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**MASTER OF EUROPEAN AFFAIRS  
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**INTERNAL MARKET HARMONISATION  
AND TRADE IMPLICATIONS FOR NON-EU  
COMPANIES**

A CASE STUDY OF THE AUSTRALIAN WINE INDUSTRY

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MASTER PAPER  
10 POINTS

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## **Abstract**

After the formation of the European Union internal market in 1992, member state specific obstacles and barriers were largely removed. This was especially the case in harmonised industries where standardisation and technical regulation have led to legal certainty. Despite this, a large range of trade regulation continues to remain distortional to trade, in addition to the ongoing tariffs and subsidies.

The key trade regulations relate to a number of areas involving technical regulations such as production labelling and the protection of intellectual property rights. Whilst policy makers claim justification based around the need to correct market failure in delivering desired outcomes, the question is whether these regulations are appropriate responses to market failures or if they have simply been imposed in an attempt to protect domestic markets.

These regulations become especially clear for non-EU companies exporting their products to the EU internal market. When entering the EU, a large amount of primary and secondary legislation and case law becomes applicable, further compounding the difficulties found within different cultural affinity zones. In light of recent legislative developments, this paper seeks to conduct a research study on the Australian wine industry, an industry in European favour over the last decade.

Through an examination of industry developments and the underlying EU legislation, the extent to which barriers and obstacles impede the natural forces of free market trade will be determined.

# Contents

|   |            |
|---|------------|
| <b>Abstract.....</b>  | <b>ii</b>  |
| <b>List of Abbreviations.....</b>   | <b>vi</b>  |
| <b>List of Tables and Figures.....</b>  | <b>vii</b> |
| <b>1. Introduction.....</b>   | <b>1</b>   |
| 1.1 Background .....  | 1          |
| 1.2 Problem Description/Discussion .....  | 2          |
| 1.3 Paper Purpose .....   | 5          |
| 1.4 Target Audience .....   | 5          |
| 1.5 Delimitations.....  | 6          |
| <b>2 Methodology .....</b>  | <b>7</b>   |
| 2.1 Introduction .....  | 7          |
| 2.1.1 Methodological Approaches .....   | 7          |
| 2.1.2 Inductive and Deductive Argumentation.....  | 7          |
| 2.1.3 Qualitative and Quantitative Research Methods .....                               | 8          |
| 2.2 Implemented Methodology .....   | 9          |
| 2.2.1 Legal Methodology .....   | 9          |
| 2.2.2 Use of a Case Study.....  | 9          |
| 2.3 Collection of Empirical Data .....  | 10         |
| 2.3.1 Primary Data Collection .....   | 10         |
| 2.3.2 Secondary Data Collection .....   | 10         |
| 2.3.3 Validity and Reliability of Research .....  | 10         |
| 2.4 Criticism of the Sources and Methodology.....                                       | 11         |
| <b>3 Theoretical Framework .....</b>  | <b>12</b>  |
| 3.1 Globalisation .....   | 12         |
| 3.1.1 The Dynamic Facets of Globalisation.....  | 13         |
| 3.1.2 Characteristics of a Global Strategy .....  | 13         |
| 3.2 Trade Theory - Multinational or Multidomestic Business Strategy .....               | 14         |
| 3.2.1 Multidomestic Business Strategy and Porter's Value Chain .....                    | 15         |
| 3.3 Porter's Diamond .....  | 16         |
| 3.3.1 Porter's Clustering Model .....   | 17         |
| 3.3.2 Discussion of Porter's Framework.....   | 18         |
| 3.3.3 The Role of Government .....  | 19         |
| 3.4 The Investigative Framework.....  | 20         |
| <b>4 Empirical Research .....</b>   | <b>21</b>  |
| 4.1 Background and Development of Australia / EU Trade Relationship.....                | 21         |
| 4.1.1 EU – Australia Trade Relationship .....   | 22         |
| 4.2 Third Country (Australia) Wine Export Background .....                              | 24         |
| 4.3 Globalisation and Wine Strategy .....   | 26         |
| 4.3.1 Multidomestic Business Strategy and Porter's Value Chain –The Wine Industry ..... | 27         |
| 4.3.2 Porter's Diamond and the clustering of the Australian Wine Industry .....         | 28         |
| 4.3.3 The Role of Government .....  | 29         |
| 4.3.4 Third Country Wine Authorities.....   | 29         |
| 4.3.5. Macro Level Developments of Clustering Principles.....                           | 30         |
| 4.3.7 Standardisation of Wine Export Practises .....                                    | 32         |
| 4.4 Relational Marketing .....  | 34         |
| 4.4.1 European Cultural Affinities in Downstream Marketing.....                         | 34         |
| <b>5. European Community Legislation .....</b>  | <b>37</b>  |
| 5.1 Legislative Background .....  | 37         |

|   |  |           |
|---|--|-----------|
| 5.2   | Protection Provided by the European Community Treaty .....         | 38        |
| 5.2.1   | Free Movement of Goods .....                                       | 38        |
| 5.2.2   | Common Customs Tariff.....   | 38        |
| 5.2.3   | Justification of Discriminatory Barriers .....                     | 39        |
| 5.2.4   | Article 28 and 30 and Secondary Legislation .....                  | 39        |
| 5.2.5   | Article 90 – Internal Taxation.....                                | 41        |
| 5.2.6   | EC Treaty and Geographical Indications of Origin .....             | 41        |
| 5.3   | Regulations .....  | 42        |
| 5.3.1   | Background.....  | 42        |
| 5.3.2   | EC Regulation Development (Regulation 822/1987 and 823/1987) ..... | 43        |
| 5.3.3.  | EC Regulation 1493/1999 .....                                      | 44        |
| 5.3.6   | Geographical Indications .....                                     | 48        |
| 5.4   | Directives .....   | 50        |
| 5.5   | ECJ Case Law .....   | 52        |
| 5.6   | EU / Australia Bilateral Wine Trade Agreement .....                | 56        |
| 5.6.1   | Background.....  | 56        |
| 5.6.2   | Agreement .....  | 56        |
| 5.6.3.  | Bilateral Treaty Protection – An Example.....                      | 57        |
| 5.6.4   | Bilateral Treaty Development .....                                 | 58        |
| 5.6.5   | Practical Applications of the Bilateral Treaty .....               | 60        |
| <b>6.</b>   | <b>State Trading Enterprises.....</b>                              | <b>61</b> |
| 6.1.1   | The European Union Perspective .....                               | 61        |
| 6.1.2   | The ‘Franzen’ Case .....   | 62        |
| 6.1.3   | Business Implications .....  | 64        |
| <b>7.</b>   | <b>Conclusions.....</b>  | <b>65</b> |
| 7.1   | Summary .....  | 65        |
| 7.2   | The Policy Context for Future Research .....                       | 67        |
| <b>8.</b>   | <b>References.....</b>   | <b>68</b> |
| <b>Appendices .....</b>                             |  | <b>74</b> |
| <b>A1. European Community Treaty Articles</b>       |  | <b>74</b> |
| <b>A2. Australian National Wine Industry Bodies</b> |  | <b>75</b> |

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*David*

# List of Abbreviations

|           |   |
|-----------|---|
| ABS       | Australian Bureau of Statistics   |
| AWBC      | Australian Wine and Brandy Corporation (Corporation)  |
| DFAT      | Department of Foreign Affairs and Trade (Australia)   |
| EC        | European Community  |
| EEC       | European Economic Community   |
| ECJ       | European Court of Justice (Court)   |
| ESC       | Economic and Social Committee   |
| EU        | European Union  |
| GATT      | General Agreement on Tariffs and Trade  |
| MAA       | Mutual Acceptance Agreement   |
| MRA       | Mutual Recognition Agreement  |
| New World | Referring to the wine production countries of North and South America, Chile, South Africa and Australasia. |
| OIV       | Office International of Vine and Wine   |
| Old World | Referring to the wine production countries of Western and Eastern Europe                                    |
| TRIPS     | Trade-related aspects of Intellectual Property Rights   |
| VAT       | Value Added Tax   |
| WTO       | World Trade Organisation  |
| WWTG      | World Wine Trade Group  |

# List of Tables and Figures

- Figure 1 International Trade Theory and the Principle of Comparative Advantage
- Figure 2 Porter's Value Chain
- Figure 3 Porter's Diamond
- Figure 4 Investigative Framework
- Figure 5 Australia's Exports to the EU
- Figure 6 The Single Market and the Common Commercial Policy
- Figure 7 Australian Wine History
- Figure 8 'Old' and 'New World' Wine Markets
- Figure 9 Annual production growth rates for Old and New Wine Markets
- Figure 10 EU's Largest Importers of Wine (in HL and €)
- Figure 11 EU Wine Imports from Australia
- Figure 12 Downstream Marketing At Work – The Case of Yellow Tail
- Figure 13 The Office International of Vine and Wine
- Figure 14 Mutual Acceptance on Oenological Practises
- Figure 15 AWBC Guide to Exporting Wine
- Figure 16 Wine Quality and Price/Quality Segmentation
- Figure 17 Cultural Affinity Zones in Europe
- Figure 18 Wine Label Specifications

# 1. Introduction

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*This opening chapter aims to arouse reader interest providing a basic comprehension of the study. The background and underlying motivation for the paper will be provided followed by a presentation of the purpose. Thereafter, the target audience and delimitations will be made followed by a summary of the structure of the paper.*

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## 1.1 Background

With the accession of 10 further member states into the European Union (EU) on May 1st, 2004, the EU has became one of the largest economies of the world with a GDP similar to that of the United States. Enclosed within the EU are the third, fourth, fifth, sixth and nine largest economies of the world<sup>1</sup>, producing together approximately 30% of global GDP.

Through integration, the goals of the European Union are to prohibit barriers to trade, movement and investment, eliminating discriminatory measures within individual member states whilst simultaneously reducing transaction costs. The Treaty of the European Union, the underlying guardian document of the Union, states that goods should circulate freely within the Internal Market with Member States only able to restrict free movement of goods in exceptional cases<sup>2</sup>. Other principles accompanying the free movement of goods and services include the creation of a common commercial policy, protection of free competition and consumer rights<sup>3</sup>. Specific policies then act to assist in developing certain industries such as agriculture where the aforementioned guidelines and principles are refined to reflect the needs of the particular market.

To ensure legal certainty across the Member States, those countries that have either joined the Union or are in the process of applying for membership must go through the task of adopting, applying and enforcing EC law (regulations and directives), policies and practises. This process, known as the ‘acquis communautaire,’ revolves around the core issue which is central to EU integration, that being effective policy implementation<sup>4</sup>. Implementation of EC regulations and directives requires the reformation of national law and policy by individual member states, where broad industry wide changes need to be reflected in everything from product standards to technical regulations.

During the early formation of the EU when there was a rapid succession of new members, focus was on building the institutions which would function in the ‘new’ democratic environment<sup>5</sup>. As the process of integration and internal market harmonisation has progressed, internal market barriers and

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<sup>1</sup> Germany, the United Kingdom, France, Italy and Spain (Eurostat Yearbook 2003)

<sup>2</sup> For example, when there may be danger resulting from public health, environment or consumer protection issues.

<sup>3</sup> Steiner and Woods (2003:187).

<sup>4</sup> Nicolaides, (2003:45) ‘Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Application of EU Rules.’

obstacles to trade have subsequently digressed from a member state specific level to an EU wide level, with 89% of Community legislation relating to the internal market transposed into national laws by 1994<sup>6</sup>. Through effective implementation of EU regulations and directives, the administrative weaknesses and internal impediments to trade of member states have largely been removed. Where once there may have been outright discriminatory statutory impediments to trade of a protectionist nature, through integration, these restrictions are being replaced with EU wide barriers<sup>7</sup>. Furthermore, whilst tariffs on imports to the EU and subsidies on the production of certain industries remain distortional regarding trade, other trade regulations are becoming more stringent on an EU level towards third country importers<sup>8</sup>. In these cases the prospect of having a single internal market with an increasingly close union between member states has brought about a fear of a 'fortress' Europe, where protectionist policies exist against those countries outside the union<sup>9</sup>. A World Bank paper published in 2000, brings clarity to this perspective, stating that “..there has been a rising use of technical regulations as instruments of commercial policy in unilateral, regional and global trade contexts. These non-tariff barriers are of particular concern to business which may bear additional costs in meeting such mandatory standards.<sup>10</sup>”

These technical regulations are also in many cases coupled with quarantine requirements and the protection of intellectual property rights. Where these protectionist measures exist, the usual justification is that they are in place in order to correct the failures of the market<sup>11</sup>. The area in contention, is whether these regulations are appropriate responses to market failures or if they have simply been imposed to protect either domestic Member States or the EU from import competition.

## 1.2 Problem Description/Discussion

In the light of the European Union's role in motivating the removal of obstacles from a strategic level, (ie: within the Internal Market as a whole) and the Member States' continual efforts to effectively implement EU regulations and directives, it is clear that obstacles, specific to individual Member States are diminishing. Some decades ago businesses external to the EU were faced with ambiguity not only on a European level but also on a national level. This EU wide ambiguity was largely removed by the creation of the internal market in the early 1990s which saw standardisation especially in high risk areas such as pharmaceuticals. In such areas, standardisation and technical regulations have led to legal certainty<sup>12</sup>. In sectors or areas where risks are less, or where European legislation has yet to be introduced, free trade is at the will of the mutual recognition principle<sup>13</sup>.

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<sup>5</sup> Nicolaides, (2003;47).

<sup>6</sup> Steiner and Woods, (2003;196).

<sup>7</sup> Cremona, (2003;172).

<sup>8</sup> Maskus and Wilson (2000;14).

<sup>9</sup> Steiner and Woods, (2003;15).

<sup>10</sup> Maskus and Wilson (2000;4).

<sup>11</sup> Ibid.

<sup>12</sup> Internal Market Scoreboard, European Commission. No 10, May. (2002;29-33).

<sup>13</sup> The mutual recognition principle guarantees the free movement of goods and services as goods which are lawfully produced in one Member State cannot be banned from sale within another Member State. This extends to areas where products are produced to technical or quality specifications in a Member State, different to those

As a result of this principle, Member States' national legislation does not need to be harmonized. In the 2002 Internal Market Scoreboard, it was stated that approximately half of intra-EU trade is accounted for within this 'non harmonised' area. This area can be further divided into two sectors consisting of the sector which is regulated by national technical regulations (30% of total trade), and the sector which is not specifically regulated at all (which consists of 20% of total trade)<sup>14</sup>. In the 'non-harmonised' area, the rules of the Member State of origin prevail and a greater diversity of products and services are subsequently developed due to an observance of local, regional and national traditions. Moreover, compliance with the principle of subsidiarity<sup>15</sup> is ensured and no detailed or cumbersome rules at the EU level become necessary<sup>16</sup>.

It has been recognised though that in practise, there are still a great many obstacles which deter and hinder the free movement of goods. Some industries like the bicycle market have no harmonised technical regulation and as a result, all Member States still continue to have different national rules regarding technical requirements. The Commission believes that many of these requirements violate the mutual recognition principle but at present they are not receiving many complaints as manufacturers and importers are voluntarily adapting their bicycles to local standards<sup>17</sup>. Despite this, the product adaptions come at a cost which reduces competitiveness and makes bicycles more expensive for the consumer<sup>18</sup>. Whilst examples of prohibitive national technical barriers are becoming reduced, such regulations continue to pose problems for the SME who inevitably face increased costs to adapt their products to local requirements.

These member state specific obstacles are further compounded for companies external to the EU (third country companies), when exporting to the European Union. For such companies, products need not only meet European Union compliance regulations but also the regulations of each member state upon whose territory the product or service is sold. Such measures could include:

- National specifications resulting in additional costs;
- Unusual testing, certification, or approval procedures;
- High procedural costs and an inability to deal with complex issues;
- Complicated VAT procedures;
- Complicated or slow administrative procedures and delays;
- Costly financing arrangements for cross-border transactions;
- Complicated appeal procedures;

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applied in the Member State where the product is sold. The only exception allowed is in high risk areas where there is an overriding general interest in health, consumer or environmental protection. See:

<http://europa.eu.int/scadplus/leg/en/lvb/l21001b.htm>

<sup>14</sup> Internal Market Scoreboard, European Commission, No 10, May (2002).

<sup>15</sup> See Article 5 of the EC Treaty, 'Principle of Subsidiarity' referring to the Community only taking action when the objectives of the proposed action cannot be sufficiently achieved by the Member States.

<sup>16</sup> COM (1999) 299.

<sup>17</sup> Internal Market Scoreboard, European Commission, No 10, May (2002;21).

<sup>18</sup> The Commission notes that this practise continues as most bicycle producers are SME's who do not have the resources to be involved in legal proceedings to gain their rights under the principle of mutual recognition.

- Obligations to establish locally;
- Difficulty in sourcing local rights or licenses from local competitors;
- Attitudes of public authorities;
- Low levels of mutual confidence in acts performed by other MS;
- Lack of useful information<sup>19</sup>.

In the ‘harmonised,’ area, all such national technical regulation and standards have been removed and have been replaced with regulation at the EU level. These regulations act as a form of commercial policy but can also be seen as trade distorting instruments<sup>20</sup>. Market access barriers which can be both tariff and non-tariff in nature. These include:

- Preferential trade agreements;
- Expansion of customs unions and free trade areas;
- Tariff escalation within national markets to protect domestic industry;
- Domestic support and export subsidies;
- Intellectual property protection;
- Sanitary regulations;
- Technical regulations;
- Quarantine requirements;
- State trading enterprises<sup>21</sup>.

Clearly there are still a number of obstacles and barriers which continue to distort trade in harmonised industries. These are made all the more explicit for third country companies entering the EU. Whilst there may well be fair justification for the use of such measures, the question is whether the regulations are appropriate responses to market failures or simply protectionist measures against import competition<sup>22</sup>. Moreover, in the current era of trade liberalisation, are such measures only serving to act as clouding mechanisms, hindering the development of the true spirit of the ‘*acquis communautaire*<sup>23</sup>,’ or are policy makers and practitioners acting in the best interests of Europe and increased global trade as a whole.

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<sup>19</sup> Internal Market Scoreboard, European Commission, No. 7, November (2000;19); Nicolaides, (2003;54).

<sup>20</sup> Maskus and Wilson, (2000;1).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Nicolaides, (2003;45).

### **1.3 Paper Purpose**

As Businesses' across Europe begin to benefit from the increasing ease with which they can trade beyond national borders, so too are foreign companies or third country companies (to the EU). Where foreign companies previously had to tackle trading obstacles which existed independently between Member States, with the formation of the Internal Market in 1992, these obstacles were moved to the European wide level. The European Union effectively achieved the completion of one of the fundamental pillars of the Treaty, that being the creation of a single internal market and the free movement of goods within that market.

In light of the harmonisation of the EU internal market, this paper proposes to conduct an analysis of the implications of this harmonisation on trade with third country companies exporting their goods to the European Union.

*Put simply, what are the barriers to non-EU companies entering the EU's single internal market?*

In an attempt to provide an analysis of the market a variety of other associated questions also need to be asked.

- How complete, therefore, is the harmonisation of the internal market: totally complete, or are there aspects of harmonisation remaining for industries that have been harmonised?
- What implications does this harmonisation have on non-EU companies entering the market?
- And furthermore, as a result of this harmonisation, what are the developing obstacles, barriers and problems that non-EU companies are having to deal with, on both a EU level and local market level?
- Of these obstacles, which constitute legal obstacles and what are the market or business specific barriers when analysing a particular case study industry?

### **1.4 Target Audience**

The target audience for this paper involves four main groups of people:

- Students and members of the academic community with an interest in international trade, European affairs, the harmonisation of the European Union internal market and trade obstacles for third country importers;
- Wine Industry stakeholders who have an interest in Australia's bilateral relationship with the European Union, the export of wine to the EU under this relationship and the legislative obstacles which protect European domestic industries and hence distort trade;
- Managers, employees and entrepreneurs with an interest in EU market barriers;
- Employees at Austrade or other trading or wine industry organisations who have an interest in the negotiations, developing wine trade relationship between Australia and the EU.

## **1.5 Delimitations**

The number of existing and available theories regarding the growth of competitive advantages and development of export industries is many and varied. As a result, the theoretical models used in this paper were chosen for their recognition as providing the most widely accepted applications. Moreover, they were most suitable for the chosen case study industry.

A single case study industry was chosen as multiple industries would lead to inconclusive correlations. The case study industry covers a harmonised industry and as such, the focus will be on EU level obstacles and barriers which shall be explored.

Information that is not covered in this paper is argumentation for open market free trade. This paper will not discuss multilateral World Trade Organisation (WTO) arrangements and negotiations as developed through the GATT agreement. Neither will this paper discuss the development of the TRIPPS agreement on intellectual property right protection. Whilst the current state of intellectual property right protection and the European Union common market organisation may reflect upon WTO approved practices, argumentation for different perspectives behind this development will not be discussed.

Moreover, distortions to trade comprise of both tariff and non tariff measures. This paper will focus on trade regulations other than tariff measures. Tariff measures will not be included in this discussion. Whilst tariffs are a distorting mechanism for international trade, they are not a mechanism which has been affected by the specific harmonisation of a unique industry within the EU internal market. This paper will focus solely on those measures, both market and legal which have changed as a result of EU internal market harmonisation. Discussion of the EU's Common Agricultural Policy (CAP) and its relation to domestic subsidies and its external impact in the context of multilateral trade arrangements and bilateral/regional trade negotiations will not be included in this paper.

Furthermore, a highly detailed analysis of individual member state obstacles will not be included within this paper. Due to language restraints and the complexity of individual member state systems, no effective analysis could possibly be performed within the constrained resources of this study. Whilst a detailed analysis of the differing domestic tax arrangements of the industry in question may have been justified, only a limited overview is presented due to the limited page requirement.

Out of respect to the country in which this paper was written, the penultimate chapter focuses on a specific national area of law – that being state monopolies. Whilst it is recognised that this form of market arrangement is rare, an attempt to give insight into how such an arrangement is both (a) legal and (b) may benefit or restrict producers that trade with such an enterprise is provided.

## 2 Methodology

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*The Methodology Section begins by providing a short introduction to the theoretical nature of methodology. The implemented methodology is presented together with a discussion concerning the research method, that being the primary source of factual information upon which this paper is based.*

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### 2.1 Introduction

The theoretical basis for this paper involves a synthesis of legal and business analysis. To understand the methodological approach chosen, a brief overview of the theory behind the two different approaches to methodology will be presented.

#### 2.1.1 Methodological Approaches

The two different methodological approaches represent two different ways of perceiving reality. These approaches are:

- Positivistic;
- Hermeneutic.

Founded by French sociologist August Comte, the ideology of positivism states that we only have two sources of knowledge, the things we can register with our five senses and the conclusions that we can draw through logic reasoning. The aim is to build a more positive and hence, more certain field of knowledge<sup>24</sup>. This approach is based upon scientific measures and the formal logic and facts contained therein.

