



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

(USPTO, online. See also Beresford, 2007, 981ss). Namely, they are both aimed at enhancing informational efficiency as to the origin of a product by granting a monopoly over the use of a sign. Therefore, it has been claimed that the existence of GI as a sui generis IPR is unjustified. Based on this reasoning, US lobbying efforts have intensified to absorb these collectively used signs within the trade mark regime, via certification or collective trade marks (Dudas, 2003: p. 349; USPTO, online; WIPO, 2002, para 33; see also Gangjee, 2012, 11–14).

This is the background that is traditionally put forward. However, this article will demonstrate that the line of demarcation between the EU and the US model is far from clear, and it cannot simply be presented as consequence of the conflict between the “New” and the “Old” world as it is sometimes done (Nieuwveld, 2007). Indeed, the following sections will show that in the US the public institutions intervene in the protection of GIs more often than is generally assumed, thus showing some similarities with the EU conception of the protection of GIs.

3. CERTIFICATION MARKS

The US, the Lanham Act, that is the US Trademark Law, at §45 (15 USC §1127) mentions four types of marks: (1) Trademarks; (2) Service Marks; (3) Certification Marks and (4) Collective Marks. “Standard” trademarks, the first type, are defined as follows under the same section:

The term “trademark” includes any word, name, symbol, or device, or any combination thereof—

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

However, this category does not readily lend themselves to protect GIs. Indeed, the USPTO cites only one example of a trademark protecting a GI—“Tillamook”, which designates a cheese made by some companies in and around the town of that name in Oregon.¹⁷ But rather than being a trademark used by several producers, “Tillamook” is in fact more like a collective mark or certification mark, for only members of the co-operative are allowed to use it, and this subject to certain standards.¹⁸ As this example shows, regular trademarks are not a particularly suitable means for protecting geographical origin. If an individual trademark’s licensing program is being used to indirectly perform certification functions, the benchmarks or standards need to be made publicly visible as well as open to all who satisfy the production conditions.

Indeed, American protagonists have themselves recognized the need to prevent “standard” trademarks appropriating Geographical Indications. Ironically, Starbucks vigorously opposed attempts by the Ethiopian Coffee Federation in 2007 to register “Sidamo”, “Harrar” and “Yirgacheffe” as “standard” trademarks, arguing that a certification mark guaranteeing the typical local characteristics of the coffee was the only way to provide protection for these terms (Rotstein & Christie, 2010). The fact that awarding a trademark would enable the Ethiopian Federation to refuse Starbucks a license, and that it was unlikely a certification mark be awarded given the informal nature of the coffee production and distribution network in Ethiopia, both no doubt had something to do with it.

We therefore need to consider the category of certification marks, which have been used to protect indications of regional

origin. Even if these marks are regulated in a different way in different jurisdictions, some common traits can be identified. As a general rule, certification marks are not held by a collective body such as an association of producers, but by a certification authority that grants the use of the mark to applicants that demonstrate compliance with its specification. Such authority is the proprietor of the mark. It may be a local council or an association which is not engaged in the production or trade of the concerned products. It must ensure that the goods bearing the mark possess the certified qualities. This is the certificatory function that assures the origin and/or the manufacture of the goods to consumers (WIPO, 2004, para 2.699; Belson, 2002; Dawson, 1988).

In US law, the Lanham Act §45 (15 USC §1127) defines the certification mark as follows:

The term “certification mark” means any word, name, symbol, or device, or any combination thereof—

- (1) used by a person other than its owner, or
- (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

The analysis of how this category of marks works in US law reveals that it is strongly influenced by government involvement and investment. A study of the USPTO trademark register demonstrates that in many cases American State and/or other public agencies invest in the registration and ownership of these marks certifying specific geographical origin, which is interesting to compare with EU GI law.

Starting from the subjects allowed to apply to the protection of a geographical name, EU Regulation 1151/2012 requires that a GI must be registered by an “applicant group” (art 8) and, in particular, “(…) groups who work with the products with the name to be registered” (art 49).¹⁹ Instead, US law, specifically 15 USC §1054, stipulates that the applicant for the registration of a certification mark may be “a person, a nation, a state, a town or an entity of this type”. As anticipated above, a certification mark protecting a geographic term used to indicate regional origin cannot be owned by any one producer or even by a group of individual producers who wish to use it (McCarthy, 2015, para 4.15ss).

