The historical way protection of foreign geographical indications in Brazil: the case of “Champagne”

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1.- Introduction

Only a few years ago, if someone asked for “Champagne” in a Brazilian restaurant, it would almost certainly not be a sparkling wine from the French region of Champagne. This is because, until very recently, the word in Brazil meant any sparkling product – be it wine or any grape and wine derived products, or any other fermented drinks.

At now, we can say that something is changing, but what is this? Certainly, the success of Brazilian sparkling wine has made it possible for people to find out that “Champagne” is an appellation d’origine contrôlée and refers to a delimited area located in France and recognized by the Decree of 17th December 1908. In addition to this, considering that there are various types of sparkling wines, consumers gradually realized that there was muscatel – a sparkling wine made in Brazil using only varieties of the type muscat and through a process of single fermentation also called “Asti”-, the sparkling wine made with the variety prosecco (or glera, according to the European Union), and the sparkling wines made using charmat method and the traditional method (also called champenoise by the European Union). So, what do all of these names have in common? Are they merely methods for making sparkling wines or is there anything else behind all of this?

These designations – recognized as geographical indications, denominations of origin or similar terms in their countries of origin – until recently in Brazil, only named a type of product and referred only to their basic organoleptic characteristics, such as color, aroma and flavor – without mentioning their geographical origin. It is now reasonable to assert that this picture has changed considerably, even though the legislation continues to classify products using the terms mentioned above. What factors have triggered this change? Answering this question is certainly a great challenge and as we are still going through a transitional period, it is difficult to make conclusive assertions. Therefore, before understanding this change, it becomes necessary to study how these products have historically been regulated in Brazil. Thus, the objective of this study is to demonstrate how historical and legislative use
has evolved, in Brazil, of protected terms, in other countries, as geographical indications for wines. For this, some specific terms are analyzed, notably “Champagne”, which has a long timeline of usage in Brazil. This analysis, carried out based on the inductive method, makes use of primary sources, such as legislation and regulations, of federal and state scope, as well as decisions and statements issued both at the administrative and judicial levels. This comparative historical study, aims at demonstrating the paths that regulation has taken for the making of these products, as well as the usage of the names on product labeling and the determining factors used to promote changes in the conception and comprehension of these products.

2.- Protection of “Champagne” in France

In historically analyzing the use of the “Champagne” denomination in France, it can be seen that, even before its internal official recognition, the term had already been used and was present in bilateral agreements signed by this country with the aim of ensuring its exclusive use. Initially, distinctive signs of origin were protected in a negative manner, that is, before the repression of use of a sign that indicated a provenance that was not the true origin. It did not exactly signify the existence of rights or the bearers’ distinctive signs of origin, nor the final consumers rights. What was sought was to effectively regulate the actions of the competition in the market, so that abuse would not occur. However, these were troubled times in France, especially due to the devastating effects of phylloxera. Internal fraud was rife and making wines without grapes had become common practice. One of the measures taken by the French government was to adopt Loi Griffe, on 14th August 1889, which aimed at defining what could be considered wine. However, in preventing the cruder types of fraud, more sophisticated frauds took their place: with wines being of a region that was not of their genuine origin. To control this and other unfair practices, the Law of 1st August 1905 was issued, regarding repression of commercial fraud, criminalizing, amongst these, the practice of deceiving buyers about a product's origin. This law defined that origin should be regulated by the delimitation of large wine and grape regions via regulation, carried out in the Act of 05th October 1908, which drew geographical limits for appellations based on local and constant use. This Act was gradually regulated by specific decrees for each region, as it is the case of “Champagne”, covered by the Decree of 17th December 1908, and Bordeaux, regulated by Decree 18th February 1911. These Decrees, however, were not largely accepted, especially “Champagne” that excluded from the
delimitation important territorial parts, and required state intervention to deter producers who were left out of delimitation. In 1911, Jules Pams presented a draft that proposed instituting an area of delimitation via court. After the war interregnum, this draft was approved in the form of the Law of 06th May 1919, that related specifically to the protection of “appellations d’origine” – although it did not bring any definition of this term. The problem was that the expression was interpreted as a mere geographical indication, without the need to include any qualifying factor for the wine or any quality guarantee: it proved products’ provenance as originating from a determined area, regardless of quality, and producers had the right to use “appellations d’origine”. The court proved to be inefficient in guaranteeing deep analysis of such issues and legislation in force at that time did not suffice to protect the true quality wines. Therefore, there were large orders for AO, many with no grounds (Vidal, 2001, p.81-89).

