and accounts at least two thirds of that area(s) of productions.”

2.6. Requirements

Regulation (EC) No 607/2009 establishes that the terms shall consist in names traditionally used in a large part of the territory of the Community or the third part of the country concerned, or a reputed name traditionally used in commerce in at least the territory of in MS or a third country concerned, The names cannot be generic²⁷ and shall be defined in the MS legislation or subject to conditions of use, except for those traditional terms referred in article 54.1.1 of the Regulation (EC) No 479/2008.

The norm adopts the protection of the existing traditional terms protected by articles 24, 28 and 29 of the Regulation (EC) No 753/2002, previous regulation that the current examined norm repealed, shall automatically be protected provided a summary of the definition and conditions of use, and not ceased to protect in the MS or third countries.

Regarding to the temporal aspect, traditional terms must have a period of 5 or 15 years of proved use in the territory, depending the cases, in order to reach protection.

According to article 31 of the Regulation (EC) No 607/2009, the terms will be protected in the official language(s), regional language(s) of the MS or third country language where the term originates, or in the language used in commerce for this term. When the term is registered, it must maintain its original spelling. The registration of a traditional term for a determined category of wine also determines the scope of protection of the term.

The result of these requirements are illustrated in the following cases as a model of example; the qualification *Fior d'Arancio* can only be attributed to Protected Designation of Origin (PDO) in relation to the two *Colli Euganei* typologies, and referring to a production method and to the typical aromatic characteristics of the product, which is extracted from Muscat variety grapes produced through a careful production method; or *κάβα* (cava²⁸ in Greek) for Protected Geographical Indication (PGI) wines aging under controlled conditions.

²⁷ According to article 35.3 of Regulation (EC) No 607/2009, *generic* means “the name of a traditional term although it relates to a specific product method, or the quality, color, type of place or ageing method, or a particular event linked to the history of a grapevine product, has become the common name of the grapevine product in question in the Community.”

²⁸ The protection of the term “cava” foreseen in Regulation (EC) No 1493/1999 is without prejudice to the protection of the geographical indication applicable to quality sparkling wines psr “Cava”.

2.7. Third Countries

Article 54.1 of the Regulation (EC) No 479/2008 is applied *mutatis mutandis* for imported products. As a consequence, the same standard of protection is demanded to third countries' products, in order to ensure that consumers are not misled.²⁹

2.8. Relation with Trademarks

With respect to the relationship between traditional terms and trademarks, article 41 of *EC No 607/2009* establishes that traditional terms prevail over trademarks in the case that a submission of application for a trademark corresponding to a traditional term will be accepted if the trademark correspond with wines qualified to use such traditional terms. Nonetheless, a trademark registered or established by use in the territory of the Community before the 4th May 2002, will be used and renewed even if coincides with a protected traditional term.

It is very interesting to note that, in difference as previous regulations, article 41.3 foresees that a traditional name would not be used if, due to the coincidence of name with a reputed and renowned trademark, can mislead consumers as to the true identity, nature, characteristics or quality of the wine.

2.9. Homonyms

Article 42 of the Regulation (EC) No 607/2009 establishes that homonym traditional terms will be protected with due regard with local and traditional usage and the risk of confusion. It cannot mislead consumers as to the nature, quality or true origin of the product.

²⁹ Whereas clause No 13 of the Regulation (EC) No 607/2009.

3. INTERNATIONAL AGREEMENTS ON WINE LEGAL PROTECTION

As has been explained in previous chapters, the European Union (EU) has long had a strategic interest in dominating the protection system for Intellectual Property (IP) of trade-related aspects of wine.

Wine plays a strategic role in the European economy because it is a very competitive product which European countries have been leaders in merchandising around the world. Due to changes in consumer habits in recent decades, wine consumption in the EU has diminished and exports to third countries increased in a lower level than expected since 1996.³⁰

While it may be true that IP is one way to build “the most competitive and dynamic economy of knowledge in the world”³¹, and as a strategy for changing this trend towards lower sales of wine, the EU has increased its protection of wine IP trade-related aspects in order to create a wine market based on specialization and quality and increase sales of European wine at the same time that protecting the right of the consumers to an adequate information, and improving the social and economic rights of producers. One of the aspects of this European strategy is to reach the same standards and level of protection for them products in third countries than in the heart of the EU. European protection of wine is in some aspects controversial, especially in IP related protection and ambiguous categories of rights on the area of wine labeling, such as traditional terms.

³⁰ Whereas clause No 2 Regulation (EC) No 479/2008

³¹ Maximiliano Santa Cruz S., « Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries, » in *ICTSD Program on Intellectual Property Rights and Sustainable Development*, (Geneva, International Centre for Trade and Sustainable Development, 2007).

Due to the controversial character of these rights among the international actors and the ambiguity of these labeling related rights, yet no satisfactory agreement has been reached at a multilateral level (WIPO, the World Intellectual Property Organization and the WTO).

Protection of traditional terms has been one of the hot topics on which agreement has been difficult to reach because of the opposition of Wine World Trade Group (WWTG) members to accept the levels of protection requested for the EU. These countries allege that protection of traditional terms by the EU is a foreign practice to their rights, and that in the new world of wine consumers habits are determined by other associations than traditional terms such as mark, country, type of vine-plant, color, consistency, year and, in last term, Appellation of Origin (AO) or Geographical Indications (GI) and other categories.

Due to the EU's power of negotiation in the wine sector, the EU has successfully concluded bilateral agreements on the protection of traditional terms with some of these countries that initially rejected such protection.

On the other hand, European conditions of wine importations are determined by Regulations EC N0 479/2008 and No 607/2009 that establish strict standards for wines coming from third countries and that are claimed to be inconsistent with the WTO commitments.

The multilateral agreements at the heart of these discussions, plus bilateral agreements of the EU regional integration on IP matters and the EU's bilateral agreements in wine trade where traditional terms have finally been recognized, are analyzed at length in this chapter.

3.1. Multilateral Agreements

3.1.1. GATT 1994 and TBT Agreements

3.1.1.1. Introduction

The beginnings of the World Trade Organization (WTO) date from 1947, when the Agreement on Trade and Tariffs (GATT 1947) was concluded. Between 1948 and 1994 several round of negotiation were held under the umbrella of GATT 1947. In the last of these Rounds, the Uruguay Round of 1994, the Marrakesh Agreement was signed, constituting the WTO.

