

## **The Legal Protection of China's Geographical Indications in the Context of TRIPS Agreement**

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### **Abstract**

*The Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) is the most widely accepted agreement on protection of geographical indications (GIs) in the world. World Trade Organization members are required to afford them protection under the TRIPS Agreement. This study makes a comprehensive analysis of the current legal system of GIs protection in China. It has been observed that the current laws and regulations for GIs protection do not meet all the requirements of the TRIPS Agreement. The current GIs protection system in China generates various conflicts, increases cost of GIs protection and causes various issues to the consumers. This study proposes that it is necessary to abolish some regulations, amend the current Trademark Law of the People's Republic of China, draw up a special law in due time for GIs protection. In addition, this study put forward several issues that should be taken into consideration for legislation.*

**Keywords:** Geographical Indications; the TRIPS Agreement; Legal Protection; Intellectual Property Rights; Legislation

### **Introduction**

The universal acceptance of geographical indications as intellectual property (IP) is due to four international treaties: the 1883 Paris Convention on the Protection of Industrial Property (the Paris Convention), the 1891 Madrid Agreement on Indications of Source (the Madrid Agreement), the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (the Lisbon Agreement), the 1994 Agreement On Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement). Among these four treaties, the TRIPS Agreement is the most influential international treaty which used the term "geographical indications" (hereinafter GIs) formally for the first time. It can be said that the TRIPS Agreement established the first worldwide protecting system of GIs (Gervais, 1998), so this paper discusses the protection of GIs in China in the context of the TRIPS Agreement.

According to article 22 of the TRIPS Agreement, GIs 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". China has a long history and a vast territory, the natural environment is complicated and various, the civilization for thousands of years nurtured many kinds of local specialties, the resource of GIs is very rich. With the development of consumers' income and their demands for high-quality life, products of GIs are increasingly favored.

The protection of GIs has great significance in increasing GIs producers' income, protecting consumers' rights, bettering ecological environment, improving the development of IP. China is a member state of World Trade Organization (WTO), it's an obligation to fulfill the TRIPS Agreement. However, the research into protection of GIs in China begins late, and the current law and regulations is not systematic (Yang Yong, 2013).

The defect in GIs legislation has hampered the development of GIs in china (Jiang Ling, 2012), it's necessary to analyze the current protection mode, find out the problems and work out methods to solve them.

## **2. The Current Legal System of GIs Protection in China**

### **2.1 The Trademark Law**

The first Trademark Law in China was issued in 1982 and firstly amended in 1993, the corresponding implementing regulations provided that collective marks and certification marks which had been approved and registered by the Trademark Office shall be protected by law. The next year, State Administration for Industry and Commerce of the People's Republic of China (hereinafter SAIC) promulgated Measures for the Registration and Administration of Collective Marks and Certification Marks, in which article 2 provided that certification marks can be used to prove the place of origin of goods or services, it means that GIs can be protected by Certification Marks.

In 2001, China was admitted to WTO. To meet the requirement of WTO the Trademark Law was secondly amended; the particular article 16 for GIs protection was added into it. The Trademark Law defines a GI as an indication "identifying goods as originating in a specific area, where a given quality, reputation or other characteristic of the good is essentially attribute to the natural or human factors of the area". The Implementing Regulations of the Trademark Law provided that GIs may be registered as collective marks or certification marks.

### **2.2 The Regulations for the Protection of GIs Products**

In August, 1999, the State Bureau of Quality and Technical Supervision promulgated the Regulations on the Protection of Products with An Appellation of Origin. This was the first Regulations that protected products with appellations of origin in China. Two years later, the State Bureau of Entry-Exit Inspection and Quarantine promulgated the Regulations on the Administration of Appellations of Origin. On April 10, 2001, the State Council of China merged the State Bureau of Quality and Technical Supervision and the State Bureau of Entry-Exit Inspection and Quarantine into General Administration of Quality Supervision Inspection and Quarantine of the People's Republic Of China ( hereinafter AQSIQ ).

Obviously, one department with two regulations is likely to cause conflicts. In October, 2004, AQSIQ set up a specialized office to be in charge of the management of GIs. In May, 2005, AQSIQ promulgated the Regulations for the Protection GIs Products to replace the Regulations on the Protection of Products with an Appellation of Origin. The Regulations on the Administration of Appellations of Origin was still in force but was subject to the Provisions for the Protection of Products of GIs.

### **2.3 The Measures for the Administration of GIs of Agro-products**

In December, 2007, Ministry of Agriculture of the People's Republic of China (hereinafter MOA) promulgated the Measures for the Administration of GIs of Agricultural Products, and the Registration Procedures of GIs of Agricultural Products, the Specifications of Usage of GIs of Agro-products. MOA also set up a GIs office to manage affairs of GIs related.