Joseph Capus, a deputy from the Gironde region, and considered AOCs mentor, suggested modifications to this criteria via the Law of 22 July 1927. This law determined that, in addition to grapes being of the determined region, in order to have the right to “appellations d’origine” (AO), conditions of terroir and varieties had to be consecrated by local, loyal and constant use. At that moment the current AOC was created. But the existing legislation did not guarantee sufficient protection of quality wines and continued to allow, at the same time, an anarchical multiplication of new recognition orders. At that moment, Joseph Capus proposed a new amendment, which came into force under the Decree-Law of 30 June 1935, that instituted the National Committee for “appellations d’origine des vins et eaux-de-vie”, as well as, finally, creating and regulating the AOC. This Committee had the function of determining, after the agreement of interested unions, conditions that should be satisfied by wines and wine rums for each one of the AOCs. After this, it established that the document should be sent ready to the Ministry of Agriculture, for them to decide, definitively, if this document would be published or not, via Decree, the approval for the recognition of an AOC without, however, altering the presented document. This way, it is possible to verify the conception of French AOCs, in the way they are perceived today, dated 1935 (Vidal, 2001, p. 81 to 89).

3.- “Champagne” at the international level

If the nationwide suppression of unfair competition has had any effectiveness, when it comes to international trade this effect ceases to exist due to the lack of established rules or principals to prohibit the use of symbols that may indicate a
false provenance. On the contrary, many items that have became synonymous with their respective geographical origins ended up creating a specific category of product, giving rise to what today is termed a common or generic descriptive name – a product of “type” that is produced in a certain place. If a sparkling wine hails from the region of “Champagne” it is a “Champagne”, so all sparkling wines produced by way of a secondary fermentation in the bottle, are of the “type” “Champagne”. This is due to the fact that international commerce, extremely prosperous in the 19th century, allowed other States to leverage the use of the names of regions known for their products in order to promote a wide range of products. In summary, the increase in value and reputation that many products acquired stimulated the falsification of identity. An increase of this practice could sully the image of these products if no measures were taken. This situation prompted producers in these regions to put pressure on their respective States to create a mechanism of protection that would transcend national borders, encompassing producing states and consumers of the products.

Firstly, the States attempted to sign bilateral agreements (Ladas, 1930), generally termed as treaties “of friendship, commerce and navigation”, with the aim of achieving a mutual understanding between the parties involved in general commerce. As a rule, these agreements also had provisions for the combat of counterfeit, unfair trade and, particularly for the States with well-known producing regions, a reciprocated prohibition on the abuse of the names of these regions. It is possible to notice that there were three bilateral agreement standards: 1) those agreements that, although concerned industrial property, did not relate to the protection of distinctive signs of origin, which, usually, besides inventions protection, only approached some manufacturing brands and the trade; 2) agreements that protected in a negative way geographic names, but only before repression to counterfeit provenance indication; 3) agreements that protected distinctive signs of

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(2) Examples of these agreements: the agreement between France and Baden, 1857; between France and Belgium, 1861 and amended in 1874 and 1879; between France and the Dominican Republic, 1882. Available at: https://pastel.diplomatie.gouv.fr (visited April 23, 2010).

