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Getting art 22(1) TRIPS right: a commentary on the definition of ‘Geographical Indication’ from an EU perspective with a focus on wines

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Abstract

The article conducts an in-depth analysis of art 22(1) of the TRIPS Agreement that provides the definition of ‘Geographical Indication’, focusing specifically on the field of wine. Particularly, the research analyses: (1) the concept of ‘indication’; (2) the words ‘quality, reputation or other characteristic’ and (3) the adverb ‘essentially’. Building upon the text of the Agreement; its drafting history and adopting the EU GI regime as a case study, the research concludes that: first, the concept of ‘indication’, in spite of its literal meaning and historical origin, can be subject to a very broad interpretation; second, wine remains a product characterised by a qualitative link with its area of production, although the importance of the ‘reputational link’ is growing; and, lastly, that the adverb ‘essentially’ introduces a margin of flexibility, thus allowing products that are not ‘exclusively’ related to a specific area to qualify for GI protection nonetheless.

Keywords: EU Geographical Indications Law; Geographical Indications; TRIPS Agreement; Wine; Wine Geographical Indications.

1 Introduction

1.1 Legal background, goals of the research and its importance for Wine GIs

This article will provide the first in-depth analysis of art 22(1) of the TRIPS Agreement (‘TRIPS’),¹ interpreted from the perspective of the rules, history and practice of the EU. Art 22(1) introduced at

¹ Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPS). It is the Annex 1C to the Agreement Establishing the World Trade Organisation (WTO Agreement) and the most comprehensive multilateral treaty on IP. It came into force on 1 January 1995. For the text of the agreement, see <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf>. For an in-depth commentary to this treaty, see Maria Carlos Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary* (2nd ed, Oxford University Press 2020); Daniel J Gervais, *The TRIPS Agreement: Drafting History and Analysis* (5th ed, Sweet & Maxwell, Thomson Reuters 2021). For a guide to this treaty, see Antony Taubman, Hannu Wager and Jayashree Watal, *A Handbook on the WTO TRIPS Agreement* (Second edition, Cambridge University Press 2020); Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and*

international level the definition of ‘Geographical Indication’ (‘GI’) as an independent and standalone Intellectual Property Right (IPR). Particularly, it reads as follows:

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.

This provision displays all the basic elements that comprise a *sui generis* rule for the protection of names that indicate geographical origin. These are the object of the protection and are technically called Indications of Geographical Origin (IGOs) to distinguish them from the individual IPRs that can protect them, such as GI, Appellation of Origin (AO), Indication of Source (IS) and so on. In particular, art 22(1) TRIPS states that an IGO can be protected by GI when: (1) it originates from a specific place, rather than just ‘coming from’ or ‘being manufactured’ there; (2) it is characterised by a specific set of elements that establish the existence of a substantive link between the product and its place of manufacturing, the presence of which must be proved to receive protection known as the ‘origin link’,² which can be established through three specific criteria that will be called ‘linking factors’, i.e. quality, reputation and other characteristic; and (3) these elements must be ‘essentially attributable’ to the geographical origin of the good. Finally, there are no limits as to the nature of the goods that can enjoy protection.³

Next, under arts 22(2)-(4) and 23, TRIPS sets forth the minimum level of protection granted to this intellectual property right. A complete overview of this issue would exceed the scope of the present article.⁴ Here, it is enough to observe that the general standard of protection provided by art 22(2) is rather low. It essentially consists of measures aimed at preventing misleading uses of the indications, acts of unfair competition and the registration of marks that could mislead the consumer as to the origin of the products.⁵ The same article also features rules against the registration of trademarks and

Policy (Third edition, Oxford University Press 2015), Chapter 17. See also, WTO, ‘Guide to the TRIPS Agreement’.
<https://www.wto.org/english/tratop_e/trips_e/ta_modules_e.htm>.

² The concept of ‘origin’ is so central in this field that in the EU a product that qualifies for GI protection is often called ‘origin product’. This is defined as a good that, unlike standard industrial ones, is the result of a specific geographical, social and cultural evolution; it contributes to the sustenance of the rural community that makes it and represents the local know-how of the latter. For more on this point, see Giovanni Belletti and Andrea Marescotti, ‘Origin Products, Geographical Indications and Rural Development’ in Elizabeth Barham and Bertil Sylvander (eds), *Labels of origin for food: local development, global recognition* (CABI 2011).

³ For more details, see Correa (n 1) 208-212; Taubman, Wager and Watal (n 1).

⁴ For an in-depth analysis, see Dev Gangjee, *Relocating the Law of Geographical Indications* (CUP 2012) Chapter 5.

⁵ TRIPS, art 22(2).

GIs that would mislead consumers as to the origin of the goods.⁶ However, a higher level of protection is granted under art 23(1) to wines and spirits. In particular, these GIs are protected against any indication identifying products not originating in the place indicated by the GI. This rule applies even when no possibility of deception or confusion exists, for instance, where the true origin of the goods is shown or the indication is accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or similar.⁷ Finally, art 24 features, among the other things, some exceptions to protection that cannot be analysed in depth here.⁸

A detailed discussion on the concept of GI as defined in TRIPS is important for at least two reasons. First, as anticipated above, this treaty provides a legal frame that is broad and relatively undemanding.⁹ Furthermore, it does not state how this level of protection must be ensured in the practice. This is why IGOs are protected in different ways in different jurisdictions.¹⁰ In particular, three approaches can be identified: (1) unfair competition law; (2) collective/certification marks - this approach is usually the preferred one in common law countries and strongly supported by the United States¹¹ - and (3) *sui generis* GI regimes, that specifically and directly protect IGOs as such. These are registration-based systems that provide *ex-ante* protection to IGOs after a bureaucratic registration process that generally involves a group of applicants, a public body – the Ministry of Agriculture, the national IP/Trade Marks Office or an *ad hoc* institution¹² – and other stakeholders, such as public

⁶ TRIPS, art 22(3) and (4).

⁷ This provision, at paragraph 4, also invites the WTO member states to establish ‘a multilateral system of notification and registration of geographical indications for wines’. However, this register has not been established yet and probably never will. For more information on art 23 TRIPS, see Correa (n 1) 221-228.

⁸ For instance, paragraph 5 deals with the relationship between GIs and earlier trade marks and stipulates that their registration, application or right to use shall not be prejudiced. For more details, see Correa (n 1) 229-239;

⁹ This is specifically due to the fact that during the Uruguay Round, i.e. the multilateral round of negotiations begun in 1986 and ended in 1994 and that led to the creation of the WTO, the position of the key stakeholders on this point deeply diverged. In particular, while many discussions were characterised by a contrast between the ‘global north and the global south’, i.e. between developed and developing/least developed countries, GIs saw a new world / old world divide that opposed, broadly speaking, the EU, on the one side, and the United States, plus other common law countries, on the other. See, Gangjee (n 5) 191-213. For more details on the Uruguay Round see, Jayashree Watal and Antony Taubman (eds), *The Making of Trips Insights from the Uruguay Round Negotiations* (World Trade Organization 2015). See also, John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (Diane Publications Co, 1995).

¹⁰ Kireeva and O’Connor distinguish between a ‘passive’ approach to GI protection, i.e. unfair competition, and two ‘active’ approaches characterised by the registration of the IGO, i.e. *sui generis* GIs and trade marks. See, Irina Kireeva and Bernard O’Connor, ‘Geographical Indications and the TRIPS Agreement: What Protection Is Provided to Geographical Indications in WTO Members?’ (2010) 13 *The Journal of World Intellectual Property* 275.

¹¹ For the position of the US on GI Protection, see United States Patents and Trademark Office, ‘Geographical Indication Protection in the United States’ (USPTO)

<https://www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf>. However, public investment to protect GIs is not completely absent in this jurisdiction, see Caroline Le Goffic and Andrea Zappalaglio, ‘The Role Played by the US Government in Protecting Geographical Indications’ (2017) 98 *World Development* 35.

¹² The most famous example of an *ad hoc* institution in charge of the registration and support of *sui generis* GIs is the French ‘National Institute of Origin and Quality’ (*Institut National de l’Origine et de la Qualité*, INAO) <

administrations, universities and other interested parties. The EU is the inventor and main promoter of this model.¹³ Thus, GIs are probably the least harmonised area of IP law today. It is therefore important to provide a detailed analysis of this concept as defined in TRIPS.

Second, currently GIs are the subject of substantial discussion at the international level, mostly because of the EU. First of all, this region, as mentioned earlier, applies a strong *sui generis* GI regime that protects agricultural products and foodstuffs; wines; spirits and fortified wines.¹⁴ This regime may be soon extended also to non-agricultural products such as handicrafts.¹⁵ Indeed, the US has already voiced its concern over this project of reform, thus confirming, once again, how controversial this issue is at the international level.¹⁶ Secondly, the EU strongly supports the spreading of its regime, especially through Free Trade Agreements (FTAs) where it often presents GIs as a real deal-breaker.¹⁷ It is not surprising that this approach has sometimes become a source of tensions during the negotiations of these agreements, especially in relation to the protection of products whose names are considered generic or in any event not protectable in some countries, such as Champagne or Prosecco.¹⁸ Indeed, the fact that the EU approach to GIs can give rise to disputes at international level

<https://www.inao.gouv.fr/eng/The-National-Institute-of-origin-and-quality-Institut-national-de-l-origine-et-de-la-qualite-INAO>>.

¹³ For some general works on the EU *sui generis* GI regime, see Michael Blakeney, *The Protection of Geographical Indications: Law and Practice* (2nd ed, Edward Elgar 2019); Dev Gangjee, ‘Sui Generis or Independent Geographical Indications Protection’ in Irene Calboli and Jane C Ginsburg (eds), *The Cambridge handbook of international and comparative trademark law* (Cambridge University Press 2020); Andrea Zappalaglio, ‘Sui Generis, Bureaucratic and Based on Origin: A Snapshot of the Nature of EU Geographical Indications’ in Anselm Kamperman-Sanders and Anke Moerland (eds), *IP as a Complex Adaptive System: its Role in the Innovation Society* (Edward Edgar Publishing 2021).

¹⁴ For an updated analysis of the EU *sui generis* GI regime, with a specific focus on the agrifood sector, see Andrea Zappalaglio, *The Transformation of EU Geographical Indications Law: The Present, Past, and Future of the Origin Link* (Routledge 2021). See also the sources cited in the previous footnote.

¹⁵ For the EU agenda on the protection of non-agricultural GIs, see European Commission, ‘EU-Wide Protection of Geographical Indications for Non-Agricultural Products’ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12778-EU-wide-protection-of-geographical-indications-for-non-agricultural-products_en>.