The other methodological approach is the hermeneutic view, which can be explained as the science of interpretation. Often associated with qualitative research, the author approaches the research subjectively from his or her own understanding. Originally evolving from problems of understanding within theology and humanistic science, the hermeneutic view seeks to find an insight whilst understanding the entirety<sup>25</sup>. Taking consideration of the fact that texts are created by human beings, methods within hermeneutics attempt to develop clean-cut techniques for attempting to understand what the author of a text really intended. This means effectively reconstructing the authors purpose at the time that the text was written<sup>26</sup>. The hermeneutic viewpoint infers that a person understands another human being's actions and behaviour, and as such, language and dialogue are crucial aspects of ensuring that comprehension is correct.

#### 2.1.2 Inductive and Deductive Argumentation

Arguments have traditionally been classified into two main categories; inductive and deductive. Deduction is usually described as moving from the general towards the specific, whereas induction is

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<sup>24</sup> Alvesson and Sköldberg, (2000;32).

<sup>25</sup> Ibid, page: 53.

described as moving from the specific to the general<sup>27</sup>. It is ascertained that arguments which are based upon general principles, laws and existing theories are best expressed deductively<sup>28</sup>.

### **Deductive Illustration**

A deductive argument forms a hypothesis, which is tested empirically and thereafter, conclusions about the validity of the theory are drawn. It is claimed that it is impossible for premises to be true if the conclusion is false. For example:

- (1) All books on philosophy are boring;
- (2) This book is a book on philosophy;
- (3) This book is boring.

In this example, if (1) and (2) are true, then (3) is also bound to be true. This is the key feature of a logically valid deduction<sup>29</sup>.

### **Inductive Illustration**

The starting point in induction is reality with no theoretical support from established theories. The premises are supposed to support the conclusion in a way that if the premises are true, then it is improbable that the conclusion would be false. If premises are based on observations which are likely to be biased, then the conclusion follows from the premises. In this case, the observations and investigations eventually lead to the formulation of a theory<sup>30</sup>.

Because it is possible to arrive at an incorrect conclusion, it may seem that the inductive line of argumentation is weaker than the deductive. However, it must also be noted that the conclusions are already contained within the premises of the deductive approach<sup>31</sup>. This means that no new information can be developed by a theory using the deductive approach, hence the reason why most often deductive arguments are used in mathematics whilst most other fields of research use inductive logic<sup>32</sup>.

## **2.1.3 Qualitative and Quantitative Research Methods**

When conducting research two primary methods for collecting data exist, these being qualitative and quantitative methods. The method is chosen based around the type of information that is required<sup>33</sup>. Quantitative information is limited to general perceptions which thus lead to trends and statistical findings regarding numbers and quantities. Qualitative analysis provides an opportunity to gain a far deeper and richer insight into behaviours and motivations, thus providing an invaluable means to gauge to interpret and draw conclusions of significance<sup>34</sup>.

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<sup>26</sup> Ibid, page: 55.

<sup>27</sup> Chalmers, (1999;107).

<sup>28</sup> <http://www2.sjsu.edu/depts/itl/graphics/induc/ind-ded.html> (17/05/05).

<sup>29</sup> Chalmers, (1999;43).

<sup>30</sup> Ibid, pg: 49.

<sup>31</sup> Ibid, pg: 50.

<sup>32</sup> Ibid, pg: 50.

<sup>33</sup> Alvesson and Sköldberg (2000;4,204).

<sup>34</sup> Ibid.

## **2.2 Implemented Methodology**

The theoretical basis for this Masters paper is through the positivistic approach. The purpose of this paper involves building a deeper level of knowledge and as such, the positivistic approach allows conclusions to be drawn through logic reasoning. Furthermore, a combination of the inductive and deductive approaches are used to develop the findings behind the purpose of this paper. A study of empirical information has allowed the purposes of this paper to be developed through both observations and different theories. Moreover, a line of argumentation has been developed which is either verified or disproved through the empirical information and research.

The empirical study and research information is predominantly based upon qualitative data however some quantitative statistics are used to gain greater factual accuracy. Further qualitative empirical information was gained through the use of telephone interviews which allowed respondents to give their opinions to the stated hypotheses. This allowed the investigation to be explorative; in that the problem was quite broad and the most suitable information needed to be identified, descriptive; in that the main issues at hand are described, and explanatory; in that the purposes are explained with regard to the different empirical information that is covered.

### **2.2.1 Legal Methodology**

For the legal aspects of this study, the European Community (EC) Treaty is used as the primary source of law. The regulations and directives regarding wine legislation are the main secondary sources of law which are used to discuss the legislation in force. Moreover, the principles of EC Law relating to wine are also discussed to provide a better understanding of the implications of EC Law on individual member states.

Following this, the jurisprudence of the European Court of Justice (ECJ) is consulted in the annex to support the analysis. The cases chosen are the ones where the principles discussed are first applied or else are updated.

### **2.2.2 Use of a Case Study**

To gain an insight into the full extent of internal market harmonisation, an external perspective was chosen. Moreover, it was determined that a specific case study industry was required to ensure that levels of EU harmonisation could explicitly be compared against obstacles and market barriers. OECD research supports such an inference as different industries reflect different levels of correlation regarding development of international standards<sup>35</sup>. This reflects the different levels of harmonisation found throughout different industries within the European Union.

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<sup>35</sup> Maskus and Wilson (2000;22).

Therefore, to achieve the stated purpose of determining the barriers to non-EU companies when entering the EU's single internal market, an analysis will be made of the Australian wine industry. The Australian wine industry was chosen as it is representative of the most harmonised and integrated third country industry due to the signing of key industry specific agreements as early as 1994. These were the first agreements of their kind, symbolic of a legislative process facilitating trade flows.

## **2.3 Collection of Empirical Data**

### **2.3.1 Primary Data Collection**

In the primary data collection phase a number of people were targeted for their strategic position within the chosen industry. Interviews were conducted over the telephone in a semi-structured fashion. Through analytic type questions, an attempt was made to cover a specific list of topics and sub areas to gain greater insights into the material.

### **2.3.2 Secondary Data Collection**

Secondary data is existing and accessible information which was originally collected for a purpose other than for the current problem. The empirical and theoretical base behind this paper consists predominantly of academic literature which was sourced from Lund University libraries and online databases and electronic journals. The internet was also used as a means of research with information being taken from reliable sources such as the websites of both government and non government organisations. Any supplementary material was sourced through the use of search engines such as the 'google scholar' facility.

The development of research for this paper was carried out in a number of phases. Initially preliminary research was conducted to gain a general comprehension of external market barriers to the European Union. As the research continued, the study became more specific until it became what it is today.

### **2.3.3 Validity and Reliability of Research**

All secondary information used for the purposes of this study was gathered from reliable sources. A reliable source is defined here as a professional journal, database or website which has transparency as to any claims made. When reviewing documentation, a level of objectivity was determined to ensure that no bias influenced the authenticity of information. As such, it can be affirmed that all literature and theories presented are duly well reputed.

## **2.4 Criticism of the Sources and Methodology**

A large weakness in this study is the lack of information from a greater number of primary sources. A larger number of sources would have led to a more informed practical understanding of the level of harmonisation facing the selected industry. Moreover, a broader selection of primary sources would have ensured that the market obstacles and barriers facing the industry are specific and current. In this case, the limited number of sources means that the analysis is based on a small relative sample of research and as such, whilst conclusions are drawn these are insufficient for gross generalisations. The limited number of respondents is unfortunately mainly due to a shortage of time and resources. There is also a clear need for a quantitative assessment of the impact of non-tariff trade barriers, however this would also be beyond the resources of this paper. Regardless, it is hoped that within the constraints of the primary and secondary data, that an objective and truthful account of the industry and its dynamics is presented.

There are obviously a number of different ways to reach the objectives of this masters paper, other than through the chosen methodology. The methodology used in this chapter was chosen as it results in the accomplishment of the predetermined purpose. Despite this, the reliance on such a small number of primary data sources leads to the possibility of the findings being biased towards a certain perspective.

### 3 Theoretical Framework

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*The purpose of this chapter is to gather existing trade and market theories to present a framework that is applicable to exporters to the EU Internal Market. In this way, the reader will gain an increased understanding as to the background and remaining analytical areas of this paper.*

*Theories of globalisation and international trade are complemented by business strategy theories which provide an insight into the motivation and negotiation practises used for the export of goods to foreign destinations.*

*Through this, an understanding will be presented for the mechanics behind the interactions between the Australian export industry and the EU.*

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#### 3.1 Globalisation

The last two decades have seen incredibly dramatic change across many industries with the forces of globalisation transforming economies on local, regional and macro levels. The speed and efficiency with which transactions are conducted has been reduced substantially, with decreased transport costs leading to opportunities for truly global sourcing. The era of globalisation has influenced the behaviour of managers, consultants, and researchers alike – with people responding to strategies and organisations, transforming the nature of industries into a truly global context.

Much literature now argues that the success or failure of a business or industry in the 21<sup>st</sup> century is determined by whether an industry or firm can compete effectively in world markets<sup>36</sup>. As the world becomes smaller in relative terms, forces of globalisation are motivating business' to form a global strategy based on the interdependent nature of global markets. As national and regional preferences become homogenised, it is argued that those companies that compete on a national basis become vulnerable to those companies that compete on a global basis<sup>37</sup>. Clearly those companies that can leverage global cost advantages that come from scale economies, are in a better position to attain key competitive advantages.

Industries are rapidly developing global characteristics and to remain competitive within this changing marketplace, an analysis of the theoretically accepted views on competitive advantage must be ascertained. Only then, can an evaluation of an industry pragmatically discern business opportunities and market obstacles which may artificially distort the dynamics of global trade. Through an examination of the theoretical business model applied to gain competitive advantage in international export markets, and subsequently, the pragmatic business factors and challenges facing the wine industry, this paper aims to provide a critique of the state of the European market.

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<sup>36</sup> Hax (1989) and Ohmae (1989) in Zou and Cavusgil, (1996;52).

<sup>37</sup> Levitt (1983;92-102).

### **3.1.1 The Dynamic Facets of Globalisation**

In order to extrapolate various theories on the determination of benefits arising from the increasing global market, it is important to primarily identify, distinctly and clearly, the factors and mechanisms at work within the globalisation process. This process is often discussed with regard to three factors; these being scale, speed, and cognition. The first process, scale, refers to the magnitude of which economic, political, social and human linkages are greater now than they were at any point in history. The second term, speed, has to do with how globalisation is conceptualised regarding time and space, (ie: never before has time and space become so rapidly condensed). And the final and third term, cognition, provides an insight into the increased awareness that we all have that the globe is a smaller place. Thus, “..Globalisation involves the reduced significance of barriers such as borders, distances and states to global flows of both tangible and intangible factors such as goods, services, technology, people and ideas.”<sup>38</sup>

Through the advent of these global processes, the very dynamics behind the economic forces of supply and demand have been reshaped, adapted to increased speed, technological advances, efficiencies and the availability of information.

### **3.1.2 Characteristics of a Global Strategy**

George Yip, one of the pre-eminent theorists on global strategy has identified what is recognised as four major benefits that arise through the possession of a global strategy. These are:

- Cost reduction (through concentration of activities, avoiding duplication, leveraging off scale economies and exploiting differences in factor costs between countries);
- Improved quality (through increasing regional and global competition, and exposure to a more discerning variety of customers);
- More specific customer preference through global availability and recognition;
- Competitive leverage that comes from having multiple bases with the potential to use global resources in competitive initiatives<sup>39</sup>.

When determining the type of business' that may fulfil the criteria which is idiosyncratically tied to a global strategy, it is important to note that this business does not necessarily have to be a multinational. Quite the contrary, as the maximised benefits of scale economies favour geographically concentrated production where world markets are served through exporting<sup>40</sup>. This strategy is referred to as *multidomestic*<sup>41</sup>, where international strategy is effectively an extension of a series of domestic strategies, with competition occurring on a country by country basis, each country essentially independent of each other.

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<sup>38</sup> Kinnvall, (2002;5).

<sup>39</sup> Yip (1995), in Zou and Cavusgil, (1996).

<sup>40</sup> Grant, (2002;431).

<sup>41</sup> Porter, (1986;11).

### 3.2 Trade Theory - Multinational or Multidomestic Business Strategy

Traditionally, neo-classical trade theory has revolved around the principle of comparative advantage, with the key determinant being resource endowments<sup>42</sup>. In the case of agricultural industries, this means climate, land of appropriate quality, sufficient water, information, knowledge and skills. This has over time changed due to

growing complexities in strategic theory, the changing economic environment and globalisation. Such theory can no longer explain why certain countries show large differences in the competitiveness of certain industries whilst other, more highly developed countries, have similar comparative advantages<sup>43</sup>. Strategic theories replacing trade theory have evolved with the growth of the multinational firm, growing in complexity over the course of the 20<sup>th</sup> century. Initially developed in Europe prior to World War I, and then through industrialisation in the United States after WWII, and then through the scale advantages of Japanese manufacturing in the 1970s, multinational strategy and structure has been developed by building global-scale efficiency in existing activities<sup>44</sup>. Moreover, flexibility in a multinational setting has also been developed within the model in response to country-

specific risks and opportunities. As a result, the developed multinational firm therefore learns from its international exposure, exploiting its environment and henceforth, creating further opportunities. The multinational strategy can thus be best summarised as an attempt to utilise all three sources of global competitive advantage: national differences, scope economies, and scale economies – in order to optimise global efficiencies, multinational flexibility, and worldwide learning<sup>45</sup>.

#### ***International Trade Theory and the Principle of Comparative Advantage***

*International trade theory analyses how items are produced, consumed and traded in a world where goods can flow unrestrictedly between countries, which each have their own unique set of resources. This theory is based upon the principle of comparative advantage, which states that a country (or geographical area) should specialise in producing and exporting those products in which it has a comparative, or relative cost, advantage compared with other countries and should import those goods in which it has a comparative disadvantage.*

*This theory was furthered by Heckscher and Bertil who developed underlying reasons as to why such differences occur. The Heckscher-Ohlin (H-O) theory postulates that all products require a combination of different factors of production – natural resources (land and raw materials), a labour supply, capital in the form of money to buy the materials, machinery, technology and so on. For simplicity it can be seen that countries with abundant supplies of labour therefore export labour-intensive products whilst capital-abundant countries export capital-intensive products. This illustrates how comparative advantage depends on the relative contribution and respective combination of factors of production within a country.*

*The theory is based upon four key assumptions these being: (1) Factors of production are assumed to be fixed and immobile geographically; (2) Transport costs are curiously enough nonexistent; (3) Technology is assumed as a given and is also geographically constant; and (4) Perfect competition and thus nonexistent economies of scale.*

*As none of these assumptions can be maintained in the real world, so called 'new' theories have developed which incorporate technology, economies of scale and changes in the way that business is conducted.*

*Figure 1: Adapted from Dicken, P. (1999) Global Shift.*

<sup>42</sup> Van Berkum, and Van Meijl (2000).

<sup>43</sup> Dicken, (1999;75).

<sup>44</sup> Grant (2002;435).

<sup>45</sup> Bartlett and Ghoshal, (1994;241).

In multidomestic industries, it is discretionary for a firm to compete internationally and firms only choose to make this expansion decision if they believe that it will allow them to gain some form of international competitive advantage. In the case of the Australian wine industry, firms employ an export oriented multidomestic country-centred strategy where they can focus on specific market segments or countries where they can respond to local country specific demand.

### 3.2.1 Multidomestic Business Strategy and Porter's Value Chain

To understand the determining factors for the creation of an international competitive advantage, an analysis can be made of an industry or firms value chain. Porter describes a firms value chain as the set of discrete activities performed to do business within the scope of the firm. Competitive advantage comes about through the ability of the firm to perform the activities in its value chain either at low cost or through differentiation<sup>46</sup>. By analysing a firms activities in a systematic method, activities can be categorised and then better understood when compared to the industry as a whole and other firms competing in the same industry.

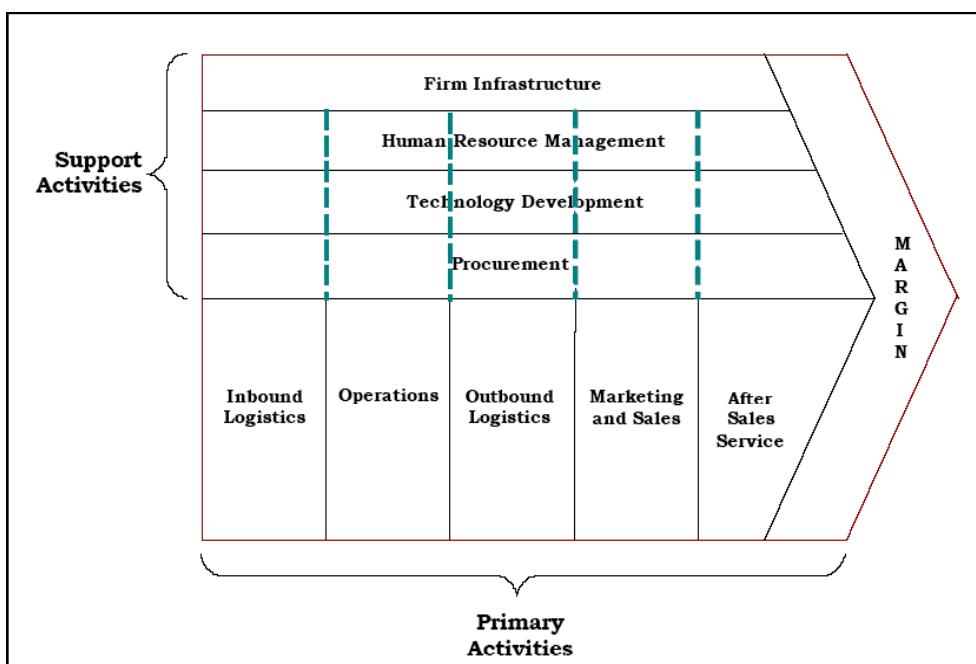


Figure 2: Porter's Value Chain, Porter (1986).

As can be seen above, primary activities have to do with the research (inbound logistics), production (operations), creation, delivery and marketing. Whilst there are five categories listed above, these can be simplified into research and development, production, and marketing<sup>47</sup>. The support activities of the value chain provide inputs that allow the primary activities to take place. Procurement assists the firm in ensuring that the primary production function correctly transfers physical materials through the value chain, materials which are efficient and modern as a result of technological development. The human

<sup>46</sup> Porter (1986;13).

<sup>47</sup> Hill, C. (2003;407).

resource function is important in many ways as it ensures that the right mix of appropriately skilled people develop the firms capabilities. The final support function being the overall company infrastructure which is the context within which all other value creation activities occur. This includes the organisational structure, control systems, culture of the firm and of course top management who have the ability to consciously shape all determining factors<sup>48</sup>.

Where marketing and sales activities are downstream value activities, and inbound logistics and production are upstream value activities, downstream value activities create competitive advantages that are largely country-specific. A firm's reputation, brand name and marketing network developing from the firm's activities in that country, creating entry and mobility barriers largely in that country alone<sup>49</sup>. Porter ascertains that where downstream activities or buyer-tied activities are vital to competitive advantage, there tends to be a more multidomestic pattern of international competition<sup>50</sup>.

According to Porter, the environment in the domestic (home) market essentially drives the international competitiveness of companies and industries. The home base is where strategy is formulated and the core product, process technologies, and marketing campaigns are created, motivated and maintained<sup>51</sup>. This is best characterised by four basic and two residual attributes which shape an industry and its associated firms, a structure otherwise known as the Porter Diamond.

### 3.3 Porter's Diamond

In Porter's groundbreaking book of 1990, 'The Competitive Advantage of Nations,' Michael Porter seeks to ascertain why a nation achieves international success in a particular industry. Using the concept of a diamond as the analogy for the framework, Porter writes that there are four factor conditions which are the determinants for the creation of competitive advantage<sup>52</sup>. These attributes being:

- *Factor Conditions* – the nation's position regarding factors of production such as appropriately skilled labour and required infrastructure;
- *Demand Conditions* – the nature of home demand for the industry's product or service;
- *Related and Supporting Industries* – the presence or absence of supplier and related industries that are internationally competitive;
- *Firm Strategy, Structure and Rivalry* – the local market conditions governing how companies are created, organised and managed and the respective domestic policy<sup>53</sup>.

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<sup>48</sup> Hill, C. (2003;409).

<sup>49</sup> Porter, (1986;16).

<sup>50</sup> Porter, (1986;17).

<sup>51</sup> Hill, C. (2003;160).

<sup>52</sup> Porter, (1990).

<sup>53</sup> Ibid.

The four attributes whilst important independently, are argued to be mutually reinforcing as the effect and presence of one is contingent on the state of the others. In most industries, sustained success therefore requires a national environment where all four factors are present, as the interactions between the factors ensure that advantages gained become difficult for foreign firms and industries to replicate or imitate<sup>54</sup>. Two

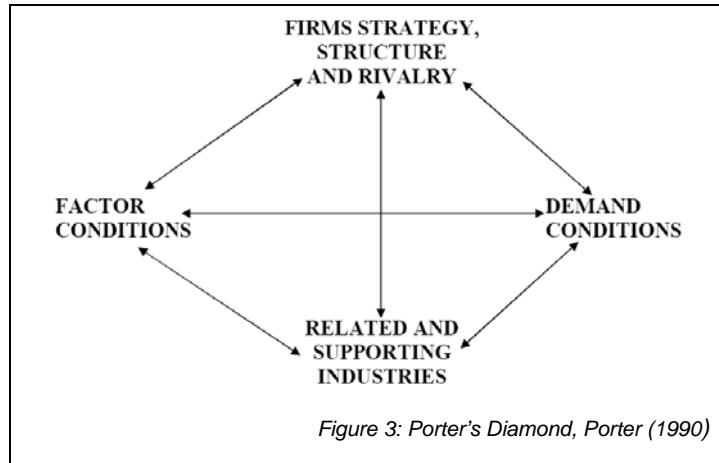


Figure 3: Porter's Diamond, Porter (1990)

residual conditions are also identified, these being: chance, and government. Chance elements are those innovations which can rapidly transform an industry. Government influence on the other hand can act to enhance the strength of the diamond by suitably developing the four factor conditions.

Porter argues that the two elements of domestic rivalry and geographic concentration are in particular, key in determining whether the diamond becomes a dynamic system. Without domestic rivalry, levels of innovation will fall and consequently the entire diamond will deteriorate. Geographic concentration is necessary for the diamond to be turned into a system, the systemic nature of this, promoting clustering<sup>55</sup>. Ultimately though, the success of the whole cluster is dependent upon all four of the underlying components and their mutually inclusive role in creating a perpetual cycle of advantage.