(3) An example of an agreement signed between France and Ecuador, 1900. Available at: https://pastel.diplomatie.gouv.fr (visited April 23, 2010).
origin in a positive way, although without an international register, in a way that some of them showed an amendment indicating which names should be reciprocally respected. These were, however, extremely generic agreements that did not identify the distinctive seals of origin, sometimes called “place name” or “indication of origin/source”, only pertaining to the matter of the repression of false indications of origin. As a result, these agreements were not as effective as it was hoped they would be, primarily due to the fact that they were limited to the signatory State parties. Furthermore, enforcement of the agreements was not always carried and, due to political or economic factors the agreements were terminated, negating any compensation to the parties with respect to “rights acquired” during their lifetime. Finally, possible solutions to conflicts gave more weight to the relations between States than to the supposed rights acquired by the producers of the distinctive seals of origin protected by the scope of these bilateral agreements. Thus, it was not seen as possible to construct common principals that could be progressively consolidated internationally (Plaisant, 1949, p. 12-14; Pelletier e Vidal-Naquet, 1902. p. 2-8.).

Contemplation of a plurilateral agreement, which would force a fixed number of states – those central to international commerce and equivalent in political and economic power – presented itself as one of the most appropriate ways to mitigate the climate of insecurity (Accioly, Silva e Casella, 2009). The search for this plurilateral agreement therefore, was a result of the fact that the various and numerous bilateral agreements did not result in the construction of an effective international protection (Ladas, 1930).

In virtue of this, after a summit held in Vienna in 1873 during the universal exhibition held there, a movement was started to create a Union of States around a common theme that most affected the participants of the exhibition: the protection of industrial property, especially with regard to forgeries and counterfeits (Plaisant, 1949, p. 12-14). For some States, the greatest concern was caused by the disregard of patents for inventions, whilst for others, it was the constant fight in litigating against the misuse of geographical names. This provided an insight into a multilateral union, which would reciprocally handle these additional demands and be more effective than the previously attempted bilateral agreements. With these objectives, a union was created and titled the Paris Convention for the Protection of Industrial Property by a pact signed on the 20th March, 1883 between 11 states – Brazil, Belgium,

\(^{4}\) Examples of these agreements: France and Guatemala, 1895; France and Mexico, 1899; France and Colombia, 1901; France and Salvador, 1903; France and Cuba, 1904. Available at: https://pastel.diplomatie.gouv.fr (visited April 23, 2010).
Spain, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Serbia and Switzerland and later ratified by the United Kingdom, Tunisia and Ecuador. Through this agreement, norms were defined that would have to be respected by all of the signatories. The first amendment to the agreement which took place in Rome in 1886 had no repercussions. However, some signatory States, applying pressure seeking to improve the protection afforded to brands and indications of origin for products, met in Madrid on the 14th April 1891 and signed four additional protocols that each State could adhere to at their discretion. Amongst these was the Madrid Agreement, which related to the repression of false indication of origin of products. This was the first plurilateral agreement specific to the repression of false indications of origin and was designed to deal with, in particular, the issues that France had raised during previous meetings (Michelet, 1911, p. 159).

Among the numerous issues regulated, the agreement allows some exceptions. The first is related to the possibility that the merchant places, on the packaging of the product, his address and location so that the origin can be clearly seen (art. 3). The second refers to the permission granted to the courts of each State to be able to determine what may be considered a generic term and which repression may not be applied to (art. 4). However, under strong French influence, wines are safe, because for these, an indication of origin may not be considered generic. (art 4, last part). This final provision was not considered in the Brazilian judgment in relation to the usage of the term “Champagne”, even though Brazil is a signatory to the agreement which it has not revoked (Brazil, 1975). But this protection was still far from meeting the scope desired by the State sponsors, especially France. England and Switzerland, for example, continue to produce “English Champagne” and “Swiss Champagne”, because they understand that “Champagne”, despite being a product of viticulture origin and with special protection under article 4, is a composite product and not a wine. Therefore, it is disqualified as a natural viticulture product provided for in the Madrid Agreement (Michelet, 1911, p. 165). This uncertainty continues, having only been resolved by way of bilateral agreements that expressly apply the protection. And France didn’t have a bilateral agreement with Brazil or neither MERCOSUR, nor the European Union has any bilateral agreement with Brazil or MERCOSUR in this sense into today. In resume: there is not an agreement between France and Brazil on protection of geographical indication, especially champagne.