Despite being a private tool, certification marks are widely used in the field of GI by public authorities and agencies. The policy and economic rationale for this are described by the US doctrine (Holtzman, 1991, pp. 184–185) that explicitly admits protectionist intents:

Typically, a governmental body or agency owns and controls the use of the mark to certify regional origin. Often, geographic terms indicate a degree of superior quality of the goods originating from those areas. There is a need to distinguish such products from the same type of products grown in other geographic areas for two reasons: (1) to protect the producer in that region from outsiders using the designation, and (2) to protect the public from being misled as to the geographic source of the product.²⁰

Therefore, a governmental entity is clearly considered to be in the best position to establish and regulate standards, to control the use of the mark and to ensure that no discriminatory activity will occur. Of course, the Lanham Act does not prohibit an individual or private organization from owning a certification mark to indicate geographic origin provided they demonstrate the ability to control the use of the mark, do not use the mark themselves and estab-

lished that they do not engage in discriminatory practices. However, practical guides such as the *Trademark Manual of Examining Procedure of the USPTO*, at para 1306.02(b) of headed “Authority to Control a Geographical Term”, confirms that:

When a certification mark consists solely, or essentially, of a geographical term, the examining attorney should inquire as to the authority of the applicant to control the use of the term, if the authority is not obvious. *Normally the entity that has authority to exercise control over the use of a geographical term as a certification mark is a governmental body or a body operating with governmental authorization.*

When a geographical term is used as a certification mark, two elements are of basic concern: first, preserving the freedom of all persons in the region to use the term and; second, preventing abuses or illegal uses of the mark that would be detrimental to all those entitled to use the mark. *Normally a private individual is not in the best position to fulfill these objectives. The government of a region would be the logical authority to control the use of the name of the region. The government, either directly or through a body to which it has given authority, would have power to preserve the right of all persons and to prevent abuse or illegal use of the mark.*²¹

And paragraph §1306.02(c) of the Manual, headed “A Government Entity as Applicant for a Geographical Certification Mark”, goes on to state that:

The applicant may be the government itself (such as the government of the United States, a state, or a city), one of the departments of a government, or a body operating with governmental authorization that is not formally a part of the government. There may be an interrelationship between bodies in more than one of these categories and the decision as to which is the appropriate body to apply depends on which body actually conducts the certification program or is most directly associated with it.

These recommendations differ from the US official position that its version of GI protection is a self-policing system that does not draw on public resources and taxpayers’ money. Indeed, public intervention in GI protection is not only encouraged but even recommended because it is necessary in order to achieve public policy goals such as the protection of high quality products that are produced in specific areas of the country and not elsewhere. As a consequence, US GIs are often held by public entities.

In the context of the present article is not possible to proceed to a comprehensive analysis of US publicly owned certification marks. However, the following list will present 29 examples of certification marks owned by various public authorities, agencies, and state departments referring to 18 different States, plus one, “USA Onions”, controlled directly by the Federal Government. It demonstrates that the US public institutions often invest in the protection of GIs (in the form of both simple indications of source as well as those products which have a qualitative or reputation-based link to their region of origin). The certification mark, despite being a private tool and not a hybrid public-private one like *sui generis* GIs,²² becomes a device of public intervention.

(1) “Idaho” (Registration No. 2914308) for potato grown in Idaho and compliant with other specific requirements, filed in 2004 by the State of Idaho Potato Commission State Agency.

(2) “Fresh from the Florida Sunshine Tree” (Registration No. 1559414) for fresh Florida-grown citrus fruits, filed in 1987 by the Florida Department of Citrus State Agency.

(3) “Vidalia Onions” (Registration No. 1709019) for yellow Granex type onions grown by authorized growers within the Vidalia onion production area in Georgia as

defined in the Georgia Vidalia onion act of 1986, filed in 1990 by the Georgia Department of Agriculture.

(4) “Pride of New York” (Serial No. 76580496) filed in 2004 for agricultural products by the New York State Department of Agriculture and Markets.

(5) “A Taste of Iowa” (Serial No. 75645360) for various agricultural products (now canceled) filed in 1999 by the Iowa Department of Economic Development.

(6) “Wisconsin Cheese” (Serial No. 76536404) filed in 2003 for dairy products, namely cheese by the Wisconsin Milk Marketing Board.

(7) “Certified Maine Lobster” filed in 2006 by the Maine Lobster Promotion Council public instrumentality (Serial No. 78835322).