### 3.3.1 Porter's Clustering Model

The “self-reinforcing interplay of advantages,<sup>56</sup>” where all factors are a necessary requirement for competitive advantage can be described by the systems otherwise known as clusters. In a subsequent work to the 1990 publication, *The Competitive Advantage of Nations*, Porter describes a cluster as being a geographic concentration of interconnected companies and institutions in a particular field, and noted that clusters often extend to downstream channels<sup>57</sup>.

The cluster's boundaries in this case are defined by linkages and complementarities across industries and institutions that are of importance to competition, with all stakeholders promoting the twin values of competition and cooperation. Competition being a necessity for success, coexisting with cooperation as cooperation often takes place on a separate vertical dimension<sup>58</sup>. Due to the different yet interwoven perspectives existing between arm's length markets, vertical integration and hierarchies, Porter postulates that the cluster can be seen as an alternative way of organising the value chain. The clear benefit being that close proximity of firms and institutions and repeated

<sup>54</sup> O'Shaughnessy, N. (1996;12).

<sup>55</sup> Porter, (1990), in Williamson and Wood, (2003;11).

<sup>56</sup> Ibid.

<sup>57</sup> Porter, (1998;3).

exchanges between them can lead to greater coordination and trust, rather than dispersed and random market transactions. The clear advantage here is that clusters mitigate the problems of having arm's length relationships without imposing the burden and inflexibilities of vertical integration or the management complications which come with developing formal linkages such as networks, alliances and partnerships<sup>59</sup>. The operational concept of Porters model becoming clear when it can be understood that industry clustering grows directly out of the determinants of competitive advantage. This is through a manifestation of the systemic character of the conditions and particular processes that lead to the development of clusters. Because each determinant affects each other, the mutually reinforcing process which is clustering only works when each competitive industry helps to develop and support each other, thus all determinants acting and operating like a system.

### 3.3.2 Discussion of Porter's Framework

In light of the growing literature on competitiveness, Michael Porter has made significant contributions to the understanding of global strategy and the interaction and role of regions within this framework. These sentiments have been echoed by other strategy theorists who have also affirmed that "a business must think global, but act local."<sup>60</sup> Where a major source of competitive advantage has come from the ability to produce high-quality products at low cost<sup>61</sup>, another prominent theorist believe that the "optimum global strategy is to produce a single standardised product and to sell it through a standardised marketing program."<sup>62</sup> Other theorists taking a contrasting approach to Porter, contending that globalising and localising forces work together to transform many industries, and success therefore depends on how a business achieves its global efficiency and national flexibility simultaneously<sup>63</sup>. For a firm to compete globally they believe that local flexibility (national competence) needs to be furthered by the ability to manage across national borders, thus bringing about global perspective. Whilst these other theorists find areas of disagreement with the Porter cluster concept, they do provide an insight into their opinion on the importance of regional networks and flexibility.

Jacobs and De Man take a different interpretation on the definition of a cluster though, ascertaining that there are many definitions of a cluster and no correct one<sup>64</sup>; as opposed to Porter's universal definition. Depending on the specific nature of the cluster, certain dimensions will be emphasised over others, a point which should duly be taken into consideration when conducting an analysis. O'Connell et al further supports this weakness through their research, finding that the model does not take into account the relative importance that different aspects of the diamond can play<sup>65</sup>. Viewed objectively, it

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<sup>58</sup> Porter, (1998;4).

<sup>59</sup> Ibid.

<sup>60</sup> Quelch and Hoff, (1986) in Zou and Cavusgil, (1996;54).

<sup>61</sup> Consumer theory suggests that global consumers will sacrifice their idiosyncratic preferences for high-quality but low-priced products.

<sup>62</sup> Levitt, (1983) in Zou and Cavusgil, (1996;54).

<sup>63</sup> Bartlett and Ghoshal, (1988,1991), in Zou and Cavusgil, (1996;55).

<sup>64</sup> Jacobs and De Man, (1996).

<sup>65</sup> O'Connell et al, (2001).

is only rational to believe that different definitions of clusters can lead to policy making advantages as strategies can be better tailored to suit specific situations.

Further critique has been provided by Jacobs and De Man, who have identified additional lateral dimensions regarding the quality of the network. The introduced factor of quality provides a better analysis of the effectiveness of a cluster once it exists. This is furthered by the introduction of the possibility that clusters can also encourage defensive behaviour (as opposed to simply being innovative systems)<sup>66</sup>.

O'Shaughnessy also believes that the model is neglectful in that it does not consider historical and cultural impacts. Rosenfeld agrees with this, arguing that frameworks for understanding clusters should treat local economies as both production and social systems, with linkages between businesses, organisations and government agencies. These linkages, Rosenfeld argues, must also include the dynamic and intangible characteristics that represent knowledge flows. In short, Rosenfeld believes that a production system is embedded in a social system where 'latent' clusters are those that have the production elements but don't have the social systems required to diffuse information and innovation<sup>67</sup>.

### 3.3.3 The Role of Government

Part of Porter's premise in 'The Competitive Advantage of Nations,' is that the idea of competitive policy should inform the development of government policy<sup>68</sup>. In response to the impact of globalisation amongst other things, governments have become increasingly concerned with analysing the interactions between regions and networks, thus facilitating the policy development for greater competitive behaviour and economic actions.

Both academic theorists and governmental organisations recognise the importance of regional competitiveness with regard to global competitiveness and the important role that networks play in providing an intermediary function between the regional and macro level. As such, over the last two decades there has been a growing increase in the number of organisations, both governmental and independent, with the purposes of serving their respective industry.

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<sup>66</sup> Jacobs and De Man, (1996).

<sup>67</sup> Rosenfeld, (1997).

<sup>68</sup> Porter, (1990), in Williamson and Wood, (2003;11).

### 3.4 The Investigative Framework

The framework for the business and legal investigation has evolved from the theories and research questions set out in the preceding areas of the paper. The theoretical framework that has been developed includes an analysis of the following underlying theories:

- Globalisation forces;
- Global strategy;
- Multidomestic business strategy;
- Competitive advantage;
- Value chain analysis (in particular, downstream aspects);
- Industry clustering;
- The role of the government.

The analysis of these theories is made with respect to the research questions outlined in chapter 1.3 entitled 'Paper Purpose.' These questions can be reinterpreted as:

- What are the barriers that non-EU companies face when entering the EU's single internal market?
- What are the implications that a harmonised market has on non-EU companies?
- What are the developing obstacles, barriers and problems that non-EU companies are having to deal with, on both a EU level and local market level?
- Of these obstacles, which constitute legal obstacles and what are the market or business specific barriers when analysing a particular case study industry

The specified theoretical framework and research purpose henceforth develop to form the investigation which is made up of the following empirical research and analysis of EU legislation.

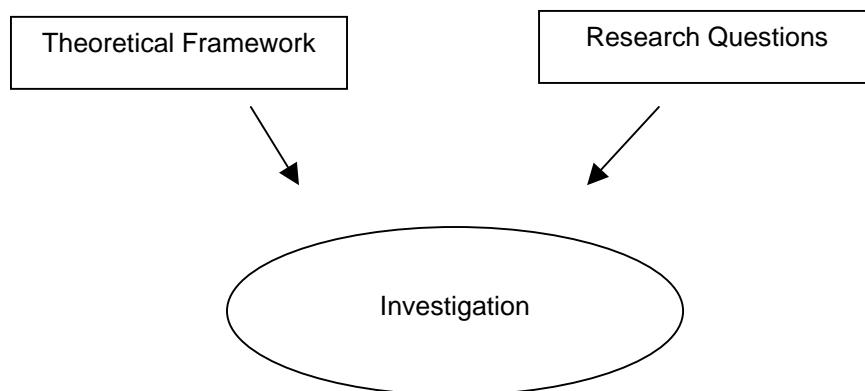


Figure 4: Investigative Framework

# 4 Empirical Research

Chapter four presents empirical research on the development of the chosen case study: *The Australian Wine Industry*. Through an analysis of the development of the industry, and more particularly, the clustering and organisational aspects of the downstream export market, an understanding of the industry's negotiation position with regard to the export market of the European Union is presented.

The underlying motivation behind the industry allows the reader to better grasp the legislative obstacles and barriers which are presented in the following chapter.

## 4.1 Background and Development of Australia / EU Trade Relationship

When viewed as a single entity, the EU is Australia's largest trading partner. In 2003, two-way trade of merchandise between Australia and the EU was valued at € 35.4 Billion. Australia sent € 11.7 billion worth of merchandise exports to the EU, and received € 23.7 billion in imports, resulting in a trade deficit of € 12 billion. In 2003, total services trade was valued at € 11 billion, and two-way investment at December 2003 was valued at € 376 billion<sup>69</sup>. These figures and their respective significant growth over the last decade being symbolic of the economic integration taking place within the European Union, with exports doubling in size over the last 10 years (see Figure 5 below). Integration has removed barriers within the internal common market, simultaneously enabling greater access for external third-country companies when entering the European market.

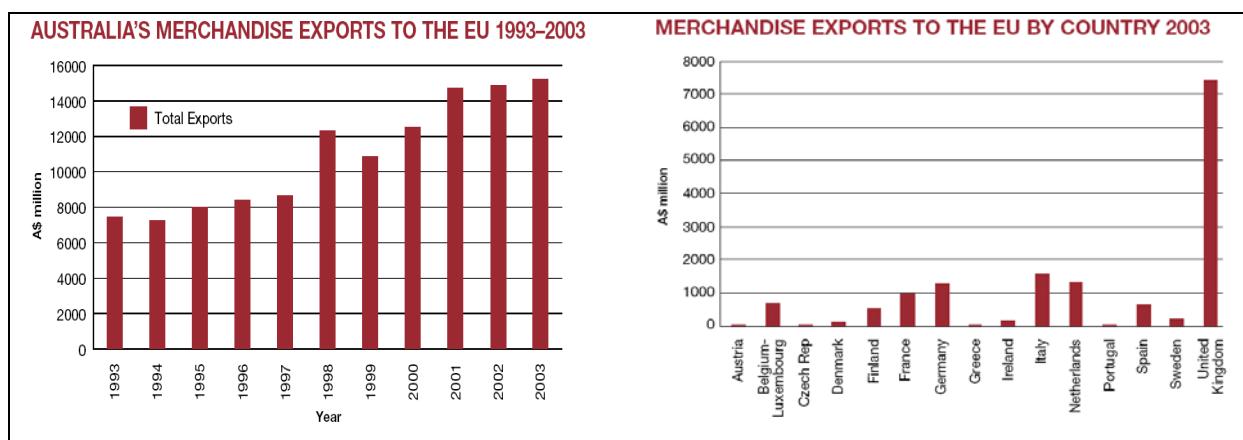


Figure 5: Australia's Exports to the EU (Source: ABS data on the DFAT Database)

The large growth in trade over the last decade may in part be attributed to the completion of the EU Internal Market. Whilst it is noted that the United Kingdom appears to be the destination of a large proportion of Australian exports, common market policies have brought about more efficient functioning and increases in trade quantities on the continent as well.

<sup>69</sup> Export EU; Austrade (2005)

The internal market was principally completed in 1993 which saw the introduction of a number of common policies to aid in the increase and effectiveness of market functions<sup>70</sup>. Transparency and a common policy stance towards external trade was also introduced through a Common Commercial Policy which introduced a harmonisation of existing member states' trade policies.

#### **The Single Market and the Common Commercial Policy**

##### ***The Single Market***

*The Single Market, otherwise referred to herewith as the Internal Market, refers to the creation of a fully integrated market within the EU which allows for the free movement of goods, services and factors of production (including labour).*

*The origins of the single market date back to the Treaty of Rome, signed in 1957 which marked the beginning of the evolution of the single market. By 1969, the European Economic Community (EEC) had abolished most tariffs and quotas between states allowing good to circulate relatively freely within the EEC. By 1993, most technical and physical barriers affecting the movement of people, goods, capital and services had also been removed, and as such, the Single European Market was largely complete.*

##### ***EU Policies Designed to Assist the Functioning of the Internal Market***

- *Free movement of goods: establishment of a customs union covering trade in all goods and adoption of a common customs tariff with respect to third countries;*
- *Free movement of persons: any citizen of an EU member state has the mandated right to live and work in any other EU member state. (There is a phasing-in period for this right for citizens of the 10 new member states;*
- *Competition policy: designed to prevent price fixing, collusion and abuse of monopoly of significant market power. The EU adopted the Lisbon Strategy in 2000 to improve, among other things, competition in key sectors such as energy and transport;*
- *Services: providing for the freedom for any member state national to provide services in other member states;*
- *Capital: prohibiting restrictions on the movement of capital, and on payments, within the EU and between member states and third countries;*
- *Taxation: agreement between member states that Value Added Tax (VAT) will be applied at a rate not less than 15 percent; and*
- *Simpler Legislation for the Internal Market: An initiative of the EU aiming to improve and simplify the legislation governing the functioning of the internal market by cutting business red tape.*

##### ***The Common Commercial Policy (Harmonising External Aspects of the Internal Market)***

*This EU policy harmonises member states' trade policies around common principles relating to tariff rates, trade agreements, liberalisation measures, export policy and anti-dumping; regarding trade of goods. Under the Common Commercial Policy, the European Commission is empowered to negotiate international trade agreements on behalf of EU member states'. (New member states are obliged to abrogate existing bilateral trade agreements).*

Figure 6: Adapted from <http://www.europa.eu.int/>

#### **4.1.1 EU – Australia Trade Relationship**

Australia has historically, a strong and positive relationship with Europe. The origins of Australia's relationship dates back to 1962 when Australia's first ambassador to the EU assumed office in Brussels. This was followed shortly thereafter by the signing of a agreement negotiated under the

<sup>70</sup> Steiner and Woods, (2003;380).

GATT<sup>71</sup> articles in 1968. Over the following years a number ministerial consultations led to the signing of further GATT agreements. 1981 saw the relationship between the two countries increase substantially with a Delegation of the Commission of the European Communities established in Canberra, Australia. In May of 1990, significant progress was made by the EC and Australia with both parties agreeing to enhance the level and quality of foreign policy and trade talks with regular Ministerial level meetings established. Various meetings over previous years had already covered trade issues regarding a variety of industries as well as the Common Agricultural Policy (CAP).

This progress led to a number of agreements being signed throughout the 1990's and also more recently, including most notably:

- European Community-Australia Wine Agreement (1994);
- European Community-Australia Agreement on Scientific and Technical Cooperation (1994);
- Joint Declaration on EU-Australia relations (1997);
- Mutual Recognition Agreement (MRA) on Conformity Assessment, Certification and Markings (1999);
- Consumer Protection Agreement Signed (2002);
- 20<sup>th</sup> Ministerial Consultations take place between EU and Australia (2004)<sup>72</sup>.

Australia and New Zealand were the first country's to develop a MRA agreement with Europe, a process facilitating trade through conformity testing of products in the country of origin rather than the destination country. Theoretically this means that because compliance with the requirements of the relevant EC Directives (or regulations) is established in Australia or New Zealand (through CE product marking prior to export), there should be no further intervention by EC authorities within Europe<sup>73</sup>.

Through reducing trading obstacles through differing standards and technical regulations the economic costs of multiple testing and certification are minimised. In this case, the agreement sets a precedent for further trading harmonisation, however, has a minimal overall effect due to the limited number of industry sectors which the agreement currently covers.

One of the key industry specific agreements signed between the EU and Australia was the European Community-Australia Wine Agreement (1994). Through focusing on the development of this bilateral agreement, and associated EC Directives and Regulations, an analysis of the development of the market towards integration and transparency will be presented. As one of Australia's foremost export industry's, a strong focus is placed on harmonising and integrating legislation and trade agreements in an effort to bring about the most efficient and streamlined trade processes.

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<sup>71</sup> The General Agreement on Tariffs and Trade (GATT), first signed in 1947 is designed to provide an international forum that encourages free trade between member states by regulating and reducing tariffs on traded goods.

<sup>72</sup> The European Commission's Delegation to Australia, Relationship Milestones  
[http://www.ecdel.org.au/eu\\_and\\_australia/milestones\\_90-99.htm](http://www.ecdel.org.au/eu_and_australia/milestones_90-99.htm)

<sup>73</sup> MRA on Conformity Assessment between the EC and Australia, January 1<sup>st</sup> 1999.

Even today, more than a decade on, discussions towards further clarity continue. Having signed a joint declaration on future cooperation in 1997, in 2002 during Ministerial Consultations, both the European Commission and Australian Ministers chose to move forward in a determined fashion by focusing on a number of key areas. The outcome of this meeting, a document entitled '2003 Australia – EU Agenda for Cooperation' identifies a number of priorities with a section also devoted to trade. Through this document the parties involved clearly communicate that.. "We commit to resolving outstanding issues in our bilateral Wine Agreement." Despite the fact that Australia and Europe are "like cousins separated by the tyranny of distance,"<sup>74</sup> discussions on the development of the bilateral agreement continue at the time of this documents publication.

## 4.2 Third Country (Australia) Wine Export Background

The Australian Wine Industry has developed over the course of a century, building on the practises and techniques used by Old World Wine producers. Without having the preoccupation of tradition, Australian producers have been able to rapidly develop and adapt to modern techniques, thereby increasing both the expertise of personnel involved in the development of oenological practises, and the subsequent quality of wine. As international acceptance and demand has increased, so has the behaviour and dynamics behind the Australian Wine Industry in its export aspirations, characteristics best reflected in a *multidomestic* analysis of international strategy<sup>75</sup>.

### Australian Wine History

*Australian has been exporting wine to Europe since not long after the first European settlers arrived in Australia in 1788. In 1822, Gregory Blaxland shipped the first quantity of wine to London, 135 litres and was awarded the silver medal by the Royal Society of Arts. Planting of vines accompanied the spread of European settlement across the Australian continent, and by the beginning of the 20th century Australia was exporting some 4.5 million litres of mainly full-bodied dry red wines to the United Kingdom. Following the Second World War, the rapid influx of migrants from Europe and their associated strong wine related culture brought a further impetus to the Australian wine industry.*

### Regulation and Structure

*Australia maintains national standards for wine which are administered by State and Territory governments. Federal regulations focus on quality control. The Australian Federal government assists the industry by improving the trade environment (redressing barriers to trade) and by improving the domestic economic operating environment. Policy issues are the province of the Australian Government Department of Agriculture, Fisheries and Forestry.*

*The Australian Wine and Brandy Corporation (AWBC) promotes and controls the export of grape products including wines. The Australian Wine Export Council (AWEC) is a committee of the corporation.*

*Figure 7: adapted from: DFAT Wine Industry Fact Sheet.*

<sup>74</sup> Brittan, Sir Leon, in September of 1997, who was then the Commissioner for External Relations with the European Commission, presented a speech for the rationale of the Australian National Europe Centre.

<sup>75</sup> Much business administration literature covers information on the problems of doing business in a foreign country, referred to as International Marketing, International Finance and so forth. The perspective taken here is to focus on the choice of the Australian Wine Industry's international strategy and the incremental investment decisions associated with this. In this way, respective EU business and legal market barriers which respond to Australian Wine Industry export strategy can be best addressed.

Whilst world wine production has declined since a peak in 1982 this predominantly reflects control measures placed upon wine supply within the European Union. Wine output has been cut and policy measures have motivated growers to shift their production towards more popular varieties of grapes. Thus, despite the fact that traditional producers of wine in Europe account for approximately 60 per cent of world wine production<sup>76</sup>, the decline in output has been offset by stronger production from 'New World' countries including Australia.

#### 'Old' and 'New World' wine markets

*World wine markets are comprised of the 'Old World' markets of Western and Eastern Europe, and the 'New World' markets of North and South America, South Africa and Australasia. In the late 1980s, Europe accounted for all but 4% of wine exports and more than three quarters of wine imports globally. Since then, there has been massive structural change as New World producers began to challenge the dominance of European producers in global markets. New World producers have been planting unprecedented amounts of vines over the last decade and the subsequent wine production and export has placed increased pressure on Old World production.*

Share of key import markets (Germany, USA, Japan and the United Kingdom)

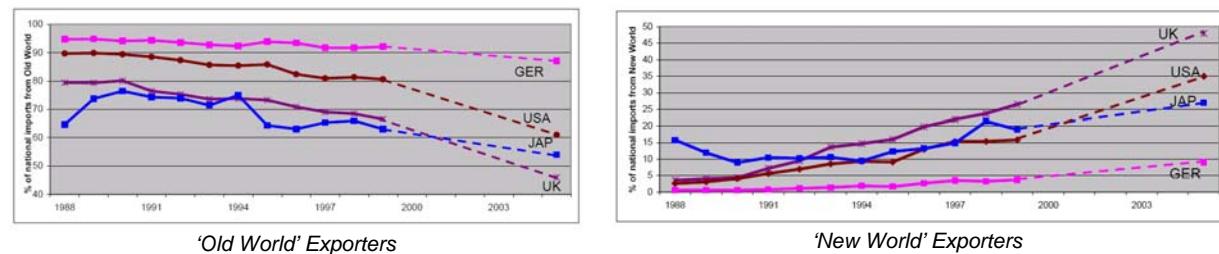


Figure 8: 'Globalisation and the World's Wine Markets,' Anderson, Norman and Wittwer, (2001)

Many European Union countries are not blessed with the ability to produce wine due to the distinctive environment required to successfully grow grapes. Indeed, the characteristics of a wine and its quality are directly influenced by the conditions under which the grapes are grown. Other factors affecting wine production include the development and use of technological innovations to increase the quantity and quality of production. In the European Union, the production technologies of many countries have been diminished through strict and specific government regulation, restricting the ability with which the industries can make productivity improvements. In Australia, the adoption of such technology has only assisted in bringing about substantial gains.

Having exported wine to Europe for well over a century, the market has become the largest export destination for Australian wine with over 50% of Australian wine exports destined for the European internal market. Australia's strong growth rates in wine production reflect this growing appetite and desire (as pictured in Figure 9). Indeed, Australian wines are also the largest third country wine imported into Europe with consumption doubling over the last decade.