After the Madrid Agreement, some countries within the confines of the Paris arrangement, signed the Lisbon Agreement of 1958, for the protection of denominations of origin and its related international register. However, Brazil is not a signatory country.
In 1994, the agreement that established the World Trade Organization was signed which included in Addendum 1C, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Amongst others, TRIPS regulates the protection of geographical indications in its articles 22, 23 and 24. This does not establish an international protection of geographical indications, nor to oblige member states to automatically reciprocate protection. Each party shall grant to nationals of the remaining parties the right to have their GI protected by way of its own mechanisms. In the case of Brazil, a registry was created by law number 9279/1996 and Normative Instrument of the INPI no, 75/2000. This requires that all GIs, national and foreign, must solicit their recognition from the National Institute of Industrial Property. Therefore, only GIs recognized in Brazil by its official agency have their protection guaranteed. Furthermore, the TRIPS agreement allows that, even with the recognition of exclusivity in the use of the seal, those at least 10 years old before 1994 (in other words, before 1984) who used the term in good faith, may continue using it, like article 24(4). And this is the case of Champagne, because in Brazil this was used since the early twentieth century. But, in the other hand, it’s a good question to know if the TRIPS article 24 (6) can be used in the case of the TRIPS article 23 (1). Can the foreign producer use a “type champagne” for your sparkling wine, because in this country it became a common name? All these issues will certainly create more dilemmas and ambiguities in the regulation of the term “champagne” in Brazil.

4.- The use of “Champagne” term in Brazil

On analyzing the use of the word “Champagne” in Brazil in a chronological manner, starting with Decree 2253/1896, this term was already a synonym for sparkling wine. In May 1921 Companhia Antartica Paulista launched “Guaraná Champagne Antártica”, in a clear allusion to the golden soft drink (French sparkling wine). In another way, Law 549/1937, the first Brazilian Wine Law, established in its Article 2, paragraph 3 that “wine brands do not allow indications of geographic origin that do not correspond to the true origin of grape or wine production”, demonstrating the existence of a concern in this matter. In Decree-Law 476/1969, in Decree 73267/1973 and in the current Wine Law 7678/1988, “Champagne” or “champanha” is still defined as a type of wine: sparkling wine. However, the use of this term was not constant. It is possible to verify that, for instance, in Decree n. 3582/1941, the use of sparkling wine only, although it referred to the use of the champanhense method. In Law 2795/1056 there is no reference either.
Generally speaking, it is possible to notice that Brazilian legislation has treated the denomination “Champagne” since 1896 as a synonym for sparkling wine. In 1975, this assertion was put to the test in the Brazilian justice system. On this date Comité Interprofessionnel des Vins de “Champagne” (CIVC) – Association of wine producers of “Champagne” – litigated against a group of Brazilian companies that had been using this term to denominate their sparkling wines for more than 30 years at that time. These companies – Armando Peterlongo e Cia Ltd., “Champagne” Georges Aubert S.A., Mosele S.A., Estabelecimentos Vinicolas Industria e Comércio and Dreher S.A. Vinhos e Champagnas – won the argument at the Federal Recourse Court (RE 78835), guaranteeing the right to use this denomination for their sparkling wines. Not that this use was or is until today prohibited: legally any company can denominate their sparkling wine “Champagne”, because this denomination is seen by the law as a class of product (Brazil, 1975).