(8) “Jersey Fresh from the Garden State” (Serial No. 78444238) and “Jersey Fresh” (Serial No. 78430085) both for fruits and vegetables, both filed in 2004 by New Jersey Department of Agriculture, State Agency of New Jersey.

(9) “Seal of Quality Vermont Department of Agriculture” (Serial No. 73565826) for milk, dairy products, apples, honey, potatoes and other agricultural products, filed in 1987 by Vermont Department of Agriculture.

(10) “Alaska Seafood Certified Responsible Fisheries” (Serial No. 86557774) certifies that the identified goods were made from seafood that originated from fisheries managed by the State of Alaska, filed in 2015 by Alaska Seafood Marketing Institute, State Agency of Alaska.

(11) “Made in Alaska” (Serial No. 77576527) for various foodstuff, crafts, clothing and apparel and other products produced in Alaska, filed in 2009 by the State of Alaska Department of Commerce.

(12) “Alaska Grown” (Serial No. 77525283) for various agricultural commodities, plants and flowers grown in Alaska, filed in 2008 by the Alaska Department of Natural Resources.

(13) “USA Onions” (Serial No. 85524786) for US fresh onions, filed in 2012 by Idaho-Eastern Oregon Onion Committee established by the US Secretary of Agriculture.

(14) “Texas Department of Agriculture Organically Produced” (Serial No. 76092644) for food or fiber products produced organically within the territory of Texas, filed in 2000 by Texas Department of Agriculture.

(15) “Arizona Grown” (Serial No. 76451693) for food and agricultural products filed in 2004 by the Arizona Department of Agriculture.

(16) “Certified Authentic Louisiana Wild Seafood” (Serial No. 85516899) for seafood that was landed, processed, and packaged in the State of Louisiana filed in 2012 by Louisiana Department of Wildlife and Fisheries.

(17) “Proud Grown in Ohio” (Serial No. 77394637) for agricultural products, foodstuff, fruit, tobacco, waters and other products at least 50% grown, raised or processed in the state of Ohio filed in 2008 by the Ohio Department of Agriculture.

(18) All types of coffee grown in the Hawaii registered by the Department of Agriculture of the State of Hawaii in 1997: “Kona” (Serial No. 2322867), “Oahu” (Serial No. 2380257), “Molokai” (Serial No. 2380256), “Maui” (Serial No. 2344394), “Kauai” (Serial No. 2337127) and “Hawaii” (Serial No. 2365585).

(19) “Certified SC Grown” (Serial No. 77799326) for agricultural product grown or raised in South Carolina, filed in 2009 by the South Carolina Department of Agriculture.

(20) “South Dakota Certified Enrolled Cattle” (Serial No. 78593129) for cattle born in the state of South Dakota, filed in 2005 by the State of South Dakota.

(21) “Made in Montana” (Serial No. 85215633) and “Grown in Montana USA” (Serial No. 85215763) for various products including food, forestry products, agricultural products and other that are made or substantially transformed in Montana, both filed in 2011 by Montana Department of Commerce.

(22) “Oregon Certified Sustainable Wine” (Serial No. 77976748) for wine made using sustainable methods in the state of Oregon, filed in 2008 by the State of Oregon.

Hence, the situation of many US protected GIs does not differ from that of foreign GIs registered in the US, such as the EU GIs which, when registered as certification marks in the US, are often filed by public authorities. The “Roquefort” mark, for instance, (Serial No. 571798) was registered in 1953 by the Community of Roquefort-sur-Soulzon²³ or the “Fungo di Borgotaro”²⁴ (Serial No. 79084246) registered in 2011 by the Italian Ministry of Agriculture.

Therefore, the sample of certification marks above shows that the demarcation line between the private based “self-policing” US system and the more bureaucratic and publicly funded *sui generis* EU one is not so clear as the international rhetoric may suggest. Indeed, the analysis demonstrates that a meaningful number of American States do intervene directly in the protection of GIs. The next Section will complete the picture by showing that the AVA system for the protection of wines has many points in common with the traditional European rules.