#### Annual production growth rates

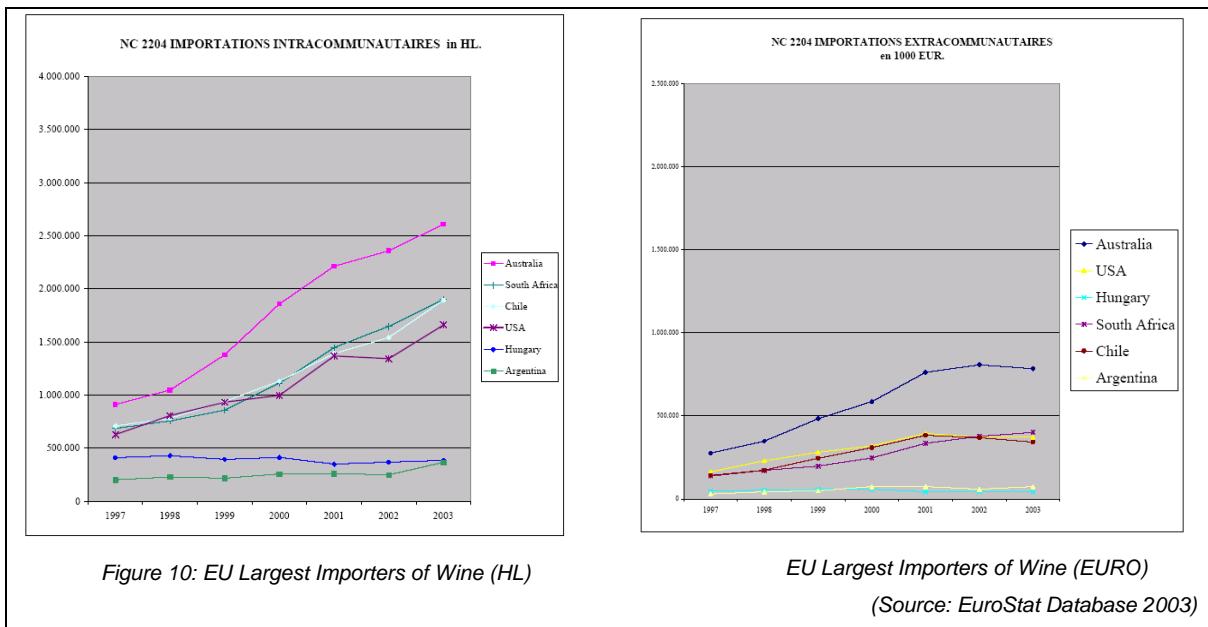
Trend annual growth rates, 1990–2001

| Key 'Old World' producers | Key 'New World' producers |
|---------------------------|---------------------------|
| France 0.0%               | Argentina 0.0%            |
| Germany 0.0%              | Australia 7.7%            |
| Italy 0.0%                | Chile 6.1%                |
| Portugal 0.0%             | New Zealand 2.6%          |
| Spain 0.0%                | South Africa 1.5%         |
| Romania 1.5%              | United States 3.6%        |

Figure 9: Foster and Spencer (2002;11)

<sup>76</sup> AWBC Winefacts Statistics Database.

Figure 10, pictured below, provides a greater insight into Australia's portrayals Australian wine import statistics for Europe from 1997 to 2003, with 268 million litres imported in 2003 to the value of 810 million Euros<sup>77</sup>.



These gains (as portrayed in Figure 9) can be further broken down into the main European importing countries. These are shown in Figure 10. The United Kingdom is Australia's largest export market, accounting for 40% of Australia's total wine production.

|                    | Volume<br>Litres<br>Mill. | Value<br>€ Mill |
|--------------------|---------------------------|-----------------|
| United Kingdom     | 208.7                     | 519.3           |
| Germany            | 21.2                      | 35.0            |
| Ireland            | 7.3                       | 24.0            |
| Netherlands        | 10.8                      | 23.3            |
| Sweden             | 9                         | 20.3            |
| Denmark            | 10                        | 20.2            |
| Belgium-Luxembourg | 3.8                       | 9.8             |
| France             | 3.9                       | 7.4             |
| Finland            | 1.5                       | 4.2             |

Figure 11: EU Wine Imports from Australia  
(Adapted from AWBC Export Database)

#### 4.3 Globalisation and Wine Strategy

As industry's transform through the forces of globalisation, geographical borders are minimised and products become one of the new means of identity. Academics describe this spread of products as being representative of the unification of global cultures, the multifarious concept “..representing the ways of life that common people enjoy and share.<sup>78</sup>” Applied more specifically to the wine industry, the marketing by the Australian Wine Industry (AWBC) of the wine brand ‘Australia’ has “..changed the way the world perceives wine. The beverage which 20 years ago was the preserve of the connoisseur

<sup>77</sup> AWBC Export Database

<sup>78</sup> Sugimoto, (2003;244).

is now a river which links the world in an appreciation of food, travel, art, music and heritage.<sup>79</sup> This globalised view of the proliferation of wine as a form of popular culture is being expressed in export destination markets around the globe, reflected in the sentiments of wine industry experts. "Food and wine – not just here in Australia, but worldwide – now have a new, exalted cultural position. It's not a passing fancy: it's a mega-trend in our culture."<sup>80</sup>

It can therefore be inferred that the proliferation and export of Australian wine is representative of a spread of mass culture, the cultural product being New World Wine and the destination in this case being the Internal Market of the European Union. Where a product, which in this case is wine, is not only an aspect of popular culture as much as it is a business product, its survival and development is a direct result of business factors which enhance its competitive advantage export opportunities in the face of discriminatory market forces and restrictive market barriers. By examining the theoretical basis upon which an industry develops a global strategy, the underlying factors behind the growth of the Australian Wine Industry can thus be ascertained.

#### **4.3.1 Multidomestic Business Strategy and Porter's Value Chain –The Wine Industry**

For a Australian wine producer, research and production takes place within a local and regional setting. Marketing, on the other hand, takes place in an international export setting, determining the level by which a firm can leverage off its other capabilities when building competitive advantage. For a multidomestic wine exporter it is therefore crucial to international success that the firm attains local expertise from its planned destination markets to ensure that both legal and business factors are taken into consideration.

This is clearly reflected in the export orientation of the Australian wine industry where the focus is moving from production to marketing. In a statement made at a wine marketing conference held in Germany in 1999, it was affirmed that "..Australian wine has enormous potential as it is a good product. My impression is there is only marketing missing."<sup>81</sup> The view of the speaker was that the international marketing [in Germany] was the only factor suppressing the success which could be achieved by Australian wine. This belief which has become all permeating is a reflection of the theoretical basis where Porter ascertains that downstream (export-oriented) activities are vital to competitive advantage<sup>82</sup>. In the specific case of the Australian wine industry, marketing activities are a domestically developed factor endowment, which are then transformed to best suit multidomestic export destinations<sup>83</sup>. A success story representing this development is depicted in figure 12.

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<sup>79</sup> 'The Marketing Decade,' Winemakers Federation of Australia (2000;5).

<sup>80</sup> Rich Cartiere, Wine Market Report, USA, Wine Marketing Conference, October 1999 in 'The Marketing Decade,' (2000).

<sup>81</sup> Michael Jansen, Macrom Kolin, Germany. Wine Marketing Conference, October 1999, in 'The Marketing Decade,' (2000).

<sup>82</sup> Porter, (1986;17).

<sup>83</sup> Interview with Hardy, Alix. Marketing Executive, Australian Wine Bureau Scandinavia, Friday, 22<sup>nd</sup> April, 2005.

#### **Downstream Marketing At Work – The Case of Yellow Tail**

*Casella Wines was once a family-owned dwarf, a 16 hectare, 39.5 acre vineyard selling bulk wine since the 1960s. In 1995, the son of the founders who had recently taken over management recruited a experienced manager, who quickly began to launch new export wines. Whilst the initial products did were not successful and did not pass some of the basic marketing tests, John Soutter continued unabated and began to put the company behind a new merchandising program with a superbly designed trademark of a distinctive kangaroo with catchy deep yellow and black colours. With a strong brand identity John proceeded to motivate his distribution channel, creating a 50/50 association with one of the largest US Wine importers with access to a distribution network in 44 states.*

*With an expectation to sell 25,000 cases in the first year of export, 2001, Casella Wines were amazed when the wine sold nine times as much, justifying he need to have extra cases shipped by plane at large cost. Expansion has since continued, with the sale of 2.2 million cases in 2002 and 4 million cases in 2003.*

*Many commentators attribute the incredible success of the brand to marketing strategies that in this case, successfully penetrated the tough US market. Through focused positioning involving a distinctive name, label, advertising and marketing strategy, the company was able to transcend its domestic marketing effectively to every point of the consumer in the States. Successfully bringing about a downstream campaign in an international export market, delivering a level of consistency not easy to follow.*

*Figure 12: Adapted from Grimaldi (2003), ‘Yellow Tail Leaps of the Shelf’*

#### **4.3.2 Porter’s Diamond and the clustering of the Australian Wine Industry**

When applying the mutual concepts of clustering and multidomestic export marketing to the Australian wine industry, it can be seen that over 1600 commercial wineries produce wine with over half of these exporting their products<sup>84</sup>. Supporting this large number of exporters and producers is an extensive complement of industries involved in supplying grape stock, irrigation and harvesting equipment, barrels, outsourced bottling, labels, specialist business and production consultancies, public relations and advertising firms, and of course numerous publications aimed at both consumer and trade audiences. Moreover, more than 80 organisations at the national, state and regional levels are supplemented by a strong research base ranging from the University of Adelaide’s Department of Horticulture, Viticulture and Oenology, to a specialist Wine Research Institute.<sup>85</sup> The well developed hierarchy of interactions also enjoys the privilege of being linked to other Australian clusters in agriculture, food and restaurants and wine country related tourism.

The systemic relationships which exist within the wine industry reinforces processes that lead to the further manifestation and development of the industry. This is only because the competitive aspects of the industry are a result of players which develop and provide support for each other, operating very much like a system. This is depicted in the Australian Wine Industry where strong yet independent linkages portray an organisational form displaying strong competitive advantage through its efficiency, effectiveness and flexibility.

<sup>84</sup> Australian Wine Industry Overview, <http://www.winetitles.com.au/awol/overview/exports.asp> (12/05/05).

<sup>85</sup> See Appendix A2, ‘Australian National Wine Industry Bodies;’ and <http://www.wineaustralia.com.au/> (15/05/05).

#### **4.3.3 The Role of Government**

In their State of the Regions Report (2001), the Australian Local Government Association stated that, “An irony of globalisation is that it enhances the significance of local and regional economies. This is due to, amongst other factors, the growing importance of regional clusters and networks, greater regional specialisation, the utilisation of ‘tacit’ local knowledge and the need for regions to promote flexibility and adaptation when confronted with uncertainty.<sup>86</sup>” This can be seen reflected in the large development of wine industry related affiliated organisations and research bodies<sup>87</sup>. As regional competitiveness has grown, so has the development of government or government affiliated clusters, extending to statutory wine industry bodies such as the AWBC.

#### **4.3.4 Third Country Wine Authorities**

The Australian Wine Industry is controlled by the Australian Wine and Brandy Corporation (AWBC) which is the Australian Government authority responsible for the promotion and regulation of Australian wine and brandy<sup>88</sup>. Established in 1980, the AWBC has the principal aims of enhancing the operating environment for the benefit of the Australian wine industry by providing a leading role in the following functions:

- Market development – growing international markets;
- Knowledge development – better decision making;
- Quality and integrity –maintaining the reputation<sup>89</sup>.

The AWBC is a statutory authority of the Australian government established under the provisions of the Australian Wine and Brandy Corporation Act, 1980 (the ‘Act’)<sup>90</sup>. The objects, functions and powers of the corporation being set out in the Act.

As the Australian government authority controlling the export of grape products from Australia, the AWBC has a regulatory role in preserving Australian wine’s internationally recognised reputation for quality and integrity. As such, the Corporation inspects and issues all permits for Australian wines and brandies which are exported, runs a label integrity program to prevent false or misleading labelling and through the Geographical Indications Committee, defines and protects the identities of Australia’s grape producing regions<sup>91</sup>. Furthermore, the AWBC is the chief organisation for the negotiation of trade agreements with export markets, having successfully negotiated the first Australian EU bilateral wine agreement in 1994 (See section 5.6).

<sup>86</sup> Australian Local Government Association, (2001). ‘State of the Regions Report.’

<sup>87</sup> See Appendix A2, ‘Australian National Wine Industry Bodies,’ of 14 listed bodies 13 were created after 1980.

<sup>88</sup> AWBC ‘About Us’ <http://www.awbc.com.au/Content.aspx?p=2> (09/05/05).

<sup>89</sup> Ibid.

<sup>90</sup> Australian Wine and Brandy Corporation Act, 1980, Part III, Section 8 ‘Powers of the Corporation’

<http://scaletext.law.gov.au/html/pasteact/0/155/top.htm> (Sourced: 24/04/05).

<sup>91</sup> AWBC ‘About Us’ <http://www.awbc.com.au/Content.aspx?p=2> (Sourced 09/05/05).

#### 4.3.5. Macro Level Developments of Clustering Principles

In 1998, another organisation was formed, the New World Wine Trade Group in response to discriminatory behaviour from the Office of International Vine and Wine. The Office of International Vine and Wine has continually sought to enforce standards that favour European wine producing countries and as a result, there was need for an organisation that provided a more balanced global approach to standardisation and harmonisation, balanced between Old and New World Wine producers<sup>92</sup>. The World Wine Trade Group (otherwise known as the New World Wine Producers Forum) soon became a key part of Australia's strategy in maintaining access to key overseas markets<sup>93</sup>. Consisting of government and industry representatives from Argentina, Australia, Canada, Chile, Mexico, New Zealand, South Africa, and the United States, the group meets twice a year with the objective of achieving growth in wine markets and responsible wine consumption<sup>94</sup>.

##### **The Office International of Vine and Wine**

*The oldest independent international wine organisation,) is an intergovernmental organisation made up of member states, which was formed in 1924 to assist and improve the conditions for producing and marketing vine and wine products. Working predominantly in a scientific and technical nature, there are currently 46 member countries with the notable exception of the United States that work towards standardisation and harmonisation of existing practises and methods.*

*Figure 13:*

*International Organisation for Vine and Wine,  
<http://www.oiv.int/uk/accueil/index.php> (11/05/05).*

In 2001, five of the countries involved in the World Wine Trade Group signed a Mutual Acceptance Agreement on Oenological Practises that seek to remove barriers to world wine trade that arise through wine making practises. "This agreement is a breakthrough for world wine trade that recognizes the effectiveness of other country's regulatory and enforcement systems for assuring that producers comply with its country's standards.<sup>95</sup>" The United States as with other parties to the agreement believe that mutual acceptance agreements are the best method for recognising that different countries use different winemaking practises due to local conditions, climatic variations and traditions and that grapegrowing and winemaking practises are constantly evolving. It is these same reasons which in many cases are the practises which are being used to prevent market access and restrict or obstruct international wine trade. As such, the WWTG believes that for countries with strong regulatory mechanisms in place, mutual acceptance is the optimal means to facilitate wine trade<sup>96</sup>.

<sup>92</sup> Foster and Spencer (2002;24).

<sup>93</sup> World Wine Trade Group website: <http://www.wwtg-gmcv.org/> (11/05/05).

<sup>94</sup> Mission Statement, WWTG, <http://www.wwtg-gmcv.org/EnglishPages/missionstatement.htm> (11/05/05).

<sup>95</sup> De Luca, John. President and CEO of the Californian Wine Institute in San Francisco, in Californian Wine Institute News Release, (18<sup>th</sup> December, 2001).

<sup>96</sup> Californian Wine Institute News Release, (18<sup>th</sup> December, 2001).

#### **Mutual Acceptance on Oenological Practises**

*In April of 2001 a multilateral Mutual Acceptance Agreement on Oenological Practises (MAA) was signed by Australia, Canada, New Zealand and the United States. Chile, Argentina and South Africa were also involved in the negotiating of the agreement and it is anticipated that they will sign the agreement in the near future.*

*The agreement permits wine imports from other participating countries where wine is made in accordance with the producing country's domestic laws and technical wine making requirements, procedures, and regulations. Through mutual acceptance of oenological practises, trade barriers which could otherwise have been erected to restrict trade based on differences in wine making practises are restricted. Furthermore, the agreement sets an agenda for the acceptance of any new domestically sanctioned oenological practise where no perceived health or safety issues are involved.*

*The organisation is currently negotiating an agreement on wine labelling to encompass the standardisation of mandatory labelling requirements between the participating countries, and where possible, the mutual acceptance of other labelling practises. It is anticipated that this agreement will be signed in the later portion of 2005.*

*Figure 14: World Wine Trade Group <http://www.wwtg-gmcv.org> (11/05/05).*

#### **4.3.6 The Critical Role of Clusters in the Australian Wine Industry**

The development of statutory and industry organisations to build a supportive and structural foundation for industry development is clearly the underlying explanation for the success that has and continues to transpire. Where “success demands achieving integration of the firm’s competitive position across markets,<sup>97</sup>” many of the positive factors behind the development of the Australian wine industry are attributed to the strong support provided by wine industry associations. Indeed, the Industry’s development has shadowed the development of these support organisations. After the foundation of the Australian Wine and Brandy Corporation in 1980, the industry’s export capacity has increased exponentially. Exports of 8,683,000 litres in 1984 growing to 417,300,000 in 2002<sup>98</sup>. This phenomenal increase is also reflected in financial gains, with export sales growing from less than AUD \$20 million in the mid-1980s<sup>99</sup> to AUD \$2.3 billion in 2002<sup>100</sup>. The collaboration that brought about these results came through motivations to internalise externalities, thereby overriding the free rider problem of collective action. Efforts were thus directed into three key areas, these being: investments in research, education, training and statistical information; the generic promotion of Australian wine domestically and especially overseas; and lobbying governments for predominantly, the lowering of taxes on consumption at home and for imports overseas<sup>101</sup>.

The development of this cluster affected the competitive potential of the wine industry in three key areas; it increased the productivity of companies based in the area, drove the direction and pace of innovation, (underpinning future productivity growth), and stimulated the formation of new businesses,

<sup>97</sup> Porter, (1986).

<sup>98</sup> Australian wine exports, <http://www.winetitles.com.au/awol/overview/exportstable2.asp> (15/05/05).

<sup>99</sup> Anderson, (2001;2).

<sup>100</sup> Ibid.

<sup>101</sup> Anderson, (2001;14).

thereby expanding and strengthening the cluster itself<sup>102</sup>. Other aspects of clustering which can be seen reflected through the developing nature of the Australian wine industry include:

- A more productive sourcing of inputs;
- Better access to employees and suppliers;
- Local sourcing and hence lower transaction costs and minimised inventory;
- Great alliances with stakeholders;
- Access to specialised production and market information;
- Complementarities; a host of informal linkages leading to the whole being greater than the sum of the parts, eg: outsourcing of bottling operations to minimise costs;
- Joint marketing; wine brand ‘Australia’;
- Improved access to institutions, industry organisations and public goods;
- Better motivation and measurement through increased regional competition; and
- Greater opportunities for innovation<sup>103</sup>.

These have all become renowned characteristics of an industry known for its unity, and solidified through current marketing activities. In 1996, the Australian wine industry laid down a vision that by the year 2025, it would achieve AUD \$4.5 billion in annual sales, being the world’s most influential and profitable supplier of branded wines<sup>104</sup>. By outlining the resources that ‘the industry’ would need, the industry body reflected its desire to ensure that the cluster would develop through unified growth. A year 2000 report on the 1996 strategy has already proclaimed that the industry is ahead of schedule, with the goal of reaching AUD \$1 billion in sales completed 12 months ahead of its target<sup>105</sup>. Clearly, individual wine production companies, associated firms and their stakeholders have all embraced the vision and through this inspiration, have spurred each other to greater heights. The cluster continues to thrive, withstanding risks and consolidation by collaboratively removing intimidation barriers, thereby building the wine brand ‘Australia’ on the back of global economic and social trends.

#### **4.3.7 Standardisation of Wine Export Practises**

The formation of the AWBC in 1980 and the corresponding Wine Act, brought with it a standardisation of wine export process and a variety of conditions necessary for the export of wine. Regulation 6 of the Australian Wine and Brandy Corporation Regulations 1981, outlines these conditions of export which in short, require that the exporter is licensed, the product is sound and merchantable, and that the Corporation has issued an export permit for the product. Exemptions to these conditions are only granted to exports in consignments less than 100 litres<sup>106</sup>.

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<sup>102</sup> Porter, (1998;5).

<sup>103</sup> Porter, (1998).

<sup>104</sup> AWBC ‘The Marketing Decade,’ (2000).

<sup>105</sup> Ibid.

<sup>106</sup> AWBC ‘Clarification of conditions of export,’ <http://www.awbc.com.au/Content.aspx?p=128> (17/05/05).

Any party wishing to export wine from Australia must gain approval by following a procedure clearly outlined by the Australian Wine and Brandy Corporation. This involves the following steps:

- Obtaining a export licence: available to those that fulfil a broad set of criteria;
- Submitting a ‘Continuing Approval Application’ which is available from the AWBC;
- Having two bottles of wine ‘inspected’ by the AWBC’s wine inspectors;
- Having label(s) vetted by the AWBC.

The AWBC then issues an approval number. European Union regulations also state wine exported to the EU must be accompanied by an official EU Analysis Certificate (referred to as a VI1 Certificate).

Therefore, the exporter must then provide the AWBC with a ‘Shipping Application,’ as well as the EU wine label and a VI1 Certificate of Analysis. These are then processed by EU approved laboratories of which the AWBC is one. Once this

information is processed, the AWBC provides the exporter with a ‘Wine Permit Number’ (WPN) which needs to be quoted when applying for a ‘Export Clearance Number’ (ECN) from the Australian Customs Service (ACS). It is this number which is written on the Export Receival Advice (shipping company

information) which accompanies the container/cases to their final destination. Whilst these procedures are somewhat more arduous than those which may be found in less regulated industries, through the role played by industry organisations, the process has become clear, transparent and straightforward. This allows producers and exporters to focus on market determined aspects of business such as marketing and sales as bureaucratic and legislative obstacles and barriers are tackled by industry bodies with experience in the negotiating process.

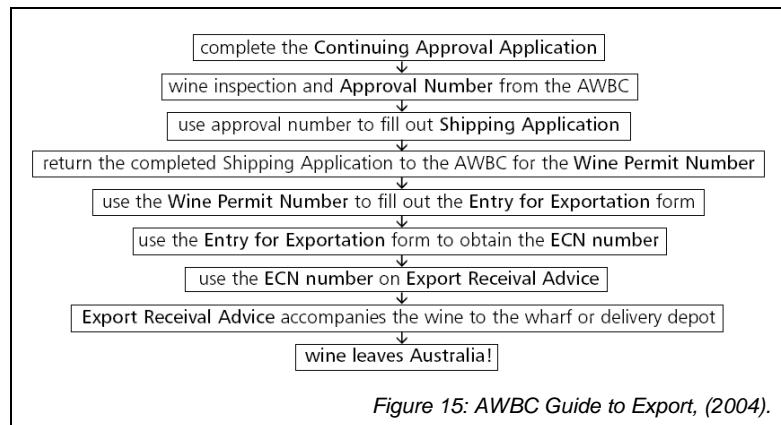


Figure 15: AWBC Guide to Export, (2004).