With the internalization of TRIPS and the publication of Law 9279/1996 that regulates protection of industrial property in Brazil, the situation did not alter. Article 193 continued to allow the use of correcting terms, such as “type”, “specie”, “gender”, “system”, “similar”, “substitute”, “identical”, without making use of the safeguard provided both in TRIPS and the Agreement of Madrid with regard to wines. In addition to this, the Wine Law of 1988, in its article 49, § 2, continues to allow the use of the term “type”, that can be utilized in wines or grape and wine by-products whose characteristics correspond to classic products.

Finally, on August 4, 2011, the CIVC filed at the National Industrial Property Institute (INPI) of Brazil an order to recognize “Champagne” as a Denomination of Origin for sparkling wines. The process IG 201102 was published to gather manifestations from third parties or even the opposition with regards to its recognition in November 2011, in the Revista da Propriedade Industrial n. 2132, p. 267. In February 7, 2012, however, a manifestation was published in which one of the companies whose right was guaranteed at RE 78835 (Brazil, 1975), presented an opposition to the order of recognition of “Champagne”, according to RPI 2144. A table tries to demonstrate chronologically the regulation of the term “Champagne” in Brazil.

Table 1 – Chronology of the Use for the Term Champagne in Brazil

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>1891</td>
<td>Madrid Agreement</td>
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<tr>
<td></td>
<td>Regards repress to fake provenance indications on goods</td>
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<tr>
<td></td>
<td>Forbids wine IGs to become generic.</td>
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<tr>
<td>1896</td>
<td>Decree n. 2253</td>
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<tr>
<td></td>
<td>Regulates tax charges on consumption of drinks made in Brazil.</td>
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<td></td>
<td>Utilizes the word “Champagne” as a synonym for sparkling wine</td>
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<tr>
<td>Year</td>
<td>Event</td>
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<td>------</td>
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</tr>
<tr>
<td>1908</td>
<td>Decree of 17/12/1908</td>
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<tr>
<td>1921</td>
<td>Companhia Antarctica Paulista</td>
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<tr>
<td>1969</td>
<td>Decree-Law n. 476</td>
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<tr>
<td>1973</td>
<td>Decree 73.267</td>
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<tr>
<td>1988</td>
<td>Law 7678/1988 – Wine Law</td>
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<tr>
<td>1994</td>
<td>Agreement TRIPS</td>
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<tr>
<td>1996</td>
<td>Law 9279/1996</td>
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<tr>
<td>2011</td>
<td>Order for IG Register 201102</td>
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Source: Original

5.- Results and discussion

Taking into consideration all information and issues raised, we are left to discover how INPI will position itself. Would “Champagne” be a denomination of origin or a type of wine (sparkling wine)? Ten or twenty years ago, we could say that the recognition would be impossible, since Brazilians understood this name as being a
type of product and not a denomination of origin of exclusive use by the inhabitants of the famous French region. But what would prevail today? On the one hand, in 1891, Brazil signed the Madrid Agreement, which concerned the repression of false provenance indications on goods. This Agreement, amongst a large number of things, enforces that provenance indications for wine cannot be considered generic – therefore, since this date Brazil would have implicitly recognized “Champagne”. But in countries such as England and Switzerland it was understood that “Champagne” was not a wine but a compound product – a wine by-product. It is worth highlighting that when the word “Champagne” was first used in Brazil – in 1896, this term was not yet protected in France, because “Champagne” was only recognized by a Decree as an Appellation d’Origin in 17th December 1908. Lastly, TRIPS gives other problems.

First, it permits in the article 24 (4) that, even with the recognition of exclusive use of this sign, those that for more than 10 years before 1994 (that is, before 1984), used the term in good faith, can continue to do it so.

And, in the article 24 (6) TRIPS permits a term customary in common language as the common name for such goods, that is identical to a geographical indication of any other Member, continue to be used.

But, in the article 23 (1) TRIPS prevents the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type” “style”, “imitation” or the like.

The question is to understand if the article 24 it is applied to the wines or not. If it is, is possible that we have some exception for the wine’s geographical indication: the Grandfather clause (24, 4) and the common name (24, 6).