4. AMERICAN VITICULTURAL AREAS

American Viticultural Areas (AVAs) are a type of US Appellation of Origin (AO) for the protection of wine. According to the “Manual for Petitioners” published by the Alcohol and Tobacco Tax and Trade Bureau (TTB) in 2012: “The use of an AVA name on a label allows vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in a certain area to its geographical origin”. The concept of the AO is also at the heart of the most “European” and publicly regulated system of protection of geographical names, introduced for the first time in France (Gangjee, 201, chap. 32; Olszak, 2001). It has directly influenced the European concept of “Designations of Origin” (Art 34 Wine Regulation).²⁵ Indeed, the abovementioned definition is not so different from the French one of *Appellation d’Origine Contrôlée*, according to which they are “The name of a country, region or locality serving to designate a product originating therein the quality and characteristics of which are due to the geographical environment, including both natural and human factors.”²⁶

Starting from these preliminary observations, this section will demonstrate that the AO-type of protection adopted in the US is extensively regulated by public authorities. In this sense, it recalls to some extent the EU model, despite the fact that, from time to time, the latter is harshly criticized by the relevant American literature (see for instance Chen, 1996). In particular it will be shown that (a) AVAs are officially created by administrative decree. (b) Initially they only indicated the origin of wines, but have subsequently been used by public entities as a way of guaranteeing the typical geophysical characteristics of a place of origin (what is referred to as a *terroir* in French²⁷), and this has had an impact on local development, agricultural development and on the achievement of other goals of public interest.

(a) Official administrative recognition of the AVAs

Under US law, GIs for wines are governed by a set of regulations decreed by an independent administrative authority (created by the Federal Alcohol Administration Act in 1935)²⁸ called the Bureau of Alcohol, Tobacco, and Firearms (BATF), before being renamed the Alcohol and Tobacco Tax and Trade Bureau (TTB) in 2003. As early as 1938 the BATF created the AO as a distinct instrument differing from other types of mark and used specifically to designate wines (Titolo, 2009, 185ss).²⁹

The definition of an appellation of origin for American wines is as follows:

An American appellation of origin is: (i) The United States; (ii) a State; (iii) two or no more than three States which are all contiguous; (iv) a county (which must be identified with the word “county”, in the same size of type, and in letters as conspicuous as the name of the county); (v) two or no more than three counties in the same States; or (vi) a viticultural area [AVA] (as defined in paragraph (c) of this section).³⁰

While the definition for foreign wines reads: “an appellation of origin for imported wine is: (i) A country, (ii) a state, province, territory, or similar political subdivision of a country equivalent to a state or county; or (iii) a viticultural area”.³¹ The final category of a viticultural area was introduced by the BATF in 1978. It is a specific subcategory of AO, the boundaries of which are defined by the US public authorities. Once again the definitions distinguish between American Viticultural Areas and foreign viticultural areas. AVAs are defined as: “a delimited grape growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in part 9 of this chapter”. Foreign ones are: “a delimited place or region (...) the boundaries of which have been recognized and defined by the country of origin for use on labels of wine available for consumption within the country of origin”.³²

Hence, the AVAs designate zones with certain physical features and a certain degree of homogeneity. Therefore, they are not dissimilar from the traditional concept of French AO, mentioned above, as well as from the European and international definitions. They too are recognized and registered by specific bureaucracies exclusively dedicated to the registration of AOs for wines (Hughes, 2006, p. 333).

The procedure for registering an AVA is set out in the 9th Part of Title 27 of the CFR (TTB, 2012). The request is filed with the director of the TTB, who is invested with the regulatory power to adopt rules, which are then codified in the CFR, and to reject any petitions. Petitions may be filed by any interested party.³³ They are mostly filed by a group of winemakers. As in Europe, the petition normally emanates from producers. Under US law, however, they do not have to be a formal grouping, while art 37 Wine Regulation mentions only “groups”. The petition is made in writing and has to include proof that the name of the zone in question is well-known, and stipulate the geographical characteristics and precise boundaries of the proposed zone.³⁴

Once the petition has been filed, the TTB examines it. It can request additional information from the petitioners and, if necessary, conduct a field survey. After examining the petition it draws up a proposed ruling, which is then published in the Federal Register.³⁵ At this stage other parties can make known any opposition to the creation of the AVA, within a period running from 45 to 90 days.³⁶ After having taken into account any such opposition the TTB makes its final decision. It may either reject the petition to register the AVA, or approve it. If approved the new appellation is added to the list

in the CFR (TTB, 2012).³⁷ Overall, the procedure appears heavily bureaucratic and administration-driven as if it was following the EU model.³⁸

(b) *Avas and their typical geophysical characteristics*

In the previous sections of this article it has been shown how both the US Government and a number of scholars criticize the EU approach to GI protection. In particular, it is argued that EU appellations of origin, while purporting to protect *terroir*, are in fact an indirect way of compensating for the progressive reduction in direct agricultural subsidies within the Common Agricultural Policy (Beresford, 2007, 985ss; Hughes, 2006, 331ss). Such a policy is said in the US to amount to indirect government intervention, and as such to contravene the American idea of competitive agriculture where it is the market that should regulate competition between producers. However, it will be demonstrated that if we look at the TTB's behavior we may detect a growing recognition of the concept of *terroir* in the US as well. Therefore, the US policy is getting closer, at least to some extent, to the European and French model that it often criticizes.

