

The Global Dispute on Geographical Indication Protection System among China-EU-USA and Its Implication for China



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국문 요약

The protection of geographical indications (GIs) has become an important concern for both developed and developing countries. Because of the flexibility in the TRIPs Agreement as to the systems of protection, diverse approaches have been adopted by several countries for the domestic protection of GIs. The purpose of this paper is to analyze the GI protection system, compare the characteristics of the European Union (EU), the United States of America (USA) and China in the GI protection system. The goal is to find out the differences among the three countries and the reasons for the differences through the typical three cases of evidence and evaluation. It is pointed out that there are certain problems in equilibrium between rights and obligations in China in GI protection. China should respect international rules in GI protection to realize its individual interests maximization. Furthermore, based on this observations this paper proposes the solutions to the problems existing in the protection of GIs in China. According to the study performed in this paper, the shortcomings of the Chinese GI protection system can broadly be summarized

as follows: some geographical names are preemptively registered; GIs are collective rights, the generalization of the main group leads to the lack of brand value; the existing protection mode has conflicts; the dual model has limitations. Finally to address these shortcomings, in the conclusion of this paper, some solutions for developing GI strategies are mentioned.

Key words: Geographical indications, Protection, China-EU-USA, Intellectual property, Global dispute

I. Introduction

Geographical Indications (GIs) become a specific products' marker for the protection of products is an inevitable result of economic development (Irene Calboli 2017). Initially, people didn't recognize the intrinsic value of GIs. However, with the economic and social development, people began to recognize that productions from particular geographic region have specific quality, reputation or other characteristics, with advantages other commodities unmatched (Hwang Kisik, Shengnan, Ru 2018). GIs are, just like trademarks, signs used for the purpose of distinguishing goods. Unlike trademarks, GIs do not identify the commercial origin of a product from a particular undertaking, but its geographical origin from a specific place or region and, connected therewith, in most cases a given quality or other characteristic of the product (Suyv Lv 2008). GIs are defined in TRIPS Article 22.1 as: 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.

There are two main legal protection methods for GIs in the world. One is protected by a sui generis protection legislation of GIs, represented by the European Union (EU); the other is protected by trademark law, represented by the United States of America (USA). It is necessary to strengthen the registration and protection

of GIs of agricultural products in border areas. Moreover, it requires to promote the construction of special agricultural product supply bases and the construction of national-level export food agricultural products quality and safety demonstration zones¹⁾ while Strengthening the administrative enforcement of trademarks. The Ministry of Commerce is responsible for intensifying the negotiation process on the well-known trademarks, GIs, and GIs for foreign trademarks, and deepening the bilateral and the intellectual property cooperation in between China-the USA and China-EU. Furthermore, it should work to strengthen the protection cooperation of well-known GI products at home and abroad, and promote the international development of GI products.²⁾

The purpose of this paper is to analyze the GI protection system, compare the characteristics of the EU, the USA and China in the GI protection system, and find out the differences among the three. Moreover, this paper aims to search for the reasons which are responsible for these differences through the typical three cases of evidences and evaluations. Furthermore based on these comparative study, this paper proposes the solutions to the problems existing in the protection of GIs in China. Finally, to provide a precise insight of the shortcomings still prevailing in the Chinese GI protection system, a summary has been created in the conclusion sections which highlights the following crucial points: some geographical names are preemptively registered; GIs are collective rights, the generalization of the main group leads to the lack of brand value; the existing protection mode has conflicts; the dual model has limitations.

1) The General Office of the State Council issued a notice to the State Council on the issuance of the 13th Five-Year Plan for the Promotion of the Frontier and the People [2017] No.50, available at: http://www.gov.cn/zhengce/content/2017-06/06/content_5200277.htm, (accessed October 26, 2018).