¹⁶ World Trademark Review, ‘European Commission launches non-agricultural GIs consultation as Unites States voices concern over extending protection’ (5 May 2021) <<https://www.worldtrademarkreview.com/brand-management/european-commission-launches-non-agricultural-gis-consultation-united-states-voices-concern-over-extending-protection>>.

¹⁷ These were the words used by Prof Roxana Blasetti, officer of Government of Argentina, when discussing about the negotiations of the recent EU-MERCOSUR FTA at Max Planck Institute GI Workshop (Munich, 13-14 February 2020). For more on GIs in FTAs see, Bernard O’Connor and Giulia de Bosio, ‘The Global Struggle Between Europe and United States Over Geographical Indications in South Korea and in the TPP Economies’ in William van Caenegem and Jen Cleary (eds), *The importance of place: Geographical Indications as a Tool for Local and Regional Development* (Springer 2017); Liam Sunner, ‘How the European Union Is Expanding the Protection Level Afforded to Geographical Indications as Part of Its Global Trade Policy’ (2021) 16 *Journal Of Intellectual Property Law and Practice*. See also, David Vivas-Eugui and Christoph Spennemann, ‘The Evolving Regime for Geographical Indications in WTO and in Free Trade Agreements’ in Carlos Maria Correa and Abdulqawi Yusuf (eds), *Intellectual property and international trade: the TRIPS agreement* (2nd ed, Kluwer Law International 2008).

¹⁸ As an example, for a response to the EU request to ban the use of the term ‘Prosecco’ on non-GI products in Australia, see Mark Davison, Caroline Henckels and Patrick Emerton, ‘In Vino Veritas? The Dubious Legality of the EU’s Claims to Exclusive Use of the Term “Prosecco”’ (2019) 29 *Australian Intellectual Property Journal* 110. For

is not new. The dispute *EC – Trademarks and Geographical Indications* is a well-known example.¹⁹ Lastly, it is worth noting that the EU system is proving very influential as different countries in the world have adopted a *sui generis* GI system based on it.²⁰

Finally, this analysis will be especially important for the field of wine because of the prominence of this product among GI goods, although it will be relevant for any kind of GI product, since art 22(1) TRIPS applies to all of them regardless of their nature, e.g. agrifood, spirits and so on. First of all, as shown above, wine – together with spirits – enjoys enhanced protection under TRIPS. It is therefore important to clarify the meaning and functioning of the definition of a GI as the wines that satisfy its requirements have access to a strong level of protection that all WTO member states are bound to implement. Second, wine is the most valuable GI product from an economic perspective. This applies not just to the EU but also to various other countries, such as the US and Australia, that often contest the European approach to GI protection.²¹

1.2 Object of the analysis and methodology

This contribution will provide a complete commentary of the three key components of the definition of GI provided under art 22(1) TRIPS. In particular, Section 2 will focus on the term ‘indication’;

another forceful critique of the EU approach to GI protection, see Justin Hughes, ‘Champagne, Feta and Bourbon: The Spirited Debate About Geographical Indications’ (2006) 58 *Hastings Law Journal* 299.

¹⁹ In this case, the US supported a complaint filed by Australia against the first European GI regulation of 1992 on agricultural products and foodstuffs. 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. See, Timothy E Josling, ‘The War on Terroir: A Transatlantic Trade Conflict’ (2006) 53 *Journal of Agricultural Economics* 337.

²⁰ The most notable example is that of Chinese Appellations of Origin that are explicitly based on a French/EU model, see Haiyan Zheng, ‘A Unique Type of Cocktail: Protection of Geographical Indications in China’ in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the crossroads of trade development and culture* (Cambridge University Press 2017). Furthermore, two recent examples that can be made, among the others, are Ukraine and Russia. Particularly, the new Ukrainian GI Law, came into force on 1 January 2020, is one of the outcomes of the ‘Association Agreement’ between the Ukraine and EU whereas Russia introduced a new GI law in July 2020 that attempts to mimic the EU system. For the first case, see Ukraine: Law of Ukraine No. 123-IX of September 20, 2019 <https://www.wipo.int/news/en/wipolex/2020/article_0001.html>; ‘Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part’ [2014] L161/3, arts 201ss. For an analysis of the new Russian GI system, see Andrea Zappalaglio and Evgeniia Mikheeva, ‘The New Russian Law of Geographical Indications: A Critical Assessment’ (2021) 16 *Journal Of Intellectual Property Law and Practice* 368.

²¹ For instance, according to the latest available data (2017), the sales value of EU Wine GIs amounted to approximately 40 billion €. In comparison, Agrifood GIs’ sales value amounted to little above 27 billion €. Moreover, the export of EU GI Wine to non-EU countries is worth approximately 8.5 billion € while that of Agrifood GIs 1.7 billion €. In the US, wine sales of wine produced in Californian American Viticultural Areas was worth \$40 billion in 2020. In Australia, in 2018, 65 wine regions generated a revenue of 6.3 billion AUD and, in 2019, an exports value of 2.8 billion. See European Commission. Directorate General for Agriculture and Rural Development., *Study on Economic Value of EU Quality Schemes, Geographical Indications (GIs) and Traditional Specialities Guaranteed (TSGs): Final Report*. (Publications Office 2021); Gillespie Economics and AgEconPlus, ‘Economic Contribution of the Australian Wine Sector 2019’ (2019); Statista, ‘Retail value of the Californian wine market in the United States from 2006 to 2020’ <<https://www.statista.com/statistics/737296/california-wine-us-market-value/>>.

Section 3 will investigate the three components of the term ‘quality, reputation or other characteristic’; and Section 4 will explore the meaning of the adverb ‘essentially’.

With regard to the methodology that will be adopted for this assessment, it is known that the interpretation of the international treaties is regulated by arts 31-33 of the Vienna Convention on the Law of Treaties (VCLT). This set of rules stipulates that, first of all, a treaty must be interpreted in good faith, on the basis of the ‘ordinary meaning of the terms in their context and in light of the object and purpose of the treaty itself’ (art 31(1) VCLT). This will be the starting point of the analysis below. However, this approach to interpretation will not be conclusive in this case. Indeed, all the abovementioned terms have a highly specific and technical meaning. Hence, a literal interpretation based on syntax and dictionary definitions can only partially be useful.²²

Next, the relevant ‘context’ that can be used for the purposes of interpretation is defined under art 31(2) VCLT as the text of the treaty, including its preamble and annexes. However, nor can this general rule of interpretation lead to decisive results. Indeed, as it will be shown below, the key terminology that will be analysed in this paper appears almost exclusively in the provisions on GIs, i.e. Part II, Section 3 TRIPS. Next, art 31(2) and art 31(3)(a) and (b) list various means of ‘authentic interpretation’. In particular, agreements reached between the parties, ‘instruments’ which are acquiesced in by the other parties, and practice subsequent to the treaty. Unfortunately, none of these tools is available in this case.

Lastly, art 31(3)(c) VCLT introduces the so-called ‘systemic integration’ rule. This allows the interpreter to construe the text of a treaty in light of ‘any relevant rules of international law applicable in the relations between the parties’.²³ Therefore, in the present case, the set of rules that can be employed is mainly the Paris Convention²⁴ because, per art 2 TRIPS, all the substantive provisions of this treaty bind also all the WTO Member States.

²² Indeed, the Appellate Body itself has hold that ‘... dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents’. See, *US – Offset Act (Byrd Amendment)* (WT/DS217/AB/R, WT/DS234/AB/R) [248].

²³ See for all, Mark Villiger, ‘The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission’ in Cannizzaro Enzo (ed), *The Law of Treaties Beyond the Vienna Convention*, vol 1 (Oxford University Press 2011) 111-112.

²⁴ ‘Paris Convention for the Protection of Industrial Property’ (1883, last as amended on September 28, 1979) <<https://wipo.int/en/text/287556>>.

Moreover, the jurisprudence of WTO panels and the Appellate Body (AB) is not entirely helpful in this specific case. In fact, although both the Panels and the AB have more than once dealt with the rules of TRIPS on GIs,²⁵ art 22(1) was never specifically interpreted in depth. In particular, the key elements of the definition of GI have never been analysed.²⁶

In light of the above, it is relevant to make use of ‘supplementary means of interpretation’, as defined by art 32 VCLT. Indeed, without them the interpretation of the terms at issue will remain incomplete and at least partially obscure. In particular, the analysis will resort to the preparatory works of art 22(1) TRIPS. Furthermore, a complete and clear explanation of the meaning of art 22(1) TRIPS cannot be provided without taking into consideration other treaties that, although not binding on all WTO member states, constituted the foundations upon which this provision was built. We are referring in particular to the Madrid Agreement and the Lisbon Agreement.²⁷ In fact, the former is necessary to shed light on some of the concepts introduced by the Paris Convention, particularly that of Indication of Source. The latter, instead, introduced the Appellation of Origin (AO) into the international legal frame. This is an important predecessor to GIs and was mentioned in the negotiations that lead to the final text of TRIPS.²⁸

Finally, the present contribution is aimed at providing a broad scholarly commentary on art 22(1) TRIPS. This will be based not just on an interpretation of the treaty but on a more general assessment of the systematic relationship between GI and other IGO protection systems, such as AO and IS, as well as on their history. In addition, an analysis of art 22(1) TRIPS can be effective only if conducted through the lenses of a national GI system. In fact, first, the TRIPS frame is too thin to constitute a viable frame for an in-depth investigation and, second, the approach to GI protection in the WTO member states is too diverse. Thus, a general and all-encompassing argument cannot be developed in a single contribution. This is why the interpretation provided by this article, as the title itself suggests, will be based on the EU experience. This point of view is justified by the fact that, as already shown,

²⁵ For a complete repertoire of the paragraphs of the decisions of the Panel and of the AB concerning art 22(1) TRIPS, see WTO, ‘WTO Analytical Index: TRIPS Agreement – Article 22 (Jurisprudence)’.

<https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art22_jur.pdf>.

²⁶ In this regard, the most relevant decision is *EC – Trademarks and Geographical Indications (US)*. Here, the Panel confirmed that the two EU quality schemes, Protected Designation of Origin and Protected Geographical Indications, they both fell within the definition of art 22(1) TRIPS.

²⁷ The Madrid Agreement, despite its broad membership (109 countries) does not bind all WTO Member States. The Lisbon Agreement, instead, has a limited membership of 34 parties. ‘Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods’ (1891, last amended on 14 July 1967).

<<https://www.wipo.int/treaties/en/ip/madrid/>>; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958, last. amended on September 28, 1979) <<https://wipolex.wipo.int/en/text/285838>>.