The WTO is formed by four pillars;

Annex I is formed by the multilateral agreements in trade in goods (Annex I A) - GATT 1994, Agriculture, Sanitary and Phitosanitary measures (SPS), Textiles and Clothing, Technical Barriers to Trade (TBT), Trade-Related Investment Measures (TRIMs), Anti-Dumping, Customs valuation, Preshipment Inspection, Rules of Origin, Import Licensing, Subsidies and Countervailing Measures, and Safeguards – the Annex II B formed by the General Agreement on Trade in Services (GATS), and Annex I C dealing with the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Annex II to the Agreement consists in the Dispute Settlement Understanding (DSU), Annex III with Trade Policy Review Mechanism and finally, Annex IV, with the Plurilateral Agreements, in which not every Member State (MS) of the WTO is part.

All these agreements are inspired in the protection of the WTO principles of Non-discrimination, reciprocity, binding enforceable commitments, transparency and safety valves.

The aim of the WTO agreements is “to implement a global liberal trade regime”³² through the supervision of the implementation and administration of the WTO agreements, the provision of a *fora* for negotiations, and the settlement of disputes.

For this dissertation, the most important WTO agreement to be analyzed is the TRIPS agreement³³, the GATT 1994 and the TBT agreements.

3.1.1.2. GATT 1994

The GATT 1994 Agreement is the general framework and the cornerstone of the WTO ruling international trade of goods.

The GATT has dispositions dealing with restrictive practices on trade, and principles that shall govern international commercial relations, the accomplishment of which is ensured by an enforcement mechanism contained within the treaty.

GATT 1994 assembles the GATT 1947's dispositions complemented by other legal instruments concluded under the GATT 1947, of Understandings concluded during the Uruguay Round on the interpretation of the provisions of the GATT 1947, and the Marrakesh Protocol on Tariff Concessions.

The GATT's pillars are the principles of Most-Favoured Nation (MFN) and National Treatment (NT), as an expression of the Non-discrimination principle. By the MFN principle, a State shall give to State A the same standard of protection that it gives to State B. Yet, NT principle is understood to include that a State shall give the same or better treatment to foreign products as it gives to its domestic products.

The GATT 1994 establishes some exceptions to its disciplines that are enumerated in Article XX and deal with measures necessary to protect human, animal or plant life or health, measures under article XX (d), and measures relating to the conservation of exhaustible natural resources.

Exception under article XX (d) establishes that

³² Alberto Francisco Ribeiro de Almeida, *The TRIPS Agreements, the Bilateral Agreements concerning Geographical Indications and the Philosophy of the WTO*.

³³ Appellate Body WTO, Retreaded Tyres case, Brazil

“Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(...) (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this Agreement, including (...) the protection of trademarks, patents and copyrights, and the prevention of deceptive practices. “

Other exceptions are established in other articles such as;

- Article XXI - Security exceptions related to national sovereignty,
- Article XIX and the Agreement on Safeguards the safeguard measures exceptions,
- Article XXIV the cases of regional integration,
- Articles XII and XVIII Balance-of Payments restrictions

In regards to this study, it is also relevant to note that the GATT Agreement also requires that a tariff or non-tariff measure must be the least trade-restrictive possible to be in accordance with the treaty. In this sense, the Appellate Body of the DS system has declared in many cases that, in the case of equal effective measures, it is necessary to apply the less restrictive.³⁴

3.1.1.3. TBT Agreement

The TBT Agreement is the main international legal instrument adopted in the field of technical regulations aiming to ensure that regulations, standards and testing and certification procedures do not create unnecessary obstacles to international trade, contributing under this viewpoint to the transversal commitment of the WTO agreements in liberalizing international trade.

This Agreement was signed in 1995 and reinforces the provisions of the previous Standard Code, a multilateral agreement on technical barriers to trade.

Keeping in mind that technical regulations, such as regulations on packaging and labeling or conformity assessment procedures, can have obstacles to international trade, the agreement defines the rules that governmental and non-governmental bodies must ensure

when developing standards, technical regulations and other related procedures, in relation to agricultural and industrial products.

These measures cannot be “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”³⁵, and not “maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner”.³⁶

With the objective of ensure transparency in the system and enhance dialogue, the system has a notification procedure to ensure transparency and facilitate the establishment of dialogue.

3.1.2. Intellectual Property International Agreements

3.1.2.1. Multilateral Agreements administered by the World Intellectual Property Organization

The first recognition of Appellation of Origin (AO) in the multilateral arena was in the 1883 Paris Convention for the Protection of Industrial Property – the Paris Convention. Article 10 of that agreement foresees sanctions that should be applied to the cases in which:

(1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant.

(2) Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

³⁵ Article 2.2. TBT Agreement.

³⁶ Article 2.3. TBT Agreement.

This Agreement was not very operative because it had conceptual deficiencies and because of the scant number of ratifications. In any case, and although the concept of AO defined in the treaty is very primitive, the signing of this Convention signified a necessary first step towards defining the concepts of AO and geographical indications (GI), so its importance should not be underestimated.

Since the Paris Convention, a lot of progress has been made in legal protection of the IP rights of wine and other agricultural products internationally.

In the WIPO sphere, several treaties have been signed where the concepts of AO or GI were broached. These agreements are the following: 1891 Madrid Agreement on the Repression of False or Deceptive Indications of Source in Goods; the 1924 Agreement establishing the International Wine Office (IOV) in Paris, and the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Protection.

In the 1891 Madrid Arrangement, the protection of the indication of origin of products is ensured under the name of “regional origin indications”. In this agreement, the protection of vine-growing products is expressly mentioned.

The Lisbon Agreement of 1958 established a naturalist conception of AO, following the French doctrinarian flow, and defines an AO in Article 2.1 as “the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors”.

Regulation of AO in this agreement is very protective due to the strict legal standards including type requirements for protection and prohibitions for thirds. For the first time in international law, the concept of AO was defined in a multilateral text, and the constitution of an international register of AO was also an important achievement. For these reasons, even if the agreement did not have many adhesions – only 25 signatory states – its influence in the international regulation of AO is still present, as the agreement became a model to follow in further multilateral, regional and bilateral agreements on the matter.

Lastly, in the *WIPO constitutive Agreement – Stockholm Additional Charter of 1967*, there is a special mention regarding the organization’s intention to achieve adequate international protection of AO and GI.

The WIPO has played an essential role in the evolution of the legal protection of origin indication. The WIPO has systematized the uses of words alluding to AO or GI related concepts and its Standing Committee on the Law is continually working for the improvement of the international protection of IP. The WIPO has not only managed several treaties dealing with the subject, but has created a necessary discussion forum on IP protection, thanks to which protection of consumers and producers, in relation to product indications of origin, is continually improving.

3.1.2.2. TRIPS Agreement

The TRIPS Agreement – Annex 1C of the Agreement Establishing the WTO – is administered by the WTO and deals with IP, but only from the trade-related aspects view point.