There is no denying that originally defining the boundaries of a viticultural area tended to be more a matter of politics than of geography. For instance, the history of Champagne, although it cannot be analyzed here, is a good example of this (Guy, 2007). As for the US, the "San Francisco Bay" AVA included the city center of San Francisco, which was clearly not suited to wine production. The TTB did not conduct any real monitoring of the natural factors meant to give the zones in question their distinctive character and demarcate them as coherent units. For instance, the earliest AVAs such as "Napa Valley" were only identified by their location on a map,³⁹ and the BATF regulations make no mention whatsoever of the physical properties of the zones in question. Furthermore, many of these initial AVAs were so large that they had no homogeneity. The "Sonoma Coast" AVA, for example, included half of the county of Sonoma, having been set up primarily by a few large vineyards as a marketing tool, and it covered too large an area to have any real significance in terms of the wine produced there. Though initially very rudimentary, the AVA system has developed significantly since the 1990s, and the TTB's efforts have shifted toward more rigorous analysis of the geographical data. Two major characteristics illustrate this change.

Firstly, the TTB is now more demanding in its appreciation of the characteristic natural factors of the proposed areas. It carries out more stringent monitoring of the *terroirs* of the various AVAs. Revealingly the French term is increasingly used by the TTB⁴⁰. In addition, there is an increasing number of refusals to register a zone on the ground that the geographical data indicate a lack of homogeneity. For instance, in 2001 the TTB refused to recognize the "California Coast" AVA, for which it been petitioned in 1997 by four large winemaking groups, after having received nearly 500 objections.⁴¹ This vast appellation would have been made up of four existing AVAs—"North Coast", "Sonoma Coast", "Central Coast", and "South Coast"—varying considerably in their soils and in the climatic and physical conditions. Recognizing it would have weakened the AVA system, for it would have created an area without uniform winegrowing qualities. Therefore, AVAs are recognized according to increasingly specific criteria and the TTB is careful to ensure that the areas in question are endowed with homogenous natural characteristics. Hence, the "Mendocino Ridge" AVA, recognized in 1997, presents the originality of only containing zones that are above 400

meters in attitude within a defined perimeter.⁴² These more stringent controls not only apply when petitions are made to recognize an AVA, but also apply when zones are up for revision. As in Europe, AVAs may be redrawn.⁴³ Over recent years many of them have been revised in such a way as to delimit the areas in question more precisely, and thus introduce greater homogeneity. For instance, certain studies showed that the "Russian River Valley" AVA—which partially overlaps with the "Chalk Hill" and "Alexander Valley" AVAs—included 73 different soil types (Boyd, 2001). In 2005 it was revised to include just its Western part, based on the constant fog there as observed by experts, a factor that was common solely to this coastal zone.⁴⁴ The reduction in size of initially very extensive AVAs reveals the TTB's increasing concern with homogeneity and coherence.

Secondly, this tendency toward differentiation may also be seen in the recent proliferation of sub-AVAs, that is to say AVAs that are physically contained within existing AVAs.⁴⁵ The TTB first introduced these smaller Sub-AVAs in 1986, showing it is aware of the need to identify various zones possessing unique characteristics within certain heterogeneous AVAs. For instance the "Lodi" and "Napa Valley" AVAs are now made up of respectively seven and 14 sub-AVAs, which are sometimes better known and more prestigious than the AVAs in which they lie (for example, many producers now prefer the "Oakville" sub-AVA over the "Napa Valley" AVA, illustrating the increasing differentiation between *terroirs*). This is an ongoing trend, as illustrated by the petition in 2007 to divide up the "Paso Robles" AVA, which has given rise to extensive litigation (Appellation America, 2007: online).⁴⁶

The control exercised by the TTB over the homogeneity of AVAs has become progressively more stringent, and by extension so has the role played by the federal state. Furthermore, these increasingly stringent standards have had effects on local and agricultural development. To take but one example, the recognition of a series of AVAs in Missouri—not traditionally a winegrowing state—gave rise to local research programs, price increases in grapes and vines, as well as an influx of workers from neighboring states (The Economic Impact of Wine, 2007). So, AO, far from being private assets similar to trademarks, are (also) strategic assets for pursuing public interests. This is something that a number of scholars (Bérard & Marchenay, 2006; Pacciani et al., 2001; Traegar, 2003) as well as the European Commission (EU Commission, 2012) have already understood and that the US institution cannot and are not ignoring as the practice shows.