2) Notice of the General Office of the State Council on Printing and Distributing the Work Points of the National Combating Infringement of Intellectual Property Rights and the Production and Sale of Counterfeit and Inferior Commodities in 2017 [2017] No.46, available at: http://www.gov.cn/zhengce/content/2017-05/31/content_5198504.htm, 2017.05.31, (accessed October 26, 2018).

II. The Literature Review

Scholars from the EU, the USA and China have conducted research on the protection of geographical indications. There are some representative literatures, namely, the work by Bernard O'Connor (2013) which analyzes the knowledge of general background to the differences between the EU and the USA in relation to GIs. Tim Josling (2006)'s work explores the differences in approach taken by the EU and the USA towards GI protection, and illustrates the nature of the legal and economic arguments. The article by Babcock, B. A. and Clemens, R. L. (2004), describes and contrasts the three systems of protecting property rights for agricultural products (certification mark, EU-wide GI, and WTO GI) and discusses some of the benefits and problems of each system and the effects of each system on helping to differentiate and protect high-value US agricultural products. The paper by Knaak, R (2015) outlines the basic features of this sui generis system for GI protection and its relationship to trademark protection. Chen Runan and Yang Ju (2017) analyzed and discussed the protection of GIs of agricultural products to the US legal system and make recommendations for China. Li Yuping and Liu Yanqun and Liang Weijiang and Song Qidao (2012) discusses the protection of domestic and foreign flags, geographic patterns and the status quo of development. Wang Xiaobing (2007) analyzed the principles that should be followed in the selection of geographical indication protection mode. Wu Chaoran (2011) proposed several countermeasures to improve the protection of GIs in China, and under the premise of maintaining the current legal system, some appropriate modifications. Xiao Zhoulun and Zhang Wenyu (2011) put forward the idea of having a reasonable division of legislative content and enforcement authority of GIs and certification marks, Tang Yue and Sun Zhi (2013) analyzed the path Guizhou GIs of agricultural brand building, Wang Xiaobing (2005) analyzed the economy of GIs and indicates that legal protection of GIs is to ensure the function of information channels that convey the quality, characteristics or reputation of the products. Wang Xiaobing (2010) studied the

trademark protection model, specialization with the advantages and disadvantages of the legal protection model. Ping Shaohua and Geng Lan (2015) analyzed the protection of the rights and interests of the geographical indication system with agricultural products as an example. Liu Yajun (2004) studied the countermeasures to improve the legal protection of GIs in China. Wang Xiaobing and Lin Xiuqin (2012) pointed out the differences between China and the EU's geographical indication legislative systems. Wang Lianfeng (2003) studied the international protection of GIs.

The interesting works performed by the previous scholars can be summarized in three points as followed: The GI protection system is country specific and varies from country to country. Second, GI is a kind of collective property rights. It is necessary to scale the industrial chain of agricultural products to achieve the branding effect. Third, GI marketing strategies is important. The scholarly work performed and documented till now shows the significant amount of success and achievement made by the scholars from China, EU and the USA in studying the GIs. Their views have greatly enriched the relevant theories on the protection forms of various GIs in the world, especially the EU special legislation on GIs. The theoretical study of the protection characteristics provides valuable basic information for subsequent in-depth research. However, there are very few studies on the comparison of the protection patterns of GIs among the EU, the USA and China. Therefore, in order to address the shortcomings existing in the documented works, in terms of comparison of the GIs of different countries, this paper will use the method of literature research, combined with three typical cases to analyze the GI protection system of the EU, the USA and China, and explore the deep-seated reasons of China's GI protection and propose countermeasures to promote the protection of Chinese GIs.