After scant advances at the core of the WIPO in wine trade-related aspects, in the WTO sphere, there has been enormous development of GI and wine trade-related aspects, as well as agreements in other fields affecting wine trade such as tariffs, taxes, quotes, exportation subvention, border protection, sanitary and phytosanitary measures and internal subsidies.

The WTO's main objective is reflected in the aim of the TRIPS, which is to establish minimum protection standards to be upheld by all member state regulations in order to achieve harmonization and avoid IP from restricting trade and avoid it becoming a barrier to free trade. The TRIPS Agreement changed international conception of IP rights on the international scene and, for the first time, the importance of IP rights to international trade was highlighted. This agreement established, for the first time, a new approach in international IP regulation. .

The TRIPS Agreement contains IP rights accepted by almost every country (trademarks, copyright and patents) as well as others, such as GI and Layout Designs of Integrated Circuits which are not.

The protection of GI in national and regional orders is characterized by a variety of different legal concepts, developed according to the economic and historic evolution of each

tradition, which has also affected the scope and conditions of protection.³⁷ Although only European countries, and some countries with a European legal tradition, are familiar with this concept, after negotiation, the inclusion of GI in the TRIPS was finally agreed upon. The regulation of GI in TRIPS signifies international consolidation of ancestral practices in some countries that are not practiced in others.

It is important to note that the subject of the inclusion of GI in the TRIPS negotiations was not a “North-South” quarrel; the EU, Switzerland, Bulgaria and India, supported by Chile, South Africa and New Zealand, were the main “*demandeurs*” in this area, in opposition to the US, Canada and Australia, countries that did not agree with the inclusion of GI in the TRIPS Agreement.³⁸

In many instances, the TRIPS Agreement refers to other international IP norms regulating the subject, such as administered WIPO treaties. However, when the TRIPS Agreement regulates GI, although respecting the WIPO principles on the matter, none of its treaties is expressly mentioned or referred.³⁹

The Agreement includes no allusion to Indications of Origin (OI) or AO, frequent subject of polemic and disagreement in the multilateral field that made several WIPO agreements do not have the expected success. The only category that appears is GI.

In the Agreement, GI is defined 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.”

The scope of this institution is very broad. Only two limits that restrict the legal type of GI are imposed: the objective ambit of “products”, and the necessary intervention of characteristics that are not exclusively due to human factors as a requirement for receiving protection. Even if the concept is well defined in the treaty, an *ad hoc* Trade Negotiations Committee (TNC) has been set up by the Doha Declaration that works for a better definition of the parameters of this institution.

³⁷ Javier Guillem Carrau, *Denominaciones Geográficas de Calidad – Estudio de su Reconocimiento y Protección en la Organización Mundial del Comercio, la Unión Europea y el Derecho Español* (Valencia: Tirant lo Blanch, 2008), 97.

³⁸ Juan Luis Prada, *Los Derechos de Propiedad Intelectual en la OMC* (I) (Madrid: CEFI, Instituto de Derecho y Ética Industrial, 1997), 191.

³⁹ Juan Luis Prada, *Los Derechos de Propiedad Intelectual en la OMC* (I) (Madrid: CEFI, Instituto de Derecho y Ética Industrial, 1997)

The principles of NT and MFN are foreseen in the articles 3 and 4 of the agreement, and other principles established in article 8 oblige member parties to promote public interest in applying IP measures.

Regarding the conflict between the trademark and the GI system, the TRIPS Agreement regulates the subject in article 22.3 enough broadly to include both protection systems. This article, as a way to solve in a non constringent way the frequent situation of overlapping between the GI and the trademark systems, establish that the parameter to refuse the registration of a trademark in its territory should be the possibility to mislead the consumers on the true place of origin.

In this field, in 1992, Australia and the US brought a complaint to the WTO against EU methods of protecting their GI. This case was settled by a WTO Panel ⁴⁰ and, thanks to the result of that consultation, in 1992, Australia agreed to respect GI in order to have better access to the EU market for its wines. On the same subject, other conflicts have arisen. EU complaints in the wine sector regarding usurpation by US' trademarks of its AO are a good example.

It is relevant to note that there is an extra regulation of wines and spirits foreseen under Article 23 of the TRIPS Agreement giving to this product an extra protection.

Some experts criticize the creation of a first-class and second-class category of products, creating unfair discrimination. In the Seattle Ministerial Conference, a large number of WTO Member states indicated their interest in the negotiation on extending additional protection of Article 23 to products other than wines and spirits; for example, basmati rice, Bulgarian yoghurt, Parma ham, different cheese, traditional products, and raw materials such as marble.⁴¹

One of the reasons for the efficacy of the TRIPS Agreement theoretically lies in the fact its enforcement falls under the umbrella of the WTO. Any violation of the treaty obligations can be submitted to the WTO settlement process, where commercial benefices and subsidies from the WTO in other fields can be affected.⁴² However, the reality of this mechanism is not usually activated, at least in GI-related matters, because conflicts are most often resolved

⁴⁰ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008).

⁴¹ WTO Mandated Negotiations on Geographical Indications (TRIPS), 1 January 2001.

⁴² Cristina Errázuriz Tortorelli, "Geographical Indications and Appellations of Origin – Intellectual Property in Progress," in *Revista Chilena de Derecho* (37, n° 2, 2010, 207-239).

by negotiations, as shown in the EU's negotiations with Chile, Australia, Canada and South Africa in the sector of IP trade-related aspects of wine.⁴³

Concluding with a general assessment, in the area of WTO, the TRIPS Agreement is a big step in IP protection. As almost every country is part of the WTO, the principles of the TRIPS Agreement are generally recognized all around. Even if TRIPS is a norm of minimal standards, its requirements increase the original levels of exigency of the member States, creating, at the same time, an effect of harmonization.⁴⁴ The TRIPS Agreement reinforced the public nature of IP rights as WIPO had never done before,⁴⁵ as it managed to stipulate a regulation that is global and broad, clear and flexible. Even if there is no system of registration and notification foreseen for GI in TRIPS, due to what the standards of protection and enforcement () are inferior than other IP rights such as trademarks or patents, TRIPS is considered the most complete international instrument in GI.

3.1.2.3. WWTG

The World Wine Trade Group is an informal grouping of industry and government representatives from wine producing countries formed in 1998 by Argentina, Australia, Canada, Chile, Mexico, New Zealand, South Africa and the United States (US), aiming to facilitate international trade in wine and avoid the application of obstacles to international trade in wine.

There are several Agreements in the heart of this organization, some of them dealing with issues that cause polemic in the international ambit of the WTO or WIPO. At this respect, the agreements on Oenological practices and on Labeling are remarkable.

