

ORIGINAL ARTICLE

# Geographical Indications: Can China Reconcile the Irreconcilable Intellectual Property Issue between EU and US?

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## Abstract

Geographical indications (GIs), signs used on products that identify their geographical origin and special quality or reputation, are atypical intellectual property. The conflicts of interest between the New World and Old World and the diversity of legal regimes have obstructed the international harmonization of GI protection. Neither the Lisbon Agreement nor the TRIPS Agreement have been able to establish a widely accepted international GI registration or protection system. Though the Geneva Act has remarkably improved the treaty regime of GIs, the different approaches of the European Union and United States still seem irreconcilable. This article examines the Chinese dual GI system from a treaty perspective and explores the common functions of GIs and Trademarks, concluding that China's Trademark Law can ensure GI protection that is compliant with the TRIPS Agreement and the Geneva Act. The Chinese solution can be a reference for other countries which protect GIs with a trademark system.

**Keywords:** Geographical Indication; Geneva Act; Lisbon Agreement; Chinese Geographical Indication; TRIPS

## 1. Introduction

A 'geographical indication' (GI) is a sign used that identifies the specific geographical origin of products and indicates the unique qualities that are related to that origin.<sup>1</sup> Bordeaux wines (France), Napa Valley wines (United States), and Yantai apples (China), are typical examples. GIs are protected mainly by two legal means among countries: the *sui generis* (Latin for 'of its own kind', describing a form of legal protection that deviates from typical legal protections) system in European countries and the trademark system in common law countries. Apart from these means, there are also countries that protect GIs through a dual system, such as China. Though the necessity to protect GIs is now universally recognized, there is still considerable difficulty in establishing international harmonization and in promoting legal protection of GIs due to both the diversity of legal systems and conflicts of interest among countries (US Mission Geneva,

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<sup>1</sup>In general, GIs are classified into two categories: appellation of origin and geographical indication. The former 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. The latter refers to indications which identify a good as originating in the territory of a Member, 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. The qualification conditions are more demanding for the former than for the latter. As the TRIPS Agreement and Geneva Act protect both at the same level, we use GIs to designate both together in this article except as otherwise indicated. See Blakeney (2017): 162–172.

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2015; see also Sanders, 2015). Regarding the legal systems, European countries consider GIs to be a particular type of intellectual property (IP) which should enjoy strict protection against imitation or misleading use, and that the *sui generis* system provides a higher level of protection than trademark law. However, common law countries do not believe a higher level of protection is justified, as they consider GIs to be a type of trademark which can be protected under trademark law or unfair competition law (Micara, 2016). With regard to conflicts of interest, mass immigration in the eighteenth and nineteenth centuries, to countries such as Australia and those of North America, inevitably led to products similar to European GI products being produced, using European methods, in the new locations, and they still have the products original European geographical names. It is true that such a practice may be a natural and expected phenomenon of development, and can even be considered respectable. However, as far as competing interests in trade are concerned, for a GI, renowned for producing a specific agricultural product, to be shared by producers of two countries poses problems in the global market. Neither a higher level of GI protection, nor the international GI registration or recognition system in favour of the original GIs is welcomed by the new world countries (Sanders, 2015).

In international law, the Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention) recognizes GIs as a type of IP.<sup>2</sup> The Lisbon Agreement for the Protection of Appellations of Origin (AO) and their Registration of 1958 (Lisbon Agreement) defined the notion of AO and its protection, as well as established an international registration system. However, until now this treaty has only been accepted in 28 countries with the *sui generis* system. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),<sup>3</sup> applicable to all 164 WTO members, has also listed GIs as a type of IP along with copyright, patent, trademark, and designs, etc. It defined GIs in a generous manner and the substantive content of GI protection is in accordance with the Lisbon Agreement. For example, it conferred a preferential protection for GIs of wines and spirits. Unfortunately, despite the intentions of the TRIPS Agreement, it has not been able to establish an international registration system of GI.<sup>4</sup> This divergence among WTO members has made the process of negotiation very slow. In the meantime, The Transpacific Partnership (TPP) has used the TRIPS provisions as a basis for its rules, but it places more emphasis on the freedom of parties regarding GI protection rather than aiming to transition towards further harmonization. Negotiations for the revision of the Lisbon Agreement have made significant progress with the adoption of the Geneva Act of 2015.<sup>5</sup> The Geneva Act has enlarged the scope of protected GIs, increased their level of protection, and provided more flexibility with respect to the availability of remedies in order to make the Lisbon Agreement a more acceptable and efficient treaty (Micara, 2016). However, while WIPO and Lisbon union members celebrate this achievement, certain countries, particularly the US, have actively criticized the Geneva Act, claiming that the new rules are not compatible with their domestic trademark laws and will harm the interests of their producers.<sup>6</sup> In fact, the dispute not only pertains to the legal issue of what system is appropriate for protecting GIs