III. The Characteristic of GI Protection in China-EU-USA

1. Characteristic of Geographical Indication Protection in EU

GIs are particularly important for wines, spirits, beers, cheeses and processed meat products. The characteristics of GI products have been highlighted by numerous international research projects in Europe (Arepo 2015). The EU protects the GIs by means of a sui generis GI system. The key of this approach is that GIs are a separate form of IP with features different from Trade Marks. As GIs are different, it is necessary to have a stand-alone system for protection (Cerkia Bramley, Estelle Bienabe 2012). Article 5 of Regulation 1151/2012 provides two definitions of GIs. The differences between them are in relation to the intensity of the link between the product and the origin.³⁾ They are 'designation of origin'⁴⁾ ("PDO") and 'protected GI'⁵⁾ ("PGI"). The essential feature of the EU system is that the applicants must demonstrate positively that the characteristics, qualities or reputation of the product is essentially attributable to the geographic environment or origin. The proper geographic name can be registered if the link is proven (Na Li, Caide 2013).

2. Characteristic of Geographical Indication Protection in USA

Unlike EU, the USA does not consider that GIs require a sui generis system

3) 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 ("Regulation 1151/2012").

4) According to Article 5(1) of Regulation 1151/2012, Designation of origin', (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; (c) the production steps of which all take place in the defined geographical area.

5) According to Article 5(2) of Regulation 1151/2012, protected geographical indication: (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.

for protection. It considers that GIs are a sub-set of trademarks. As a consequence, the protection of GIs in the USA is based on the same criteria and rules applicable to trademarks (Dong Binghe 2006). The USA protects GIs by means of trademark law. Under the American-style trademark protection system, GIs have two different legal attributes: one is a sign indicating the geographical origin of the product, and the other is a sign indicating the specific quality, reputation or other characteristics of the product. It is important to note that in the USA, if a GI is registered as a collective or certification mark, it will undoubtedly be strictly protected. In this regard, the level of protection of GIs under USA trademark law is very high.

3. Characteristic of Geographical Indication Protection in China

There are currently three systems of concurrently operated GI protection systems in China. They are protected according to their own laws and regulations. The presence of three such GI protection systems has its own drawbacks, such as, during the occurrence of problem in the practice management, it is difficult for each department to quickly identify their responsibilities. There may be conflicts in administrative authority, which also reduces the efficiency of departmental management oversight. Simultaneously, the three sets of protection systems overlap in terms of protection regulations, protection standards and application procedures and protection effectiveness. In other words, it is a clear indication that they cause waste of management resources; Irrespective of these drawbacks, they will make the owners of GIs have no choice in choosing the protection method of GIs. If the application for protection is applied simultaneously in two or three departments, the production and operation costs of the users of the GIs are significantly increased, which is bound to be detrimental to the protection, development and utilization of the GI products. Thus, the bloated management system can not only promote the development of GI agricultural products, but also hinder the development of GI agricultural products.

IV. Comparison of the GIs Protection System in China-EU-USA

1. Case Study in the EU: An Empirical Analysis of Cognac⁶⁾

The French National Cognac Industry Office in France is an institution that performs government functions under the supervision of the state and serves all enterprises in the Cognac region. The government resumes of the wine-importing country contacts and cooperates. To this end, the Millennium Office must supervise the manufacture and sale of cognac by AOC (Appellation d'origine contrôlée monitored appellation of origin wines) on behalf of all operators in the Millennium Wine Region. The work of the Cognac Industry Office is mainly performed from the three sides of production supervision, sales supervision and protection of AOC dry wine. In addition, the French Cognac Office also implements stage management, from seed to sales in five stages, on the family situation, location, grape varieties, production month records, production, raw materials, processes, stocks, quality, sales, exports, etc. Registration, in triplicate, shall be submitted to the customs, taxation and other departments for joint supervision. The use of the origin label must comply with national regulations, registration, numbering, name of the factory name, place of origin, date, production, sales to the place, etc., and password security. Strict management mechanism and efficiency make the cognac office quite prestigious in the country, among fruit farmers, wine merchants and even abroad.