In relation to traditional terms, the WWTG is against them acceptance, as they consider it is an unjustified and unnecessary barrier to the international trade of wine. The Agreement on requirements for wine labeling signed at Canberra on 23 January 2007, the concept, nor the words "traditional terms", does not even appear.

⁴³ Federico Mekis.

⁴⁴ Cristina Errázuriz Tortorelli, "Geographical Indications and Appellations of Origin – Intellectual Property in Progress," in *Revista Chilena de Derecho* (37, n° 2, 2010, 207-239).

⁴⁵ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008).

3.1.2.4. Regional Agreements on Intellectual Property

Following the theory by which IP is a key element to enhance development, integration regional systems are including harmonization of IP norms in their agendas. The more developed model is the EU, although it is not underestimating the efforts made by other regional systems which are explained;

- *MERCOSUR*: Argentina, Brazil, Paraguay and Uruguay are full member states of the Southern Common Market (MERCOSUR). The core of this organization is a post-Uruguay Round Protocol of 5 August 1995, on the harmonization on IP norms in the area of trademarks, origins indications and AO. To protect those rights effectively and adequately and guarantee that their use does not constitute an illegitimate barrier to trade, the Protocol foresees inclusion of industrial products and services. In regard to AO and OI, the Protocol establishes the reciprocal protection of national AO and OI and the prohibition of registering Trademarks as OI or AO.
- *North America Free Trade Agreement (NAFTA)*: Chapter XVII regarding IP of this Agreement binds Mexico, Canada and the US in similar obligations to the TRIPS norms on GI.
- *Andean Community (CAN)*: Bolivia, Colombia, Ecuador, Peru and Venezuela are member states of the CAN. IP norms in the CAN have similarities with the Lisbon Agreement of 1958 and the Madrid Arrangement of 1891. The regulation links the protection to OI and AO under the prism of the ancestral value of the culture.
- *Central America*: The 1968 Central American Agreement for the Protection of Industrial Property is inspired by the 1958 Lisbon Agreement in regard to the definition of AO and regulates the legal type of GI and conflicting cases of trademarks and AO in its Articles 70 to 80.
- *Africa*: The African Regional Intellectual Property Organization (ARIPO) establishes the regulation of GI and AO in the field of trademarks. It is stated by

the organization in the *Initiatives on the Protection of Geographical Indications in the Member States* on November 2010 that the protection of GI is important for the economic development of Africa. There is a definition of GI in the official documents governing ARIPO, as well as a registration system and parameters for solving conflicts between trademarks and AO.

- *Asia*: There is no further integration in GI matters and their use, even if economic traffic in countries such as India and Thailand, still very incipient in the region, is currently accepted.
- *European Union (EU)*: The EU protection of IP is a cornerstone of the internal market. The EU is undergoing a process of superseding national law by European law. So its advanced IP regulation with strict standards has a strong effect of harmonization in the regulations of member states. The heterogeneity of legal categories and norms on IP and, specifically, on origin indication norms was hard to overcome, but finally, focusing on shared aspects rather than divergences of the member states' institutions, this challenge was resolved.⁴⁶ The result was the creation of multiple European Regulations dealing with GI registration, of which the most important is currently the Council Regulation (EC) No 479/2008 and other regulations concerning specific products containing IP rules, such as the Council Regulation (EC) 607/2009.

3.2. The EU'S Bilateral Agreements on Traditional Terms

The EU's have signed several bilateral treaties with non-EU members containing clauses of protection of traditional mentions in wine. Most of times, the EU successfully achieve protection for its traditional terms with countries that are opposed to the recognition of this right. The examples detailed above are the most significant. Before analyzing them, it is important to make a preliminary assertion on the terminology of these treaties. The word

⁴⁶ Javier Guillem Carrau, *Denominaciones Geográficas de Calidad – Estudio de su Reconocimiento y Protección en la Organización Mundial del Comercio, la Unión Europea y el Derecho Español* (Valencia: Tirant lo Blanch, 2008), 202.

used in European regulations where the concept of traditional terms emerged is “traditional term”, while in international treaties which the EU has signed with third countries, and in international meetings, the term used is “traditional expressions”, rather than “traditional terms”.

3.2.1. Agreement establishing an Association between the European Community and its Member States, and the Republic of Chile

The Agreement on Trade in Wine was signed on 26th April 2002 and is annexed to the Agreement establishing an Association between the EU and Chile, concretely in Annex V, named the Agreement on Wine. The dispositions in relation to traditional expressions are a good reflection of European regulation on the matter.

The agreement on Wine in indent c of article 3 defines traditional expressions as “name traditionally used to refer, in particular, to the production or ageing method or the quality, color, type of place, or a particular event linked to the history of the product concerned of wine that is recognized by the laws and regulations of a Party for describing and presenting a product originating in that Party”, in the same order of ideas and terms as European regulations.

Article 8 establishes a broad protection of traditional expressions on the following terms:

1. The parties will ensure mutual recognition of traditional expressions and shall prevent traditional expressions from being used to describe a wine not covered by the indications or descriptions concerned in Article 3.
2. Products originating in the Party to which they apply and may be used only under the conditions laid down in the laws and regulations of that Party.
3. Language/s in which appears in Appendix III or IV.
4. For the category of wines which are listed in Appendix III or IV.
5. Case of homonymous traditional expression and complementary quality mention. (...)

In Article 10, the regime of coexistence of traditional expressions and complementary quality mentions with trademarks is also the one foreseen in the

European regulations, consisting of the prevalence of traditional expressions over trade marks, except that these traditional expressions correspond with the registered trademark (indent 2).

The stipulations of this agreement are enough broad to insinuate a favorable position of Chile towards the recognition and protection of traditional terms. However, official documents of the WIPO, in the mark of the negotiations for wine trade agreements, Chilean representatives claimed against the EU in the following terms:

“... Given this broad perspective adopted b the EU, the scale of the problem in any negotiation with Chile becomes virtually insurmountable. This is not only due to the traditional expressions – constituting an enormous foregone conclusion on the part of Europe for which there is no legal justification at all, certainly not in the TRIPS Agreement (...).⁴⁷”

In any case, finally Chile accepted the protection in its territory of European traditional terms, and claimed protection for Chilean traditional terms such as Pajarete, Clásico, Gran Reserva o Clos.

3.2.2. Agreement between the European Community and Australia on trade in wine

This agreement was signed in 2008 and entered into force on 1 September 2010. It was adopted by the EU in the Council Decision of 28 November 2008, 2009/49/EC.