Different from the Trademark Law and the Provisions for the Protection of Products of GIs, Measures for the Administration of GIs of Agricultural Products are only applied to the primary products from agriculture, including plants, animals, microorganism and products from them.

According to statistics from SAIC, among the 2697 GIs trademarks that had been registered or preliminarily examined by the end of 2014, more than 85% of them are used for agro-products (Figure 1).

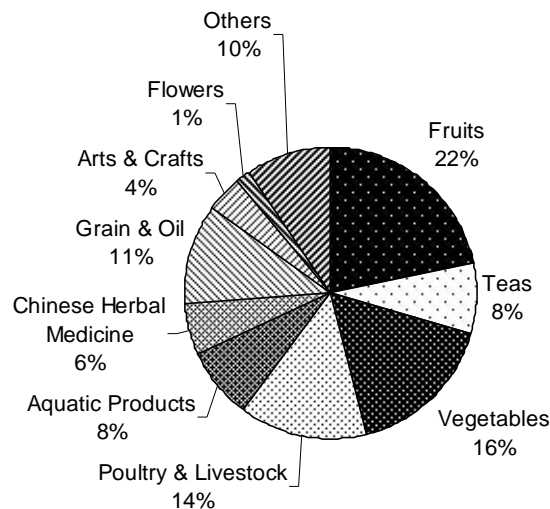


Figure 1. Categories of GIs Registered in SAIC

## 2.4 Other Laws

In China, Law of against Unfair Competition, Consumer Protection Law, Product Quality Law, Agricultural Law also protect GIs, but these laws focus on the true marks of place of origin of products, while the essence of the protection for GIs of the TRIPS Agreement is the essential relationship between product quality, reputation or other characteristic of the goods and their graphical origins. In other words, the protection for GIs provided by laws mentioned above are not in the sense of IP (Tian Furong, p.275), so this paper doesn't put them under discussion.

## 3. The Defects of Current Legal System for GIs Protection in China

### 3.1 Doesn't Entirely Meet the Requirements of the TRIPS Agreement

The current legal system for GIs protection in China doesn't entirely meet the requirements of the TRIPS Agreement as follows:

Firstly, the protection for GIs for wines and spirits is not adequate. Article 22 of the TRIPS Agreement prevents the use of a GI unless it is misleading. Article 23 affords additional protection for GIs on wines and spirits. It requires members to provide the legal means to prevent use of a GI on wines or spirits not originating in the place indicated by the GI in question, even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like. In China, the Measures for the Registration and Administration of Collective Marks and Certification Marks, Article 12 prevents the use of a GI on wines or spirits unless it is misleading. In other words, it doesn't afford additional protection for GIs on wines and spirits as the TRIPS Agreement does.

Secondly, provisions about place name trademarks are not in accordance with the Trips Agreement. Article 10 of the Trademark Law requires that "place name at the level of county or above may not be registered unless they are used as part of a collective mark or certification mark. Place name trademarks that have been registered are still effective." But how about place names below the level of county? There're many GIs in regions below the level of county. For example, in GI "Dengcun Green Tea", "Dengcun" is a town of Yichang City in Hubei Province. In fact, a town, a village, even a smaller region may be famous for its local specialties, if these place names were registered as trademarks by certain companies, persons, or organizations, it is not reasonable for other business owners there.

Thirdly, the TRIPS Agreement Article 22 prohibits GIs which are, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory. China's current laws have no regulations to deal with this kind of situation.

### 3.2 Generates Conflicts

As discussed above, SAIC, AQSIQ and MOA manage GIs in the light of different laws, this often causes conflicts. The Jinhua Ham case is a typical example. The term “Jinhua Ham” was registered as a trademark by Pujiang County Food Company in 1979, this trademark was transferred to Zhejiang Province Food Company (ZPFC) in 1983. It means that the ham producers located in Jinhua city have no rights to use the term “Jinhua Ham” without the license of ZPFC. Later, Jinhua city applied to AQSIQ to protect Jinhua ham under the Rules on the Protection of Products with An Appellation of Origin and was approved in August, 2002. In 2003, ZPFC sued a Jinhua ham producer and a Jinhua ham seller for using the term “Jinhua ham”. ZPFC claimed that the defendants had infringed on its trademark rights, while the defendants argued that “Jinhua ham” was protected by the Rules on the Protection of Products with An Appellation of Origin. The court acknowledged the trademark rights of ZPFC, but also supported the legitimate use of “Jinhua ham” as a GI. Although this lawsuit has been concluded, this kind of conflicts happens frequently. The fundamental reason is the inconformity of different laws and regulations.

It’s necessary to mention that the State Forestry Administration of the PRC is about to establish the system of GIs of forestry products. Measures for Management of GIs of Forestry Products (advice solicited manuscript) has been published, once was adopted, it will make the situation more complicated.