## 4.4 Relational Marketing

The Australian wine industry can be divided into two broad business areas comprising of multinational companies who have the privilege of being able to maintain local offices in the country where their exports are destined, and the remaining wine producers. These companies, which comprise the largest section of the industry either sell their wine in bulk to larger producers or they export their wine themselves. In these cases, marketing is largely conducted in Australia for the end destination market. This is an especially complex task as Europe is comprised of large regional areas where cultural affinities determine the criteria by which marketing is conducted. The AWBC recognises these cultural affinity zones with its marketing presence in Europe, maintaining offices in the key differentiated target markets of the United Kingdom, the Netherlands and Germany<sup>107</sup>. Despite the fact that economic integration has allowed for the use of a single currency, cultural affinities remain, suggesting that success is determined by a company's ability to appeal to cultural variables more importantly than any other distinction.

### 4.4.1 European Cultural Affinities in Downstream Marketing

Products are viewed as comprising a number of different attributes. The level of competitive advantage and subsequent success which comes with the firm's ability to market the product successfully, is a determinant of the firm's ability to adapt the product to the desires of consumers in the chosen target market<sup>108</sup>. Through the harmonisation of the internal market, product and technical standards have largely converged to the European level and as such, no regional dissimilarities exist<sup>109</sup>. Other points of difference regarding product differentiation can be broken down to issues of economic development (and hence affecting pricing strategy), and cultural difference<sup>110</sup>.

Even though the countries within Europe are developed economies with a sound GDP per capita, pricing strategies are still exceedingly important as price competition is strong. This is emphasised by the excessive supply of inexpensive wines produced by countries such as Spain and Germany. In the wine industry, this is dealt with through the supply of wines of different qualities, each with its own trends, market requirements and distribution outlets. Whilst the discerning consumer may have different criteria for assessing the quality of wine, the ultimate and most distinct criteria by which quality is assessed is value. As value is perceived differently in different markets, price distinctions thereby result in the creation of differences through quality segmentation<sup>111</sup>. Moreover, prices are also different in each country as they are affected by duties, levies and other trading discounts and specials. In the

<sup>107</sup> See AWBC European offices: <http://www.wineaustralia.com/Europe/Contact/ContactUs.aspx?p=5> (18/05/05).

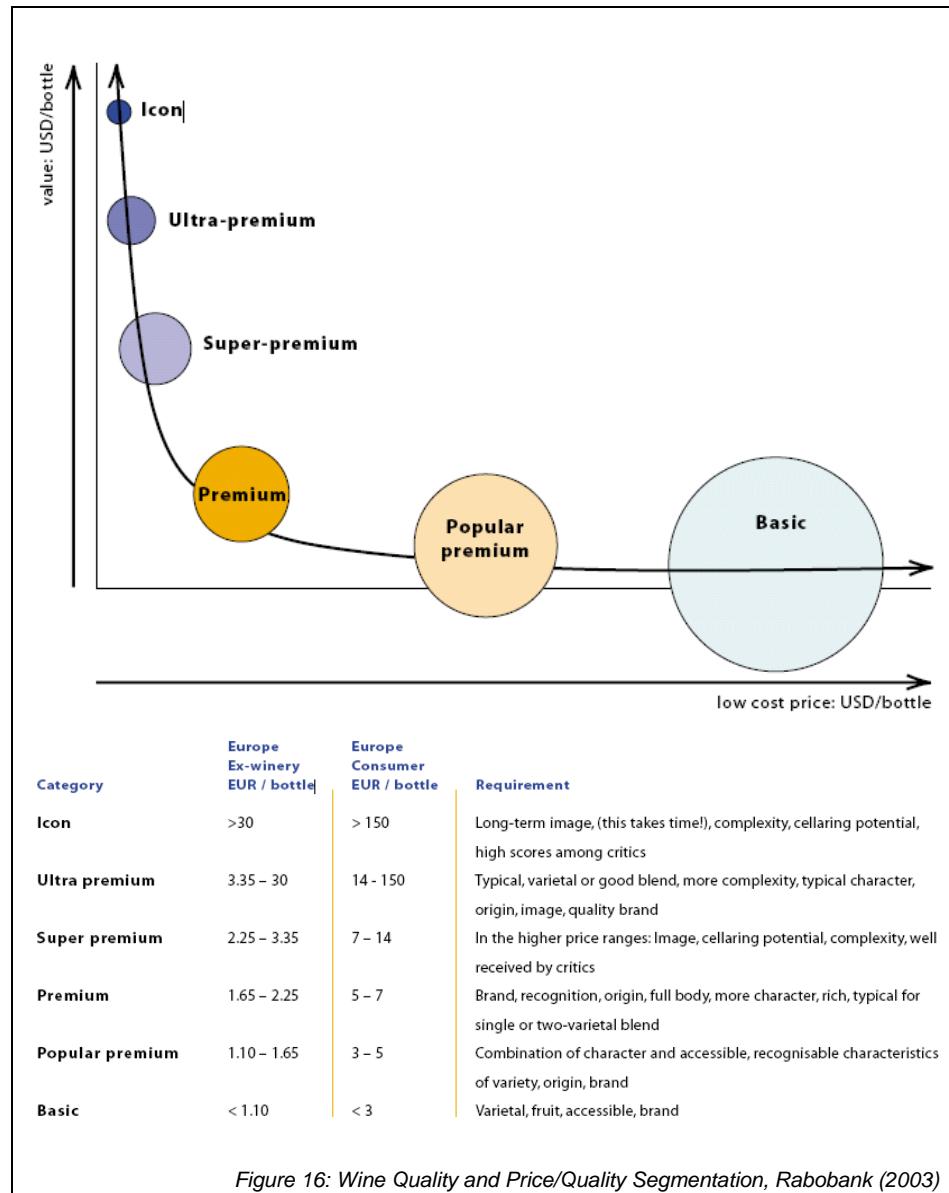
<sup>108</sup> Hill, (2003;576).

<sup>109</sup> An analysis of the development of dissimilarities in product and technical standard regulation is provided in section 5.

<sup>110</sup> Hill, (2993;577-200).

<sup>111</sup> Winemakers' Federation of Australia; (2000;9) 'The Marketing Decade,' Rabobank, (2003).

diagrams pictured in figure 16, the graph indicates the different price segments. Consumer prices are European wholesale prices whereas retail prices can be up to twice as high. In France and Spain for example, the popular premium segment starts at around 3 euro per bottle. The 5 euro price point is perceived throughout Europe to be an important price barrier for both consumers and retailers. The difference between the 3-5 euro segment and the 5-7 euro segment of the market is that even though premium wine can be expected at about 3 euros per bottle, above 5 euros, quality becomes distinctly more important than volume<sup>112</sup>. On the other hand, from the 5 euro barrier price point, volume levels drop off considerably. Trends in Europe suggest that the United Kingdom and most Scandinavian countries prefer comparatively higher consumer prices. In continental Europe, prices are lower. Thus, price is indicative of purchasing power and product quality is adjusted accordingly.



The other factor that requires consideration in multidomestic export marketing is cultural differences which can be broken down into cultural affinity classes and zones. Cultural affinity zones refer to national cultural groups whereas cultural affinity classes refer to age groups or sociodemographic characteristics<sup>113</sup>. Those in a particular affinity class share similar values, behaviour and interests, and hence present common traits within the consumer segment, converging lifestyles irrespective of national borders<sup>114</sup>. Where popular culture is seen as the permeating cultural variable,

<sup>112</sup> Rabobank, (2003).

<sup>113</sup> Usunier, (2000;270).

through globalisation, products of popular culture such as wine spread oblivious to national borders.

The challenge that wine marketers face is in combining their marketing to consider both cultural affinity zones and classes, hence geography, demographics and lifestyle segmentation<sup>115</sup>. Market researchers suggest segmentation along similar lines to the segmentation that the AWBC has identified. It is generally acknowledged that the two most diverse of these areas are Mediterranean Europe and the Scandinavian countries. The central European countries are not dissimilar to the United Kingdom in that these countries bridge the other two affinity groups. It is perceived that there are less differences between the United Kingdom and the Scandinavian countries than between the United Kingdom and southern Mediterranean countries<sup>116</sup>.

These differences are furthermore, traced to greater long-established differences such as religion and the clear anglo-saxon / latin culture which permeates all aspects of lifestyle; language, religion, family life patterns, work relations, and consumption patterns.<sup>117</sup> The AWBC has dealt with the cultural affinity zones by choosing a 'lead country' to be used as a base for Australia's wine representation. From this base, market entry is planned and the various marketing and advertising efforts throughout the zone are implemented<sup>118</sup>.

A further parallel can be drawn between cultural affinity zones and clusters. Cultural affinity zones possess the characteristics of consumer clusters where clusters possess similar consumption habits, lifestyles and values. Therefore, downstream competitive advantages can result from the clustering of marketing activities to bring about affinities. Similarly to the economic and legislative harmonisation taking place on a macro level, through the identification of these zones, market obstacles are grouped together, effectively reducing the relative number of barriers.

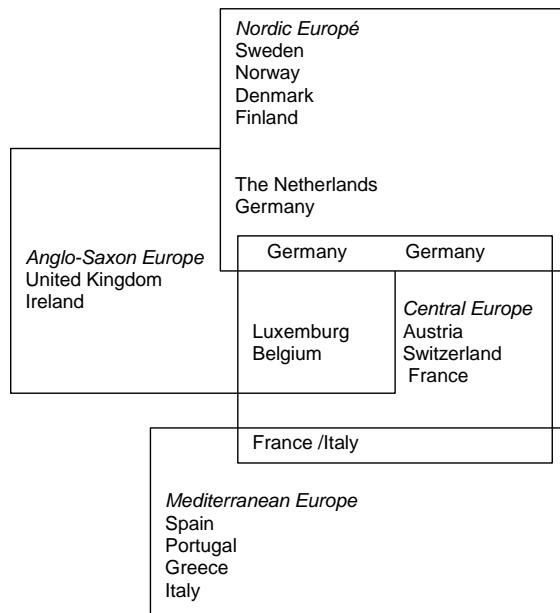


Figure 17: Cultural Affinity Zones in Europe (Usunier, 2000;272).

<sup>114</sup> Usunier, (2000;270).

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Even though country's within cultural affinity zones may have different consumer behaviour, the total marketing criteria ranging from price to distribution and promotion are more closely related than outside the zone.

# 5. European Community Legislation

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*Chapter 5 provides an analysis of the development of the harmonisation of European Union Wine specific legislation. A focus is on developments through Community Treaty protection, EC Regulations and Directives, and the jurisprudence of the European Court of Justice. Together, such EC wide legislation may present obstacles as trade regulation for third-country exporters wishing to enter the EU.*

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## 5.1 Legislative Background

Through integration and the desire to accomplish a cohesive internal market, a large amount of primary and secondary EC legislation, in addition to ECJ case law has been developed. Principles of development have largely centred around free movement of goods and services and the protection of free competition and consumers, however, policies have also been utilised to ensure that specific market sectors similarly function according to specific guidelines and principles. In the agricultural area, this has meant protecting quality and producers whilst simultaneously protecting the free movement of such goods and ensuring that the best possible processing methods are used.

In practise, Member States have always had an interest in providing increased protection for products with geographical indications, whether for national products or imported goods and this poses a disadvantage for others and does not serve any fair purpose<sup>119</sup>. It is also fair to assume that in other Member States no protection at all might be provided for indications which might be highly protected in these other Member States. It was to this end that European-wide legislation was formed to ensure that through European Integration, no unnecessary obstacles would be in place which could possibly damage economic development.

Initially this need was recognised by the European Court of Justice which handled a number of issues on a case-by-case basis using the articles found within the European Community Treaty. As a result of these events, it became obvious that specific legislation was needed and as such, a number of regulations and directives were adopted. More recently, the ECJ has founded its decisions on these regulation in addition to reference from Treaty articles.

In an attempt to provide an analysis of the evolution of legislation in this area it is important to draw a distinction between where both internal market and third country obstacles and barriers may exist. These obstacles evolve from an underlying different perspective between case law and legislation. Case law is directed towards removing unfair restrictions in specific cases through the use of natural laws, whereas legislation is oriented towards the implementation of fair restrictions of a general nature on the free movement of goods by European law<sup>120</sup>.

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<sup>119</sup> Brouwer (1991).

<sup>120</sup> Steiner and Woods (2003) page 60, 188.

To ensure that recent market obstacles are presented taking consideration of fair historical motivations, the evolving legislation affecting wine shall be presented focusing on legal discrepancies and unfair market obstacles. This will be based on an understanding of the Treaty of the European Union, the directives and the decisions of the ECJ both prior to and after the adoption of the regulations. Moreover, obstacles found where national laws of Member States are not correctly harmonised to European law will be discussed in addition to the key Australia/European Union bilateral agreement which thereby forms a part of European law.

## **5.2 Protection Provided by the European Community Treaty**

One of the four founding freedoms guaranteed by the Community Law of the European Community Treaty is the free movement of goods within the common market. This freedom, binding on all Member States, has been articulated through the prohibition of quantitative restrictions and abolition of duties and quotas. The stated provisions which directly affect these freedoms can be found in a variety of areas within the treaty, namely part three, title one, chapters one and two.

Chapter one provides legislative protection regarding The Customs Union with regard to movement of goods, customs duties and charges having an equivalent effect. Within the Treaty, applicable articles can be disseminated according to the following subheadings.

### **5.2.1 Free Movement of Goods**

Articles dealing with restrictions on the free movement of goods are Article 25<sup>121</sup> and Article 28<sup>122</sup>. Part 2 of Article 23 deals specifically with products originating from third countries. These can be found in Appendix A1.<sup>123</sup>

### **5.2.2 Common Customs Tariff**

These Articles are further complemented by Article 26<sup>124</sup> and Article 27<sup>125</sup> of the EC Treaty which provide more specific coverage regarding the establishment of a common customs tariff.

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<sup>121</sup> EC Treaty, Article 25 (Ex Article 12).

<sup>122</sup> EC Treaty, Article 28 (Ex Article 30); Article 29 (Ex Article 34) deals with quantitative restrictions on exports, however is not applicable for the analysis of third country imports into the EU.

<sup>123</sup> EC Treaty, Article 23, Part 2 (Ex Article 9).

<sup>124</sup> EC Treaty, Article 26 (Ex Article 28).

<sup>125</sup> EC Treaty, Article 27 (Ex Article 29).

### **5.2.3 Justification of Discriminatory Barriers**

Within the Treaty, Member States have the ability to justify their discriminatory barriers for reasons of health amongst others. This is stipulated in Article 30 of the EC Treaty.<sup>126</sup>

### **5.2.4 Article 28 and 30 and Secondary Legislation**

Article 28 and 30 are of particular importance within the European Community, being the principle provisions designed to eliminate national barriers from the free movement of goods that are not fiscal in nature<sup>127</sup>. Article 28 catches quantitative restrictions and all measures having an equivalent effect (MEQR)<sup>128</sup>. This is effectively the key component for ensuring that an economic area exists in which market forces prevail without restraining national borders. Over the course of the development of the legislation, a number of cases have shaped the article into a ‘formidable and flexible instrument in the legal campaign against national rules that restrict the free circulation of goods in the Community’.<sup>129</sup>, Article 30, however, is slightly different in nature, a standard definition of the scope of the article resulting from the case, *Procureur du Roi v Dassonville*.

In the judgement of this case, a crucial element which has allowed for clarification of the existence of a measure having equivalent effect was the clear indication that a discriminatory intent was not required. The ECJ made clear that it would take a very broad view of measures hindering the free flow of goods within the community as the important factor would be the ‘effect’ of the measure, not the measure itself.

*“All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having a effect equivalent to quantitative restrictions.”*

*“In the absence of a Community system guaranteeing for consumers the authenticity of a product’s designation of origin, if a Member State takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member State and should, in consequence, be accessible to all Community nationals.”<sup>130</sup>*

Despite the broad scope of the ruling and in the absence of Community rules governing for consumers the authenticity of a product’s origin, state action to prevent unfair practises may conform to EC law if ‘reasonable’ if the means do not act as hindrances to trade between Member States. This idea is

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<sup>126</sup> EC Treaty, Article 30 (Ex Article 36).

<sup>127</sup> Weatherill and Beaumont, (1999;565).

<sup>128</sup> Craig and De Burca (1998;583).

<sup>129</sup> Weatherill and Beaumont, (1999;503).

<sup>130</sup> ECJ Case 8/74, ECR 837 *Procureur du Roi v. Dassonville*, ‘Dassonville’ para 5 and 6.

called the ‘rule of reason’ principle and indicates that the ECJ would look at the substance, not the form of any measures used to restrict intra-community trade<sup>131</sup>.

Following from the *Dassonville formula*, in the early 1970s the European Court of Justice set a further groundbreaking judgement by interpreting article 28 in a broader light. By suggesting a policy of ‘negative integration,’ the ECJ was able to apply the abolition of non-tariff barriers to the free movement of goods, a stance put forward through the *Cassis de Dijon* case.

As a result of restrictive German laws, Cassis de Dijon, a blackcurrant liqueur lawfully produced in France could not be marketed in Germany as sales of spirits in the Cassis de Dijon category had to possess at least a 32 percent alcohol content. The importer initiated proceedings before the German courts to establish incompatibility of the German rule relating to alcohol strength with article 28 of the Treaty. Whilst the rule was not discriminatory in that it applied to all fruit liqueurs marketed in Germany without making any distinction according to their origin, it was seen as a indistinctly applicable technical rule. In this case, it could be seen that due to differing rules between Germany and France an obstacle to trade existed that led to partitioning of the internal market<sup>132</sup>. As a result, it could be seen that the German rule exerted a restrictive effect on trade in which article 28 was capable of applying.

The ECJ through its ruling established a precedent where pending harmonisation, proportionality<sup>133</sup> and secondary legislation, any trade barriers arising from diversity between national laws would possibly be in contradiction to article 28.

*“In the absence of common rules relating to the production and marketing of alcohol... it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.”* The Court continues, *“Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”*<sup>134</sup>

The judicial decision in this case highlighted the importance of article 28 regarding ‘negative harmonisation’ in which uniformity between member states can be achieved by the negative process in which national laws are held incompatible with article 28<sup>135</sup>. Because the Cassis case effectively brought about legislation regarding specifically and only, the abolition of national rules, it therefore assisted in deregulating the market. The questionable legal perspective though was whether a true

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<sup>131</sup> Craig and De Burca (1999;588).

<sup>132</sup> Weatherill and Beaumont, (1999;567).

<sup>133</sup> Member States bear the burden of proof in showing that there is a genuine risk of a threat to health for any prohibitions to be justifiable under primary Community law.

<sup>134</sup> ECJ Case 120/78 ECR 649 *Rewe-Zentrale v Bundesmonopolverwaltung fur Branntwein*, ‘Cassis de Dijon’ para 8 of judgement.

<sup>135</sup> Weatherill and Beaumont, (1999;599).

common market could be achieved only through removing national barriers without simultaneously, bringing in accompanying positive Community legislation<sup>136</sup>.

Many scholars question the extent to which the Community should regulate the market in a positive sense<sup>137</sup>, as opposed to through secondary legislation seen in the Cassis judgement.

Through a greater need for legitimate and harmonised social protection, most of the development of European Community law as discussed in the following sections favours a more equal balance between free trade and legitimate measures of protection<sup>138</sup>.

### 5.2.5 Article 90 – Internal Taxation

Article 90 of the EC Treaty ensures that no member state imposes a internal taxation to afford protection towards a certain domestic industry:

*Article 90 stipulates, “... no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.”*

*“Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.”*

The two paragraphs of Article 90 are in a sense distinct as under paragraph one, products are similar and as similar products, need to be taxed at similar levels. Under the second paragraph, products are competing rather than similar. Under the provisions of the Treaty, internal market protection must be prohibited. The practical application of this is that only objective real differences in the nature of a product may be reflected in different taxation. If there are no differences in the nature of the product then any tax differences must be so insubstantial that no protective consequences result<sup>139</sup>.

### 5.2.6 EC Treaty and Geographical Indications of Origin

The free movement of goods, being one of the four freedoms of Community law guaranteed by the Treaty, involves the right of free commerce without discrimination and restrictions throughout the territory of the European Union. Geographical indications of origin involves the protection of property rights and is especially relevant to the wine market. Indeed, the first pieces of legislation, regulations about geographical indications concerned the wine market. The problem with this form of protection as with other industrial property rights, is that the principle of free movement of goods in the internal market is to a certain extent, incompatible with the protection of such rights<sup>140</sup>.

<sup>136</sup> Weatherill and Beaumont, (1999;599).

<sup>137</sup> Craig and De Burca (1998;583); Weatherill and Beaumont, (1999;599).

<sup>138</sup> Weatherill and Beaumont (1999;601).

<sup>139</sup> Weatherill and Beaumont (1999;484).

<sup>140</sup> Xourafa, (2000;16).

For the European Union to be successful in applying the free movement of goods principle whilst simultaneously protecting designations of origin and geographical indications, the ECJ and EC legislation must seek a compromise between the Treaty principle, imposing restrictions on the right to use such indications and also on the principle of territoriality that governs them<sup>141</sup>.

Geographical indications can be viewed as being equivalent to the granting of monopoly rights to local producers regarding the commercial use of the geographical name of the place in question<sup>142</sup>. Rights generally encourage some forms of investment that otherwise may not be so worthwhile, inevitably leading to increased efficiency and consumer choice, thus making the economy more competitive<sup>143</sup>. Geographical indications have been recognised by the WTO under the TRIPS<sup>144</sup> agreement as part of the world's intellectual property stock<sup>145</sup>, and as such, have an equivalent effect to quantitative restrictions. The ECJ though has interpreted the quantitative restriction provision in articles 28-30 broadly and as such, geographical rights can be perceived as a measure of equivalent effect to a nil quota<sup>146</sup>. This extreme quantitative restriction is allowed for as an exemption in article 30, however it should be noted that this is a narrowly construed provision. In an attempt to bring greater clarity to this point and to reduce free movement of goods problems, regulations were introduced in 1987 and have been regularly amended over the subsequent period.

## 5.3 Regulations

### 5.3.1 Background

Historically, wine has always been viewed in a special light with increased protection afforded to the many qualities upon which the quality of wine is based. Factors determining quality include the soil and terrain in which the grape grows, the climate, the variety of grape, system of distillation, other oenological practises, wine-making methods, the alcoholic strength by volume, the conditions under which the wine is left to age and the traditional methods of production in each region and sometimes of each vineyard<sup>147</sup>.

The EU has traditionally had a very strong appellation system where protection has been warranted to protect the intellectual aspects of a specific wine. International concern over the protection of industrial property was discussed at the Paris Convention in 1883 and the Madrid Convention of 1891, however it was only in the 1930s that the French initially adopted a geographically based system of controlled

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<sup>141</sup> Xourafa, (2000;12).

<sup>142</sup> Xourafa, (2000;12).

<sup>143</sup> Korah, (2000;258).

<sup>144</sup> TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights). This is a WTO international agreement on the subject of intellectual property.

<sup>145</sup> TRIPS Agreement, Part II.

<sup>146</sup> Korah, (2000;259).