5. CONCLUSION

This article was aimed at demonstrating that, despite the formalistic rhetoric, the US public institutions, funded by taxpayers' money, play a crucial role in the field of GI protection. In order to demonstrate this thesis it has been shown that in the US the regime of certification marks and of AVAs appellations of origin for the protection of wine, customarily employed for the protection of GIs, are based on public intervention and investment in a way that substantively and often procedurally recalls the EU regime of protection.

Even if the EU and US law diverge on some points, the line of demarcation between the two systems is indeed not as clear-cut as traditionally claimed by the US government and by the doctrine that opposes EU-inspired *sui generis* GI regimes. This does not mean that the two systems can be considered completely interchangeable or equivalent since they are struc-

turally divergent. In particular, the adoption of a bureaucratic registration-based *sui generis* system introduces some elements that do not belong to US trademark law at all. For instance, Regulation 1151/2012 and its predecessors require that the definition of PGI or PDO is satisfied in order to register a geographical name under one of these schemes. Such step is completely absent in US law. Furthermore, in terms of the “drawing up of certified standards”, the EU regime requires a detailed product specification the template of which must strictly follow the text of the law. Under US Trademark Law, the exact content of the specification is left entirely to the applicant as it is understandable being, in the last analysis, a protection system based upon a private tool like trademark.

However, the analysis conducted in the present article shows that, contrary to what is usually argued, in the US, just like in the EU, the public power and public investment is indeed well

present and plays an important role as it emerges from the analysis of American certification marks and AVAs. In addition, the public goals that GI protection plays in the US are not too distant from the EU mindset. Even if these data may be considered insufficient for distilling a general rule, they should, nevertheless, lead to further reflections and reconceptualization of the essence of GI protection in these two regions, especially in a period in which this issue is intensively debated both at international and at domestic level. Indeed, beyond the hot debate around the negotiations of the TTIP, things are moving in the US themselves, with the interest in the protection of origin products essentially linked to their territories and communities of origin growing in the US, with over 6,000 producers that have joined the [American Origin Products Association \(AOP, online\)](#), another convergence with the EU.

NOTES

T. he Transatlantic Trade and Investment Partnership (TTIP) is a free trade agreement between the European Union and the United States currently under negotiations. Among the others, it will regulate some aspects of the commerce in agricultural products and foodstuff between the two regions. This is raising lively discussions on both sides of the Atlantic Ocean on issues related to quality standards, certifications and food security. The European position on this GI-related matters can be found here <<http://ec.europa.eu/trade/policy/in-focus/ttip/>>, the US one here <<https://ustr.gov/ttip>>.

2. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), is an international agreement that came into force on 1 January 1995 administered by the World Trade Organization (WTO). It sets the minimum standards of IP protection that every WTO Member State (158 so far) must respect domestically. For more information, see WTO, The TRIPs Agreement, available at https://www.wto.org/english/tratop_e/trips_e/trips_e.htm.

3. However, this definition is not the only one that can be found at international level. Indeed, the TRIPs regime can be located in-between its two predecessors, Indications of Source (IS) and Appellations of Origin (AO). IS are mentioned both in the Paris Convention at arts 1(2) and 10 and in the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods (1891). These two treaties do not specifically provide a definition, however, under section 1 of WIPO Model Law for Developing Countries on Appellations of Origin and Indications of Source, IS are described as an “expression or sign used to indicate that a product or service originates from a country, region or specified place”. Appellation of Origin appears, without being defined, in the Paris Convention. Instead, Art. 2(1) of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958) defines it as the: “(…) geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”

4. WIPO IP Handbook authoritatively mentions three main ways to protect GI applied at domestic level, each one belonging to a very different genus: (1) unfair competition law and case law based instruments, (2) collective and certification marks typical of the common law tradition and (3) special titles granted at the end of an administrative procedure typical of a civil-law/continental European background.

5. Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs applies to “(…) agricultural products intended for

human consumption (...) and other agricultural products and foodstuffs (...)” (art 2.1). It provides for two different forms of GI certifications, Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI). Art 5(1) and (2) defines them. In particular, PDO consist in: “1. (...) a name which identifies a product: (a) originating in a specific place, region or, in exceptional cases, a country; (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and (c) the production steps of which all take place in the defined geographical area.” PGI, instead, are defined as: 2. (...) a name which identifies a product: (a) originating in a specific place, region or country; (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area.

6. Council Regulation 479/2008 of 29 April 2008 on the common organization of the market in wine. Its Chapter IV deals with Designations of Origin and Geographical Indications for wines and defines them at art 34 (1). In particular, Designation of Origin is “ (...) the name of a region, a specific place or, in exceptional cases, a country used to describe a product (...) that complies with the following requirements: (i) its quality and characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; (ii) the grapes from which it is produced come exclusively from this geographical area; (iii) its production takes place in this geographical area (iv) it is obtained from vine varieties belonging to *Vitis vinifera*” Instead, a Geographical Indication is “ (...) an indication referring to a region, a specific place or, in exceptional cases, a country, used to describe a product (...) which complies with the following requirements: (i) it possesses a specific quality, reputation or other characteristics attributable to that geographical origin; (ii) at least 85 % of the grapes used for its production come exclusively from this geographical area; (iii) its production takes place in this geographical area; (iv) it is obtained from vine varieties belonging to *Vitis vinifera* or a cross between the *Vitis vinifera* species and other species of the genus *Vitis*.” See also, Council Regulation (EC) No. 491/2009 of 25 May 2009 amending Regulation (EC) No. 1234/2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation).

7. Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of Geographical Indications and designations of origin for agricultural products and foodstuffs.

8. Council Regulation 1493/1999 of 17 May 1999 on the common organization of the market in wine. However, European legislation regulating the designations for wines and spirits dates back to 1970 with

the Council Regulation 817/70 of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions.

9. Refusals to grant a trademark in the US are based on the Trademark Act of 1946, 15 U.S.C. §1051 et seq., or the Trademark Rules of Practice, 37 C.F.R. Part 2. Statistically, the most common reasons for refusing registration are because the mark is: (1) likely to cause confusion with a mark in a registration or prior application; (2) descriptive for the goods/services; (3) a geographic term that has not acquired a second meaning; (4) a surname that has not acquired a second meaning; (5) ornamental as applied to the goods.

10. In addition, a group of developing countries, led by Brazil and India, called for an intense protection capable of preventing any use of GIs which was likely to confuse or mislead the public as for the origin of the good.

11. This reform would support the policy of the EU and other countries (such as India) that provide for a registration-based system of GI protection well beyond wines and spirits. However, so far no important steps forward have been made.

12. The “Lisbon Agreement for the Protection of Appellations of Origin and their International Registration” is a treaty entered into force on 31 October 1958. It is aimed at protecting internationally the Appellations of Origin defined at art 2 as “the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors”. This goal is achieved through an international register that offers a means of obtaining protection for an appellation of origin (AO) in the contracting parties to the Lisbon Agreement through a single registration. So far, the Agreement have had limited success with only 28 Member States, all civil law countries, that, however, have registered more than 900 AOs. Currently this agreement is passing through a process of reform. The most notable amendment will be the adoption of the model of “Geographical Indications” alongside the traditional one of AOs, therefore, in harmony with the TRIPs Agreement, the required link between the product and the place will also encompass the reputational and not just the physical link. The Diplomatic Conference for the Adoption of a New Act of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration will take place from May 11 to 21, 2015.

13. Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of Geographical Indications and designations of origin for agricultural products and foodstuffs.

14. WTO DSB Dispute DS290 “European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs”. The request for consultation was received by the DSB on 17 April 2003 and the Panel report circulated on 15 March 2005. For an official analysis of the case, see <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm>

15. This is the content of a recent letter written by US Senators Toomey and Schumer, signed by more than fifty US senators. It urges the US Department of Agriculture and the US Trade Representative not to accept EU’s proposal concerning GI rules in the context of the TTIP. The letter can be found on Toomey’s official website <<http://www.toomey.senate.gov/?p=news&id=1297>>.

16. Traditionally, the USPTO argues that the EU *sui generis* regime is *de facto* closed to foreign producers because, being funded by EU taxpayers discourages non-EU registrations. See USPTO, GIs FAQs, online. However, today this is not the case anymore. In fact, since, there are 16 registrations from 7 countries (Andorra, China, with 10 registrations, Colombia, India, Thailand, Turkey and Viet-Nam) and several applica-

tions. More information can be found on the EU GI online register, i.e. the DOOR database.