Therefore, the advantage of a sui generis GI system in EU is that it fully takes into account the characteristics of special industrial property rights of GI rights, emphasizes the status and role of GIs, and its protection is clear and easy to understand. The shortcoming is that it fails to take into account the issue of coordination with the trademark law. In the process of review and registration,

6) Cognac is a variety of brandy named after the town of Cognac, France. It is produced in the surrounding wine-growing region in the departments of Charente and Charente-Maritime

“the trademark and the registration authority of origin will be separated, resulting in duplication of registration and waste of resources. For example, in determining the category of goods and inadequate in the search for conflicts in prior rights.” Moreover, special administrative agencies need to be established for management and increased government expenditures, therefore most countries have not adopted special laws. In general, countries protected by special laws have products and related industries that enjoy high reputation in the world. The economic value of these products given by GIs is of great significance to the producers and countries that produce the products, therefore the host country will be very active in the specific legislation on the protection of GIs (Jiang Shiyuan 2012).

2. Case study in the USA: Idaho Potatoes

The USA registered the GI product No. 1,735,559 (certified trademark Idaho Potatoes Idaho Potatoes) and this registration is a certification mark. Idaho is a state in the United States, known for its high quality potatoes. The trademark consists of the geographic term “Idaho” and the geographic outline of Idaho. The trademark's function is to prove that the user's potato is produced in Idaho, therefore the Idaho Potato Board authorizes it to be used as the trademark. As a certification body, the Idaho Potato Board can arbitrarily set standards for those who want to use the certification mark. The potatoes they produce must be grown in Idaho, have a certain size and color, and grow under specific conditions or even must be a certain variety. Furthermore, anyone will be authorized to use the certification mark as long as they meet the requirements and the standards set by the certification board. Unless the applicant fails to meet the required standards, the certification mark owner may not refuse the authorization.

The characteristics of the US trademark law protection system are as follows: First, the GIs are treated as a special trademark in the trademark law protection system, and the GIs can be registered as a type of collective marks or certification marks, and protected, registered person may pursue a tort liability for acts such as counterfeiting in accordance with the trademark right. Second, countries often

restrict the qualifications of trademark registrants of GIs. Generally, government agencies or civil organizations with legal management have the power to apply for registration and obtain trademark rights. The trademark registrant establishes regulations for the use of the GI and authorizes the use of the enterprise or individual that meets the conditions of use. Third, the protection of GIs includes two aspects: prohibiting the registration of GIs as proprietary trademarks and allowing the protection of GIs by means of registered certification marks or collective marks. The fourth is to divide GIs into two categories: the protection of the applications of origin that have been registered as trademarks and the protection of unapproved applications of origin. Fifth, when the rights are violated, the trademark registrant and the GI have the right to file a lawsuit against the registrant, requiring the infringer to stop the infringement and compensate the loss. This model uses the existing international trademark registration system to protect GIs, saves certain legal resources, and avoids power conflicts and disputes caused by different authorities, reducing transaction costs in legal protection. Countries adopting this model generally need to have a relatively complete trademark law.

3. Disputed Case Study in China: Longjing Tea

Zhejiang Agricultural Technology Promotion Center, on the grounds of trademark infringement, sued the Changzhou Kaigu Tea Food Co., Ltd., which marked “Longjing Tea” on the front and back of the production and sales of tea packaging boxes. Article 57 of the Trademark Law of the People's Republic of China stipulates that, without the permission of the trademark registrant, the same trademark as its registered trademark shall be used on the same commodity; or a trademark similar to its registered trademark shall be used on the same commodity. Or the use of a trademark that is identical or similar to a registered trademark on a similar commodity, which is confusing, constitutes a trademark infringement. The defendant claimed that his company is engaged in the packaging and sales of Longjing tea. In order to ensure the specific quality of raw materials, Longjing tea raw materials are only ordered from the outsider Hangzhou Nade Food Co., Ltd. The suppliers

are located in the area of Longjing tea planting, and are allowed to use the “China Geography” and “Longjing Tea” certification trademarks on Longjing tea products. The quality of the Longjing tea raw materials of the alleged infringing goods is in line with the Longjing tea national standard GB/T18650.-2008. The registered trademark of “Longjing Tea” of Agricultural Technology Center is a certification mark, and Longjing Tea itself is a common name. As early as the beginning of 2001, the company began to use Longjing tea as a trade name before registering the trademark involved, enjoying the prior right and the right to continue to use it. Article 4 of the Regulations for the Implementation of the Trademark Law of the People's Republic of China stipulates that GIs may be used as certification marks for registration.