<sup>2</sup>The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 further provided for the measures against false or misleading indication of origins, <https://wipolex.wipo.int/en/treaties/textdetails/12602> (5 July 2019).

<sup>3</sup>World Trade Organization (WTO) (1994), Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement) (negotiated 1994, effective 1 January 1995). Arts. 22–24 of TRIPS is about geographical indications, [https://docs.wto.org/dol2fe/Pages/FE\\_Browse/FE\\_B\\_009.aspx?TopLevel=4482/](https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_009.aspx?TopLevel=4482/) (18 June 2019).

<sup>4</sup>The negotiation within TRIPS council has two objectives: extending the protection level for wines and spirits to other products and establishing an international registration and recognition system such as the Lisbon Agreement. See Blakeney (2012).

<sup>5</sup>World Intellectual Property Org. [WIPO], Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, WIPO Doc. LI/DC/19 (20 May 2015) [hereinafter Geneva Act]. For Lisbon Agreement, see <https://wipolex.wipo.int/en/treaties/textdetails/12586> (5 July 2019).

<sup>6</sup>US Statement on the Adoption of the Geneva Act of the Lisbon Agreement; see also Sanders (2015), Gervais (2015: 341).

but also the problem of conflicts of interest concerning common geographical names which refer to different regions of the old world and the new world (Sanders, 2015). Presently, the differences between the old world and the new world seem irreconcilable (Gervais, 2015).

The positions of the EU and US are undoubtedly important for the development of international GI systems. The positions of those countries outside of the old world or the new world are also important. When these countries create or reform their GI systems, their options will surely lead to an interaction between international law and national laws. In view of the TRIPS Agreement and the Geneva Act, the main issues for the international protection of GIs, from a domestic law perspective, are the following: What are the suitable measures for the protection of GIs: is the *sui generis* system the only option or can trademark law also work? For non-Lisbon Agreement countries, how can trademark law be adapted so as to guarantee protection that is in compliance with the TRIPS Agreement and Geneva Act, in light of the fact that the Geneva Act has provided flexibility in this regard? How might foreign GIs be recognized in order to facilitate their international protection and, at the same time, fairly treat conflicting GIs from other countries? How may conflicts between GIs and trademarks be dealt with? Finally, what may be appropriate levels of protection for GIs in light of the TRIPS Agreement and the Geneva Act?

In this article, we will examine the Chinese law as an example of how national laws can adapt amidst the evolving international harmonization of GI systems in order to provide adequate and treaty-compliant GI protection. Although China is not a contracting party to the Lisbon Agreement, the Chinese authorities have already referred to this agreement in making their own GI regulations. It is quite probable that Chinese authorities will take the Geneva Act into account if Chinese GI systems are to be modified. As for negotiation in the framework of the TRIPS Agreement, China has supported the EU's submission to the WTO, which proposes the establishment of a multilateral GI recognition system with binding effect (WTO, 2008).<sup>7</sup> This article will first review the development of the Chinese dual GI system. Second, it will analyse the recognition of foreign GIs within China in light of the international recognition of GIs. Third, it will review the dual system's protection of GIs, and, finally, consider how the conflicts between GIs and trademarks are settled. This analysis of the Chinese GI laws, from the perspective of international treaties, will permit a better understanding of the relationship between the national GI systems and the international systems.

## 2. Evolution of the Dual Chinese GI System

GIs as a legal concept were first introduced into China with China's accession to the Paris Convention in 1985. Prior to the promulgation of any domestic legislation in China, the State Administration for Industry and Commerce (SAIC) demonstrated its willingness to recognize and protect GIs by prohibiting the use of 'Champagne' and its Chinese transliteration on wines or spirits in 1989 and the use of 'Danish butter cookies' in 1987 and 1989.<sup>8</sup> Later, the systematic registration and protection of GIs came in to place with the development of trademark law and the adoption of *sui generis* systems of GIs.