For Calboli (2006), the article 24 also addresses the limitations and exceptions to the general standards from Articles 22 and 23, and the Members can invoke while implementing GI protection into their laws. For this author “to accommodate those countries that were not traditionally in favor of GI protection, Article 24(4) grants a grandfather clause and exempts member countries from having ‘to prevent continued and similar use of a particular [GI] of another Member identifying wines or spirits in connection with goods and services [where the GI has been used] in a continuous manner with regard to the same or related goods or services in the territory of that Member’ for at least ten years prior to April 15, 1994, or where this continuous use has been in good faith” (Calboli, 2006). On the other hand, “a clear compromise between old and new worlds, Article 24(6) finally provides that TRIPs countries do not need to protect GI ‘with respect to goods or services for which the
relevant indication is identical with the term customary in common language as the common name for such goods or services,’ thereby exempting GI that are generic terms in some countries from being protected under their laws” (Calboli, 2006).

We can conclude that it is possible to interpret that, under the TRIPS, in Brazil is possible continue to use champagne like a common name and under the protection of the grandfather clause. But, under the Madrid Agreement, we couldn’t say the same.

6.- Conclusion

Regulation and use of designation of certain products, in Brazil, occurred even before the referred names were positively protected and regulated in their countries of origin. In another way, the national industry opted by – in the specific case of “Champagne” – no longer using the term, because it saw its product as something unique, choosing for building its own identity. Another finding is that one of the largest thrusters for use restrictions was TRIPS, as well as actions by countries in the WTO scope, that aimed at protecting geographic indications – even if this did not take to specific panels. Therefore, we can conclude that endogenous and exogenous factors collaborated to this gradual change in the Brazilian culture regarding the use of designations that constitute geographic indications. But, it is possible to notice that this alone will not suffice. If the product does not become effectively known in Brazil, it is of little use that such products have specific protection and that local producers are forbidden to use this or that denomination. Effectively, only the true geographic indications have established themselves – and they do it so not by force or coercion, neither via rules and international agreements. Any geographical indication can only succeed if the product that effectively represents such regions means the local, loyal and constant knowledge of the region, or still, if the product translates human and natural factors that made this territory known.

As a conclusion, we hope that the official the INPI of Brazil recognizes “Champagne” as a Denomination of Origin for sparkling wines, because in the Madrid Agreement, article 4, last part, it’s clear that the wine indication of origin may not be considered generic. But the TRIPS is not so clear, and the article 24(4)(6) can be strongly used, for two reasons: in the Brazilian law, champagne continue to considered a generic or common name; and a lot of consumers continue to generally use the name champagne to designate sparkling wines.
Bibliography:


ABSTRACT

A few years ago, if a person ordering a “Champagne” in the restaurant, in Brazil, normally it's not a sparkling wine from the French region that will be served to him. This happen because, in Brazil until recently, this word designates any sparkling alcohol - from wine or other fermented beverage. That designation - recognized as geographical indications, appellations of origin or similar terms in their original countries - in Brazil indicated only a type of product, as referring to their basic organoleptic characteristics such as color and flavor – but not their geographical origin. At now, we can say that the picture has changed considerably, although the
legislation still continues to typify the products with the terms described above. What factors triggered this change? Answering this question is certainly a great challenge, without allowing conclusive statements. So, before comprehending this change, it is necessary to study how these products have been historically regulated in Brazil. So, the objective of this work is to make evident how was the historical and legal evolution, in Brazil, of the use and protection of these terms. For this investigation, it examine primary sources, like federal laws and statements, as well as decisions and opinions issued in both administrative and judicial level. It can be concluded that endogenous and exogenous factors contributed to this gradual change in the Brazilian culture, on the use of geographical indications names. But this is not enough. A geographical indication can only be sustained if the product effectively means the natural and human factors that made this territory recognized.