It points out there are some problems in China's protection system. First, some place names are preemptively registered. Article 10 of the Chinese Trademark Law stipulates that “the geographical names of administrative divisions above the county level or the publicly known foreign geographical names may not be used as trademarks”. This regulation only limits the areas above the county level, it means areas below the county level can not be restricted. Therefore, many companies register the sub-district level as a trademark. This behavior does not violate the Trademark Law. Simultaneously, the trademark owner can monopolize the right to use the place name, which will hinder the future economic development of the region. Second, GIs as a collective interest, the generalization of the main body leads to the lack of brand value. Third, many owners are the beneficiary to the development of GIs, however, each owner is too focused on private interests to ignore the collective interests. As a result, when there are problems with GIs, no one is willing to take the initiative to use the existing law to protect the rights and interests of GIs, just to avoid the conflicts between existing protection models. Most of the GIs in China are protected by the dual laws of the State Administration for Industry and Commerce and the State Administration of Quality Supervision. The current problem is that these two protection modes are independent and there are still many repeated and conflicting parts lead to inconsistencies in many aspects. Fourth, there are limitations in the dual model. Chinese products want

to be registered as GIs, and if they are legally protected, they will spend a large amount as registered capital. Increasing the cost of enterprises has led to companies not having more funds to develop GIs and not maintaining the standards that GIs should have. Slowly, the quality of GIs will decline and it will be difficult to achieve and maintain the quality of GIs. Even some companies, rather than registering as ordinary trademarks, are reluctant to register as GIs, which is a loss to the local culture and economy.

V. Implications for China

The protection of GIs has been a point of conflict among the EU, the USA and China for many years. The essential difference is in how GIs should be protected, if they should be protected at all.

As far as China's GI protection is concerned, while learning the existing practical experience abroad and drawing on the current institutional model, it is not important to simply compare the two models to determine the so-called “excellent” and “inferior”. The inherent logic, value and rationality of these two models should be combined with China's actual national conditions, thus establishing a system of GI protection that meets the requirements of the TRIPS Agreement and meets the real needs of China. The trademark model advocated by the USA has the effect of “heavy trademarks and light GIs”, which is in line with the interests of the USA as a “new world” country. China is an ancient civilization with a long history and rich culture, thus the GI is worth protecting. Strengthening the protection of GIs, even if it does not consider the implementation requirements of the TRIPS Agreement, has very important practical significance. Therefore, we should be mentally aware that a high level of protection is more beneficial to China. This means that our country's interests in the protection of GIs are closer to the “old world” represented by the EU, not the “new world” represented by the USA. This is an important issue that we must not pay attention to when making institutional choices.

Therefore, suggestions are as follows:

Firstly, it is necessary to establish a unified and responsible GI management agency. In the setting up of the GI management institution, it is recommended that the State Council set up the GIs Protection Committee (the committee can be located in the Ministry of Commerce), and be responsible for the administrative management of the verification, registration, investigation and prosecution of GIs, clarify the application procedures, and strictly review standards, unified special signs, and effectively strengthen the protection of GIs. For some GI products that require special protection, national mandatory standards may be applied. At the same time, the existing GIs should be reorganized to regulate the use of GIs. The committees shall set up special committees as needed. The special committees may be located in the corresponding ministries and commissions to be responsible for the identification and management of GIs within their respective areas of responsibility. Moreover, to being responsible for the identification and management of GIs, the special committees shall also undertake to publicize and promote GI products and assist enterprises in expanding their responsibilities in the international market.