The current Chinese Trademark Law was enacted in 1982, but initially there were no provisions concerning GIs. In 1994, the SAIC adopted the 'Rules on the Registration and Administration of Collective Trademarks and Certification Trademarks', which cover GIs as subject matter (SAIC, 2003).<sup>9</sup> As China adhered into the Madrid Agreement for International Registration of Trademarks in 1989, the Chinese Trademark Office (CTO) accepted also international application

<sup>7</sup>The EU led group of WTO members has submitted a proposal on a binding multilateral GI registration system, the US led group has submitted a proposal on a voluntary and non-binding multilateral registration system, and Hong Kong SAR has submitted a compromised proposal. See WTO (2005a).

<sup>8</sup>Chinese Trademark Office decided not to accept geographical names of counties, regions, or provinces as trademarks from 1986 in order to avoid conflicts between AO and trademarks.

<sup>9</sup>This act was replaced by the rule under the same title in 2003.

of GI certification trademarks and collective trademarks. It was in 2001 that the TRIPS Agreement's definition of GI was adopted into the Chinese Trademark Law, which clarified that GIs are a separate subject matter that can be protected as a special type of trademark: collective trademark or certification trademark.<sup>10</sup> As of the end of June 2018, 4,395 GI trademarks have been registered in China, including 171 foreign GI trademarks (Qun Li, 2018).

The two *sui generis* systems of GIs in China have been created respectively by the Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) and by the Ministry of Agriculture (MOA). AQSIQ created the *sui generis* system for the protection of GIs on agricultural products in 1999, which was updated by the 2005 Regulations. In 2009, AQSIQ adopted the 'Working Rules on the Protection of GI Products for the implementation of the Regulations'. As of the end of June 2018, 2,359 GI products have been registered with AQSIQ, including 61 foreign GI products.<sup>11</sup> Under the *sui generis* system governed by the MOA, the Law on Agriculture of 2002 provided for agricultural product GIs. In 2007, the MOA adopted the Method on the Administration of Agricultural GIs. Following this, the MOA began to register agricultural product GIs. As of the end of June 2018, 2,377 GIs have been registered with MOA.<sup>12</sup>

Therefore, a juxtaposition of three parallel legal systems exists in China, and GI producers have difficulty choosing between the systems. In practice, certain GIs are registered with both the CTO and the AQSIQ, which is a waste of resources. This can also give rise to counterfeiting disputes where a GI is registered by party A with the CTO whilst it is also registered by party B with the AQSIQ.<sup>13</sup> In fact, the three systems are different regarding their bases and rationales. GI trademarks benefit from all procedures and remedies available to trademark owners but enjoy a superior status vis-à-vis ordinary trademarks. As for China's *sui generis* systems, it was the initiative of the MOA to promote quality products that resulted in the agricultural GI products system<sup>14</sup> and the initiative of AQSIQ to protect and control the quality and characteristics of geographical products that brought about the GI product system.<sup>15</sup> The primary objective of these two systems is

<sup>10</sup>Art. 16 of Chinese Trademark Law. 'Where a trademark bears a geographical indication of the goods when the place indicated is not the origin of the goods in question, thus misleading the public, the trademark shall not be registered and its use shall be prohibited. However, where the registration is obtained in goodwill, it shall remain valid. The geographical indication mentioned in the preceding paragraph means the origin of the goods, the special qualities, credibility, or other characteristics of the goods, and it is primarily determined by the natural factors or other humanistic factors of the place indicated', [www.npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384018.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384018.htm) (18 June 2019).

<sup>11</sup>National Intellectual Property Administration, PRC, [www.sipo.gov.cn/twzb/gjzscqj2018ndsjdllxwfbh/index.htm](http://www.sipo.gov.cn/twzb/gjzscqj2018ndsjdllxwfbh/index.htm) (20 June 2019).

<sup>12</sup>See, generally, Department of Agriculture Product Quality Safety Center, [www.aqsc.agri.cn/ncpdllbz/cpcx/](http://www.aqsc.agri.cn/ncpdllbz/cpcx/) (20 June 2019).