²⁸ See, Section 2.1 and 2.2.

the EU system is the most influential and famous of all the *sui generis* GI regimes. Furthermore, it is the one with the most ancient roots.²⁹ Hence, the contribution will make use of various examples drawn from the EU practice. These will mostly concern wine GIs. However, cases regarding agrifood products will also be used when necessary, as the principles distilled there can be applied by analogy to wines.

In conclusion, the three key components of art 22(1) TRIPS mentioned above will be investigated by applying the following procedure. First, when possible, their literal meaning will be taken into account also by resorting, when expedient, to the text of the Paris Convention; second, the origin of each concept will be analysed and discussed by making reference to every international treaty for the protection of IGOs, i.e. the Paris Convention; the Madrid Agreement and the Lisbon Agreement; third, based on this information as well as the history of the Uruguay Round negotiations and the TRIPS preparatory works, a plausible meaning for the assessed term will be proposed; fourth, the proposed meaning will be confirmed and clarified by making reference to the EU experience. For this purpose, the article takes as models Regulation 1308/2013 for the protection of wines ('Wine Regulation')³⁰ and, when useful, Regulation 1151/2012 for the protection of agricultural products and foodstuffs ('Agrifood Regulation').³¹

2 The object of protection of GI: the meaning of 'indication'

2.1 The predecessors of GI: Indication of Source v Appellation of Origin

TRIPS stipulates that GIs are 'indications'. This noun appears only in Part II, Section III of the Agreement and indicates the object of protection of this intellectual property right. The text of TRIPS does not provide an answer to two key questions, however. First, what is an 'indication' and what can become a protected 'indication'? And, second, what is the relationship between 'GI' and the pre-existing systems of IGO protection? These two topics can be explored by making reference to the previous sets of international rules dealing with the protection of IGOs. In fact, this terminology did not appear in a vacuum. When TRIPS came into force, there were already two international systems

²⁹ It is known that the first *sui generis* IGO protection regime was developed in France from the 1930s. See, among the many, Gangjee (n 5); Zappalaglio (n 15) Chapter 1; Alessandro Stanziani, 'French Collective Wine Branding in the Nineteenth-Twentieth Century' in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar 2016); Alessandro Stanziani, 'Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France' (2004) 18 *European Journal of Law and Economics* 149; Laurence Bérard and Philippe Marchenay, *Les produits de terroir: entre cultures et règlements* (CNRS Editions (Open Edition) 2004).

³⁰ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products.

³¹ 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.

in place: the Indication of Source ('IS'), introduced in 1883 by the Paris Convention, and expanded by the Madrid Agreement,³² and the Appellation of Origin (AO), introduced by the Lisbon Agreement, in 1958.³³

The first two agreements and the latter belong to very different historical contexts. More specifically, the Paris Convention is the first international treaty on 'industrial property', made necessary by the need to organise, facilitate and enhance the protection of intangible assets in late 19th century.³⁴ The Lisbon Agreement, instead, was introduced as the legal foundation of the 'Special Union for the protection of Appellations of Origin' in the context of the reorganisation of IP in the post-WWII era.³⁵

The expression 'indication' intuitively reminds one of the concept of IS. This has never been specifically defined by an international treaty, although the Madrid Agreement provides an indirect definition.³⁶ However, the AO model, and in general the Lisbon System, have also significantly influenced the evolution that eventually led to the text of art 22(1) TRIPS.³⁷ A comparison between the definition of IS and AO is therefore important for analysing the meaning of 'indication' in the context of the TRIPS. This is provided in Table 1 below.

Table 1. Definitions of Indication of Source, Appellation of Origin and Graphical Indication compared

Madrid Agreement (1891), art 1(1)	Lisbon Agreement (1958), art 2(1)	TRIPS Agreement (1995), art 22(1)

³² 'Paris Convention' (n 25). The key reference on this Treaty is Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford University Press 2015). See also Gangjee (n 5) 23-64. 'Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods' (1891, last amended on 14 July 1967) <<https://www.wipo.int/treaties/en/ip/madrid/>>. For an analysis of this treaty, see Ricketson (n 36) 677-686; Gangjee (n 5) 65-73.

³³ Lisbon Agreement (n 25).

³⁴ An in-depth discussion on this topic would exceed the scope of the present article. For more on this point, see Ricketson (n 36) Sections 1.01-1.02; Christopher May and Susan K Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers 2006) Chapter 5.

³⁵ For an overview, see Gillian Davies and Sam Ricketson, 'The Foundation of the World Intellectual Property Organization: What Came Before' in Sam Ricketson (ed), *Research handbook on the World Intellectual Property Organization: the first 50 years and beyond* (Edward Elgar Publishing 2020).

³⁶ Cf Paris Convention, art 10(2).

³⁷ For an excellent analysis of the impact that WIPO and, particularly, the Lisbon Agreement had on the development of GI, see Dev Gangjee, 'Making a Place for Place-Based IP: WIPO and Geographical Indications' in Sam Ricketson (ed), *Research handbook on the World Intellectual Property Organization: the first 50 years and beyond* (Edward Elgar Publishing 2020).

<p>All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.</p>	<p>(...) “appellation of origin” means 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.</p>	<p>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.</p>
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The first two definitions depict substantively different scenarios.³⁸ In particular, the IS is an IGO that refers to a country as being the place of origin of a given good.³⁹ It is a label that informs the consumer about the formal origin of a product, for instance by stating that it is ‘made in the UK’. Thus, they promote truth-telling on the marketplace, protecting products that are known by consumers due to the name of their place of production, e.g. Toledo steel or Belgian chocolate. Moreover, they can also indirectly indicate an origin. For instance, the Eiffel Tower can be an indirect IS for France and/or for Paris, while an image of the Colosseum can lead the consumers to believe that the good that bears it comes from Rome or Italy.⁴⁰ However, the IS does not attempt to establish a substantive link between a product and a place, or to imply any special quality or characteristic of the good on which

³⁸ Gangjee, ‘Making a Place for Place-Based IP’ (n 41) 152-153; Taubman, Wager and Watal (n 1) 89-91.

³⁹ It can be observed that the current version of this article mentions both IS and AO. In particular, the reference to the latter model was introduced by the ‘Acte de La Haye’ that amended the Paris Convention in 1925. However, this has nothing to do with the current concept of AO. In fact, back then, AO already existed in French Law but with a different meaning. Moreover, the terminology of IGO protection at international level was still in its infancy. This is why we endorse Ricketson who considers these two terms interchangeable. See, Ricketson (n 24) 714. The ‘Acte de La Haye’ (1925) is available at < <https://wipolex.wipo.int/en/text/287779>>. For the concept of Appellation of Origin in the early French Law, see Zappalaglio (n 15) 36-40.

⁴⁰ Gangjee (n 5) 23-26.

it is used.⁴¹ Therefore, the protection that it provides is formal in nature and any misleading or deceptive use of the IGO constitutes a specific form of unfair commercial conduct, sanctioned *ex post* under unfair competition law, or passing off in common law jurisdictions.⁴²

AO, instead, represents a substantively different tool that draws upon the French legal tradition of the *Appellation d'Origine Contrôlée*.⁴³ First of all, its definition shows that it is not a generic 'indication' but the 'geographical denomination of a country, region, or locality', thus excluding 'indirect' IGOs. Secondly, the system of protection introduced by the Lisbon Agreement is radically different. AOs are protected (1) only if registered – it is therefore an *ex ante* model of protection – and (2) 'even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind," "type," "make," "imitation", or the like⁴⁴', i.e. in cases when unfair competition protection would not apply because of the absence of a misleading conduct. Finally, unlike IS, the AO regime features an origin link. Specifically, the definition of AO stipulates that the link between the product and its place of manufacturing must be 'exclusively or essentially [due] to the geographical environment, including natural and human factors'. Therefore, in this scenario, IP protection is granted only to denominations that meet these specific requirements and not generically to every direct or indirect 'indication' used in a misleading way.

The tension between IS and AO, the first much broader than the second, influenced the definition of the object of protection of GIs as it appears in TRIPS. This point will be illustrated below by making reference to the preparatory works of the Agreement.

2.2 'Indications' in the context of TRIPS: drafting history and meaning

⁴¹ WIPO, 'Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization' (2003) [4].

⁴² Zappalaglio (n 15) 80-83. Ricketson (n 36) 686.

⁴³ This was the first modern *sui generis* system ever developed. It was introduced in France in 1935 and constitutes the forefather of the Appellation of Origin at international level as well as of similar regimes such as the Italian *Denominazione di Origine Controllata*. Initially, the system was designed to protect the French wine sector that was in crisis due to the heavy presence on the market of adulterated and counterfeited products. Moreover, in the second half of the 19th century the European vineyards – and especially the French ones – were almost wiped out by the Phylloxera, a microscopic aphid, of American origin, that had devastating effects on winemakers. Finally, World War I caused enormous damage to a large portion of the North-East of France, including the Champagne Region. Gradually, however, a system that was conceived to protect wines gradually expanded – not without discussion – to protect any product for which a substantive link to the physical characteristics of its area of production can be proved. The first good of this kind was 'Roquefort' cheese in 1925. Indeed, in 1958, when the Lisbon Agreement was introduced, this trend had already consolidated. In fact, this international treaty applies indifferently to 'products' in general (art 2). See, Zappalaglio (n 15) 48-55; Gangjee (n 5) 93-115.

⁴⁴ Lisbon Agreement, Art 3.

Art 22(1) TRIPS is the result of intense discussions that took place during the Uruguay Round between, broadly speaking, the EU – or European Community (EC) as it was before 1992 – on the one side, and the US, together with other common law countries, on the other.⁴⁵ Eventually, the negotiating parties agreed to a system that represents a mediation between the broad concept of IS and the narrow, deeply ‘continental European’, AO model.⁴⁶ As shown in the Introduction, the only exception was wine and spirits GIs to which some aspects of the latter regime apply. The noun ‘indication’ provided at art 22(1) TRIPS must therefore be read in light of this context.

During the Uruguay Round, the first draft project for GI protection was presented in 1988 by EC in its ‘Guidelines’.⁴⁷ This document included a section entitled ‘Geographical Indications including Appellations of Origin’. Here, this stakeholder proposed to provide recognition to the AOs protected at national level, already enshrined in the Lisbon Agreement, and to introduce a new *sui generis* IGO protection system, the GI. With regard to the latter, the document read:

GIs are ... those which designate a product as originating from a country, region or locality where a given quality, reputation or other characteristic is attributable to its geographical origin, including natural and human factors.

(...)