Secondly, simplify the registration procedures for GIs and strictly control the quality standards of GIs is essential. It is recommended that the responsible agency not focuses simplify on the registration procedures for GIs, however works more on unifying the standards and procedures for the identification of GIs, encourage individuals or enterprises to register GIs, and facilitate the registration of GIs by individuals or enterprises. GIs are an important means to ensure product quality. The Chinese government must focus on standardizing production and improving the quality of GI products, and combining the actual conditions of the products to develop quality standards suitable for GIs in the region, from standards, measurement, and certification. The four technical aspects of inspection and testing are strictly monitored to ensure that the product quality is up to standard and the advantages of GIs are exerted.

Thirdly, selection of a suitable protection system based on China's national

conditions is very important. The EU and China are similar based on their long history and culture and rich in special products. Before the implementation of the special protection law, they also used fake goods. It is recommended to fully learn from the French special legislative protection model and formulate the law of the People's Republic of China on GIs Protection and thus establishing a system of special protection for GIs. In fact, the “Regulations on the Protection of Products of Origin and Origin” issued by the General Administration of Quality Supervision, Inspection and Quarantine in 1999 is the prototype of the special law. The national legislature may revise and improve on this basis, form the Law on the Protection of GIs, and amend laws and regulations such as the Trademark Law, the Implementation Regulations of the Trademark Law, and the Measures for the Registration and Administration of Collective Trademarks and Certification Marks. It should assist the laws and regulations based on the GIs Protection Act, thereby achieving comprehensive protection of GIs.

Finally, it is better to use international treaties to protect GIs. China must not only improve the system to protect GIs in China, but also actively protect GIs exported to foreign countries. GIs are often violated in foreign countries. The TRIPS is the latest international convention on the protection of GIs. Thus, it can be used to make Chinese GIs in member countries according to the rules and regulations in the TRIPs agreement. Simultaneously, China can protect the law and promote the international cooperation through international negotiations, sign bilateral or multilateral agreements, strengthen the protection of Chinese products, and defend the legitimate rights and interests of Chinese GIs.

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중국-EU-미국 간 지리적 표시 보호제도에 대한 글로벌 분쟁 및 중국의 시사점

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지리적 표시(GIs)의 보호는 선진국과 개발도상국 모두에게 중요한 관심사가 되었다. 보호 제도에 관한 TRIPs 협정의 유연성 때문에, 국내의 GIs 보호를 위해 여러 국가가 다양한 접근법을 채택해 왔다. 본 논문의 목적은 GI 보호 제도를 분석하고, GI 보호 제도에서 유럽연합(EU), 미국(USA), 그리고 중국(China)의 특성을 비교하는 것이다. 전형적인 3가지 증거와 평가를 통해 3국 간 차이와 분쟁의 원인을 규명하는 것이 목표다. GI 보호에 있어 중국 내 권리와 의무의 균형에 특정한 문제가 있음을 지적 하였다. 중국은 개인의 이익을 극대화하기 위해 GI 보호에서 국제규범을 존중해야 한다. 더군다나, 이 관찰에 기초하여 본 논문은 중국의 GIs 보호에서 존재하는 문제들에 대한 해결책을 제안하였다. 본 논문에서 수행한 연구에 따르면 중국 GI 보호 제도의 단점은 다음과 같이 광범위하게 요약할 수 있다. 일부 지리적 명칭은 우선적으로 등록되고, GIs는 집단적 권리이며, 주요 그룹의 일반화는 브랜드 가치의 결여로 이어지고, 기존 보호 모드는 갈등을 초래하며, 이중 모델은 한계를 가지고 있다. 마지막으로 이러한 단점을 해결하기 위해 본 논문의 결론에 GI 전략을 개발하기 위한 몇 가지 해결책을 언급하였다.

<주제어> 지리적 표시, 보호제도, 중국-EU-USA, 지적 재산권, 글로벌 분쟁