<sup>13</sup>*Qin Zhou Yellow*, Jin Min Zhong Zi No.17 [2010] (Shanxi Supreme People's Court) (2013) Min Shen Zi No. 1642, National Supreme People's Court (2010), [www.pkulaw.cn/case/pfnl\\_a25051f3312b07f3e8e83d8dfd18b44138c4a-d246424503ebdfb.html?keywords=%E6%B2%81%E5%B7%9E%E9%BB%84&match=Exact](http://www.pkulaw.cn/case/pfnl_a25051f3312b07f3e8e83d8dfd18b44138c4a-d246424503ebdfb.html?keywords=%E6%B2%81%E5%B7%9E%E9%BB%84&match=Exact) (19 June 2019). *Qin Zhou Yellow* is a registered trademark used on food; while *Yellow Millet of Qin Zhou* is GBT 19503-2008 Geographical Indication Product produced in 19 townships in and around the jurisdiction of Qin County, Shanxi Province. *Jinhua Ham*, Hu Er Zhong Min Wu (Zhi) Chu Zi No. 239, [www.pkulaw.cn/case/pfnl\\_a25051f3312b07f340896dc80dedc5356fa15e4843-bef6d0bdfb.html?keywords=%E9%87%91%E5%8D%8E%E7%81%AB%E8%85%BF&match=Exact](http://www.pkulaw.cn/case/pfnl_a25051f3312b07f340896dc80dedc5356fa15e4843-bef6d0bdfb.html?keywords=%E9%87%91%E5%8D%8E%E7%81%AB%E8%85%BF&match=Exact) (19 June 2019). *Jinhua ham* is a registered trademark used on ham, and it is also GBT 19088-2008 Geographical Indication Products which produced in 15 counties within the jurisdiction of Jinhua City and Zhangzhou City, Zhejiang Province.

<sup>14</sup>Agriculture Law of PRC (2012 rev.), art. 23. 'The state supports the establishment and optimization of a quality agricultural product certification and indication system in accordance with the law. The state encourages and supports the development of high-quality agricultural production. Local governments at or above the county level shall, in light of local conditions, take measures to develop high-quality agricultural products in accordance with relevant state regulations. High-quality agricultural products that meet the standards set by the state may apply for the relevant signs in accordance with the provisions of laws or administrative regulations. Agricultural products that meet the requirements of the specified origin and production specifications may apply for the geographical indications of agricultural products in accordance with the relevant laws or administrative regulations.' [http://www.npc.gov.cn/npc/xinwen/2012-12/29/content\\_1749530.htm](http://www.npc.gov.cn/npc/xinwen/2012-12/29/content_1749530.htm) (5 July 2019).

<sup>15</sup>Regulation on the Protection of Appellation of Origin Products (1999), art 1. 'In order to effectively protect the products of origin of our country, standardize the use of special marks for products of origin, and ensure the quality and characteristics

the administration of GI products rather than the protection of GI owners' private interests. Therefore, the regulations focus more on the duties of GI producers than trademark law does. As trademark law focuses more on GI producers' private interests while the *sui generis* systems focus more on the administration of GI products, a combination of the two is preferable. The merging of AQSIQ and CTO in April 2018 could facilitate the reform of the two systems in this direction. The most likely solution is that the technical centre of AQSIQ will assist the CTO in the substantial examination of GI.<sup>16</sup>

### 3. Registration of Foreign GI

In this section, this article will examine the registration of foreign GIs in China, as well as the necessity and conditions required for a GI to achieve international recognition.

#### 3.1 Registration of Foreign GI in China

As far as the *sui generis* systems are concerned, the MOA has not yet accepted applications for foreign GI products. The AQSIQ only began to accept foreign GI product applications in 2016, although its GI products system was created in 1999. China's main reason for excluding foreign GIs from registering under its *sui generis* system is that China is not a contracting party to the Lisbon Agreement. In addition, the technical feasibility of examining foreign GI applications is a concern. However, before the Act of 2016, AQSIQ had already registered certain foreign GIs on the basis of a bilateral treaty with the EU.<sup>17</sup> According to the 'Memorandum of Understanding', the EU and China agreed to register 10 GIs of the other party on a reciprocal basis from 2007, and now yet another project of 100 + 100 GIs is underway.