Where appropriate, protection should be accorded to appellations of origin, in particular for products of the vine, to the extent that it is accorded in the country of origin.⁴⁸

It can be observed that this draft definition of GI reminds one to some extent that of AO. In particular, the reference to ‘natural and human factors’ is based on art 2(1) Lisbon Agreement.⁴⁹ However, the draft also included the innovative tripartite origin link that was eventually included under art 22(1) TRIPS.

⁴⁵ See, Peter Carl Mogens, ‘Evaluating the TRIPS Negotiation: A Plea for a Substantial Review of the Agreement’ in Jayashree Watal and Antony Taubman (eds), *The Making of Trips Insights from the Uruguay Round Negotiations*. (World Trade Organization 2015), 116-117; for the perspective of the US, see Catherine Field, ‘Negotiating for the United States’ in Jayashree Watal and Antony Taubman (eds), *The Making of Trips Insights from the Uruguay Round Negotiations*. (World Trade Organization 2015) 146-148.

⁴⁶ Text to n 46.

⁴⁷ European Community, ‘Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights’ (Negotiating Group on Trade-Related Aspects of Intellectual Property Rights 1988) Multilateral trade negotiations Uruguay Round Restricted MTN.GNG/NG11/W/26.

⁴⁸ Ibid, [f](i);(iii). For more information on the role of the EC/EU on the topic of GIs during the Uruguay Round, see Zappalaglio (n 15) 111-117.

⁴⁹ See, Table 1 above.

The proposal of the EC had no real chance of being approved, however. In fact, some negotiating parties, notably the US, objected to the inclusion of GI protection in TRIPS and submitted radically different draft proposals.⁵⁰ Moreover, the Lisbon Agreement was not embraced by various countries, especially the common law ones, and its membership has always been relatively limited.⁵¹ Hence, the chances that the negotiating parties would have accepted a reference to this international treaty, and particularly to the AO, in the text of the TRIPS were close to zero.

Therefore, the outcome of the negotiations led to the adoption of a concept of GI that stands in between IS and AO and that must be interpreted as such. In particular, it is an ‘indication’ and not a ‘denomination of a country, region, or locality’ as mentioned in art 2(1) Lisbon Agreement. Indeed, the object of protection of GIs, as enshrined in TRIPS, is broader.⁵² However, the term ‘indication’ in this treaty does not overlap with the concept of IS. In particular, not all IGOs qualify for GI protection. In fact, the TRIPS definition, as mentioned earlier, like AO rules and contrary to IS, includes an origin link. Hence, only the products that feature a qualitative, reputational or other link to their area of production qualify for protection.

Therefore, the inclusion of an origin link in the text of art 22(1) TRIPS, as well as the influence of the AO model, have transformed the concept of ‘indication’ as in IS into something different that had not existed before. More specifically, the GI model is broader than the AO model but narrower than the IS model with which it has little in common, apart from a general level of protection based on the standards of unfair competition law.

⁵⁰ The proposal of the US, for instance, did not provide a definition of GI and rejected the idea of a *sui generis* regime of protection. According to them, geographical names should have been protected through collective or certification marks. For the position of the US, see, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, ‘Draft Agreement on Trade-Related Aspects of Intellectual Property Rights: Communication from the United States’ (1990) MTN.GNG/NG11/W/70, 9. Another relevant example is the position of Japan, see Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, ‘Meeting of the Negotiating Group of 12-14 September 1988’ (1988) MTN.GNG/NG11/9 1988, [13]-[14]. See also, Gangjee (n 4) 192-195.

⁵¹ The success of the Lisbon System is still very limited. As of 25 July 2021, the members of the Lisbon Union Assembly are only 34. Moreover, the Geneva Act (2015), i.e. the last revision of the Lisbon Agreement, has only 9 signatory members to date.

⁵² The text of the TRIPS does not explicitly include ‘services’ within the scope of protection of GIs. Furthermore, the provision of services was excluded from the final version of the Agreement despite its presence in some early drafts. See, Communication from Switzerland, ‘Standards and principles Concerning the Availability, Scope and Use of Trade Related Intellectual Property Rights’, 11 July 1989 (MTN.GNG/NG11/W/38) 5.

However, TRIPS concerns minimum standards only. Hence, WTO members are free to extend the scope of GI protection to encompass services, if they want. In fact, as observed by Gangjee, jurisdictions such as Switzerland, Estonia, Uruguay, Peru, South Korea and Morocco already provide GI protection to various kinds of services. In general, this point is peacefully accepted by the leading literature. See, Gangjee, *Relocating the Law of Geographical Indications* (n 5) 217-218; Kireeva and O’Connor (n 11) 282; Correa (n 1) 210, 212.

2.3 Beyond ‘indications’: an outline of the recent developments of GI protection in the EU

The previous section has come to the conclusion that the GI model was designed to occupy an intermediate position between the IS and the AO. However, the case study of the EU shows that the concept of ‘indication’ can be interpreted extremely broadly, thus exceeding what the literal and ordinary meaning of the noun itself suggests. As a consequence, the scope of protection is also considerably expanded, creating a system which has no equivalents in other jurisdictions. Particularly, the EU *sui generis* GI regime for the protection of wines and that for agricultural products and foodstuffs are comprised of two major quality schemes⁵³: the Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI).⁵⁴ The former is based on the AO model as enshrined in the Lisbon Agreement while the latter mirrors TRIPS’ GI definition. The definitions of these quality schemes provided under art 5 Agrifood Regulation make this clear:

1. (...) ‘designation of origin’ is 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.
2. (...) ‘geographical indication’ is 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.

As it emerges from the text of the rules, EU GI Law defines PDOs and PGIs as ‘names’ or ‘indications’.⁵⁵ This choice is in line with the provisions of the TRIPS Agreement. However, the EU system rarely protects non-geographical terms⁵⁶ and, in general, provides protection only to specific

⁵³ EU Spirits GIs, instead, are only protected as ‘Geographical Indications’, not as PDOs or PGIs. See, Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks (Spirits Regulation), art 15.

⁵⁴ There is also another quality scheme named ‘Traditional Specialities Guaranteed’ (TSG). This distinguishes goods that are produced following a traditional recipe / production technique or made from traditional ingredients. This is not widely used, however, and does not feature an origin link. It is a quality label not an origin label, therefore. For more on TSG, see Zappalaglio (n 15) 151-155.

⁵⁵ To be more specific, art 5 Agrifood Regulation uses the term ‘names’ both for PDOs and PGIs. Instead, the Wine Regulation, at art 93(1)(b), defines PGIs as ‘indications’.

⁵⁶ ‘Feta’ is a famous and rare example. The name of this Greek cheese simply means ‘slice’ in Italian. It is not an IGO.

kinds of products.⁵⁷ Taking Wine GIs as an example, art 103(2) of the Wine Regulation states that these ‘names’ are protected against various infringing activities, such as any direct or indirect use in respect of products not covered by the registration; any misuse, imitation or evocation even if the true origin of the products or services is indicated and any other false or misleading indication used on the packaging, advertising material or other.⁵⁸

Furthermore, both the Wine and Agrifood regulations include provision according to which names are generically protected against ‘any other practice liable to mislead the consumer as to the true origin of the product’. For instance, the Agrifood Regulation features this provision at art 13(1)(d).⁵⁹ The Court of Justice of the European Union (‘CJEU’) has recently applied it to *de facto* expand the scope of protection of EU GIs beyond the defence of ‘indications’.

This tendency has yet to explicitly emerge in the field of wine. However, it has already been established in the field of cheese by the recent *Morbier* case. This approach shows a trend that in all likelihood will also be applied to wines, as the two recent cases below will illustrate.⁶⁰

2.3.1 The *Morbier* case: GI protection beyond the concept of ‘indication’ and probable impact on Wine GIs

In this case, the Association of Producers of ‘Morbier’ cheese sued an entity that was making a similar product. In particular, the cheese produced by the latter featured the same dark or blue line of ash in the middle of it. Both at first instance and on appeal the French courts held that the conduct of the defendant did not constitute infringement. In particular, the Paris Court of Appeal (*Cour d’Appel de Paris*) stated that: (1) GIs protect the names of the products and not their appearance; (2) reproducing the appearance of a product falls within the scope of the freedom of trade and industry; (3) the distinctive dark or blue line is the result of a traditional ancestral technique that is present in other

⁵⁷ Text to n 14.

⁵⁸ The most discussed of these grounds for infringement is ‘evocation’. This concept, alien to Trade Marks Law and mentioned neither under article 22(2) nor 23(1) TRIPS, prohibits practices capable of triggering in the mind of the average EU consumer an association between a good and a GI product. A complete recount of this issue exceeds the scope of the present contribution. For more on it, see Vicente Zafrilla Díaz-Marta and Anastasiia Kyrylenko, ‘The Ever-Growing Scope of Geographical Indications’ Evocation: From *Gorgonzola* to *Morbier*’ (2021) 16 *Journal of Intellectual Property Law & Practice* 442. See also, Andrea Zappalaglio, ‘EU Geographical Indications and the protection of producers and their investments’ in Enrico Bonadio and Patrick Goold, *The Cambridge Handbook of Non-Creative Intellectual Property* (CUP, [2022, forthcoming]).

⁵⁹ Cf art 13(2)(d) Wine Regulation.

⁶⁰ *Syndicat interprofessionnel de défense du fromage Morbier v Société Fromagère du Livradois SAS* [2020] Case C-490/19 (*Morbier*). This case is analysed in depth in Zappalaglio (n 62).

cheeses.⁶¹ The French Supreme Court (*Cour de Cassation*) asked the CJEU whether under the EU GI law the presentation of a product, in particular the reproduction of its shape or other distinctive features, is capable of constituting an infringement.⁶²

The Court replied that, first, the Agrifood Regulation – but the same principle would apply to Wine GIs - does not protect only the names of the GI products but has a broader scope⁶³ and, second, that, although GIs protect ‘names’, these and the products covered by them are deeply intertwined. Moreover, the CJEU held that the protection provided to GIs is open-ended as confirmed by the abovementioned art 13(1)(d) Agrifood Regulation. On this basis, the Court found an infringement.