In the definitions in Article 3.c, the agreement also refers to traditional expression as it does in the European regulations: “...shall mean a traditionally used name referring in particular to the method of production or to the quality, color or type of a wine, which is recognized in the laws and regulations of the Community for the purpose of the description and presentation of a wine originating in the territory of the Community”. It lists the protected terms in Annex II.

⁴⁷ WIPO/GEO/MVD/OI/4 page 6.

Then, extensive protection for traditional expressions is provided in Article 16, in the same way as in the European regulations, similar to how GI are protected in the European regulations, TRIPS Agreement and national legislations.

Article 17 establishes a transitional period of 12 months for the protection of the traditional expressions: Amontillado, Auslese, Claret, Fino, Oloroso and Spatlese.

In the consolidated exchange of letters that occurred during the process of negotiation and signing of this treaty, there is a special mention through which Australia and the EU are considered in terms of each party's obligations within the TRIPS Agreement, and an acknowledgement by both parties that traditional expressions do not constitute nor create IP rights.

As a consequence of an agreement signed in the 1990s by the Australian Wine and Brandy Corporation, changes in Australian legislation on GI and traditional expressions were adopted and these categories were meant to be protected in Australia.

3.2.3. Agreement between the European Community and the Republic of South Africa on trade in wine and spirits

Trade, Development and Cooperation Agreement (TDCA) between the EC was signed in October 1999. This Agreement is supplemented by four agreements, one of them dealing with trade in wine and spirits.

Some names are protected in the agreement, but not mention to traditional terms or expressions is made, and no annexed list of protected traditional terms or expressions is annexed to the agreement. However, in article 22.3 of the Agreement there is a declaration by South Africa of notable importance in which, concerning future developments, South Africa acknowledges the importance of the system of traditional expressions and the continuation in negotiations on the subject.

The Agreement, who has suffered some modifications, provides a phase-out period after which the use of some terms will be protected, in particular the European GI of "Champagne", "Port" and "Sherry", and the traditional expressions "Amontillado", "Claret", and "Auslese". On the other hand, the terms "Cape

vintage", "Cape tawny" and "Cape ruby" are allowed in the EU as traditional terms for South Africa. As well as in European regulations and in other EU bilateral agreements on the wine trade, these traditional terms are protected only in the language and for the categories of products as listed in the Annex to the treaty.

3.2.4. Agreement between the European Community and the United States of America on trade in Wine

The agreement was concluded by 2005/798/EC Council Decision of 14 November 2005 concerning the conclusion of an Agreement in the form of an exchange of Letters between the European Community and the United States of America on matters related to trade in Wine.

Article 6 of the agreement deals with the "Use of certain terms on wine labels with respect to wines sold in the United States" and Article 8, indent 3, specifically concerns wine labeling. This article concludes that:

Neither party shall require that processes, treatments or techniques used in wine-making be identified in the label. And, indent 4, the United States permits the names listed in Annex II to be used as a class or type designation on wines originating in the Community. (Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay).

The protection system of IP trade-related aspects of wine in the US is typically under the trade mark system and this can entail situations of under-protection. For this reason, after the special declaration in Article 12 by which both parties are obliged to take measures concerning IP rights that would not otherwise be taken under the Parties' perspective, there is a joint declaration in this regard on the engagement of future dialogues on the names of origin and terms in Annex II of the Agreement for a better understanding on the policies.

In regard to these protected terms, to which the agreement does not even give the name of "traditional expression" or any other, there is an express declaration by which the Parties intend that terms referred to in Article 24 of the *EC No*

753/2002 (the aforementioned terms protected in the US) do not constitute or create a new form of IP. In addition, declarations in the heart of the WIPO support this strong position against recognition of traditional terms or expressions saying that “The EU’s new draft regulations about so called Traditional Expressions for Wine are an unacceptable attempt to create a new Intellectual Property Right.”⁴⁸ Besides there is no recognition of traditional terms in the treaty but, as a result of the negotiations, the European Community undertook to approve, up to 10 March 2009, the use of the terms recognized in the EU as traditional terms of “chateau”, “classic”, “clos”, “cream”, “crusted/crusting”, “fine”, “late bottled vintage”, “noble”, “ruby”, “superior”, “sur lie”, “tawny”, “vintage” and “vintage character” for wines originating in the US and for which labeling has been already approved by the COLA (Certificate of Label Approval) in the United States. The EU did not renew the Declaration, so the terms are currently protected.

3.3. Conclusion

In the multilateral arena there are multiple agreements who deal with trade related aspects of wine trade. None of these treaties deal with traditional terms, except under the EU regional context.

Traditional terms, as was stated above, are a polemic category of rights not always accepted as a GATT-consistent measure by some countries. Traditional terms are considered by some authors to be closely linked to the GI of the TRIPS, although a major group denies it.⁴⁹

Some countries, usually wine-producing countries of the WWTG, that are declared as not “traditional terms friendly” in multilateral conversations and in the TBT Committee, have signed bilateral agreements with the EU accepting the protection of European wines’

⁴⁸ WIPO/GEO/SFO/03/15 page 4

⁴⁹ Bernard O’Connor, *The Law of Geographical Indications*, London: Cameron May, 2004.

traditional terms in their territory, and protecting their traditional terms in the EU. In effect, faced with a lack of support for its initiative on traditional terms protection, the EU has found a powerful tool in bilateral treaties for protecting its wine exportation. As a measure for avoiding clashes, these agreements do not usually go into much length regarding definitions. The typical procedure is an exchange of protection lists, which are annexed to the treaty or agreement, where each party undertakes to ensure protection under the mechanism of IP.

Botana Agra thinks that the existence of such treaties, which are a consequence of the lack of consensus and opinion that exists universally, rather than contributing to the formation of common law in AO and GI relating to the wine trade, creates confusion as long as such treaties make international regulation on these matters even more heterogeneous in nature.⁵⁰

⁵⁰ Manuel José Botana Agra, *Las Denominaciones de Origen, Tratado de Derecho Mercantil Tomo XX* (Madrid: Marcial Pons, 2001), 65.

4. LEGAL NATURE OF INTELLECTUAL PROPERTY RIGHTS

4.1. Historical Emergence of Intellectual Property Rights

Intellectual Property (IP) rights appeared in response to human beings' need to protect their ideas. Throughout the entire 19th century, with the creation of the printing press and the internationalization of commerce, the needs of organization of human knowledge and transmission of ideas changed substantially, and IP rights developed to protect the economic value of the "thinking" in an appropriate way, constituting the roots of the current IP law.⁵¹

Knowledge is an element of strategic economic importance. It is conventional wisdom that the most successful nations are those that produce, acquire, deploy and control knowledge better. Knowledge-based economies are considered wealthier than those based on traditional or natural resources. Before the rise of the information society, knowledge was considered an essential tool for development and economic progress. Knowledge that was unavailable to one's rival constituted the key to international competitiveness and therefore to national prosperity. This line of thinking prompts some scholars and academics to think of IP as "the only absolute possession in the world".⁵² This helps optimize the strategic importance of knowledge.