<sup>147</sup> Xourafa, (2000;16), AWBC 'Geographical Indications General Information'  
<http://www.awbc.com.au/Content.aspx?p=16> (Sourced: 26/04/05).

appellations<sup>148</sup>. The introduction of this system in France was principally to protect various production areas from misrepresentation by other regions with similar tasting products and also, to prevent the importation of wines from outside the specific region for immoral blending by unscrupulous producers<sup>149</sup>.

The importance of these factors have only increased in magnitude over time resulting in the first EU regulation on the Common Organisation for the Market in Wine, EC Regulation 337/79.

An excerpt from the preamble of EC Regulation 337/79 provides an insight into the nature of the regulation;

*“..Whereas in certain years it may be necessary to permit the enrichment of products suitable for yielding table wines; whereas, however, it is important, in the interests alike of the quality and of the market, that such enrichment be subject to certain conditions and limits and that it be applied only to produce of certain vine varieties and of a minimum potential natural alcoholic strength; whereas, since production conditions vary considerably between one wine-growing zone of the Community and another, it is essential that account be taken of such variations in particular in respect of enrichment procedures.”<sup>150</sup>,*

### **5.3.2 EC Regulation Development (Regulation 822/1987 and 823/1987)**

As the common commercial policy developed, each of the member states and their idiosyncratic appellation systems required harmonisation towards a common norm. Over the subsequent years after 1979, a huge multitude of diverse regulations were introduced reflecting the complexity of implementing rules for a common organisation of the market for wine. In the late 80's, this increasingly logically interwoven legal network of rules became so multifaceted that two regulations were established, these being EC Regulation No. 822/87 and 823/87.

These two regulations were quickly transformed again by new layers of legislation, especially due to their general nature. A more recent regulation, EC Regulation No. 1493/1999, amended and consolidated past regulations making a special note of the large amounts of regulations which prevailed.<sup>151</sup>,

This increasingly complex and interwoven system was regularly updated with countless regulations making the process of disseminating correct legal practises virtually impossible. Indeed, Australian exporters were in a position where they were so confused by contrasting legislation that they were highly motivated to develop EU/Australia negotiations into a point of a bilateral agreement<sup>152</sup>. The terms of the bilateral agreement and the respective parties perspective will be explored in more detail in section 5.5.

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<sup>148</sup> Casson, (1991;56).

<sup>149</sup> Casson, (1991;56).

<sup>150</sup> EC Regulation 337/79, Excerpt from preamble, paragraph 21.

<sup>151</sup> EC Regulation No. 1493/1999, paragraph 9.

<sup>152</sup> Steve Guy, Manager Compliance, AWBC (Interview 26<sup>th</sup> April, 2005).

### 5.3.3. EC Regulation 1493/1999

The need for a regulation to break through the complex rules was clarified in paragraph 10 of the preamble of the new regulation; “the rules governing the common organisation of the market in wine are extremely complex; in some cases they do not take sufficient account of regional diversity; as far as possible the rules should therefore be simplified and policy developed and implemented as close as possible to the producer within a Community framework.”<sup>153</sup>,

The new regulation coming into force on the 1<sup>st</sup> of August, 2000, repealed the aforementioned Regulations as well as the majority of those which amended and supplemented them<sup>154</sup>. Through this regulation, the Commission hoped to pave the way for a successful balance between the opposing forces of the free movement of goods pillar in the Treaty whilst recognising and accommodating regional diversity. Moreover, the Council Regulation 1493/1999 aims to bring a better balance between supply and demand on the Community market, giving producers the chance to bring production into line with market developments and to allow the sector to become permanently competitive<sup>155</sup>.

Whilst the regulation considerably simplified the legislation by bringing together a number of regulations, it also opened the door for possible future ‘special’ intervention measure on the market, allowed for by the Council in anticipation of future modifications in domestic and world demand<sup>156</sup>. In an opinion of the Economic and Social Committee the ESC states that the Commission’s proposition to combine 23 Council regulations into one basic wine regulation is welcomed as the “courageous effort” would simplify EU wine law making it more systematic. It goes on by saying that it feels that the Commission’s management committee (Article 75) has been given too much authority that exceeds the granting of technical powers of implementation<sup>157</sup>.

Perhaps the key Articles in the new regulation applicable to the previous discussion on Geographical indications as trade barriers is Article 47 and 48. In these Articles, the Council makes clear its view that the ultimate criteria for the free use of an indication as a designation of origin or as a geographical indication is that there should not be any risk of confusion. “The description and presentation of the products referred to in this Regulation, and any form of advertising for such products, must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed, particularly as regards: the information provided for in Article 47.”<sup>158</sup> Article 47 refers to the “description, designation and presentation of certain products covered by this regulation,” rules which would in particular include “the labelling of products which are imported.”<sup>159</sup>

<sup>153</sup> EC Regulation No. 1493/1999, paragraph 10.

<sup>154</sup> Article 81 of EC Regulation No. 1493/1999 stipulates the exact Regulations which are repealed as a result of the introduction of this new regulation.

<sup>155</sup> [http://europa.eu.int/comm/agriculture/markets/wine/index\\_en.htm](http://europa.eu.int/comm/agriculture/markets/wine/index_en.htm) (Sourced 19/04/05)

<sup>156</sup> Ibid.

<sup>157</sup> 1999/C 101/14, Opinion of the Economic and Social Committee on the ‘Proposal for a Council Regulation (EC) on the common organisation of the market in wine.’ Paragraph 2.2. ‘Aims of the Reform.’

<sup>158</sup> EC Regulation No. 1493/1999, Article 48.

<sup>159</sup> EC Regulation No. 1493/1999, Article 47.

It should be noted that the argument of controlled appellations versus freedom of choice, geographical indications versus less strict requirements, is a long standing argument which has been discussed for some time. Indeed, the USA has objected to the stricter requirements for the protection of geographical indications of origin creating discriminatory barriers against products originating from third countries<sup>160</sup>. Casson argues that varietal description is a more valid and rational basis for consumer choice than geographical origin, a factor with more weight in New World wineries where the potential diversity of grape varieties and wine styles is large than that found in the Old World Wineries of Europe<sup>161</sup>. Clearly the EU legislature through its creation of approved viticultural areas, (geographical indications) indicates that there is a preference and awareness for the importance of soil and the quality of fruit, than a reliance on technology in winemaking which is of greater importance in New World wineries which through greater flexibility produce a whole range of varietal blends<sup>162</sup>.

Moreover, the list of authorised oenological practises and processes provided by the Commission in this regulation is based on the Commission's inference that unauthorised practises may be harmful to human consumption<sup>163</sup>. These health and safety justifications seem dubious as they are simply highly innovative practises used by New World wine producers which have not been proven unsafe on scientific grounds<sup>164</sup>. As such, this legislation simply constituted an important barrier to New World wine producers who utilise methods not yet recognised by the European Union.

A recent WTO report indicated that for any geographical indication of standards or oenological process, hypotheses exist that trade could either rise or fall<sup>165</sup>. Whilst it is difficult to quantify if the imposition of these geographical indications and oenological processes results in an unfair implicit non-tariff barrier to third country exporters, it is clear that in the case of geographical indications, these are not a form of shared standard (If this was the case the presumption would be that shared standards would both increase imports and exports)<sup>166</sup>. Regardless of this, it must also be recognised that geographical indications are an important part of the European landscape, having been present for well over a century. The WTO report states that the most important facilitating mechanism in achieving trade liberalisation and facilitation is Mutual Recognition Agreements, (MRA's)<sup>167</sup>, a stance agreed upon by Steve Guy, the manager of compliance with the Australian Wine and Brandy Corporation. Steve believes that it is only through such a mechanism that 'regulatory imperialism' will reduce different legislative interpretations, thereby increasing the ability for both parties in a trading relationship to truly make gross benefits<sup>168</sup>.

<sup>160</sup> 'J.O. Berkey Implications of the WTO protections for Food Geographical Indications, American Society of International Law, April 2000. EC Regulations on Geographical indications that entered into force in 1991 were expected to halt exports of American blended whiskey worth \$40 million annually. See EC Rules on Geographic Origin May Hurt Sales of U.S: Blended Whisky, BNA Report, 5 WIPR 81 (1991)'; in Xourafa (2000;24).

<sup>161</sup> Casson, (1991;72).

<sup>162</sup> Casson, (1991;72).

<sup>163</sup> EC Regulation No. 1493/1999, preamble paragraph 47.

<sup>164</sup> Foster and Spencer (2002;50).

<sup>165</sup> Maskus and Wilson (2000;23).

<sup>166</sup> Maskus and Wilson (2000;23).

<sup>167</sup> Maskus and Wilson (2000;12).

<sup>168</sup> Steve Guy, Manager Compliance, AWBC (Interview 26<sup>th</sup> April, 2005).

#### **5.3.4. Common Market Organisation for Wine**

The Council Regulation (EC) No. 1493/99 has the stated goal of rebalancing supply and demand and reorientating production towards altered market demands<sup>169</sup>. A large part of this strategy is to support and protect quality wines produced in specified regions by setting quality standards taking into account traditional conditions of production<sup>170</sup>. In response to the growing popularity of high quality new world wines produced in places such as Australia, the United States, Chile and South Africa, the reform intended to move away from price support of European wines. Despite this, it still covered many of the same intervention policies and controls which existed under the old regime. Wine production is still heavily subsidised in the European Union with 1,276 million euros appropriated in 2002 alone for support measures to the wine industry<sup>171</sup>.

The reform and intervention package put forward by the European Union requires that no new planting of vines takes place unless demand for a particular variety exceeds supply. Moreover, large amounts of money are put towards restructuring and converting vineyards, improving management techniques and in the form of aid, and towards storage of wine that is produced in excess of demand. These measures are imposed to affect the supply pattern over time, simultaneously removing poor quality wine from the market. The overall dynamic of support leading to higher wine production in the European Union and lower prices to foreign wine producers than would be the case without the support<sup>172</sup>.

The justification for the subsidies and protection applied to the agricultural sector by the European Union is based on the concept of multifunctionality<sup>173</sup>. The European Union believes that agriculture is multifunctional because it is not limited to the sole function of producing food and fibers but it also has a number of other functions; these including services (skills and techniques) and preservation<sup>174</sup>. Because agriculture has a socio-economic function contributing to the viability of regional communities, the European Commission thus believes that public intervention is necessary.

Whether multifunctionality can be seen as a justification for agricultural subsidies and protection is a contentious argument as the opposing arguments seem to have logical reasoning. Not only are there more effective and less costly ways of achieving socio-economic aims than broad based agricultural protection, but agricultural subsidies can also contribute to a deterioration of land through more intense agricultural use, rather than a conservation of environmental values<sup>175</sup>. In this light, it can be seen that through the Common Market Organisation the EU continues to use WTO approved domestic

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<sup>169</sup> EC Regulation No. 1493/1999, preamble, paragraph 7.

<sup>170</sup> Excerpts of EC Regulation No. 1493/1999, in GAIN Report (2001) No: E21111.

<sup>171</sup> GAIN Report (2001) No: E21111.

<sup>172</sup> Foster and Spencer (2002:43).

<sup>173</sup> Freeman and Roberts in Foster and Spencer (2002:44).

<sup>174</sup> DG Agriculture (1999) October, 'Contribution of the European Community on the Multifunctional Character of Agriculture', paragraphs 6-9.

<sup>175</sup> Foster and Spencer, (2002:44).

support measures which continue to act as further barriers to import trade from third country exporters such as Australia.

### 5.3.5. EC Labelling Regulation No. 753/2002

One of the most concerning current developments of European Community law are the new rules adopted for the labelling of wine in May of 2002. The EC Regulation No. 753/2002 came into force on the 1<sup>st</sup> of August in 2003 with a transitional period until the 15<sup>th</sup> of March 2004<sup>176</sup>. The regulation implements the requirements of EC regulation no. 1493/1999. Wine entering the EU on or after the 15<sup>th</sup> of March, 2004, must be labelled in accordance with the new Regulations whilst wine that has been ‘put into circulation’ in the EU before that date (by that meaning cleared through customs and duly paid importation, customs and national taxes), can be sold in the EU until stocks are exhausted<sup>177</sup>. A range of new mandatory requirements have been introduced for information on the label, including alcoholic strength, lot number and the name of the bottler. Moreover, the use of certain optimal terms on the label such as the production methods, traditional expressions, names of the vineyard or the vintage year are regulated in addition to certain bottle shapes which are reserved for certain types of wines<sup>178</sup> (as seen in the German ‘Bocksbeutel’ or French ‘Flute d’ Alsace’ case).

In the preamble of the regulation the intention towards third country products is made clear. “The rules for labelling third-country wine sector products circulating on the Community market should also be harmonised as far as possible with the approach laid down for Community wine sector products in order to avoid misleading consumers and unfair competition for producers. However, consideration should be given to the differences in production conditions, winemaking traditions and legislation in third countries.”<sup>179</sup> Whilst this paragraph stipulates the Council’s best intention in recognising the needs of third country labels, there is an underlying assumption that a government will only interfere in the form of regulation of labelling requirements where market forces themselves do not lead to sufficient information for consumers in making informed choices<sup>180</sup>.

This new regulation provides two levels of protection for so called ‘traditional terms’.<sup>181</sup> As stated in Article 24 paragraph 2 of the EC Regulation No. 753/2002, “The traditional terms listed in Annex III shall be reserved for the wines to which they are linked and shall be protected against: (a) all misuse, imitation or evocation, even if the protected term is accompanied by an expression such as ‘kind’, ‘type’, ‘style’, ‘imitation’, ‘brand’ or ‘similar’.”<sup>182</sup> The terms listed in Annex III of the regulation are protected only in the language and for the class of product referred to in the Annex III and thus, for example, the word ‘Vintage’ is protected in list B of Annex III only in relation to liqueur wines. Thus, if

<sup>176</sup> EC Regulation 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.

<sup>177</sup> AWBC Website: <http://www.awbc.com.au/Content.aspx?p=48> (Sourced 29/04/05).

<sup>178</sup> Foster and Spencer, (2002;58).

<sup>179</sup> EC Regulation No. 753/2002. Preamble paragraph 20.

<sup>180</sup> Foster and Spencer, (2002;59).

<sup>181</sup> AWBC Website: <http://www.awbc.com.au/Content.aspx?p=48> (Sourced 29/04/05).

the word is used in a context outside of liqueur wines, then the AWBC believes that there should be no restriction on its use by Australian or other producers<sup>183</sup>.

### 5.3.6 Geographical Indications

The second level of protection applies to European Geographical Indications which cannot be used under any circumstances other than by the producers in the applicable restricted geographical area. Annex II of the EU/Australia Wine Agreement specifies the protected Community and Australian names which are reserved exclusively for wines originating in the Community or Australia respectively<sup>184</sup>. These have been negotiated on behalf of the Australian wine industry by the statutory authority established by the Australian Government and are protected under Article 7, part 3 of the EU/Australia Wine Agreement. “In the Community, the protected Australian names: (a) are reserved exclusively to the wines originating in Australia to which they apply; and (b) may not be used otherwise than under the conditions provided for by the laws and regulations of Australia.”<sup>185</sup>

In a report recently prepared for the Australian government a number of concerns were raised about mandatory wine labelling requirements. These include the added consumer costs that can result from additional labelling requirements through requiring products to be tracked through the entire production process. Perhaps more important, is the concern that a product may be stigmatised in the eyes of the consumer without any detrimental scientific evidence purely for the inference that the wine requires labelling as opposed to those that do not<sup>186</sup>. The European Union requires that wine produced through non-traditional methods be labelled as such even though there is no evidence of health and safety concerns with wines produced in this way. This would require Australian wines produced under different technological conditions to be labelled with a phrase similar to ‘Wine produced by non traditional methods.’ Similarly, the EU would require labelling of wine produced from genetically modified grapes to say ‘containing genetically modified material.’<sup>187</sup> Such phrase would clearly be seen as a deterrent to wine consumers.

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<sup>182</sup> EC Regulation No. 753/2002. Article 24. paragraph 2.

<sup>183</sup> AWBC March (2003;12) Labelling and Packaging Requirements.

<sup>184</sup> Ibid, See Annex II and Article 7, paragraph 2 and 3, Agreement between Australia and the European Community on Trade in Wine, 94/184/EC of 24<sup>th</sup> January 1994. (Geographical indications originating in Australia, (ie: Australian protected names) are listed in section B of Annex II whilst European names are listed in section A).

<sup>185</sup> Agreement between Australia and the European Community on Trade in Wine, 94/184/EC of 24<sup>th</sup> January 1994. <http://www.austlii.edu.au/au/other/dfat/treaties/1994/6.html> (Sourced: 18/04/05).

<sup>186</sup> Foster and Spencer, (2002;59).

<sup>187</sup> Foster and Spencer, (2000;59).

### **Wine Label Specifications**

**The Australian Wine and Brandy Corporation has explored the regulation in more detail to understand how the regulation directly applies to the practical task of implementing EU regulation onto a products label. They have published the following guide:**

- The word 'wine' must be placed on all labels, expressed in conjunction with the country of origin statement. The EC has advised that the following formulations are acceptable (there may also be others):
  - Wine Product of Australia;
  - Wine Produce of Australia;
  - Wine of Australia; or,
  - Australian wine.
- The word 'wine' separated from the country of origin statement is not acceptable.
- Exporters wishing to use certain optional terms on their labels must now make a declaration to the AWBC in accordance with the AWBC Administrative Guideline – Labelling for EC Countries, June 2003;
- Mandatory information (with the exception of the importer's details and the lot identifier) must appear on one or more labels in the same field of vision and be clearly separate and distinguished from any optional information. The concept of the 'same field of vision' implies that the bottle need not be turned in order to view all the mandatory items and all the mandatory items should be presented in the same direction. The 'clearly separate and distinguished' requirement means that you should not 'bury' any of the mandatory items in optional text such as the 'wine story'.
- Where a geographical indication (GI) is used on a label it must be placed in the same field of vision as the country of origin statement. The European Commission (EC) has advised that there is no requirement that the GI must be displayed in direct conjunction with the country of origin statement, however exporters should use care to ensure that the GI is clearly separate and distinguished (clear, legible, indelible and large enough to stand out well from the background and/or pictorial matter).

Figure 18: <http://www.awbc.com.au/Content.aspx?p=48> (AWBC, Steve Guy 20/04/05)

The requirement and need for adequate and timely information clearly exists as it is important that consumers can make informed choices about different wine types. This economic principle has been argued for over thirty years, first presented by Akerlof in 1970<sup>188</sup>. Akerlof researched the market effect of uncertainty regarding quality and safety arguing that a market for 'lemons' would evolve if no adequate or timely information was to exist. In such a situation, sellers would have better information about the products than buyers, thus creating a market where low quality goods drive out high quality goods<sup>189</sup>. Foster and Spencer speculate that such market forces may be at work, however, they believe that a more likely scenario would be that the European Union labelling regime has been implemented to protect domestic wine industries<sup>190</sup>.

Not only is the requirement to label when producing by non-traditional methods against any evidence of health and safety concerns, but they also claim that the European Union is "laying claim to traditional expressions.. make[ing] it difficult for foreign wine producers to describe their product in a

<sup>188</sup> Foster and Spencer, (2000;59).

<sup>189</sup> Akerlof (1970) examined the market effect of uncertainty about quality or safety. He argued that a market for 'lemons' would eventuate where there is a 'asymmetry of information' between buyers and sellers. This applies to wines where consumers may perceive some wines as inferior to others.

<sup>190</sup> Foster and Spencer, (2002;61).

way that consumers can understand and [thus] representing a very significant barrier to trade.<sup>191</sup>" By inferring that the provision of exclusive rights to traditional expressions does not facilitate the efficient operation of the market, Foster and Spencer are failing to recognise that the barrier to trade is one that exists both within the Internal Market as well as to third-country producers. As such, there is no arbitrary discrimination as this regulation is not contrary to articles 28 and 30 of the EC Treaty.

This regulation has recently been amended by Commission Regulation no. 1991/2004 to incorporate the provisions on allergen labelling established by Directive 2003/89/EC<sup>192</sup>. Details of changing labelling requirements will be discussed in conjunction with the Directive in section 5.3 below.

## 5.4 Directives

Directives have been implemented which concern the protection of trade and competition, specifically regarding confusing and deceptive information. These are further supplemented by recent directives which provide for specific mandatory requirements regarding statements on labels within the EU.

The first directive providing additional guidance to the notion of MEQR's and the scope of Article 28 was enacted during the Community's transitional period, Directive 70/50/EEC of the 22<sup>nd</sup> December 1969<sup>193</sup>. This was based on the provisions set out by the then Article 33, setting out to abolish measures which have an effect equivalent to quantitative restrictions on imports that are not covered by other provisions adopted in pursuance of the EEC Treaty<sup>194</sup>. This Article has since been repealed but it provides some scope on the matters which constitute a MEQR, specified in Article 2 including "...conditions in respect of packaging, composition, identification, size, weight, etc. which only apply to imported goods or which are different and more difficult to satisfy than in the case of domestic goods; the giving of a preference to the purchase of domestic goods as opposed to imports, or otherwise hindering the purchase of imports; limiting publicity in respect of imported goods as compared with domestic products; prescribing stocking requirements which are different from and more difficult to satisfy than those which apply to domestic goods; and making it mandatory for importers of goods to have an agent in the territory of the importing State."<sup>195</sup> Thus, even in 1970 the Commission was thinking about the potential reach of Article 28 with regard to indistinctly applicable rules, a concept that continued to evolve with the influential ruling in the Dassonville case where it was determined that the existence of a MEQR would be proven through the effect of any measure, rather than discriminatory intent.

More recently, there has been a number of Directives which have transformed the mandatory requirements for wine labels destined for EU markets. The first such Directive, Directive 2000/13/EC

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<sup>191</sup> Foster and Spencer, (2002;61).

<sup>192</sup> Directive 2003/89/EC of the European Parliament and of the Council of 10 November 2003 amending Directive 2000/13/EC as regards indication of the ingredients present in foodstuffs.

<sup>193</sup> Steiner and Woods (2003;221).

<sup>194</sup> Xourafa, (2000;14).

provided an approximation of the laws of Member States relating to the labelling, presentation and advertising of foodstuffs<sup>196</sup>. Article 9 paragraph 5 states that a “..durability date shall not be required,” for the various classifications of wines<sup>197</sup>. This Directive was supplemented by a new Directive in 2003 which established provisions for allergen labelling. Directive 2003/89/EC amends the previous Directive 2000/13/EC with regard to the indication of the ingredients present in foodstuffs<sup>198</sup>.

Paragraph 11 of the preamble of the Directive stipulates that

“In the case of alcoholic beverages, it should be mandatory to include in the labelling all ingredients with allergenic effect present in the beverage concerned.<sup>199</sup> Starting from November 25<sup>th</sup>, 2005, alcoholic beverages containing sulphur dioxide and sulphites at concentrations of more than 10mg/kg or 10mg/litre must be labelled “contains sulphites” or “contains sulphur dioxide”<sup>200</sup>. The statement can appear on any label on the bottle but it must be easily readable and clearly distinguishable. EU member states must transpose the directive into their national laws by November 1<sup>st</sup>, 2004<sup>201</sup>.