This case shows that the CJEU has broadened the protection of GIs beyond the mere ‘indications’ or ‘names’, thereby also incorporating features such as distinctive characteristics, shapes, colours and so on.⁶⁴ Although strong protection of GIs is beneficial to producers and consumers, this approach, which significantly exceeds the TRIPS standard, can lead to distortions. First of all, the distinctive features of a GI product are very often due to its method of production. This, however, as the Paris Court of Appeal has correctly pointed out, does not belong, and usually pre-exists, the group of producers that uses the GI. Hence, an overly broad interpretation of the ambit of protection provided by GIs may contradict one of the main bargains upon which *sui generis* GIs are based. In particular, the principle according to which names are protected but the production methods, instead, remain free to use. For instance, the *méthode champenoise*, i.e. the method for the production of Champagne wine, is used in the production of other sparkling wines.⁶⁵ Moreover, incautiously broadening the object of GI protection can potentially lead to anti-competitive effects. Indeed, as rightfully pointed out by Dev Gangjee, if decisions of this kind would have existed in the 1920s or 1930s, today we would be unlikely to see ‘Prosecco PDO’ or ‘Cava PDO’ because they are similar to Champagne as to the colour, distinctive features – i.e. the bubbles - they are sold in similar bottles and so on.⁶⁶ However, it is highly likely that this decision will be soon applied to wines. This will expand the protection of Wine GIs in the EU beyond the concept of ‘indications’, thus potentially turning Gangjee’s observations about the past into a correct prediction of the future.

⁶¹ Morbier (n 64) [15]-[16]. Today the dark/blue line does not have a technical function anymore but it is a mere distinctive characteristic of the product.

⁶² Ibid, [20].

⁶³ Ibid, [30].

⁶⁴ Some distinguished practitioners have stated that this case could even lead in the future to cases on ‘smell-alikes’, for instance.

⁶⁵ Gangjee, ‘Sui Generis or Independent Geographical Indications Protection’ (n 14) 261.

⁶⁶ Gangjee, ‘Evocation? Don’t even think about it’ (Workshop on Geographical Indications for Wines in TRIPS and Free Trade Agreements, Monash University, 14 April 2021).

In the meantime, the EU has already expanded the protection of Wine GIs to prevent services from adopting names that are similar to the registered indication. This point will be analysed below.

2.3.2 The *Champanillo* case: EU GI protection against services bearing a similar name

Art 23(1) TRIPS stipulates that WTO members ‘must provide the means for interested parties to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question.’ The rule does not suggest that the protection of wine GIs can be extended to prevent the use of a similar name on services. Art 103(2)(b) Wine Regulation, however, states that wine GIs are protected, among the other things, against ‘any misuse, imitation or evocation, even if the true origin of the product or *service* is indicated (...).⁶⁷’ This provision has recently been applied in *Champanillo*.⁶⁸

In this case, the association of producers of Champagne brought an action against the owner of some tapas bars bearing the trade name ‘Champanillo’. This is a reference to Champagne wine which in Spanish is spelled ‘Champán’. Furthermore, these bars used the image of two coupes of wine with a red liquid in it to advertise the premises. Is this a case of evocation ex art 103(2)(b) Regulation 1308/2013? The CJEU answered this question in the positive. In particular, the Court held that: first, EU GI Law protects GIs from both goods *and* services whose name is similar to that of a registered indication⁶⁹; second, the name of the service does not need to be confusingly similar to that of the GI. The fact that the former triggers in the mind of the average EU consumer the image of the latter is enough⁷⁰; third, the provision at hand applies even when no act of unfair competition has been carried out by the defendant.⁷¹

In conclusion, the two cases presented above show that in the EU the level of protection granted to GIs has been expanded way beyond the text of the TRIPS agreement. In particular, the concept of ‘indication’ encompasses not only the names but also other characteristics of the products. Furthermore, in this region, GIs are protected also against similar names of services even when no act of unfair competition can be detected.

⁶⁷ Emphasis added.

⁶⁸ *Comité Interprofessionnel du Vin de Champagne v GB*, Case C-783/19 (unpublished, 9 September 2021).

⁶⁹ *Ibid*, [52].

⁷⁰ *Ibid*, [66].

⁷¹ *Ibid*, [70].

3 ‘Origin’, ‘quality’ and ‘reputation’: roots and meaning

3.1 The concepts of origin and origin link

Art 22(1) TRIPS states that GIs are indications which identify a good as ‘originating’ in a given territory. The concept of origin is an essential component of this provision and plays a key role in defining the nature of *sui generis* GI. It is unsurprising, therefore, that the noun ‘origin’ and the verb ‘originating’ appear 15 times in arts 22-24 TRIPS.

GIs are, in fact, ‘origin labels’, i.e. labels that indicate *where* a product has been made and not *how*. This sets them apart from the larger family of ‘quality labels’ that do the opposite.⁷² For instance, the famous mark ‘Fair Trade’ certifies that a product was made following specific practices but not necessarily where. More generally, the concept of origin, which is used to certify a substantive connection between a place and a product, distinguishes the basic function of *sui generis* GIs from those of trademarks. This key point emerges from the text of the TRIPS. Indeed, art 15(1) of the Agreement defines marks as ‘any sign (...) capable of distinguishing the goods or services of one undertaking from those of other undertakings’. Thus, the main function of marks is establishing commercial origin, i.e. the fact that the products are related to a producer and not another, whereas GIs perform a substantively different task.⁷³

The concept of ‘origin’ must be translated into legal terms to be workable, however. This is why, as mentioned earlier, the definition of every *sui generis* IGO system features an element called the origin link. In a previous work I have defined this term as the set of rules that identify elements whose presence must be proved in order to establish a connection between product and a place.⁷⁴ Art 22(1) TRIPS features an origin link comprised of three linking factors: quality; reputation and other characteristics. As shown above,⁷⁵ these were all already featured in the Guidelines that the EC presented in 1988 and represent the European attempt to translate the idea of ‘origin’ into legal terms.

⁷² Elizabeth Barham, “‘Translating Terroir’ Revisited: The Global Challenge of French AOC Labeling’ in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar Pub 2016) 53-54; Gangjee, ‘Sui Generis or Independent Geographical Indications Protection’ (n 14) 258-259.

⁷³ Correa (n 1) 210. For an overview of the technical differences between Trade Marks and GIs, see FAO&SINER GI, *Linking People, Places and Products: A Guide for Promoting Quality Linked to Geographical Origin and Sustainable Geographical Indications* (2nd edn, FAO 2010), 153-155; London Economics, ‘Evaluation of the CAP Policy on Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI): Final Report’ (European Commission 2008) 171.

⁷⁴ Zappalaglio (n 15) 3.

⁷⁵ Text to 39.

Where do they come from and what do they mean, however? Neither TRIPS nor any other relevant international treaty provide a definition. Hence, in the following sections, the present contribution will investigate and propose a plausible meaning of the concepts of ‘qualitative’ and ‘reputational’ link. Instead, the third linking factor, i.e. ‘other characteristic’, is more elusive and difficult to examine in depth here. Indeed, in the EU this is usually understood as a generic clause to offer a legal basis to GI applicants that cannot provide evidence of a qualitative and/or reputational link. It is therefore extremely difficult to find a GI specification based on it.⁷⁶ Moreover, the scholarly literature has not yet focused on this element from a non-EU perspective. Therefore, the concept of ‘other characteristic’ would deserve a specific analysis that, however, cannot be carried out in this article.

3.2. The ‘qualitative link’

3.2.1 The meaning and origin of ‘quality’

In the TRIPS, the noun ‘quality’ appears exclusively, and only once, in art 22(1). The Oxford English Dictionary defines it as ‘[a] personal attribute, a trait, a feature of a person’s character’.⁷⁷ This is a good starting point to explain the general meaning of this element. Thus, according to the ‘qualitative link’ a product and a place are related if the specificities of the latter determine the quality, i.e. the essential attributes, of the former. This essentially corresponds to the link enshrined at art 2(1) Lisbon Agreement, following which the quality or characteristics of a good must be ‘due exclusively or essentially to the geographical environment, including natural and human factors’. In other words, the applicant must prove that the physical/environmental features of a specific area, together with the human element, such as the local technical know-how, traditional expertise etc, determine the distinctive characteristics of a product, i.e. its qualities.⁷⁸ For instance, a wine producer must provide evidence that both the specific physical/environmental features of an area and the human element, e.g. the local winemaking practices, contribute together to give the product its features.

By adopting the concept of ‘qualitative link’, the international legal frame has adopted the concept of *terroir*. This French term, originally appeared in the jargon of winemakers, has a long history that dates back to the 19th century and before. It stands for the specific natural and human features of an

⁷⁶ A research conducted by Max Planck Institute for Innovation and Competition that I have coordinated provides empirical evidence of this, see Andrea Zappalaglio and others, ‘Study on the Functioning of the EU GI System’ (Max Planck Institute for Innovation and Competition 2022) Chapter 1. For more empirical data, see Zappalaglio (n 15) Chapter 4.

⁷⁷ Oxford English Dictionary (OUP, 2021) ‘Quality’, [2.a].

⁷⁸ Zappalaglio (n 15) 76-77; Gangjee (n 5) Chapter 4. See also, Laurence Bérard and others, ‘Les Facteurs Historiques, Culturels, Économiques et Environnementaux Dans La Délimitation Des Zones IGP’ in Bertil Sylvander, Dominique Barjolle and Filippo Arfini (eds), *The socio-economics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional, and Co-ordination Aspects* (Actes et Communications, 2000).

area that give the good its essential characteristics. From the 1930s, this concept gradually became an important component of the conceptual foundations of the French *Appellation d'Origine Contrôlée* that eventually constituted the model on which the Lisbon Agreement's Appellation of Origin is based.⁷⁹ A complete analysis of *terroir* would exceed the scope of the present article.⁸⁰ Here, it is only the case to state that art 22(1) TRIPS, by including 'quality' as a component of the origin link for GIs, makes indirect reference to AO and, therefore, to *terroir*. The context, however, is different. In fact, this is the only linking factor enshrined at art 2(1) Lisbon Agreement. TRIPS, instead, also features the 'reputational' link that appears as a standalone element, thus providing GI applicants with much more flexibility as to how to prove the link between their product and its place of origin.⁸¹ Before turning to this kind of link, however, it is expedient to provide an example of how 'quality' is applied in the practice of EU wine GIs.

3.2.2 'Quality' in EU Wine GIs: the example of 'Chianti Classico' PDO

The Italian PDO 'Chianti Classico' is one of the most famous Wine GIs in the world. Its Single Document⁸² provides a clear example of what the qualitative link is in the EU and of how it is used. In particular, the section entitled 'Description of the Link(s)' states, among the other things:

The climate, hilly terrain and morphology of the land create an environment that is full of light and thus ideal for the grapes to ripen properly. High summer temperatures, plenty of sunshine continuing until September and October and a fairly high daily temperature range allow the grapes to ripen slowly and create the typical organoleptic and chemical characteristics of Chianti Classico, in particular its colour, bouquet and alcohol content. (...) Wine-making techniques may differ for the different vine varieties; these are usually made into wine separately to give their organoleptic properties full expression.⁸³

⁷⁹ Text to n 46.