It is important to remark that IP is not the only way to address the potential for knowledge in a productive and developmental way.

IP is a double-edged sword: while it can improve innovation and economic competitiveness, it can also create situations of economic over-protection. There are alternative policies to development that avoid the adverse external effects of IP protection.

⁵¹ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: Edward Elgar, 2008).

⁵² *Ibid.*, 12.

Cases exist of countries, usually developing countries in situations of economic poverty, where ideas and new inventions emerge forcefully as a way of overcoming situations of need, without any kind of IP protection.

When legal orders are not internationalized, the principle of independence prevails.⁵³ In IP law, where the principle of territoriality is especially strong, the intersection of the legal types with history is remarkable. Each regulation defines its IP concepts, and at the heart of each legislation is IP law which defines IP categories and their boundaries. As Charlotte Waelde and Hector MacQueen state, “Intellectual Property Law is largely responsible for drawing the boundary between what is subject to property rights, when and how, and what is not.”⁵⁴

With the globalization of the economy, a process by which the world became more inter-dependent and de-territorialized, IP underwent a *localized globalism* process.

Graham Dutfield and Uma Suthersanen explain that two effects arise from globalization. On one hand, there is the *globalised localism* which occurs when “a local phenomenon is successfully globalised” and, on the other, the *localized globalism* that occurs when a local phenomenon undergoes modifications to adapt it to international or transnational influences.⁵⁵

All legal evolution on IP law began in Europe, and spread through the rest of the world first through colonialism, and later through agreements such as the Trade Related-aspects of Intellectual Property Rights (TRIPS), or bilateral and regional free-trade agreements.

As a consequence of this globalization process, most international norms that are agreed-upon multilaterally are a reflection of western schemes. Most countries have progressively modified their regulations in order to be consistent with the general principles agreed in the main international forums. In the field of IP, the current guidelines are marked by the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). The principles emanating from these organizations are generally agreed upon by the

⁵³ Javier Guillem Carrau, *Denominaciones Geográficas de Calidad – Estudio de su Reconocimiento y Protección en la Organización Mundial del Comercio, la Unión Europea y el Derecho Español* (Valencia: Tirant lo Blanch, 2008).

⁵⁴ Charlotte Waelde and Hector MacQueen, *Intellectual Property – The many Faces of the Public Domain* (Massachusetts: Elgar Edward, 2007), 113.

⁵⁵ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008)

majority of countries.⁵⁶ In the interior of these organizations, there is a general consensus on the meaning and basic principles of IP law. However, it would be naïve to declare that the majority of countries agree with those concepts.

4.2. Intellectual Property Rights Rationale

4.2.1. Introduction

Dutfield and Suthersanen affirm that “The variety of rationales and terms justifying IP as a classification of legal rights makes the concept very nebulous and ambivalent”.⁵⁷

IP is a *sui generis* category of rights, the legal nature of which is complex. IP is not well defined in the legal order, and its independence as a branch of law is questioned by those who argue that IP is not a legal order *per se*, but a manifestation and specialization of other existing legal orders.

Sometimes, IP rights are qualified as “traded” rights due to the fact that, when an IP right is constituted, it automatically facilitates the entrance of intangible objects into the economic market as objects of transaction *per se*. This fact signifies that IP comes into contact with different legal specialties and this can entail tensions between IP and other legal orders.

Frequently, IP is confused or enters into conflict with concurrence or competition law⁵⁸, anti-trust law, and other legal regimes. The tension created between these orders provokes inconsistent legal situations.⁵⁹ Due to its hybrid nature and transversal characteristics, IP is a legal order that clash with other legal orders in many situations. However, the unity and completeness of IP, and the fact that IP encompasses many situations that do not fit within

⁵⁶ Ibid., 3.

⁵⁷ Ibid., 48.

⁵⁸ Legal Court of Benelux, 18 November 1988, Philip Morris v. BAT (Case I 87/2- 25 to 27), in Aimé De Calauvé, « Propriété Industrielle, Droits Intellectuels, Antiquités Juridiques ?, » in *Jura Vigilantibus – Les Droits Intellectuels, le Barreau*, Antoine Braun (Bruxelles : Larcier, 1994).

⁵⁹ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008), 5.

other legal orders, with its own rationale and foundations, are reasons enough to consider IP as an autonomous legal order.

4.2.2. Justifications

Historical Justification

The history of IP rights has always been strongly linked to the development of business. For that reason, IP rights are said to have existed since the beginning of civilization.

In the Roman period, the identity of an arts practitioner or master chief, and the origin of a product were elements of social importance, protected under Roman law. The grammatical terms used nowadays to qualify what we understand as patents, trademarks and AO have Roman roots. The Roman law institutions that were used to qualify the legal concepts we know today, referred, for example, to the institutions of “incentive”, “reward”, “natural rights”, “public interest”, “public good”, “free-riding” and “piracy”.⁶⁰

Legal Justification

IP consists of a group of norms that answer the need to protect a creation which belongs naturally to its author.⁶¹ The object of IP is not to intellectualize creations, but the need of societies to regulate the use of the idea.⁶² The concept of creation makes us think of “innovation” which is, in fact, a condition of many IP rights cases such as patents, but not

⁶⁰ Ibid., 48.

⁶¹ Richard Watt, “Adverse Selection and Legal Protection of Intellectual Property Rights,” in *Antitrust, Patents and Copyright – European Union and United States Perspectives*, François Lévêque and Howard Shelanski (Massachusetts: New Horizons in Competition Law and Economics, Edward Elgar, 2005).

⁶² Aimé De Calauvé, « Propriété Industrielle, Droits Intellectuels, Antiquités Juridiques ?, » in *Jura Vigilantibus – Les Droits Intellectuels, le Barreau*, Antoine Braun (Bruxelles : Larcier, 1994).

every IP right deals with creativity.⁶³ Creations are protected as an intangible asset susceptible to appropriation. This is the reason why IP is said to be a kind of possession, although the legal regime diverges from the legal regime of property in some aspects.