These allergen labelling provisions were further reflected in an amended Commission Regulation, with Regulation 1991/2004 amending the previous Commission Regulation 753/2002 on the labelling of wine. A market barrier resulting from the mandatory requirement to have a sulphites statement has come about as a result of the requirement that the statement be in the official language of the destination market<sup>202</sup>. As a result, if an Australian wine is destined for a number of different markets within the EU which have differing language requirements, then the sulphites statement will need to be in the specific language of each market or the label will need to have the statement in all the languages necessary for the various markets.

A further and more recent Directive, 2005/26/EC,<sup>203</sup> establishes a list of food ingredients and substances which are provisionally excluded from the imminent European legislation relating to Allergen labelling. The ingredients and substances listed in this directive become excluded from the Annex IIIa of Directive 2000/13/EC which is where ingredient requirements are listed<sup>204</sup>. The AWBC states that milk, fish and egg products used as processing aids in wine making will be exempt from the allergen labelling until the 25<sup>th</sup> of November 2007<sup>205</sup>.

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<sup>195</sup> Article 2 of Directive 70/50 in Craig and De Burca (1998;584).

<sup>196</sup> Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs.

<sup>197</sup> Ibid.

<sup>198</sup> Directive 2003/89/EC of the European Parliament and of the Council of 10 November 2003 amending Directive 2000/13/EC as regards to an indication of the ingredients present in foodstuffs.

<sup>199</sup> EC Directive 2003/89, Preamble paragraph 11.

<sup>200</sup> AWBC ‘Allergens statements on labels for the EU’ <http://www.awbc.com.au/Content.aspx?p=116> (9/5/05)

<sup>201</sup> GAIN (29/11/2004)

<sup>202</sup> AWBC ‘Allergens statements on labels for the EU’ <http://www.awbc.com.au/Content.aspx?p=116> (9/5/05)

<sup>203</sup> Commission Directive 2005/26/EC of 21 March 2005.

<sup>204</sup> Commission Directive 2005/26/EC of 21 March 2005, preamble.

<sup>205</sup> AWBC ‘Allergens statements on labels for the EU’ <http://www.awbc.com.au/Content.aspx?p=116> (9/5/05)

## 5.5 ECJ Case Law

The European Court of Justice Case Law covering matters relating to wine and its introduction and free movement within the Internal Market cover a range of legal areas. These include the protection of designations of origin and geographical indications (covered under Articles 20 and 30 of the EC Treaty), national rules which may pose trade barriers (Article 30), and Discriminatory Domestic Taxation (Article 90).

### 5.5.1. The Role of Articles 28-30 and Indications of Geographical Origin

#### *The ‘Sekt’ Case*

The first case which dealt with the functions and nature of indications of geographical origin was case number C-12/74, entitled Commission of the European Communities v the Federal Republic of Germany<sup>206</sup>. In this case, otherwise known as the ‘Sekt’ case, Germany reserved by the law of Vine Products of 14<sup>th</sup> July 1971, the appellations ‘Sekt’ and ‘Weinbrand’ to domestic products. It is understood in Germany that these names had been substituted for ‘Champagner’ and ‘Kognac’ since 1918 and had subsequently become synonymous for quality amongst German consumers<sup>207</sup>.

Craig and De Burca specify the circumstances where Member State legislation containing rules on origin-marking is acceptable. Generally, only if a certain quality of goods is implied in the origin, that the method of manufacturing or materials is quite particular, or where the origin is indicative of a special folklore or region specific tradition is the rule on origin marking acceptable<sup>208</sup>. In the early stages of the judgement of the case, (paragraph 6) reinforces the view set out in the Directive no. 70/50/EEC which is based on the provisions of the then Article 33 of the Treaty, since abolished. The judgement then goes on to affirm the principles by which appellations can remain protected by law. “To the extent to which these appellations are protected by law they must satisfy the objectives of such protection, in particular the need to ensure not only that the interests of the producers concerned are safeguarded against unfair competition, but also that consumers are protected against information which may mislead them. These appellations only fulfil their specific purpose if the product which they describe does in fact possess qualities and characteristics which are due to the fact that it originated in a specific geographical area. As regards indications of origin in particular, the geographical area of origin of a product must confer on it a specific quality and specific characteristics of such a nature as to distinguish it from all other products.”<sup>209</sup>

In this case the court rules that the method of production of a vine product does not constitute a criterion capable of being by itself, sufficient to prove its origin. Furthermore, if the method of production is not linked directly to the specific type of grape then the method in question may also be

<sup>206</sup> C-12/74, Commission of the European Communities v the Federal Republic of Germany, [1975] ECR 181.

<sup>207</sup> Xourafa, (2000;25).

<sup>208</sup> Craig and De Burca (1998;589).

<sup>209</sup> C-12/74, Commission of the European Communities v the Federal Republic of Germany, [1975] ECR 181, paragraph 7.

employed in other geographical areas. National measures used here to reserve specific generic names which were highly known and appreciated by the public, excluded for use by imported products which may nevertheless have the same quality and technical standards, clearly gives an advantage to those national products. The ECJ rejected the arguments of Germany drawing a conclusion that the indications 'Sekt' and 'Weinbrand' do not constitute indications of origin and that the German legislation constitutes national measures of an unjustified nature<sup>210</sup>.

### ***The 'Weingand' Case***

In another benchmark case known as the 'Weingand' case<sup>211</sup>, the court found that terms used on the products of the company prohibited Regulation No. 355/79. The ECJ held that "'misleading information' employed in articles 8(c) and 18(c) of regulation no 355/79 and the expressions 'confusion' and 'false impression' occurring in article 43 of the same regulation must be interpreted as covering not only descriptions which are liable to be confused with the description of a particular small locality ('lage') but also all descriptions which are liable to induce the public to believe that the description in question is the name, or part of the name, of a wine-growing local administrative area ('weinbauort') which does not in fact exist or the name of a small locality ('lage') which does not in fact exist."<sup>212</sup>

### ***The 'Prantl' Case***

In the 'Prantl' case, the ECJ ruled that the bottle in which a product is sold, in this case 'Bocksbeutel' wine, could constitute an indirect designation of geographical origin. It held that in the common market, consumer protection and fair trading need to be guaranteed across different member states. Accordingly, as this member state's national legislation only allowed certain national producers to use the specific shaped bottle that is 'Bocksbeutel' wine, then the prohibition would constitute a measure having an effect equivalent to a quantitative restriction<sup>213</sup>.

### ***The 'Delhaize' Case***

The 'Delhaize' case provided an answer to the question of whether a national obligation to bottle wine in the place of origin as opposed to after it had been exported to another Member State, constituted a measure having an effect equivalent to a restriction on exports<sup>214</sup>. The relatively new Council Regulation (EC) No. 1493/99 states that it is for the Member States to define the conditions applicable to the use of a name of a geographical area within its territory as a registered designation of origin for a wine from that area<sup>215</sup>. The ECJ ruled that the requirement to bottle a wine in a particular region as far as it constitutes a condition for the use of the name of that region as a registered designation of origin, is justified if the bottling function itself gave the wine particular characteristics which were

<sup>210</sup> C-12/1974, Commission of the European Communities v the Federal Republic of Germany, [1975] ECR 181, paragraph 18.

<sup>211</sup> C-56/1980, Firma A. Weingand, Weinbau, Weingrosskellerei V Schutzwerband Wein E.V., [1981] ECR 0583.

<sup>212</sup> Ibid, paragraph 20.

<sup>213</sup> C-16/83, Criminal proceedings against Karl Prantl. [1984] ECR 1299, paragraph 8.

<sup>214</sup> C-47/90 Etablissements Delhaize Freres et Compagnie Le Lion SA and Promalvin SA and AGE Bodegas Unidas SA [1992] 1-3704.

<sup>215</sup> Xourafa, (2000;27).

essential in preserving the characteristics of the wine. In this case, it was not proved that the bottling process in the place of origin would add or preserve any special characteristics or qualities in the wine<sup>216</sup>.

Interestingly enough, a contrasting conclusion was presented when the ‘Delhaize’ case was brought before the ECJ for the second time as the Spanish government had not annulled the national regulation in question and had thus violated Article 10 of the Treaty<sup>217</sup>. The ECJ in this case found in favour of the Spanish government stating that the mere co-existence of two different methods of bottling, in the place of origin or outside it, with or without the control of local producers could reduce the reputation and the trust of consumers to that indication<sup>218</sup>.

### ***The ‘Exportur’ Case***

Geographical indications gained further European wide importance and legitimacy as a result of the ruling of the ‘Exportur’ case<sup>219</sup>. In this case the ECJ recognised the importance of geographical indications (indications of provenance) and ruled that they are protected by the operation of rules designed to suppress misleading advertising, or indeed the abusive exploitation of another’s reputation<sup>220</sup>. The case was about a number of French companies and a Spanish company and their rights to produce and sell products under specific names across national borders where the qualities and characteristics were alleged to not be a result of their geographical origin. The ECJ importantly ruled that geographical indications are worthy of protection and must be preserved and protected for those products upon which it can be proved that their flavour, qualities and characteristics are a result of the geographical location of the place of production, and moreover, not produced according to a specific method of production set by national authorities. “These indications may enjoy a high reputation amongst consumers and constitute for producers established in the places to which such names refer an essential means of attracting custom.”<sup>221</sup>,

### **5.5.2 Article 90, The ‘Similar’ Product and Discriminatory Domestic Taxation**

Article 90 of the EC Treaty provides that “No Member State shall impose, directly or indirectly, on the product of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.”<sup>222</sup> In this case, the no discrimination on the grounds of nationality rule found in Article 12 EC Treaty, was being applied to the area of internal taxation<sup>223</sup>.

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<sup>216</sup> C-47/90.

<sup>217</sup> C-388/95, Xourafa, (2000;27).

<sup>218</sup> C-388/95, paragraph 77.

<sup>219</sup> C-3/91, Exportur [1992] ECR 1-5529.

<sup>220</sup> C-3/91, Xourafa, (2000;27).

<sup>221</sup> Ibid.

<sup>222</sup> EC Treaty Article 90.

<sup>223</sup> Weatherill and Beaumont, (1999;486).

### ***Commission v. France***

In case 90/79, *Commission v. France*, the court found that a tax that applies “to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.”<sup>224</sup> Thus, where Member States have the free ability to decide on rates of taxation for a particular product, they cannot as a general rule apply rates that discriminate between similar domestic and imported products, thereby affording indirect protection to domestic products.<sup>225</sup>.

When assessing the criteria for indirect protection, the point of differentiation is whether the products are in actual or potential competition. Furthermore, whether a product is similar for the purposes of applying a rule against discrimination through Article 90(1).<sup>226</sup> If the products are similar within the meaning of paragraph one of Article 90, then the Member State must equalize taxes, if the products are competing, then the protective effect alone must be removed which may not mean equalization.<sup>227</sup>

### ***Commission v. the U.K.***

In case 170/78, *Commission v. the U.K.*, excise duties on wine were higher than those charged on beer. This factor, the U.K. argued, was due to the fact that wine and beer were not ‘similar’ products as beer was generally consumed in public houses whereas wine was consumed at home.<sup>228</sup> By taking into consideration the current market as well as changing consumer habits, the ECJ concluded that beer and wine were in fact similar and that different rates of taxation gave indirect protection to beer over (mostly imported) wines.<sup>229</sup>

### ***The ‘John Walker’ Case***

In contrast to the previous case, the John Walker case, no. 243/84, presents the court faced with determining whether liqueur fruit was similar to whisky for the purposes of applying the rule against discrimination (Article 90(1)).<sup>230</sup> The Court first examined the objective characteristics of the product including reference to alcohol content and method of manufacture,<sup>231</sup> before determining whether both products were capable of fulfilling consumer needs in a similar manner. In this case the intrinsic characteristics of the product were so different, (whiskey is distilled whereas liqueur is fermented), that the ECJ concluded that the products were not similar. Regarding the second part of Article 90 and whether the products were in competition, the Court was satisfied that the Danish system was origin-neutral. In the general framework of taxation of spirits alongside other beverages including Danish-made goods, Whiskey was not prejudiced. As such, no breach of Article 90(2) had been

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<sup>224</sup> Case 90/79, *Commission v. France* [1981] ECR 283, paragraph 14.

<sup>225</sup> Weatherill and Beaumont, (1999:487), See also Chapter 5.1 above on Article 90 and Internal Taxation.

<sup>226</sup> Weatherill and Beaumont, (1999:478).

<sup>227</sup> Weatherill and Beaumont, (1999:480).

<sup>228</sup> Case 170/78, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1980] ECR 417, preamble paragraphs 1 to 9.

<sup>229</sup> Case 170/78, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1980] ECR 417.

<sup>230</sup> Case 243/84, *John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter*, [1986] ECR 875.

<sup>231</sup> Ibid, paragraph 8.

demonstrated<sup>232</sup> as the member state, Denmark, had not imposed a tax on foreign goods in order to afford protection to other products.

## **5.6 EU / Australia Bilateral Wine Trade Agreement**

### **5.6.1 Background**

Having exported wine to Europe over the course of the formation of the European Union, Australian wine producers have become familiar with the complicated trade process and have made continual initiatives towards dealing with trade issues. Over the course of the development of the industry, the Australian Wine and Brandy Corporation (AWBC) was formed in 1980 to act as the government's statutory authority on wine. A further body was also formed, the Australian Wine Export Council (AWEC) as the official wine export promotional body<sup>233</sup>.

The collective actions of the industry through these two powerful bodies have allowed policy makers to consolidate the early obstacles and challenges faced by the industry. With strong bilateral trade flows increasing trade between Australia and the European Union, policy makers on both sides were encouraged to recognise the mutual benefits that could be gained from commercial cooperation. The outcome known as the agreement between the European Community and Australia on trade in wine (1994), refers to the creation of favourable conditions for the harmonious development of trade and promotion of commercial co-operation in the wine sector based on the principles of equality, mutual benefit and reciprocity<sup>234</sup>. Part of the substantial benefits realised by both sides was the clarification of geographical indications which form a strong part of the overall document.

### **5.6.2 Agreement**

The Australian EU wine agreement was implemented to regulate and promote the bilateral flows of trade in wine. With a large and growing market for wine trade between the two continents, the bilateral agreement was seen as a strong move towards greater market liberalisation and transparency, ensuring ongoing and fair market access to the EU for Australian wines. More specifically, the overall aim of the agreement was to protect the relevant intellectual properties in wine terms, thus ensuring that consumers were not given fake representations. This was the first EU wine agreement signed outside Europe, reducing the export analysis process from 8 different procedures to 3. The agreement has given Australia improved access to the European market in exchange for the eventual phasing out of European geographic terms previously used to describe Australian products, whilst continually serving as a mechanism for dialogue between the two industries<sup>235</sup>.

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<sup>232</sup> Ibid, paragraph 23.

<sup>233</sup> AWBC 'About Us' <http://www.awbc.com.au/Content.aspx?p=2> (Sourced 09/05/05).

<sup>234</sup> Southcentre (2001) 'Geographical Indications.'

The bilateral wine treaty between Australia and the EU was seen as a strong foundation to motivating trade and removing trade barriers. In the words of Pascal Lamy, the EU Trade Commissioner from 1999, "We always use bilateral free trade agreements to move things beyond WTO standards. By definition, a bilateral trade agreement is 'WTO plus'. Whether it is about investment, intellectual property rights, tariff structure, or trade instrument, in each bilateral trade agreement we have the 'WTO plus' provision."<sup>236</sup>

In this case, the agreement has covered a variety of specific practises and processes. The first section of the document provides a list of the oenological practises, processes and composition requirements accepted. The second section sets out to establish reciprocal protection of wine names and related provisions on description and presentation, labelling and packging of wines<sup>237</sup>.

Through this agreement both parties achieved concessions. Most notably, the agreement enabled Australian wine producers to use a range of oenological practises which were otherwise prohibited in Europe. Moreover, Australian and European geographical indicators were reciprocally protected, so called traditional expressions were clarified and export certification arrangements were streamlined<sup>238</sup>. Whilst it is not easy to quantitatively determine the impact that the bilateral treaty has brought to the Australian wine industry, it can be ascertained that by simplifying and reducing trade regulations, imports and exports for both sides have grown faster than they otherwise would have done<sup>239</sup>. Whilst increased effectiveness of marketing activities are also a contributing factor in the success of the Australian export industry, this bilateral treaty has established a clear and consistent fundamental underlying regulatory structure upon which all other business and marketing functions can be leveraged.

### 5.6.3. Bilateral Treaty Protection – An Example

Any interested party, whether they are located in Australia or overseas, is able to bring proceedings against any Australian wine producer if they believe that they are in contravention of the AWBC Act. In the La Provence<sup>240</sup> case, public bodies from the French region of Provence brought legal action under the AWBC Act against the husband and wife owners of a Tasmanian vineyard who were selling wine under the name 'La Provence'.<sup>241</sup> The AWBC Act allows application to the Federal Court for any injunction to restrain any conduct which is in contravention of the AWBC Act, or if parties are required to perform any acts.

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<sup>235</sup> AWBC 'Wine Law – EU Agreement' <http://www.awbc.com.au/Content.aspx?p=47> (Sourced 10/05/05).

<sup>236</sup> Lamy, Pascal. (2004), Jakarta Post, 9 September 2004.

<sup>237</sup> Council Treaty 94/184/EC of 24th January 1994, concerning the conclusion of an Agreement between the European Community and Australia on trade in Wine.

<sup>238</sup> Vaile (2004); Council Treaty 94/184/EC of 24th January 1994, Article 1.

<sup>239</sup> DG Agriculture, (2002;143).

<sup>240</sup> Comite Interprofessionnel Des Vines des Cotes de Provence and Another v Bryce and Another 35 IPR 1705 (1995), Cth, (Australian Federal Court).

<sup>241</sup> Christie, (2003) 'Trade Marks – Protected names for wine brands – which name not to choose.'

Not only is any legal action expensive to defend, but any legal publicity in this area is also negative in nature. Moreover, anyone prosecuted of any offence under the AWBC Act for intentionally selling, importing or exporting wine with a false description and presentation may be imprisoned for up to two years with the possibility of an additional fine of \$13,200<sup>242</sup>.

In this case, the focus was on whether the winegrower had knowingly used the geographical indication 'Provence' in contravention of the AWBC Act. The judge in the case held that the winegrower had not knowingly sold their wine with a false description and presentation, were not aware of the geographical indication register of the AWBC and therefore, were not aware that the term 'Provence' was a geographical indication in contravention of the AWBC Act. In practical terms this meant that the judge could not grant an injunction against the winegrower as they were not aware of their contravention, however, they would have to immediately change their labelling as they would no longer be able to rely on the defence of not knowing that 'Provence' was a registered geographical indication<sup>243</sup>.

The AWBC has produced a register of protected names based on Annex II of the 1994 Bilateral Treaty which is readily available on their website<sup>244</sup>. As a result, any intention to sell, export or import wine with a false description or presentation is prohibited and will result in prosecution. Moreover, Title II of the Treaty, articles 6 to 14 cover an extensive definition of 'description and presentation' which would include the use of an unregistered trade mark<sup>245</sup>. Whilst there are limited exceptions to geographical indication rules, such as the use of European Community protected names, 'Shiraz,' 'Lambrusco,' and 'Claret,' these are only to be used for wines originating in Australia and for sale in countries outside the territory of the European Community. The use of such names is strictly for a transitional period of time, and accordingly, winemakers and producers must take consideration of the possibility of contravening the AWBC Act at a future date.

#### **5.6.4 Bilateral Treaty Development**

Having been formed in 1994, the Australian EU bilateral wine Treaty made great progress towards increasing bilateral trade through non-discrimination and reciprocity, forming a strong foundation and means for further dialogue. Since then, both Australia and the European Commission have been negotiating towards taking the agreement to the next level. The Commission has simultaneously been working towards gaining greater protection of European traditional expressions and geographical indications, the progress of which was represented through the EC Regulation No. 1493/1999.

In light of this, the Australian wine delegation through the AWBC has been pursuing, "in good faith and in a constructive spirit," negotiations with the EU on possible ways of protecting traditional expressions

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<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> AWBC 'Register of protected names,' <http://www.awbc.com.au/RegisterNames.aspx?p=27> (17/05/05).

<sup>245</sup> Christie, (2003).

to the best interests of both parties. For Australia though, it was of concern that the EU continued to use prescriptive regulatory arrangements for all types of grape and wine production and marketing after the signing of the 1994 agreement<sup>246</sup>. The Australian government expressed its concern that the European Commission had been introducing Regulations such as EC Regulation No. 881/98 which seeks to regulate the use of certain traditional expressions before the matter and respective issues were worked through bilaterally<sup>247</sup>. The Australian Minister for Foreign Affairs made the government's position clear when addressing the Australian wine industry in 1998, stating that "...we do not believe such unilateral action is consistent with our bilateral Wine Agreement, and we have made that view empathetically clear to the EU."<sup>248</sup>

The Foreign Minister also expressed his opinion on moving forward, embracing the bilateral Wine agreement in conjunction with the other World Trade Organisation multilateral agreements. He clarified that Australia wants to pursue agreements in the interests of Australia whilst not falling foul to broader WTO rules which include agreements such as the WTO Agreement on Technical Barriers to Trade, the TRIPs Agreement on Trade-Related Aspects of Intellectual Property Rights and the SPS, Agreement on the Application of Sanitary and Phytosanitary Measures<sup>249</sup>.

The Commission's position in bilateral negotiations has been made difficult by their insistence on maintaining the legal framework foreseen in the 1994 Agreement where it is implied that full and exclusive protection will be provided to traditional expressions and geographical indications<sup>250</sup>. Moreover, the Commission also sought to gain assurances regarding its selective agreement of only certain oenological practises. In June of 1999, EU and Australian negotiators came to an "ad referendum"<sup>251</sup> agreement on these matters (known as the Perth compromise) and whilst the European Council gave a unanimously favourable opinion, Australia was not in a position to accept the agreement<sup>252</sup>.

Both the Australian Government and European Commission recognise that several rounds of unsuccessful negotiations have taken place but they both positively note that as a result of a breakthrough in November, 2002, progress is continuing. The European Union is especially optimistic on the negotiation of outstanding issues, stating that constructive discussions have led to strong progress on issues such as oenological practises, co-operation, arbitration, the use of geographical indications and traditional expressions, and the removal of the "Origin" clause in the Mutual Recognition Agreement<sup>253</sup>. These sentiments were echoed by Steve Guy, the compliance manager for

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<sup>246</sup> Downer, (1998).