According to the 'Methods on the Protection of Foreign GI Products of 2016', AQSIQ accepts foreign GI applications on a reciprocal basis where the country of origin of the foreign GI is in a cooperative relationship with China. Foreign GIs are protected in both their original language and their Chinese translations. Such names cannot be generic in China, or be in conflict with Chinese GIs. The application should be filed with AQSIQ in the name of the foreign owner of the GI with a recommendation from the competent authorities in its country of origin.<sup>18</sup> The application will be published after preliminary examination with a 60-day period of opposition. A group of experts will examine the documents and, if necessary, perform a spot examination. Following this examination, the GI will either be approved and published or it will be rejected.

Foreign GI trademark registration in China has been possible since 1989, when China began accepting Madrid international trademark applications. The 'Collective Trademark and Certification Trademark Registration and Administration Rule of 1994' opened the door for national GI trademark applications. Evidence should be provided that establishes the legal protection of the GI in the name of the applicant in the country of origin.<sup>19</sup> However, the provision itself does not describe the acceptable forms of the legal protection for GIs in the country of

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of products of origin, these regulations are formulated in accordance with national laws and regulations and the duties assigned by the State Council.' [http://www.aqsiq.gov.cn/xxgk\\_13386/xxgkzftl/zcfg/201210/t20121017\\_265767.htm](http://www.aqsiq.gov.cn/xxgk_13386/xxgkzftl/zcfg/201210/t20121017_265767.htm).

<sup>16</sup>The examination report of such a center can be *prima facie* evidence (Latin for 'at first look', indicating evidence that is sufficient to prove the truth of a matter unless contested) of satisfaction of the above-mentioned conditions.

<sup>17</sup>Memorandum of Understanding on the Protection of GIs between PRC AQSIQ and European Commission Directorate Trade (5 September 2005), [http://kjs.aqsiq.gov.cn/dlbzcpbh wz/gjdt/200610/t20061030\\_20936.htm](http://kjs.aqsiq.gov.cn/dlbzcpbh wz/gjdt/200610/t20061030_20936.htm) (20 June 2019).

<sup>18</sup>The specifications of a GI product should include, among other things: geographical scope; characteristics of the products and its processing technics; reputation in the country of origin, in China and in other countries; causation between the characteristics of GI products and the natural or human factors.

<sup>19</sup>Rule on the Registration and Administration of Collective Trademarks and Certification Trademarks (released by the State Administration for Industry and Commerce on 17 April 2003.), para. 2 of art.6 'Where a foreigner or a foreign enterprise applies for the registration of a geographical indication as a collective mark or certification mark, the applicant shall provide proof that the geographical indication is legally protected in its original country.'

origin. In practice, the CTO and the Courts accept any legal form of protection, either as certification trademark, collective trademark, or by *sui generis* system.<sup>20</sup> This remarkable flexibility allows the Chinese trademark system to participate in the international GI registration system. Further, GI trademark certificates delivered in their countries of origin should be filed with other evidence on the qualification of GIs.<sup>21</sup> In the case of *Fiji Pure Mahogany*,<sup>22</sup> the Beijing High People's Court held that the CTO merely needs to conduct a formal examination of the technical capacity of the certification trademark applicant regarding the inspection of GI product.

The examination of Chinese GI trademark applications is a formal, document-based process, and the CTO relies mainly on historical documents to ensure that the application satisfies the GI definition. For foreign GI trademark applications, besides the formal examination of the submitted documents, the CTO relies mainly on an official document confirming that the GI is protected in its country of origin. Regarding the *sui generis* system with AQSIQ, though it requires the submission of a test report made in the country of origin indicating the physical and chemical characteristics of the GI product, the main supporting document is still the original official registration document of the GI in its country of origin. In addition, it can be noted that it would not be difficult for China to move from the current practice regarding examination of foreign GI certification trademark or collective trademark to the recognition of foreign GIs under a multilateral system like the one proposed by the Geneva Act. From a national perspective, the recognition of foreign GIs necessitates that the laws of the country of origin and the Chinese law should be identical or similar in two aspects: the conditions of qualification of GIs and the examination procedure of GIs.