Graham Dutfield and Uma Suthersanen give a good definition of IP rights that can be used as the starting point for them legal analysis:

In its simplest form, IP is a type of property regime where the creator is granted a right, the nature of which is entirely dependent on the nature of the creation on the one hand, and the legal classification of the creation on the other. To be placed within one or other of the different classifications of IP, one has to fulfill the relevant criteria (...) and comply with certain formalities. Depending on these legal (and often artificial) classifications, the creation is accorded a bundle of rights, which vary considerably across the IP spectrum in terms of scope and duration.⁶⁴

The *Theory of Justice* by John Rawls, based on the *veil of ignorance*, justifies that a just and fair society cannot be achieved when every subject pursues its own interests. Under a utilitarian perspective of society, it is necessary to opt for a set of principles, which are similar to a hypothetical social contract, to achieve justice and fairness. Property plays an essential role in this social model, and the proof is that property is the cornerstone of the legal order and social structure, so its protection is extremely regulated and this regulation is highly developed.

In effect, since printers claimed perpetual common law literary rights in eighteenth-century England, IP rights have been increasingly recognized as property.⁶⁵

Both, IP rights and property regime share the foundation that they are a sort of contract between the owner and society, by which the owner can dispose of the object within the limits imposed by the law. Property regime deals with tangible objects, while IP has the characteristic feature that it deals with intangible capital which is in the trade world. This similitude implies some consequences for the IPR regime, specifically in terms of consequences of the breach of the norm. As both systems involve non-consensual taking [of property], the legal consequences for breaking the rule are similar. These consequences are

⁶³ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008)

⁶⁴ *Ibid.*, 12-13.

⁶⁵ Ilkka Rahmasto, *Intellectual Property Rights, External Effects, and Anti-trust Law* (New York: Oxford University Press, 2003), 51.

so onerous, the penalty for breaking the rule is so harsh, that the option of breaking it—that is, taking property – is (almost) never chosen.⁶⁶

Even if case law shows that IP rights are increasingly treated with the same constitutional protection as property rights, the differences between IPR and property should not mislead us. The possession of IPRs at one time used to be multiple. The benefits of the external effects of IPRs should outweigh what the parties have invested in earning these benefits.

Economic Justification

Economists have tried to justify strong IP protection through theories that are often characterized as cost-benefit theories. Those theories do not constitute a systematic framework, and do not follow any specific guidelines or analysis model. They include: the European Proportionality Test and the “Ratio”, “Life Adjustment”, “Selection”, “Allocation Effects” and “Public Domain and Free- Rider” theories.

As this thesis does not deal directly with the economic justification of IP rights, only one of these theories, the Public Domain and Free Rider theory will be explained, as it provides clarity on the matter and its argumentation is akin to administrative law.

The model to develop this economic analysis will take as its study object a society where economic well-being depends on the level of competitiveness of the market economy. In that model, the highest degree of competitiveness is achieved with the optimal assignment of resources to satisfy that society’s wants and desires, generating the highest possible level of social well-being.⁶⁷

This optimal efficiency is, as the economist Vilfredo Pareto shows in his theory of “Pareto optimality” a situation where “no reallocations or changes can be possible so as to make one individual better off without making someone else worse off”. Due to the restrictive consequences of the Pareto criterion, the Kaldor-Hicks efficiency criterion, also

⁶⁶ Ian Ayres, *Optional Law – The structure of Legal Entitlements* (Chicago: Chicago University Press, 2005), 5.

⁶⁷ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008), 49.

named the wealth maximization criterion, is much used in economic theory. This criterion, which will be the standard for evaluating IPR efficiency in solving situations from an economic viewpoint, establishes that a change for a group of individuals at the expense of another group of individuals constitutes an improvement whenever the gains to the winners exceed the losses of the losers.⁶⁸

Assuming the market power of products protected by IP, the copy of inventions is comparable to the action of free-riders.

Free-riders create a situation of market inefficiency, as they obtain benefits at no costs. From an economic perspective, all intellectual matter is a public good, because of the characteristics of non-excludability and non-rival consumption. In economic theory it is well accepted that if the use of public goods is not regulated, it results in free-riding.

In effect, the natural reaction of societies to a new creation is the one of free riding with the public domain. Faced with creation, free-riders copy an invention and disseminate it at a lower cost. As a consequence, the real author of the invention incurs losses due to the difficulty of appropriating the value of their goods through sale and distribution. This situation entails a decrease of new ideas, as they are not economically profitable to their authors. Due to the presence of free-riders, innovation in the market decreases, and consequently, the dissemination of ideas reaches lower levels than those corresponding to an optimal market, constituting an inefficient situation.

There are multiple responses that can be adopted in order to overcome this situation. The solution of IP rights, which a certain sense mirrors the idea of insurance contracts,⁶⁹ can help to solve the unfair and inefficient situation as a manner of achieving an efficient solution to the problems of asymmetric information and risk aversion reactions. This answer is an efficient method of solving the situation, as it efficiently provides incentives to supply consumer demand to market constraint, with minimum public costs, and results in simultaneously giving creators and society the maximum expected utility.⁷⁰

The formula of IP rights also has certain externalities and adverse effects that cannot be overlooked. Every situation dealing with reality must take into account the situation of dual

⁶⁸ Ibid.

⁶⁹ Richard Watt, "Adverse Selection and Legal Protection of Intellectual Property Rights," in *Antitrust, Patents and Copyright – European Union and United States Perspectives*, François Lévêque and Howard Shelanski (Massachusetts: New Horizons in Competition Law and Economics, Edward Elgar, 2005).

⁷⁰ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008).

choice. In an ideal world, where specific solutions are foreseen for very particular situation, along the lines of one *versus* one, regulations are perfectly fair. However, on the presumption that we live in an imperfect society, where legislators create broad norms by which a variety of cases must reach a solution, not every case will find a perfect solution in a norm exclusively created for it. The aim of legal norms is to establish a fair regulation for as many situations as possible and, as is the aim of legal systems, to find the optimal equilibrium of benefits and damages derived from each norm for the group of the society regarded as a whole.

Another negative external effect of IP rights is that, as a consequence of several takers problems, enforcing a system of property regarding intangible assets can lead societies to a situation of market constraint. However, some scholars, following Calabresi and Melamed, argue that property rights encourage market transactions, and that liability rules that are “market-mimicking”.⁷¹

In any case, apart from this intervention of the State in enforcing a system of property rights to protect public interest, there are also other alternative solutions, for example, creating a liability rules regime (i.e. unfair competition) to provide public incentives, establish tax credits, sales taxes or levies on copying, managing digital rights correctly, establishing public ownership, granting public subsidies, establishing a system of taxation and state regulations, and regulating prizes with a strategic view.

The art of law is to mix those systems of protection in the most efficient way in order to achieve the optimal regulation to the problem of “ideas”. IP is a part of that.