### 3.3 Increases the Cost of GIs Protection

Another disadvantage of this system is the cost of protection. On the one hand, it makes the applicants expend more than needed. To get complete protection, some applicants have to apply for GIs protection to two or more management organizations. By the end of 2014, there were 2350 GIs trademarks registered by ASIC (the number announced by ASIC is 2697, the number of 2350 has excluded the GIs trademarks with the same name but belong to different classification of goods). According to AQSIQ and MOA, the number of approved GIs is 1194 and 1339 respectively. As showed in Figure 2, More than 9% of the GIs acquired protection simultaneously from two administrative departments, some GIs, such like Fuzhou Jasmine Tea and Dazeshan Grapes, even acquired protection from all the three administrative departments. On the other hand, from the perspective of government, the three administrative departments overlap in functions, to some extent, waste administrative resources, increases the cost of management.

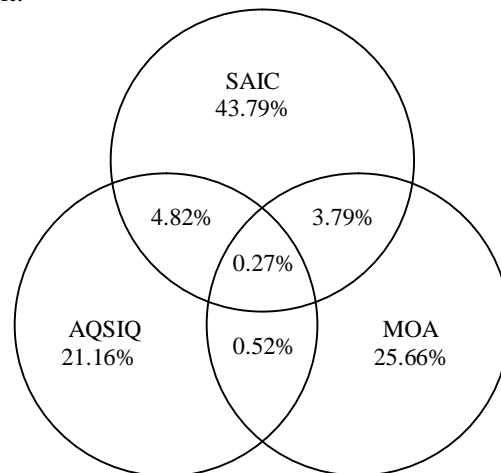


Figure 2: Percentage of GIs Registered or Approved by SAIC, AQSIQ and MOA

### 3.4 Causes Consumers’ Confusion

One of the objectives of the government’s protecting GIs is to protect consumers’ rights, provide consumers with an authoritative standard mark to find local specialties they need, make consumers buy the products with the help of the mark conveniently. However, the coexistence of laws and regulations brings confusion to consumers. China has issued five marks for GIs protection (Table 1) up to now.

**Table 1: Marks Issued by SAIC, AQSIQ and MOA**

Time	Name	Issuer	Legal basis
Jun. 1999	Special Mark for Products with An Appellation of Origin	State Bureau of Quality and Technical Supervision	Rules on the Protection of Products with An Appellation of Origin
Apr. 2001	Mark for Certification of Appellations of Origin	State Bureau of Entry-Exit Inspection and Quarantine	Implementing Measures of Rules on the Administration of Appellations of Origin
Nov. 2005	Special Mark for Protected GIs Products.	AQSIQ	No. 151 Announcement of 2005
Feb. 2007	Special Mark for GIs Products.	SAIC	Measures for Administration of Special Mark for GIs Products
Aug. 2008	Mark for Agro-product GIs	MOA	Norms for Using Mark for Agro-product GIs

Because of the merger of State Bureau of Quality and Technical Supervision and State Bureau of Entry-Exit Inspection and Quarantine, the marks they issued have been invalid. There're still three marks in effect (Figure 3). This not only confuses consumers, but also dilutes the effect of identification of GIs.



Mark issued by SAIC Mark issued by AQSIQ Mark issued by MOA

**Figure 3: The Existing Marks of GIs in China**

#### **4. The Mode of GIs Protection that China Should Adopt**

Generally, there're two main modes to protect GIs: one is by special law and the other is by trademark law, the typical country of the former is France and the latter is America. As to Law of against Unfair Competition, it prohibits the acts of false or deceptive indications of source and the content of which is defensive, we don't think it an active mode (Guan Yuying, 2010). It's necessary to point out that a country uses one mode to protect GIs not means excluding other modes. For example, France protects GIs not only with special law, but also with Law of against Unfair Competition. America mainly uses trademark laws to protect GIs, but protects wine GIs with special law.

What mode should China take for GIs protection? Scholars have different viewpoints. Bashaw (2008), Yao Sihan & Yang Yonggang (2014) suggested that China's GIs should be protected by Trademark Law. Yang Lianfeng and Huang Yanze (2006), Yang Hecai and Li Hua (2008) insisted that China is a country with abundant GIs resources, it's necessary to protect them with special law. Zhang Yumin (2007) held the view that China should use both Trademark Law and special law to protect GIs, besides the existing Trademark Law, China should legislate Law of GIs Protection in addition. Of course, every coin has two sides, China should take both the current situation and future development of GIs into consideration when selecting mode of protection. The factors below are important.