⁸⁰ For a complete historical and conceptual analysis of *terroir*, see Zappalaglio (n 15) 40-48. See also, Laurence Bérard, 'Terroir and the Sense of Place' in Dev Gangjee (ed), *Research handbook on intellectual property and geographical indications* (Edward Elgar Pub 2016). For a critique of *terroir*, see Mark Allen Matthews, *Terroir and Other Myths of Winegrowing* (University of California Press 2015).

⁸¹ Art 2(2) Lisbon Agreement mentions 'reputation' when it stipulates that a product must enjoy a certain notoriety in its country of origin to be registered as an AO. Although leading commentators rightfully point out that the requirements of both paragraphs 1 and 2 of art 2 must be met to register and AO under the Lisbon system, here the role of 'reputation' is different. In particular, it is not an independent and standalone origin link as in art 22(1) TRIPS. See, Zappalaglio (n 15) 77; Gangjee (n 5) 145-146.

⁸² The Single Document summarises the key contents of a GI specification on the basis of a standard template provided by the EU Commission. However, it is not a mere resumé of the specification but a self-sufficient document through which anyone can understand what the protected product is. In fact, the full specifications, drafted by the national producers, are not translated into English, or any other EU language.

⁸³ 'Chianti Classico PDO' [2018] OJEU C11/8, [8].

This paragraph shows how the natural and the human factors determine the specific characteristics of the product. Moreover, the specification also states:

The professionalism of the Chianti wine growers as demonstrated by the history of this territory allows the reputation of Chianti Classico and its history to endure.⁸⁴

Thus, the link between ‘Chianti Classico’ and its place of origin is not only due to the qualitative link between the product and its place of origin but also to the reputation that the former enjoys due to its history and the technical skills of the producers. This leads us to the second key link: ‘reputation’. This will be analysed below.

3.3 The ‘reputational link’

3.3.1 The origins and meaning of ‘reputation’

Just like the word ‘quality’, also the noun ‘reputation’ appears, in the text of TRIPS, only at art 22(1) and only once. Also in this case, a dictionary definition is useful to steer the analysis in the right direction. In particular, the Oxford English Dictionary defines this term as ‘the general opinion or estimate of a person’s character or other qualities’.⁸⁵ This is also the basic concept of ‘reputation’ in the field of sui generis GIs. Indeed, some products enjoy a reputation on the marketplace due to their origin. It follows that some goods originate from an area not because the key features of the former are due to the specific physical/environmental and human characteristics of the latter. Rather, because the consumers associate the name of the place with a specific good. For instance, ‘Avola’ is an area of Italy well-known for the production of specific kinds of wine. The fact that the consumers associate the name ‘Avola’ with wine proves that the product enjoys a ‘reputation’ that links it to the area of production. This kind of link, technically called ‘reputational link’, justifies the granting of a GI even in the absence of a physical/environmental link between the product and the place of origin, i.e. of a ‘qualitative link’. The analysis will return to this point in due course.

In the absence of any workable clue both in TRIPS and in the Paris Convention, only an historical analysis can clarify the technical meaning of this concept, however. In fact, the reputational link is the result of a complex evolution that began, once again, in Europe. During the Uruguay Round, the EU was interested in preventing the misappropriation by producers located in non-European countries

⁸⁴ Ibid.

⁸⁵ Oxford English Dictionary (OUP, 2021) ‘Reputation’, [2].

of the names of products enjoying a specific reputation in the EU.⁸⁶ It must be noted, however, that, at the same time, the EU member states were negotiating the first version of the Agrifood Regulation, Regulation 2081/1992.⁸⁷ This set of rules introduced for the first time the PDO and PGI quality schemes, that, as shown above, are based on the AO and GI models respectively.⁸⁸

It is therefore impossible to understand the conduct of the EU during the negotiations of TRIPS without considering the goals of its internal agenda. In particular, one of them was the introduction of a *sui generis* GI regime capable of representing the legal traditions of all its member states.⁸⁹ Broadly speaking, two main approaches existed in the region: some countries adopted AO systems, such as France, Italy and Greece while others had always protected IGOs by resorting to unfair competition law, such as Germany and the Netherlands, or passing off, such as the UK.⁹⁰

The approach to IGO protection adopted by the latter group of countries is considered the historical predecessor to the modern concept of ‘reputational link’. In fact, in these central/northern European countries, indications were protected as ISs and not AOs. Thus, protection was justified by the need to defend the communicative strength that these signs had on the marketplace and, in particular, to ensure that they conveyed correct information to the consumers. For instance, the name ‘Solingen’ enjoys a specific *reputation* on the marketplace as a place where high quality steel cutlery is manufactured.⁹¹

Hence, *terroir* is an – allegedly – objective parameter related to the specificities of a geographical area and their influence on the qualities of a product. In contrast, reputation is traditionally considered an essentially subjective element that can be broadly defined as ‘the image conveyed by the product to the public, that distinguishes it from similar goods and that links it to a specific place’.⁹² I will return on the concept of ‘reputation’ and on its evolution in EU law in due course.

⁸⁶ Thu-Lang Tran Wasescha, ‘Negotiating for Switzerland’ in Jayashree Watal and Antony Taubman (eds), *The Making of Trips Insights from the Uruguay Round Negotiations* (World Trade Organization 2015) 178.

⁸⁷ 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.

⁸⁸ Text to n 57.

⁸⁹ The diversity of the approaches to IGO protection in the domestic law of the EU member states was explicitly acknowledged in the Preamble of Regulation 2081/1992, Recital 6.

⁹⁰ Gangjee (n 5) 115-123; Zappalaglio (n 15) 83-86. For a detailed description of many IGO protection systems in place in the EC before Regulation 2081/1992, see Herman Cohen Jehoram (ed), *Protection of Geographic Denominations of Goods and Services* (Sijthoff & Noordhoff 1980).

⁹¹ Gangjee (n 5) 223-237.

⁹² Zappalaglio (n 15) 79.

The EU wanted to reconcile these two approaches and eventually succeeded both at regional and international level.⁹³ In fact, also during the TRIPS negotiations, the inclusion of the reputational link made the definition of GIs at art 22(1) acceptable to the countries that did not have in place a IGO system based on AO and that did not intend to adopt it.⁹⁴ Therefore, the inclusion of the reputational element in the TRIPS was a consequence of both the internal and external policy agenda of the EC/EU. Moreover, it was instrumental in the creation of a broad system capable of accommodating as many IGOs as possible, including those that are not connected with their area of origin by a physical/environmental link as required by the AO model.

3.3.2 The reputational link in EU Wine GIs

As mentioned earlier, ‘reputation’ is one of the three elements that comprise the origin link featured by PGI that, in turn, mirrors the TRIPS model. In the EU, however, PDO is still by far the predominant quality scheme for the protection of wines.⁹⁵ To date, 1253 Wine PDOs have been registered against 475 PGIs.⁹⁶ This is due to the nature of wine that, being a product of the vine, is inherently characterised by direct link to the soil.⁹⁷ Therefore, PGIs in this field generally protect the names of products that, despite not satisfying the requirements for PDO protection, feature some connection to a given area, maybe only reputational.⁹⁸ The difference between these two quality schemes in the wine sector emerges from their definitions, provided under art 93(1) Wine Regulation:

(a) “a designation of origin” means the name of a region, a specific place or (...) a country used to describe a product (...) fulfilling the following requirements:

⁹³ For more on this point and on the negotiations that led to Regulation 2081/1992, see Zappalaglio (n 15) 117-127. See also, Marina Kolia, ‘Monopolising Names: EEC Proposals on the Protection of Trade Descriptions of Foodstuffs’ [1992] European Intellectual Property Review 233; Marina Kolia, ‘Monopolising Names of Foodstuffs: The New Legislation’ [1992] European Intellectual Property Review 333.

⁹⁴ Zappalaglio (n 15) 111-116.

⁹⁵ In the field of agricultural products and foodstuffs, the scenario is way different. There, in fact, PGI has become the most widely used quality scheme with 891 registered PGIs and 666 PDOs as of 20 July 2021. Moreover, the 43% of PDOs were actually registered in the early years of EU agrifood GIs – especially during the period 1996-1998 – as a way to transpose into the new unitary *sui generis* system various names, mostly AOs, that were already protected at national level. Therefore, not only the concept of PGI is largely an EU creation, but it is also the most relevant quality scheme for EU agrifood GIs almost since its creation. For more details on this point, see Andrea Zappalaglio and others (n 80). For more empirical data, see Zappalaglio (n 15) Chapter 4.

⁹⁶ As of 20 July 2021.

⁹⁷ It is known that the Appellation of Origin was originally designed to fit the wine paradigm. Only later it was adapted to other products, principally cheese, not without contradictions and inconsistencies. See, Zappalaglio (n 15) 40-58. Gangjee (n 5) 77-115. For the history and development of the French wine industry and of the protection of wine, see Leo A Loubère, *The Wine Revolution in France: The Twentieth Century* (Princeton University Press 2014); Kolleen M Guy, *When Champagne Became French: Wine and the Making of a National Identity* (Johns Hopkins University Press 2003).

⁹⁸ In this sense, Wine PGIs perform in the EU legal frame the same function that their closest relative, i.e. the French *Vin du Pays*, used to perform in France.

- (i) the quality and characteristics of the product are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors;
 - (ii) the grapes from which the product is produced come exclusively from that geographical area;
 - (iii) the production takes place in that geographical area; and
 - (iv) the product is obtained from vine varieties belonging to *Vitis vinifera*;
- (b) “a geographical indication” means an indication referring to a region, a specific place or (...) a country, used to describe a product (...) fulfilling 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 that geographical area;
 - (iii) its production takes place in that geographical area; and
 - (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*.

It emerges from this provision that while PDO requires a strong link between the wine and the designated area, both in terms of *terroir* and origin of the raw materials, PGI rules are less demanding and can be granted for products with a weaker connection to the place. This scenario is different from that of Agrifood GIs. In fact, some foods can qualify almost exclusively for PGI protection because of their nature, e.g. PDOs for bakery products are rare. Wine PGIs, instead, often grant protection to indications that refer to areas relatively broad and diverse that cannot satisfy the PDO requirements.

The analysis of the specifications of the registered EU Agrifood GIs suggests that, today, the reputational link can be divided into two main parts: market reputation and a historical element.⁹⁹ The first is the classical form of ‘reputation’. It is usually proved through elements such as consumers’ surveys, the description of the awards won by the product and so on. The historical element, instead, aims at linking the product’s reputation to a place by showing that the former is traditionally linked to an area by the ‘history’ of the latter in the broad sense. This does not generically consist in the ‘past’ of the good. Rather, it demonstrates how the history links the reputation of the name of a product to a specific place and not to another, thus triggering a specific image in the minds of consumers.

