



The Role Played by the US Government in Protecting Geographical Indications

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Summary. — Unlike what is usually thought, the US public institutions play a crucial role in the protection of Geographical Indications (GIs), as trademarks or as AVAs appellations of origin for wines, to guarantee that all legitimate operators have the right to use GIs. Although the US institutions and scholars have often criticized the EU sui generis GI regime, practice shows that the two systems have much more in common than what emerges superficially. Indeed, in the US several collective marks aimed at protecting indications of geographical origin are managed and funded by public bodies or agencies. Furthermore, the US practice often procedurally recalls the European regime of GI protection and, in general, the overall development of the US system shows that it is heading toward a regime that is at least very compatible with, if not similar to, the EU one. Finally, concepts such as “terroir”, that is one of the theoretical pillars of the French–European GI regime, are increasingly accepted in the US context as well. Therefore, the analysis conducted shows how the practical aspects of the management of GIs in the US contrasts with the traditional narrative according to which GI protection in the US, guaranteed by trademarks, the self-regulated system of private law, and the European administrative-based system are substantively different and irreconcilable.

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1. INTRODUCTION

The protection of Geographical Indications (GIs), which identify a good of a given quality, reputation, or other characteristic essentially attributable to its geographical origin, such as Champagne or Napa Valley wine is a highly debated issue worldwide. The opposition between the countries of the Old world led by the European Union (EU), attached to history, tradition, and governed with strong State’s involvement and the countries of the New World led by the United States, built by migrants and characterized by liberal politics, has driven most of the international attention regarding their implication for transatlantic trade negotiations (Gangjee, 2007; Hughes, 2006; Josling, 2006a, 2006b; Le Goffic, 2009; Lorvellec, 1997). At international negotiations the US has led the charge that the EU and other sui generis legal regimes for GI protection, that is legal regimes especially dedicated to GIs, are a protectionist device for national interests. A key indicia of this is the high levels of state involvement in such sui generis systems, where public bodies participate to the regulation of the definition of the GI which consist of a delimited area and authorized practices. More precisely, in sui generis legal regimes public bodies are applicants for GI protection and/or (b) state regulators extensively scrutinize the GI application (Marie-Vivien, 2010). Such opposition between the US and the UE resulted in an unfinished deal for the protection of GIs in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in 1994, later formalized in a complaint from the US against the EU regulation in front of the World Trade Organization (WTO) Dispute Settlement Body in 2002, and is currently embodied in the negotiation of the Transatlantic Trade and Investment Partnership, a comprehensive Free Trade Agreement that, among the others, deals with important issues of GI protection and food security.^T

The purpose of this article is to look beyond superficial comparisons and opposition of EU and US models of GI protec-

tion. Indeed, even if *prima facie* they seem to be based on different normative and institutional foundations, in practice they are much less distant than what it is generally claimed, at least in so far as the role played by public intervention and investment is concerned. This article will demonstrate that in the field of the protection of GIs, government bodies in the US often play a crucial role. This contrasts with the overall position that US Government asserts on the international and domestic stage. In fact, as it will be shown in detail in the next part of the article, the US institutions and scholarly literature often criticize the extent of governmental involvement – especially by the European Union– in the administration of GIs and the related expenditure of public funding.

In order to demonstrate this thesis, the article will in part 2 present the traditional position of the US Government on GI protection as well as that of the majority of US-based legal scholars. Then, the protection of geographical names in the US will be analyzed and the important structural role played by public institutions will emerge. In particular, the analysis will focus on Certification Marks in part 3 and the American Viticultural Areas (AVAs) for the protection of wines in part 4, before drawing conclusions in Part 5.

2. US RHETORIC ON GI PROTECTION AT FIRST SIGHT

Despite the different policy views, both the EU and the US, as members of the WTO, have agreed on the general definition of GIs provided by art 22(1) TRIPs²:

“Geographical Indications are, (. . .), indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

Currently, this is the key definition of GIs at international level since the TRIPs agreement sets the minimum standards

that every WTO Member State must respect.³ Then art 22.2 TRIPs provides that GIs must be protected against misleading practices or acts of unfair competition, while, art 23 establishes “absolute protection”, i.e. even without proof of confusion and/or deception, for wines and spirits only.