### 3.2 International Registration of GI

Significantly, in examining the substantial conditions of GI registration, examiners are unable to verify the causation between the local natural or human factors of a specific region and the given quality or characteristic of a product from that region (Gangjee, 2012: 231–237). For example, although examiners may carry out certain physical, chemical, or biological tests, it is difficult to determine whether or how the factors native to the Asian continent subsequently produced the Asian elephant, or whether or how the factors native to the African continent were directly responsible for the African elephant. The objective has thus become merely to identify which quality or characteristic is common among products from a certain region while also identifying the particular natural or human factors that are common throughout that region. Science and technology only enable us to explain the connection between geographical origin and special quality of GI products to a limited extent.<sup>23</sup> As a result, it is challenging to determine the

<sup>20</sup>*Fiji Pure Mahogany* (2016), Jing Xing Zhong Zi No. 1511, [www.pkulaw.cn/case/pfnl\\_a25051f3312b07f368aa09805311-ca36def8adb0ad91e9bdfb.html?keywords=%E5%8C%97%E4%BA%AC%E5%B8%82%E9%AB%98%E7%BA%A7%E4%BA%BA%E6%B0%91%E6%B3%95%E9%99%A2%20%E6%96%90%E6%B5%8E&match=Exact](http://www.pkulaw.cn/case/pfnl_a25051f3312b07f368aa09805311-ca36def8adb0ad91e9bdfb.html?keywords=%E5%8C%97%E4%BA%AC%E5%B8%82%E9%AB%98%E7%BA%A7%E4%BA%BA%E6%B0%91%E6%B3%95%E9%99%A2%20%E6%96%90%E6%B5%8E&match=Exact) (18 June 2019).

<sup>21</sup>Such evidence may include the documents on given characteristics of the product, the causation between geographical environment and the characteristics, as well as the boundary of the GI area.

<sup>22</sup>Beijing Intellectual Property Court, *Fiji Pure Mahogany* (2015), Jing Zhi Xing Chu Zi No. 3735, [www.pkulaw.cn/case/pfnl\\_a25051f3312b07f36475edc75ff89eb3d13896635951b0b4bdfb.html?keywords=%E5%8C%97%E4%BA%AC%E7%9F%A5%E8%AF%86%E4%BA%A7%E6%9D%83%E6%B3%95%E9%99%A2%202015%20%203735%E5%8F%B7&match=Exact](http://www.pkulaw.cn/case/pfnl_a25051f3312b07f36475edc75ff89eb3d13896635951b0b4bdfb.html?keywords=%E5%8C%97%E4%BA%AC%E7%9F%A5%E8%AF%86%E4%BA%A7%E6%9D%83%E6%B3%95%E9%99%A2%202015%20%203735%E5%8F%B7&match=Exact) (18 June 2019).

<sup>23</sup>In the *Feta* cases, Greek makers of Feta cheese brought actions to prohibit the use of the term 'Feta' by Danish and German cheese producers. The court held that the determination of the essential or exclusive link between the product and its place of origin is not based on strict scientific criteria, but on a 'global evaluation of all factors including flora, and people'. See Opinion of AG Colomer in joint cases *Federal Republic of Germany and Kingdom of Denmark v. Commission of the European Communities*, C-465/02 and C-466/02, ('Feta II') (2005), paras. 194–196. Three important facts about 'feta' are as follows: firstly, by letter of 21 January 1994, the Greek Government applied under Article 17(1) of the basic regulation for registration of the word 'feta' as a designation of origin. Secondly, on 12 June 1996, the Commission adopted Commission Regulation (EC) No. 1107/96 of 12 June 1996 on the registration of geographical

rules and practices that should be followed in order to guarantee that a product will have that special quality or characteristic that qualifies it as a GI of a specific region. For these reasons, support from historical documents is vital, as life experience of society provides further insight on the criteria for GIs. From another perspective, the conditions for protecting GIs are different from those for protecting trademarks. GIs are not as easily created as trademarks.

As far as foreign GIs are concerned, their protection is dependent upon the existence of the protection in the country of origin. Therefore, once a GI disappears in its country of origin, there is no legitimate interest to protect it in any other country of the world. Under this situation, it is preferable to leave the examination of substantial conditions to the authorities of GI's country of origin. In light of these observations, it is important and necessary to apply the system of international recognition of GIs rather than the substantial examination of foreign GIs (WIPO, 2009; Gangjee, 2012: 288–295). A substantial examination of foreign GIs is inefficient. More importantly, it is not feasible and could lead to absurd scenarios such as foreign experts having to travel all the way to the Bordeaux region to examine the local French GIs.