⁹⁹ For a monographic work on this topic, see Zappalaglio (n 15). For other contributions see Dev Gangjee, ‘From Geography to History: Geographical Indications and the Reputational Link’ in Irene Calboli and Wee Loon Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture in the Asia-Pacific* (Cambridge University Press 2017); Gangjee (n 14); Bérard and others (n 82).

The historical element can take different forms. It can consist solely in the recount of the historical facts related to the product and of its cultural history until the present days; it can be used to show how the production of the good traditionally shapes the society of the designated area and contributes to sustain local communities or in other instances, it is used to illustrate why specific production methods have been developed to determine the specificities of the product. Furthermore, the specifications include an element that can be called ‘current socio-economic reality’. Generally, this consists in the description of the current status of the area of production as it results from its history.

More in-depth research on this point should be carried out specifically on Wine GIs. Nevertheless, many of the principles presented earlier with regard to Agrifood GIs can be applied here. For instance, taking Italian PGIs as an example, it is enough to notice that approximately one-fourth of the Italian wine PGIs - that represent approximately the 26% of all registered EU PGIs – protect names of whole regions, such as ‘Marche’; provinces, such as ‘Provincia di Pavia’ or broad non-administrative terms such as ‘Rhaetian Alps’.¹⁰⁰ Indeed, the two most important Italian PGI wines in terms of production volumes are ‘Terre Siciliane PGI’ (‘Lands of Sicily’) and ‘Veneto PGI’.¹⁰¹ The latter case is particularly instructive. ‘Veneto’ is in fact a broad region – with an area of more than 18,000 km² – with a very diverse territory spanning from the Alps and the Dolomites to the seaside and the Laguna of Venice. It is therefore unlikely that such a name could ever qualify for PDO protection. However, because these are areas that have a reputation for the production of high-quality wine, then they can enjoy PGI protection. In fact, the specifications of both wines, despite describing the natural features of the areas, spend the major part of the ‘link’ section describing the longstanding reputation and winemaking tradition of the region.¹⁰²

4 ‘Essentially’ attributable to its geographical origin: roots and meaning

4.1 The origin of the term ‘essentially’: the Lisbon Agreement

The adverb ‘essentially’ is used only once in Section II, Part III TRIPS and two more times in the Agreement in a radically different context, i.e. under art 25 and 27. With regards to international IGO rules, it appeared for the first time in the international legal frame in the definition of AO provided in

¹⁰⁰ This is a vast mountain area that encompasses part of two Italian regions: Lombardy and Trentino-Alto Adige as well as parts of Switzerland, Austria and Lichtenstein.

¹⁰¹ Jan Conway, ‘Leading ten Italian PGI certified wines in Italy in 2018, by production volume (Statista.com, 18 December 2020) <<https://www.statista.com/statistics/729221/top-10-italian-pgi-wines-by-production-volume-in-italy/>>.

¹⁰² See, ‘Disciplinare di Produzione dei Vini Indicazione Geografica Tipica “Veneto”’ (Ref Ares(2014)2068115, 24 June 2014) art 8(b); ‘Disciplinare di Produzione dei Vini a Indicazione Geografica Tipica dei Vini “Terre Siciliane”’ (Ref Ares(2014)2085538 – 25 June 2014) art 8(2).

the Lisbon Agreement. In particular, as already shown above, art 2(1) of this treaty protects geographical denominations that designate products whose quality or characteristics are due ‘exclusively or essentially’ to the geographical environment.

Hence, this provision is formulated to feature what seems to be an alternative, i.e. ‘exclusively or essentially’. Art 22(1) TRIPS includes only the latter. This difference means something. The analysis of the drafting history of art 2(1) Lisbon Agreement shows that already in the 1950s – well before the Uruguay Round – a key concern common to different countries was to ensure that *sui generis* IGO protection systems, AO in this case, were broad enough to accommodate the desiderata of as many parties as possible.

In particular, the *travaux préparatoires* of the Lisbon Agreement show that the issue was discussed by the 4th Commission of negotiators. Here, various parties opposed the introduction of a rigid definition of AO as this could have discouraged many countries from signing it.¹⁰³ In other words, it was argued that, just like IS, AO should not have been formally and directly defined at international level. Other stakeholders proposed to leave the definition of this concept to the national laws.¹⁰⁴ Eventually, it was Israel that proposed a definition of AO, specifically adding that this IGO system should have been presented as opposed to IS.¹⁰⁵ This did not include the two adverbs ‘exclusively or essentially’:

Appellation of Origin means a geographical denomination indicating the country, region or locality from which the product in question comes and also implying the concept of quality or nature of the product specific to that country, region or locality.¹⁰⁶

This proposal ignited a discussion between negotiating parties that were in favour of this definition and others that insisted that a broader approach would have been a better solution. At the end of the debate the initial proposal by Israel was significantly amended, taking into account the observations of the other negotiating parties, and provided as follows:

¹⁰³ Union Internationale pour la Protection de la Propriété Industrielle, ‘Actes de La Conférence de Lisbonne: 6-31 Octobre 1958’ <https://www.wipo.int/edocs/pubdocs/fr/wipo_pub_lisbonne_1958.pdf>, 831-832.

¹⁰⁴ Particularly Czechoslovakia, see *ibid*, 832.

¹⁰⁵ *Ibid*, 832-833.

¹⁰⁶ ‘Appellation d’origine signifie une dénomination géographique indiquant le pays, la région ou la localité d’où le produit considéré provient et impliquant en outre la notion de qualité ou de nature du produit particulière à ce pays, cette région ou cette localité’, translation by the Author. See, *ibid*.

In this Agreement, ‘Appellation of Origin’ means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, and the use of which corresponds to qualities or to a particular nature of this product, due exclusively to the place and method of production, manufacture or extraction of these products.¹⁰⁷

This text partially resembles the final one. It is not the same, however. In fact, the final version of art 2(1) was completed by the ‘Drafting Committee’ (*Comité de Rédaction*) of the 4th Commission, not directly by the latter.¹⁰⁸ Table 2 below highlights the differences between the two versions.

Table 2. Art 2(1) Lisbon Agreement: 4th Commission draft and final version compared

4 th Commission version	4 th Commission internal Drafting Committee final version
... and the use of which corresponds to qualities or to a particular nature of this product, due exclusively to the place and method of production, manufacture or extraction of these products.	... the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

From the comparison it emerges that the version of the 4th Commission is narrower. In particular, first, the former requires an *exclusive* link between the qualities/nature of the product and specific steps of the production process, namely the method of production, manufacture or extraction. Instead, the latter broadly refers to the geographical environment of the designated area; second, only the final version features the expression ‘exclusively or essentially’ whereas the other includes the adverb ‘exclusively’ only.

Hence, it seems that the Drafting Committee wanted to reformulate the draft of the 4th Commission in a similar but broader way. This is in line with the fact that, as mentioned earlier, various negotiating parties did not want a definition of AO in the Lisbon Agreement or, if present, they wanted it to be

¹⁰⁷ ‘On entend par appellation d’origine au sens du présent Arrangement la dénomination géographique d’un pays, d’une région ou d’une localité servant à désigner ou à qualifier un produit qui en est originaire et dont l’emploi correspond à des qualités ou à une nature particulière de ce produit, dues exclusivement au lieu et à la méthode de production, de fabrication ou d’extraction de ces produits’, translation by the Author. See *ibid*, 833.

¹⁰⁸ Every Commission had an internal ‘Drafting Committee’ coordinated by the 6th Commission that operated as ‘Drafting Commission’ (*Commission de Rédaction*), see *ibid*, 38.

as broad as possible.¹⁰⁹ Therefore, the work of the Drafting Committee was specifically aimed at making the text of art 2(1) Lisbon Agreement broader in scope and more flexible, thus satisfying the requests of many stakeholders. This also explains the introduction of the expression ‘exclusively or essentially’. The next section will show that TRIPS completed this process and that the adverb ‘essentially’ must be interpreted in light of this.

4.2 The adverb ‘essentially’ in TRIPS: drafting history and meaning

The evolution of *sui generis* IGO protection regimes, both in the EU and at international level has always been characterised by a tension between countries that supported strong registration-based bureaucratic models and others that preferred solutions centred around trademarks or unfair competition standards. It has already been shown that, during the Uruguay Round, the EC/EU had to balance these two positions both internally, while discussing Regulation 2081/1992, and externally during TRIPS’ negotiations. With regard to the latter case, the evolution of art 22(1) TRIPS, as it emerges from its drafting history, is useful to understand how to interpret the adverb ‘essentially’. This is summarised in Table 3, below.¹¹⁰

Table 3. Evolution of the draft of art 22(1) TRIPS

Reference / Date	Text
EC Guidelines (MTN.GNG/NG11/W/26, 29 August 1988)	(f)(i) GIs are ... those which designate a product as originating from a country, region or locality where a given quality, reputation or other characteristic is attributable to its geographical origin, including natural and human factors. (...) (f)(iii) Where appropriate, protection should be accorded to appellations of origin, in particular for products of the vine, to the extent that it is accorded in the country of origin.

¹⁰⁹ Ibid, 833.

¹¹⁰ For more on the drafting history of art 22(1) TRIPS, see Gervais (n 1) 370-377.

<p>Draft Agreement (MTN.GNG/NG11/W/68, 29 March 1990)</p>	<p>GIs are ... those which designate a product as originating from a country, region or locality where a given quality, reputation or other characteristic of the product is attributable to its geographical origin, including natural and human factors.</p>
<p>Anell Draft (MTN.GNG/NG11/W/76, 23 July 1990)</p>	<p>[Geographical indications] [Appellations of origin] are for the purpose of this agreement [geographical] indications which designate a product as originating from the territory of a PARTY, a region or locality in that territory where a given quality, reputation or other characteristic of the products is attributable [<i>exclusively or essentially</i>] to its geographical origin, including natural [and] [or] human factors. [A denomination which has acquired a geographical character in relation to a product which has such qualities, reputation or characteristics is also deemed to be an appellation of origin.]¹¹¹</p>
<p>Dunkel Draft (MTN.TNC/W/FA 20 December 1991)</p>	<p>Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a PARTY, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is <i>essentially</i> attributable to its geographical origin.¹¹²</p>

¹¹¹ Emphasis added.

¹¹² Emphasis added.

The first proposal of what eventually became art 22.1 was presented by the EC in its ‘Guidelines’ and did not include the adverb ‘essentially’. However, it overall appears as a mix between the already existing AO model and the GI.