While the TRIPs agreement obliges all WTO Members to protect GIs, it is up to the individual countries how to implement this and different systems exist (WIPO, 2004, paras 2686ss).⁴ The EU and the US have adopted fundamentally different approaches here. The EU with the Regulations 1151/2012 for agricultural products and foodstuff⁵ and 479/2008 for wines (“Wine Regulation”),⁶ which are the latest versions of a system originated in its modern form at the beginning of the 20th century in Southern Europe (France, Italy, Spain, Portugal) and extended to Europe in 1992⁷ and 1999 respectively.⁸ It has opted for a *sui generis* registration-based system involving a significant degree of intervention by government authorities that, indeed, are the true coordinators of the proceedings. Under EU law, an application for a Protected denomination of origin (PDO) or a Protected geographical indication (PGI) is first made to the public authorities of the relevant Member State, generally the Ministry of Agriculture. It is judged by the Member State against the criteria in the Regulation and, if found to be acceptable, forwarded to the European Commission for final approval (EU Commission, online). In France, just to make an example of a EU domestic jurisdiction that has been very influential on EU Law, the procedure is heavily bureaucratic as well. The initial request is submitted to the regional office of the National Institute for Quality and Origin (INAO) which in turn submits it to national committees for further scrutiny. A review commission is established which reports back to the national committee, advising acceptance, postponement, or refusal. If accepted, an expert commission is then constituted to establish the geographical delimitation. The national committee then approves these boundaries and drafts an Administrative Decree, which is sent to the Ministry of Agriculture for approval and enactment (Gangjee, 2012, 109–110; INAO, 2009). From these two examples it clearly emerges the centrality of the public authorities and of their acts (decrees and so on) in Europe. This contrasts evidently with the US approach that is based upon trademarks and that involves, at least theoretically as it will be shown, private rights and interests, in the sense that trademarks owners are responsible for regulating the use of their trademarks. The administrative intervention of the United States Patents and Trademark Office (USPTO) does not take into consideration the characteristics of the producers or of the product but just those of the sign.⁹ A complete recount of the US trademark practice would exceed the purposes of the present article, however, a detailed analysis of the provisions regarding certification marks will be provided in Part 3 of the work.

The opposing views became evident right from the first drafts of the TRIPs’ negotiations (Correa, 2007; Gervais, 2008; Hughes, 2006). On the one hand, the European Communities (EC) proposed a comprehensive protection for GIs to apply to all agricultural products including wines and spirits. Such protection should have been achieved through specific provisions of the TRIPs Agreement. On the other hand, the US, together with Canada and Australia were opposed to a separate regime for GIs and argued that the issue could have been easily incorporated within the field of trademarks (Das in Correa, 2010, 467ss).¹⁰ This resulted in the unfinished deal with the two levels of protection. Then, in spite of the Doha Ministerial Declaration (2001), the US have opposed the extension of the standard of art 23 TRIPs beyond wines and

spirits.¹¹ More recently, the US also expressed their strong disagreement about the outcome of the negotiations for the reform of the Lisbon Agreement for the protection of AO¹² (United States Mission Geneva, 2014, online).

Finally, the dispute *EC – Trademarks and Geographical Indications*, decided on 15 March 2005, by the WTO Dispute Settlement Body, must be briefly mentioned. In fact, it shows well the divide between US and EU on the issue of GIs as well as the different positions of these actors regarding the management of the institute. In this case, the US supported a complaint filed by Australia against the first European regulation of 1992 on *sui generis* protection of geographical names for agricultural products and foodstuffs.¹³ In particular, they argued that this legislation was discriminatory and trade-restrictive as it prevented non-European producers from having access to the EU protection when their domestic GI legislation was not equivalent to the EU regulation (Charlier & Ngo, 2007; Handler, 2006; Josling, 2006a, 2006b; Marette, Clemens, & Babcock, 2008; Marie-Vivien & Thevenod-Mottet, 2007; USG Statement, 2005).¹⁴

The description above shows the traditional hostility of US institutions toward bureaucratic/registration-based systems of GI protection with high involvement of the State, both at international and domestic level. This is not surprising considering that the protection of GIs in the US descends primarily from the liberal/business-based common law approach according to which no one can claim an exclusive right over a geographical name so as to preclude others having business in the same area to inform consumers that the goods that they sell come from the same area (O’Connor, 2004, 245ss). This traditional point of view is mirrored both by the US institutions at domestic and international levels as well as by the majority of scholars. Indeed, on the one hand, the former put forward different arguments, many of them are relevant for the present work: (1) the protection afforded for GIs under art 22 implemented through certification marks is already adequate and there is no reason to extend it; (2) the extension of absolute protection would damage the investments of the producers from the “new world” and allow free riding by those from the “old world” trying to exploit the market success of the former (US TRIPs Consultations, 2002); (3) EU-style GI rules do not inform consumers better than trademarks and actually can be much less effective; (4) *sui generis* GI regimes create monopolies and are very expensive for the public administration and the taxpayers (United States, 2003; USPTO GIs, online; WTO, 2005); (5) GIs are nothing but a barrier used by the EU to restrict trade, thus damaging the interests of the US (Toomey, 2015).¹⁵ On the other hand, different authors and scholars have argued and/or noted that from a US perspective, the *sui generis* GIs are, in the final analysis, nothing but a protectionist, trade-restrictive device (Armistead, 2000, p. 318; Broude, 2005: p. 691; Hughes, 2006, 339ss; Lister, 1996, pp. 639–640; Montén, 2006, p. 340; Nieuwveld, 2007; Shalov, 2004, fn 8). In particular, the EU is directly accused of using GIs, internally, as subsidies supported by public money and, externally, as a method for creating monopolies (Beresford, 2007, 985ss).¹⁶

In addition, the official US position supports the conception that GIs are a subset of trademarks and that the two are largely equivalent from a functional perspective, despite the fact that the ontological difference between the two systems has been often pointed out (Josling, 2006a, 2006b, 14; Rangnekar, 2004, 165; Ribeiro de Almeida, 2008). However, the trademark is considered a more flexible, less intrusive from the State and business-friendly device. This is the traditional position of the United States Patents and Trademark Office

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