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> 'European Union – 2004, Review of Australia-EU Agenda for Cooperation'

[http://www.dfat.gov.au/geo/european\\_union/review\\_04.html](http://www.dfat.gov.au/geo/european_union/review_04.html)

<sup>251</sup> An agreement reached 'ad referendum' means an agreement reached by negotiators at the table pending the subsequent concurrence of their governments.

<sup>252</sup> Guy, Steve (2005).

<sup>253</sup> 'Agreements under negotiation' Europa website:

[http://europa.eu.int/comm/trade/issues/bilateral/countries/australia/index\\_en.htm](http://europa.eu.int/comm/trade/issues/bilateral/countries/australia/index_en.htm) (9/05/05).

the AWBC who expressed his excitement towards the completion of the new Bilateral Treaty which he anticipates will be finalised towards the end of the year 2005<sup>254</sup>.

### **5.6.5 Practical Applications of the Bilateral Treaty**

As outlined in the Australia European Union Bilateral Wine Treaty, and EC Regulations, wine labels can be grouped into one of four categories; Wines described by a geographical indication, wines not described by a geographical indication, sparkling wine and fortified wine. Dependent upon which category the wine falls into will determine the exact labelling requirement. This may mean either stating the geographical indication or not, the vintage or the variety, as well as other details related to the particular wine.

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<sup>254</sup> Guy, Steve. (2005).

## 6. State Trading Enterprises

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*Chapter 6 provides an insight into different market arrangements throughout the European Union. Whilst these arrangements are currently legally acceptable, they constitute a somewhat different framework for the retail sales of alcoholic beverages, (and hence could possibly be considered a market obstacle).*

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The Nordic countries with the exception of Denmark, have since the early 20<sup>th</sup> century, had state monopolies concerned with the handling and retail sales of alcoholic beverages – wine, strong beer and spirits. Regulation in this area was brought about in response to widespread alcohol abuse that was causing widespread health and social problems<sup>255</sup>. There are two key overriding areas of law which relate to a State company specially constituted for the purposes of retailing wine, strong beer and spirits. These are Treaty articles and the GATT Agreement.

Regarding the GATT agreement, Article XVII is the principal article dealing with state trading enterprises and their operations. The article sets out rules stating that such enterprises when making purchases or sales which involve either imports or exports – must act in accordance with the general principles of non-discrimination, and that commercial considerations are to be the only guide regarding such import or export decisions. Furthermore, member countries of the WTO who have state trading enterprises must submit annual notifications to the WTO for their state trading enterprises. The WTO describes a state trading enterprise as the following: "Governmental and nongovernmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."<sup>256</sup>"

The standard of conduct is explicitly set out in paragraph 1(b) of Article XVII, "... such enterprises shall... make any such purchases or sales solely in accordance with commercial considerations including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford... other contracting parties adequate opportunity... to compete for participation in such purchases or sales."<sup>257</sup>"

### 6.1.1 The European Union Perspective

From the European Union perspective, there are a number of EC Treaty Articles which are directly applicable to public undertakings. Whilst the term undertaking is used in Article 86 it can be further extrapolated into the definition as follows: "Any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial

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<sup>255</sup> Eriksson, R. (1999;40).

<sup>256</sup> McCorriston and MacLaren (2002).

<sup>257</sup> GATT Agreement, (1994) Article XVII

participation therein or the rules which govern it.<sup>258</sup> Whilst a public undertaking is not necessarily a monopoly, Systembolaget, the Swedish alcohol monopoly, is a perfect legal monopoly as it has 100% control of the market and there are no similar or close legal products to which buyers can turn. Under Article 86 (ex Article 90), undertakings “..are subject to the rules contained in the Treaty, in particular to the rules on competition.”<sup>259</sup> Article 28 (ex Article 30), is the principal provision within the Treaty designed to eliminate national barriers to the free movement of goods, clearly prohibiting any measures that restrict the amount of goods that may be imported from another Member State. If a measure is prohibited under Article 28, then there may be a possibility that it will be justified under Article 30 (ex Article 36). This article allows an exception for measures which may, amongst other things, threaten public health. Article 31 (ex Article 37), relates specifically to State monopolies of a commercial character with a purpose of preventing Member States from discriminating in favour of domestic products through national import and export agencies<sup>260</sup>.

Under WTO rules, justifications for state trading enterprises under health and safety reasons are permissible. From the perspective of the WTO, the key issue is whether the organisation is trade distorting in that it discriminates against imported alcoholic beverages or if it gives unfair advantage to certain export industries<sup>261</sup>.

The State monopoly was put into question on the 1<sup>st</sup> of January, 1995, the same day that Sweden became a full member of the European Community (EC), which in the same year as a result of the Maastricht Treaty, developed into the European Union (EU). On this day, Harry Franzén, sold wine in his grocery shop, ICA in Röstånga, Sweden. He was subsequently prosecuted by the public prosecutor under the charge of ‘unlawful sale of alcoholic beverages’ for having sold alcohol in violation with the Law on Alcohol (SFS 1994:1738)<sup>262</sup>.

### 6.1.2 The ‘Franzen’ Case

In the case in question, Franzen<sup>263</sup>, the Swedish Government together with the French, Finnish and Norwegian Governments as well as the Commission clarified that Article 37 of the Treaty does not require the abolition of monopolies but merely requires that an adjustment is made so that they do not discriminate. This opinion concurs with the WTO framework. Then the Court provided an analysis of the way in which Systembolaget conducts business<sup>264</sup>. Systembolaget maintains products only if their sales exceed a certain volume or gain a market share, basing its selection on qualitative and commercial criteria. Moreover, traders may have their products marketed on a trial basis, are entitled

<sup>258</sup> Article of Commission Directive 80/723/EEC of 25<sup>th</sup> June, 1980 on ‘Transparency of financial relations between Member States and public undertakings.’

<sup>259</sup> Article 86, EC Treaty.

<sup>260</sup> Blum and Logue (1998:121).

<sup>261</sup> Foster and Spencer (2002:62).

<sup>262</sup> Blomberg, J. (1999:35)

<sup>263</sup> Case 189/95; At the time of the case, old Article numbers were in use. New Treaty Article numbers used here reflect changes brought about by the 1997 Amsterdam Treaty. The EEC Treaty became the EC Treaty on the 1<sup>st</sup> of November, 1993.

to be told reasons for decisions taken by the monopoly, and can also challenge any decisions made. As a result of these measures, the Court found that Systembolaget did not appear to be either discriminatory or apt to putting imported products at a disadvantage<sup>265</sup>.

Whilst the Court found that the Swedish retail monopoly did not favour the sale of alcoholic beverages from Sweden over other Member States, it did agree that the network was still imperfect<sup>266</sup>. Despite this, the Court still felt that notwithstanding the limited number of ‘shops,’ that the number of sales outlets were not limited to the point where they may compromise consumers’ procurement of supplies of domestic or imported alcoholic beverages<sup>267</sup>.

Regarding possibilities for foreign producers or importers to make available their products, the Court found that the monopoly rules do not prohibit such parties from promoting their products directly to the monopoly. The only restriction being that suppliers may not directly promote their products to managers of the monopoly’s ‘shops’ as this prohibition is in place by the Swedish Competition Authority (Konkurrensverket) to ensure that there is strictly equal conditions for the promotion of products.

Clearly the new legal order of international law in Europe where Member States have limited their sovereign rights is somewhat limited when it comes to one of the fundamental pillars of the Treaty, that being the free movement of goods. After the Franzén case, one may wonder to what extent Member States have limited their sovereign rights as the free movement of goods in this case is threatened by national measures granting monopoly rights to State owned undertakings. The Franzén case has resulted in an affirmation of Article 31 as the exclusive governor of these State monopolies’ existence and operation, a situation which would not have happened should the Court have examined Systembolaget under Article 28<sup>268</sup>. Without a thorough explanation of the Court’s judgement it can be inferred that as a consequence, by restricting the judgement to an interpretation of Article 31, trade has suffered.

Nevertheless, Systembolaget continues to remain under the supervision of the Swedish Competition Authority which twice yearly reports to the Commission. As a result, should there be any discrimination, Systembolaget will face either adjustment or abolishment. Furthermore, should Systembolaget affect trade between Member States by imposing unfair practises or choosing suppliers on discretionary grounds and thus abuse its dominant position, then Articles 82 and 86 may be possibly applicable. Whilst this description has depicted Sweden in a restrictive light, it should also be noted that the system today is far more liberal than it was prior to Sweden’s membership of the EU in 1995<sup>269</sup>. Nowadays, the off-premise retail alcohol monopoly is the only distant reminder of a once comprehensive alcohol monopoly system. With a far more customer-orientated market approach, the

<sup>264</sup> Case 189/95, paragraph 49 of the judgement.

<sup>265</sup> Case 189/95, paragraph 51 and 52 of the judgement.

<sup>266</sup> Case 189/95, paragraph 57 of judgement.

<sup>267</sup> Case 189/95, paragraph 54 of judgement.

<sup>268</sup> Blomberg (1999;68).

<sup>269</sup> Österberg and Karlsson, (2003).

Swedish alcohol market is increasingly attracting private alcohol producers, importers and wholesalers, motivated by profit interests who will without doubt, continue to motivate further liberalisation in future.

### 6.1.3 Business Implications

As a result of the monopoly on retail sales there are a variety of both advantages and disadvantages for trading companies importing alcoholic beverages. Systembolaget purchases its wine through a tender process, selecting its products on the basis of their quality, lack of adverse effects on human health, consumer demand and business or ethical considerations<sup>270</sup>. A trading company which may be a potential supplier must first and foremost have an import license and a form of company which can either be a sole proprietor or private company. All importers must also have a registered or bonded warehouse. Systembolaget stipulates to their list of registered wholesalers their wine requirement needs, for example: an Australian Shiraz for sale within a particular price band and importers/wholesalers are at liberty to make a tender application. Thus, from a business perspective, whilst the potential number of orders may be less than in a completely open and unregulated market, a successful order achieved through Systembolaget will generally result in a far greater quantity of cases being sold through each single order<sup>271</sup>. This is a direct result of the breadth of Systembolaget which covers 420 retail stores and 590 local agencies<sup>272</sup>.

Alcoholic beverage importers and wholesalers are also allowed, by law to market their products in Sweden, particularly wines to licensed restaurants and bars. The possibility of success is far greater here where wholesalers do not have to meet the large volume limits appointed by Systembolaget.

Whilst this example demonstrates the most restrictive of market environments for the importation and marketing of alcoholic beverages, trade within the common Internal Market on an international scale for alcoholic beverages has greatly increased. People are travelling much more than ever before, buying large amounts of 'rations' in other Member States before returning home to Sweden. Whilst this does not reflect the easing up of any Swedish market restrictions for importers/wholesalers, it reflects a natural change towards the gradual process of removing immortal monopolies whose excessive regulatory regimes will over time be reduced by market forces.

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<sup>270</sup> Blomberg (1999;64).

<sup>271</sup> King, Justin. Manager and Owner, Australia Wine Direct, (Interview 22<sup>nd</sup> April, 2005).

<sup>272</sup> Systembolaget website: <http://www.systembolaget.se/hem/> (14/05/05).

## 7. Conclusions

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*The harmonisation of European legislation regarding the wine industry has brought about a shift in external obstacles from the Member State level to the EU level. The conclusion of this paper provides a brief analysis of the development of business and legal obstacles that non-EU companies face when exporting goods to Europe.*

*Building on the current barriers to increasing trade, suggestions are made for future research opportunities.*

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### 7.1 Summary

This paper undertook the purpose to carry out a study on the barriers that non-EU companies face when entering the EU's single internal market. To gain clarity on the level of explicit harmonisation and the different obstacles and barriers faced by non-EU companies, a third country industry was chosen; the Australian wine industry.

As dynamic forces have changed the dynamics behind global wine supply and demand, the European Union has seen the internal market for wine transform from an un-harmonised into a completely harmonised market. This greatly reduced member state specific obstacles as the high procedural costs which were associated with complying with arduous and complicated national specifications were largely removed. It can therefore be acknowledged that the harmonisation had a positive effect on the removal of member state specific barriers. The Australian wine industry has also transformed, developing a multidomestic pattern of international competition through the use of clustering and downstream buyer-led activities. Through these activities, the industry has developed a far stronger negotiating position from which it seeks to pursue its intrinsic interests<sup>273</sup>.

Through EU-Australia negotiation, predominantly 'superficial' administrative barriers to trade have been removed. As knowledge, sophistication and subsequent negotiating power of both parties has increased, the larger and more complex trade regulations have become a greater cause for concern. Post-harmonisation, there has been a rising use of technical regulations as the EU now uses these in bilateral (as well as unilateral, regional and global sense) trade contexts as instruments of commercial policy<sup>274</sup>.

One of the current areas of disagreement which has resulted in obstacles for Australian wine exporters is the concept of 'geographical indications.' As a form of intellectual property, both Australia and the European Union have certified schemes for geographical indications which are currently recognised under both the WTO TRIPPS agreement and the Australia EU Bilateral wine Treaty. The European Union prohibits wine imports that use its prescribed set of 'traditional expressions' and reserves the right under the Australian AWBC to prohibit the sales, imports or exports within Australia

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<sup>273</sup> For example, Australian exports of wine to the EU have become standardised, reducing 8 separate applications to 3 as a result of the 1994 Bilateral wine Treaty.

of wine using European ‘traditional expressions.’ Many Australian producers are becoming concerned that this level of regulation has stifled the ability of wine producers to respond to changing market demands including the ability to compete in international markets<sup>275</sup>. Whilst the European Commission claims that such protection is necessary to ensure that consumers are not deceived about the quality of wine and that such protection promotes the efficient operation of the market, other countries challenge this belief on the grounds that such generic terms have no material link with any particular geographical indication or specific product<sup>276</sup>.

Further obstacles exist regarding the new rules that the EU is imposing for the labelling of wine. Whilst it can be acknowledged that some aspects of the new labelling requirements satisfy a responsible response to the increasing importance of health consciousness, there will definitely be greater costs for the Australian producer. Not only will production costs increase, but the wine may also be stigmatised in the minds of consumers. Even though there may not be any scientific evidence suggesting that the product is less safe than wine that does not require labelling, consumers may be deterred from purchasing wine which is labelled ‘Wine produced by non-traditional methods.<sup>277</sup> This stigmatisation of ‘New World’ wines may well begin to pose a increasing barrier in future if innovative wine production methods are seen by uninformed consumers as being negative.

There also appears to be a contradiction in the way that the European Commission seeks the protection of traditional expressions for labelling purposes. On one hand, the Commission seeks to restrict the use of everyday terms, ‘traditional expressions’ which consumers can understand and thus, are helpful in assisting them in making educated decisions. On the other hand, the Commission says that consumers need information about where and how wine is produced so they can make educated decisions. This seems to be a contradiction which begs one to question if there is an alternative motive at stake. In either case, the continued use and protection of such ‘traditional expressions’, will continue to be seen as a barrier to Australian exporters.

Despite this, bilateral wine trade between the two continents continues to grow in the face of continued disagreements over non-tariff trade barriers. Such differences of opinion will nevertheless continue until forms of mutual recognition agreements are signed covering all aspects of trade<sup>278</sup>.

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<sup>274</sup> Maskus and Wilson, (2000).

<sup>275</sup> Foster and Spencer, (2000;56).

<sup>276</sup> DFAT, (2002).

<sup>277</sup> Foster and Spencer, (2002;59).

<sup>278</sup> Guy, Steve (Interview).

## 7.2 The Policy Context for Future Research

The WTO and European Commission continue to develop frameworks for greater trade liberalisation through instruments such as Mutual Recognition Agreements (MRAs). Whilst these agreements build advocacy for greater trade liberalisation, they do nothing to halt the increase in barriers which discriminate against foreign products such as mandatory standards, certification rules or testing<sup>279</sup>.

The key determining factor here is that the EU, through a more demanding unified trade policy is bringing about areas where government control is exercised through regulations on the import of a product (in this case wine), which then affects the exporting firm's ability to produce to particular technical specifications or meet conformity assessment requirements.

Other areas where similar regulations are being imposed is through product labelling. There is clearly a distinct lack of empirical research being conducted on these only currently evolving, trade regulations, and as such, research is justified. This could be in the form of a comparison between the costs that diverging government regulation brings for goods and agricultural products that cross national boundaries.

In addition, the principles and underlying reasoning behind the introduction of such regulations needs to be carefully contrasted against internationally accepted principles for non discriminating and least trade distorting benchmarks. These are both areas which would be useful for the collection of data and empirical information.

There also appears to be minimal literature and research conducted on the topic of standards and technical barriers to trade. Whilst the World Bank Group has a research program in place dealing with the development of standards and trade, research studies conducted thus far largely focus on developing nations<sup>280</sup>. The Directorate General Trade of the European Commission has also conducted some largely non-conclusive research documents on the role of trading standards however there appears to be little industry specific publicly available research<sup>281</sup>. Further progress in this area will no doubt provide a strong basis for more transparent disclosure of standard policy, and hence, greater mutual recognition for all parties concerned.

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<sup>279</sup> Maskus and Wilson, (2000;14).

<sup>280</sup> <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20106761~menuPK:222955~pagePK:148956~piPK:216618~theSitePK:239071,00.html> (19/05/05).

<sup>281</sup> See Directorate General Trade of the European Commission:  
[http://europa.eu.int/comm/trade/index\\_en.htm](http://europa.eu.int/comm/trade/index_en.htm) (19/05/05).

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EC Regulation No. 1493/1999. 17<sup>th</sup> May 1999 on the common organisation of the market in wine;

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# Appendices

## A1. European Community Treaty Articles

(see chapter 5.2.1 - 5.2.3)

### **Articles dealing with restrictions on the free movement of goods:**

*Article 25 of the EC Treaty stipulates “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between member states. This prohibition shall also apply to customs duties of a fiscal nature.”*

*Article 28 of the EC Treaty stipulates “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”*

### **Article dealing specifically with products originating from third countries:**

*Part 2 of Article 23 of the EC Treaty stipulates that “The provisions of Article 25 and of Chapter 2 of this title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.”*

### **Articles dealing with a common customs tariff:**

*Article 26 of the EC Treaty stipulates “Common Customs Tariff duties shall be fixed by the Council acting by a qualified majority on a proposal from the Commission.”*

*Article 27 of the EC Treaty stipulates “In carrying out the tasks entrusted to it under this chapter the Commission shall be guided by:*

- (a) *the need to promote trade between Member States and third countries;*
- (b) *developments in conditions of competition within the Community in so far as they lead to an improvement in the competitive capacity of undertakings;*
- (c) *the requirements of the Community as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;*

*the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Community.”*

### **Article dealing with the justification of discriminatory barriers:**

*Article 30 of the EC Treaty stipulates “The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member State.”*

## A2. Australian National Wine Industry Bodies

Source: <http://www.winetitles.com.au/awol/overview/industrybodies.asp>

There are two statutory bodies regulating the industry, the Australian Wine and Brandy Corporation and the Grape and Wine Research and Development Corporation. The Winemakers' Federation of Australia is the industry's own representative body. Funding for the industry comes from both industry and government sources through levies and matching funding, plus ad hoc grants.

ASVO -- Australian Society of Viticulture and Oenology

Established: 1980

Focus: dissemination of research or technical information

Funding: by membership

Serves the interests of practising winemakers and viticulturists by encouraging the exchange of technical information.

ASWE -- Australian Society of Wine Education

Established: 1990

Focus: wine educator training

Funding: by membership

Dissemination of information to educators.

AWRI -- The Australian Wine Research Institute

Established: 1955

Focus: applied research, extension and teaching

Funding: grants, fees for services

Carries out applied research in oenology; provides extension services to winemakers; teaches oenology.

AWBC -- Australian Wine and Brandy Corporation

Established: 1980, statutory body

Focus: wine promotion, information and regulatory administration

Funding: by statutory levy and fee for service

Enhances the operating environment for the benefit of the Australian wine sector by providing the leading role in quality and integrity (export licenses, export inspections and approvals, label integrity programs, geographical indications) knowledge development (analysis, Wine Industry Information Centre, data warehouse) and market development (AWEC, cooperative export promotion, market access).

AWEC -- Australian Wine Export Council

Established: 1992

Focus: Australian wine export development

Funding: AWBC, industry contribution

The section of the AWBC responsible for export market development, cooperative promotions; offices in Adelaide, London, Frankfurt, New York, Tokyo, Toronto and The Netherlands.

CRCV -- Cooperative Research Centre for Viticulture

Established: 1992

Focus: coordination of research activities

Funding: by member organisations

Provides Australian grapegrowers and processors with readily adoptable, improved technologies based upon cooperative multi-disciplinary research and development, and effectively promotes those technologies.

GWRDC -- Grape and Wine Research and Development Corporation

Established: 1991, statutory body

Focus: Research and Development Funding

Funding: by statutory levy and matching government funds  
Research project assessment and disbursement of statutory R&D funds; reports on activities to Federal Parliament and industry.

WFA -- Winemakers' Federation of Australia

Established: 1990

Focus: Political industry issues

Funding: members pay voluntary levies based upon domestic sales

Represents the interests of Australia's winemakers; develops policies and programs to increase the net financial returns to Australia's winemakers.

WGCA -- Winegrape Growers' Council of Australia

Established: 1932

Focus: represents interests of independent winegrape growers

Funding: subscriptions from state and regional organisations

Policy development, strategic planning and advocacy; collects, collates, interprets and disseminates information to winegrape growers.

WIIC -- Wine Industry Information Centre

Established: 1998

Focus: First point of contact for wine industry enquiries

Funding: AWBC & GWRDC

Information collection, organisation and dissemination to the wine industry, media, government and the wider community; referral service to other industry organisations.

WINETAC -- Wine Industry National Education and Training Council Incorporated

Established: 1995

Focus: ensures that the skill requirements of the future are met through national coordination, integration and standards maintenance for vocational education and training

Funding: GWRDC and Commonwealth Government

## **Research Organisations**

Australian Society of Viticulture and Oenology. A non-political organisation that serves the interests of practising winemakers and viticulturists by encouraging the exchange of technical information.

The Australian Wine Research Institute. The research arm of the Australian wine industry.

Grape and Wine Research and Development Corporation (GWRDC) Australia's statutory body that funds research and development projects in viticulture and oenology. The GWRDC's Five-Year Research and Development Plan 1997-2002 is now online.

The Cooperative Research Centre for Viticulture focuses its research resources into the key areas where the greatest technological and economic gains can be made in Australian grape production.

University of Adelaide, Department of Horticulture, Viticulture and Oenology. Education research and consulting in viticulture and oenology as well as wine business and wine marketing. Houses the Hickinbotham Roseworthy Wine Science Laboratory and its Aroma Facility.

The Wine Marketing Research Group of the University of South Australia. Provides research and consultancy in wine marketing, including research scholarships. Also provides postgraduate education in wine marketing through the new online Masters in Wine Marketing.