Firstly, regulations for GIs protection at the level of ministry or below have been criticizing for their legitimacy from the time they are issued. According to Law on Administrative Approval of the PRC, regulations at the level of ministries or below have no rights of setting administrative approval. The confirmation of GIs products by AQSIQ and the registration of agro-products GIs by MOA are non-administrative reviews. In April, 2014, China's State Council announced to clear up review items of non-administrative reviews which were implemented by its ministries. In May, 2015, the State Council released a decision on canceling items of non-administrative reviews. The category of non-administrative review and approval will no longer exist.

Secondly, China has a large amount of GIs. Compared with other countries in the field of IP, China has no superiority in patents, trademarks and copyrights. At the beginning of 21 century, Zheng Chengsi (2002) pointed out that GIs had the possibility of becoming an advantageous program of China in the field of IP.

Since China began protecting GIs, there're about 4000 GIs have been registered according to incomplete statistics, some of them, such as Longjing Tea, have become world renowned. China has made great progress in GIs protection during the past years, but hasn't reached the achievement it should be. To strengthen GIs protection in China can promote the development of GIs, improve their competitive power in global market, and give China a greater voice in negotiation about GIs with other countries. Internationally, countries with abundant GIs, such as France and India, intend to protect GIs with special law (Feng Shoubo & Lu Ling, 2014), on the contrary, countries with few GIs, such as America, more likely to protect them mainly by trademark law.

Thirdly, China's GIs protection should be in line with international norms. There're radical differences between GI and trademark in many aspects. GIs emphasize on the essential attribution of geographical origin to reputation or other characteristic of the good, while trademarks pay more attention to formal review. In the international treaties China has signed, the Paris Convention and the TRIPS Agreement for example, GI is a single kind of IP which is parallel with others. Besides, GI and trademark are different in valid time, the scope of place and so on.

Lastly, China's government has put GIs legislation on the agenda. As early as June, 2008, the State Council of China issued Outline of National IP Strategy, in which listed GIs legislation as one of the strategic priorities. In December, 2014, the general office of the State Council issued The Further Implementation of the National IP Strategy Action Plan (2014-2020), in which list GIs legislation as a supporting measure. We can reasonably think that China's legislation for GIs special law will start in recent years. China should abolish the existing GIs protection regulation at the level of ministry or below, protect GIs by the Trademark Law uniformly at present, constitute special law for GIs protection in due time.

## ***5. The Problems to be solved in GIs Legislation***

### **5.1 The Definition of the Term GIs**

The concept of GI is complex, different terms are used to describe it, and there're scholars ever wrote papers to analyze them (Wu Chunqi, 2003; Zhang Guohua, 2006; Zhong Changyuan, 2009; Yao Sihan, 2014). The terms used by the four international treaties and China's domestic laws and regulations includes "indications of source", "appellations of origin", "geographical indications" and so on. Sometimes, although the terms are the same, the meaning is different. In view of the fact that the term "geographical indications" and its definition in the TRIPS Agreement are widely accepted in the world, China should also use this definition.

### **5.2 The Relationship between GIs and Trademarks of Geographical Name**

Due to historical reasons, there're many trademarks of geographical name in China, this brings about many conflicts as introduced in 3.2. Although article 59 of the current Trademark Law provides that "The owner of a registered trademark has no rights to forbid other person to use geographical name of goods", it hasn't solve the problem completely. What's more, the assignment and licensing of trademarks of geographical name, the registration of trademarks of place name below the level of county, the prior rights of GIs should also be taken into consideration in legislation.

### **5.3 GIs Which Are Literally True but Mislead the Consumers**

In many countries, different places with the same geographical name is a common phenomenon, China is no exceptional. For example, the province of Heilongjiang, Jilin, Henan, Gansu, Shanxi all have a town with the same name "Yulin" (Kang Yongwei, 2012), this may cause the situation prohibited in the TRIPS Agreement Article 22: GIs which are literally true but mislead the consumers. In legislation for GIs protection, articles for this kind of situation should be added.

### **5.4 Additional Protection for GIs for Wines and Spirits**

Generally, wines and Spirits are products with high profits, and the quality, reputation or other characteristic is closely connected with its geographical origin, so it's significant to give additional protection to GIs for wines and spirits (Zheng Chengsi, 1995). In China, there're a large number of GIs for wines and spirits, especially spirits. Protecting GIs for wines and spirits additionally is not only the requirement of the TRIPS Agreement, but also an important measure to advance China's wines and spirits industry.

### 5.5 Special Protection for Key GIs

Key GIs are GIs which are China-characteristic and economically significant, such as Chinese herbal medicine, porcelain and so on. Chinese herbal medicine, for example, is famous for long time, especially after Tu Youyou, a Chinese pharmaceutical chemist, won the 2015 Nobel Prize in Physiology or Medicine for her discovery of artemisinin and its treatment of malaria. China should give special protection to this kind of GIs, this is also a common mode adopted by many countries, such as the protection of wines GIs by France, the protection of watches by Switzerland.

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