Philosophical Justification

The area of IP is a legal field that attracts many theoretical and empirical justifications *ex-post facto*. Some of the justifications are complementary to each other; others are contradictory. In any case, they can always be classified into two defined normative groups: deontologist and teleological theories.

⁷¹ Ibid., 142.

Teleological theories define good and bad depending on what causes correct or incorrect consequences. It is a question of maximizing good. On the other hand, deontological theories consider that good and bad actions exist independently of their consequences. It is not a question of maximizing the good, but that there are good actions, obligations and duties which must be accomplished beyond those consequences.⁷²

Several philosophers have written about philosophical justifications for property law that, to a certain degree, could be transferred to IP law. Not to enter into detail, these main theories are the following:

- Locke's Theory on Property
- Natural Rights Theory
- Kant – Cult of Authorial Personality
- Hegel's Theory – Personality.

Property is the initial and final embodiment of freedom and individuality, so it is a *must* because it means controlling one's own resources and, therefore, achieving a personality.

4.2.3. Diversification of Intellectual Property Legal Types

In recent years we have experienced a tendency towards specialization and expansion of the concept of IP rights, as well as an enrichment of forms of protection.⁷³ As a consequence of the constant evolution and reconsideration of IP law, which is a direct consequence of rapid social development, there are IPRs for which the legal types have been modified, and rights which have been created new.

The evolution of law is a response to social necessities: in IP, when there is a new creation, there is a new need for protection. Policy-makers have the option of including this

⁷² Peter Singer, *Compendium of Ethics* (Madrid: Alianza Editorial, 1995), 291-308.

⁷³ Endre Lontai, *Unification of Law in the Field of International Industrial Property* (Budapest: Akadémiai Kiadó, 1994).

protection into existing rights – which is a technique known as accretion – or creating a new category of rights, called emulation.

IP traditional rights are copyright, patents, trademarks, and designs. All these rights answer different needs for protection, deal with different objects, and grant their holders' different faculties.

An example of the mechanism of emulation is the case of new IP figures that have recently merged into the traditional ones, such as plant variety protection, integrated circuit design, trade secrets, database rights, utility models and petty patents and GI.

Albeit not always easily, these new legal concepts are considered to fit under the umbrella of IP. Yet this is denied by some authors who defend the idea that IP rights are solely the traditional rights, while others question the very existence of the legal category of IP.⁷⁴

As a result of the debate and lack of consensus in this area, there is no agreement on the international panorama. Legislation on the matter is tied up in legal loopholes and inconsistencies. The subject this thesis analyzes, traditional mentions, is a good exemplification of this present situation.

4.3. Legal nature of Traditional Terms

Traditional terms are a category of law basically regulated in European regulations, bilateral treaties signed by the EU, and by national laws of countries that have signed a bilateral agreement on the subject with the EU.

The boundaries of traditional terms are not still well defined, as it is a category of rights in an early development stage. The category into which are included, is not either defined.

⁷⁴ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Cheltenham: EE, 2008).

As it was stated in previous chapters of the study, traditional terms are regulated in terms of protection, requirements, justification, aims and legal scope, as IP rights. However, there is no country, at least in a public manner, having confirmed this perception.

At the contrary, WWTG principally, and the EU as a reaction to the WWTG countries critics, deny in WIPO public documents and in their treaties and communications the legal nature of traditional terms as a IP right.

Under the perspective of legal justification that has been developed through the chapter, the legal type defined by European legislation as traditional terms, and described in international the bilateral treaties of the EU on wine trade, could be considered an IP law as long as it bestow to the owner faculties that are characteristics of the property right. However, in regard to the economic and philosophical justification, this affirmation is less sure due to the pressure of other factors that makes IP right not being a correct or effective way to pursue the aim of traditional terms, which is to inform consumers and protect a quality wine production.

5. CONCLUSIONS

According to Alf Ross in his book on legal theory called *Tû-Tû*, Tû-Tû was an expression that an African tribe used to designate a state resulting from specific situations; for instance, meeting your mother-in-law in the street constituted a Tû-Tû. People suffering from Tû-Tû needed to pass through a purification ritual in order to regain their former status and be accepted into society as a normal member. A European missionary arrived in that tribe and decided to explain to its inhabitants the illogicality of Tû-Tû. After many attempts to make them understand that Tû-Tû meant nothing, the missionary failed in his objective. Through the author's line of reasoning, the reader is made aware that legal enunciates follow a similar structure as Tû-Tû.

Legal terms and structures make sense only as long as a society imbues them with such. They entail the legal consequences that a society decides to impose. Traditional terms are legally accepted categories at the heart of the European Union, especially in the countries of the Mediterranean basin, where legal protection of wine has enjoyed a long tradition, and where some categories only make sense and gain their legal meaning and consequences through usage and practices.

When the EU tried to ensure this concept was understood and accepted abroad, the reaction of other countries, which had no protection of these terms, was not favorable. The EU began to regulate certain legal labeling requirements for national and imported wines to take into account the possibility of protecting the exclusive use of certain traditional terms which could “evoke in the mind of the consumer a production or ageing method, a quality, color or type of wine, or a particular event linked to the history of wine”.

Within international multilateral trade legislation, traditional terms are not protected and are a difficult category to classify, given their mixed nature as both an intellectual property (IP) right, and an ordinary technical protection standard. This divergence of

criterion is essential, due to the consequences entailed by the inclusion of traditional terms in one or another group of measures, signifying they are either for or against the international trade system.

Within the WTO's TBT Committee, a controversial discussion is being held on the subject, as the measures foreseen by the European regulations are considered by some to be contrary to the WTO international trade system.

Through the long of the study the different elements dealing with this discussion have been evaluated. After all, the main issued to be answered are:

Firstly, traditional terms are initially a non-IP right, yet the entire protection that the EU extends to them, in the material and systematic spheres, is as if they were IP rights.

After analysis of the legal features of traditional terms in the European regulations, they can only with difficulty be considered as IP rights. In any case, traditional terms are not included as an IP right or any other kind of right in the TRIPS agreement, so they are not considered an IP right under international law regime.

Secondly, traditional terms should not be protected under international law.

As a consequence of the lack of any IP right legal category of traditional terms, they automatically fall under the General Agreement on Trade and Tariffs (GATT) 1994 and the Agreement on Technical Barriers to Trade (TBT). As the current regulation in European law of traditional terms is not in accordance with the Most-Favoured Nation (MFN) principle of the GATT 1994, due to the language barrier that traditional terms impose, and the principle of less restrictive measure contained in Article 2.2 of the TBT Agreement, it is a measure that is inconsistent with the WTO system.

The position of Argentina in Case DS 263 *European Communities – Measures Affecting Imports of Wine* that is being held in the TBT Committee is proved right.

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