17. Mark No. 0533033, held by Tillamook Cheese Makers cooperative.

18. In particular relating to the use of milk only from cows not having received any growth hormones, and to the natural aging process of the cheeses.

19. Also the first model of registration-based protection, the French *Appellations d’Origine Contrôlées*, provides that the applicant has to be a group of producers (“*syndicat de défense*”).

20. Emphasis added

21. All emphasis added.

22. *Sui generis* GI regime are considered “hybrid” both because protection is granted after a bureaucratic administrative procedure and because the system aims to achieve public goals such as fostering a “competitive economy based on knowledge and innovation and fostering a high employment economy delivering social and territorial cohesion” (Regulation 1151/2012 Recital 5).

23. Thanks to this mark its registrant was able to prevent the term being used to designate cheese imported from Italy and Hungary: *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 133 U.S.P.Q. 633, 5 Fed. R. Serv. 2d 921 (2d Cir. 1962).

24. Translated, Borgotaro Mushrooms

25. The concept of *Appellation of Origine* (*Appellation d’Origine*) was introduced for the first time in France in 1919 in order to contrast the widespread counterfeiting and adulteration of wine. In 1935 the French Parliament established the Appellations of Origin Controlled (“*Appellations d’Origine Contrôlées*”) that require that the wine must have a recognized link to its area of origin and that such link must be certified by the *syndicats* of the producers and controlled/guaranteed by an administrative body linked to the Ministry of Agriculture today called *INAO* (*Institut National des Appellations D’Origine*).

26. art L115-1 of the French Code of Consumption. In the original text “*Constitue une appellation d’origine la dénomination d’un pays, d’une région ou d’une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique, comprenant des facteurs naturels et des facteurs humains.*”

27. *Terroir*, that can be roughly translated as “land of origin” or “territory” is the key concept on which the traditional French concept of AO is based. It is the element that justifies a special protection for products made in a specific geographical place because there is a unique physical and environmental link between the good and its place of origin so that no one, elsewhere, can free-ride on the name of the product. However, the essence concept is much more complex and nuanced. This issue cannot be developed here, however, it is useful to quote the classification made by Gangjee (2012: 85): “it is helpful to identify at least three overlapping narratives which conceive of *terroir* as (1) a holistic or mythical anchor, associated with regional identity formation; (2) a deterministic influence, with the emphasis on physical geography and environmental conditions; or (3) a more contingent composite of natural and human factors, open to innovation.”

28. This law has been codified as 27 C.F.R. § 201-219(a). The Code of Federal Regulations (C.F.R.) is the codification of the binding rules decreed by Federal Agencies.

29. BATF amendment No. 2 (1938): 27 *C.F.R.* § 4.25a(a)1.
30. 27 *C.F.R.* § 4.25a(a)1.
31. 27 *C.F.R.* § 4.25a(a)2.
32. 27 *C.F.R.* § 4.25a(e).
33. 27 *C.F.R.* § 4.25a(e)(2).
34. 27 *C.F.R.* § 9.12.
35. Notice of Proposed Rulemaking: 5 *U.S.C.* § 553.
36. 27 *C.F.R.* § 70.701(c). An administrative appeal is required first.
37. 27 *C.F.R.* § 9.
38. Compare the US procedure with arts 38–41 Wine Regulation.
39. 27 *C.F.R.* § 9.23.
40. See for instance notice No. 905 relating to the recognition of the “Long Island” AVA.
41. TTB notices No. 903 and 951.
42. 27 *C.F.R.* § 9.158.
43. See art 49 Wine Regulation
44. 27 *C.F.R.* § 9.66.
45. The establishment of sub-AVAs is possible under two conditions: (1) the new AVA must comply with the general rules for petitions provided by §9.12(a) TTB Regulation (27 CFR 9.12); (2) it must comply also with the special requirements of §9.12(b). In particular, the petition must make a case for the proposed separate recognition of the new AVA. This means that the petition must include information identifying those attributes of the proposed AVA that are consistent with those of the existing AVA (thus demonstrating why the same area should be recognized by two viticultural area names), and it must also explain how they are different from each other.
46. In 2007, a proposal to split the area at the Salinas River and form a new “Paso Robles Westside AVA” was made. The proposal was withdrawn in 2009, and a new proposal was made to break up the AVA into 11 smaller viticultural areas.

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