Furthermore, the EC wanted the TRIPS to recognise AO protection when granted to a product under the national law of a member state. This was something that the majority of the negotiating parties did not want at all.¹¹³ Hence, as Table 3 shows, in March 1990, the draft was simplified by cutting any reference to AO. Later, in the so-called Anell Draft (23 July 1990), this article was significantly reworked. It clearly looks like an incomplete work in progress, however. Among the other things, the two adverbs ‘exclusively or essentially’ appeared in the text for the first time. This constitutes a clear reference to art 2(1) Lisbon Agreement. They are in square brackets, however, meaning that the negotiating parties had not yet found an agreement. Finally, in the Dunkel Draft, i.e. the version of the article that was eventually adopted, the negotiating parties choose the adverb ‘essentially’ but not ‘exclusively’.

This evolution suggests what ‘essentially’ means in the context of TRIPS. Indeed, this is the result of a compromise between the EC that advocated for the introduction of a strong system capable of mixing AO and GI and countries that, at least initially, questioned the very need to add GIs to the treaty.¹¹⁴ A compromise was found by agreeing on a broad model, significantly different from the Lisbon Agreement, featuring low general minimum standards of protection, plus a stronger level for wines and spirits.¹¹⁵

Therefore, the analysis of the drafting history of art 22(1) TRIPS, as well as of the context in which this evolution took place, make it possible to propose a plausible interpretation of the meaning and function of the adverb ‘essentially’. In particular, the decision of including it without the term ‘exclusively’ in a text that was designed to differ from that of the Lisbon Agreement, indicates that the two must be intended as substantively different. More specifically, ‘essentially’ must be read in a literal and etymological meaning as ‘in essence’, ‘in its essential elements’, ‘for the most part’

¹¹³ Text to n 53.

¹¹⁴ See, fn 54. See also, Gangjee (n 5) 192-195.

¹¹⁵ Concerning this point, Gervais observes that the demands of the wine producing countries, mostly EU, were accepted. See, Gervais (n 1) 398. Indeed, it must not be forgotten that, generally speaking, the sales value of wines is much higher than that of agricultural products and foodstuffs. Moreover, the international trade in wines and spirits is considerably more economically relevant than that in food. For some figures on the economic value of GIs in the EU, see European Commission - Directorate General for Agriculture and Rural Development, *Study on Economic Value of EU Quality Schemes, Geographical Indications (GIs) and Traditional Specialities Guaranteed (TSGs): Final Report*. (Publications Office 2021) <<https://data.europa.eu/doi/10.2762/396490>>.

whereas ‘exclusively’ simply means ‘not allowing other things’.¹¹⁶ This interpretation is also coherent with the general goals of the provisions of the TRIPS Agreement on GIs. These, in fact, with the exception of the rules on wines and spirits, are aimed at introducing low minimum standards that can be met in a flexible way, also through collective and certification marks as in the US.¹¹⁷

Finally, the analysis of the EU *sui generis* GI Law is once again very helpful to understand the meaning that should be given to the adverb ‘essentially’. This will be conducted in the next subsection.

4.3 The implementation of ‘essentially’ in EU *sui generis* GI Law: the ‘locality requirement’

In the EU, the definition of PDO has always included the expression ‘exclusively or essentially’.¹¹⁸ This is understandable considering that, as mentioned many times above, this quality scheme corresponds to the AO protected under the Lisbon Agreement. Instead, Agrifood and Wine PGI rules, for large part of their historical evolution, have almost never included the adverb ‘essentially’ in their texts.¹¹⁹ This is unnecessary, however. In fact, this legal frame has implemented the concept of ‘essential’ connection between the ‘quality, reputation or other characteristics’ of the products and their place of origin by introducing the peculiar concept of ‘locality requirement’. This is a key component of the EU *sui generis* GI rules that establishes ‘how much’ of the protected product must be made in the designated area to qualify for GI protection. It is a unique feature of the EU regime. Nothing similar can in fact be found either in TRIPS, nor in the Lisbon Agreement.

More specifically, in the case of PDO, exceptions aside, the locality requirement stipulates that the product must be entirely produced in the designated area using raw materials sourced exclusively from there.¹²⁰ Instead, PGI rules adopt a different standard. In particular, in the agrifood sector, the locality requirement for PGIs is the following:

¹¹⁶ I endorse the observations of Correa (n 1) 210. See also, Gervais (n 1) 379.

¹¹⁷ In this sense, I partially disagree with the opinion of O’Connor. According to this practitioner and scholar, in fact, the US system is not entirely compliant with the ‘essentially related’ test, see Bernard O’Connor, ‘Geographical Indications: Some Thoughts on the Practice of the US Patent and Trademark Office and TRIPS’ (2014) 13 World Trade Review 713. See also, O’Connor and de Bosio (n 18).

¹¹⁸ See, art 5(1)(b) Agrifood Regulation and art 93(1)(a)(i) Wine Regulation. Also compare with the equivalent provisions of the old regulations: Regulation 2081/1992, art 2(2)(a) and Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, art 34(1)(a).

¹¹⁹ In particular, the adverb ‘essentially’ has only appeared in the latest version of the Agrifood Regulation (1151/2012) under art 5(2)(b). The Wine Regulation, instead, still does not feature it for PGIs, see art 92(1)(b). The Spirits Regulation is a special case because these are only protected as ‘GIs’ and the definition provided under art 15 is identical to that of the TRIPS Agreement.

¹²⁰ See, Agrifood Regulation, art 5(1)(c) and Wine Regulation, art 93(1)(ii)-(iii).

For the purpose of this Regulation, ‘geographical indication’ is a name which identifies a product (...) *at least one production steps* of which take place in the defined geographical area.¹²¹

Instead, the Wine Regulation at art 93(1)(b) reads:

(b) ‘a geographical indication’ means an indication (...) fulfilling the following requirements:

(...)

(ii) *at least 85 % of the grapes* used for its production come exclusively from that 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*.

These rules clarify and confirm the validity of the interpretation of the adverb ‘essentially’ provided in the previous subsection. Particularly, they show that, in the EU, a PGI product does not need to feature a strong, ‘exclusive’ connection with its place of origin. Rather, it is enough for it to be ‘essentially’ linked to it. This less demanding connection is given by an origin link that is broader than the one that characterises PDO, and a less demanding locality requirement, following which the product can be partially produced outside the designated area. This is particularly evident in the case of agrifood PGIs, where just one step of the production process must take place in the designated area to satisfy the locality requirement.¹²²

5 Conclusion

This article has developed an in-depth analysis of the definition of ‘Geographical Indication’ provided under art 22(1) TRIPS. This provision applies to ‘goods’ in general. However, the present analysis has focused specifically on the field of wine while using examples taken from the agrifood practice when useful and appropriate. The assessment has been based on the text, drafting history and evolution of TRIPS and of other relevant sets of international rules, especially the Paris Convention, the Madrid Agreement and the Lisbon Agreement. Furthermore, the work has interpreted the key elements that comprise the concept of GI in the TRIPS from the point of view of EU law and,

¹²¹ Agrifood Regulation, art 5(2)(c). Emphasis added.

¹²² The EU guidelines define ‘production process’ as every step from the sourcing of the raw materials to the final product. Only optional operations such as slicing, cutting, grating and packaging are excluded. See European Commission, ‘Guide to Applicants: How to Compile the Single Document’ (2018) <https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/food_safety_and_quality/documents/guide-to-applicants-of-single-document_en.pdf>.

specifically, of its history, evolution and current application. In particular, the EU Wine Regulation (1308/2013) has been taken as model.

Particularly, the present contribution has focused on (1) the meaning of the noun ‘indication’; (2) the ‘origin link’, with a focus on the concept of ‘reputation’; (3) the role played in art 22(1) TRIPS by the adverb ‘essentially’. The findings of the research are the following:

First, although the term ‘indication’ also indicates the Indication of Source, in the context of TRIPS it acquires a different meaning. In fact, art 22(1) is the result of a compromise between stakeholders such as the EU that support strong *sui generis* GI systems and others, such as the US, that oppose such regimes in favour of non-*sui generis* ones, such as trademarks. The solution was a system that is broader than AO and narrower than IS. Therefore, the ‘indication’ mentioned at art 22(1) TRIPS is a third genus that must be interpreted independently from its historical precedents. However, the analysis of the recent case law of the CJEU has shown that the concept of ‘indication’ can be interpreted in a very broad way. In particular, it has been shown that, in the EU, GIs are now protected also against goods that possess distinctive features that can remind a registered GI, regardless of their names. Although, at the moment, these decisions concern agricultural and food products, it is easily foreseeable that the same principles will be applied in the field of wine, thus extending the protection to elements such as the shape of the bottles and/or the way in which the product is presented to the consumer.

Second, the origin link adopted in TRIPS, i.e. ‘quality, reputation and other characteristics’ is largely an EU/EC creation. This mixes the qualitative link featured in the Lisbon Agreement, based on *terroir*, with the concept of ‘reputation’. The latter characterises the traditions of IGO protection centred around the formal protection of the communicative strength of the sign on the marketplace and on the image that it generates in the minds of consumers. Today, this linking factor has become predominant in EU agrifood PGIs. However, it does not play an equally important role in the field of wines. This is due to the fact that wine, because of its very nature, is a product that features a clear connection to a specific geographical area and its physical/environmental specificities. However, some instructive examples can be made, such as that of ‘Veneto PGI’. In this case, the territory of ‘Veneto’ is just too broad for a qualitative link – often known as *terroir* link - to be established. Nevertheless, this region is known to be a place where important wines are made. Therefore, it is possible to establish a reputational link between the indication ‘Veneto’ and the wines included in the specification of ‘Veneto PGI’.

Third and finally, the adverb ‘essentially’ must be read literally as ‘in essence’, ‘in its essential elements’, ‘for the most part’. ‘Essentially’ can be distinguished from ‘exclusively’, featured in the text of the art 2(1) Lisbon Agreement, which simply means ‘not allowing other things’. Indeed, the choice made at art 22(1) TRIPS - the adoption of the adverb ‘essentially’ rather than ‘exclusively’ - is specifically aimed at making GI broader and more flexible than AO, thus capable of accommodating the legal tradition of as many WTO members as possible. In the EU, the adverb ‘essentially’ is implemented through the ‘locality requirement’. This key element of EU *sui generis* GI rules determines how much of the product must be made in the designated area to be granted GI protection. In the case of PGI – the EU equivalent of TRIPS’ GI – this requirement is flexible and relatively undemanding. The definition of Wine PGI is useful to understand how this concept translates into practice. In particular, a wine can be registered as a PGI if 85% of the grapes is sourced from the designated area, while PDO requires 100%. It thus opens the door to the protection of goods that are not ‘exclusively’ but merely ‘essentially’ linked to a given place.