The international recognition of GIs can be made possible if several conditions are met. First, the conditions of GI registration must be harmonized. Second, there needs to be an examination procedure for GIs in the country of origin. These two conditions can guarantee consistency of GI criteria amongst the nations: once country A is certain that the GI in country B has the same qualifying criteria as in country A, and the title is delivered after examination, then country A can recognize the GI registered in country B. Indeed, this is the exact intention of the Lisbon Agreement.<sup>24</sup> The current international treaties, particularly the TRIPS Agreement and the Lisbon Agreement, have harmonized the conditions for GI qualification, but not the examination procedures among countries. To do so, it would be advantageous to require that GI registration in the country of origin be subject to a harmonized examination procedure.<sup>25</sup> Third, foreign GIs should not be in conflict with a prior GI or trademark that has already been registered or protected in a country. It is here that the arguably irreconcilable conflicts of interest between the Old World and the New World arise because some GIs from Europe are identical to trademarks in the New World. However, for other countries, such conflicts do not exist in general. The EU–China bilateral GI recognition agreements may serve as an example for further bilateral practice between China and other countries. Such bilateral practice will also certainly contribute to the construction of a multilateral system recognizing GIs. The negotiation of the EU–China bilateral GI recognition agreement is more easily achievable than an EU–Canada practice, as there are fewer conflicts of interest between the EU and China in this field. Nonetheless, the EU and Canada have still been able to achieve bilateral recognition through reconciliation. All these support the feasibility of developing a multilateral system for recognizing GIs (Spennemann and Vivas-Eugui, 2006).

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indications and designations of origin under the procedure laid down in Article 17 of Regulation No. 2081/92 (OJ 1996 L 148, p. 1). Under the first paragraph of Article 1 of that regulation, the name 'feta' in the Annex thereto in Part A, under the heading 'cheeses' and the country 'Greece', was registered as a protected designation of origin ('PDO'). Thirdly, by judgment of 16 March 1999 in Joined Cases C-289/96, C-293/96, and C-299/96 *Denmark and Others v. Commission* [1999] ECR I-1541, the Court of Justice annulled Regulation No. 1107/96 in so far as it registered the name 'feta' as a protected designation of origin, <http://curia.europa.eu/juris/celex.jsf?celex=62002CJ0465&lang1=en&type=TEXT&ancre=> (18 June 2019).

<sup>24</sup>Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (2015), art. 5, [www.wipo.int/edocs/mdocs/mdocs/en/li\\_wg\\_pcr\\_1/li\\_wg\\_pcr\\_1\\_3\\_corr.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/li_wg_pcr_1/li_wg_pcr_1_3_corr.pdf) (18 June 2019).

<sup>25</sup>The EU has been very active in the development of international GI protection both by leading and pushing multilateral treaty negotiations and through bilaterally promoting its GI system to other countries. The EU Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of GIs for agricultural products and foodstuffs has already moved in the above-mentioned direction: the EU recognizes GIs granted by a foreign country under the condition that the foreign country has an equivalent definition of GI and an equivalent examination procedure of GIs. However, the EU regulation was too ambitious in that it aimed to impose an EU equivalent system for every aspect of GIs. Ultimately, the WTO Panel found it violated the national treatment principle since the protection of foreign GIs needed to be unconditional according to the TRIPS Agreement. See WTO (2005).

For purposes of international recognition or registration, GIs differ from other types of IP. International recognition or a register of patents or trademarks is still not possible today.<sup>26</sup> Each country maintains its own patent policy, which balances private rights and public interests. This results in different domestic rules and practices regarding what is patentable and what is not, even though the general conditions of patentability have been harmonized among countries for a long time. To recognize a patent granted by another country would mean abandoning control on patentability, an important policy tool for protecting national interests.<sup>27</sup> In contrast, GIs cannot affect the development of a country to the extent that patents do. One patent may prevent an unlimited number of producers from making or commercializing a series of products, and alternative technical solutions are not always available. On the other hand, one GI may simply prevent a limited number of producers of one product from using one sign, and alternative solutions are always there (such as using another sign and making some investment for its promotion). In addition, with general trademarks, the recognition of a trademark registered in another country may give rise to conflict between the foreign trademark and a national trademark. To settle the conflict is as complicated as carrying out an examination of all foreign trademarks. Therefore, this makes the recognition of foreign trademarks unfeasible. Unlike trademarks, GIs are generally composed of geographical names in the language of each country, and thus it is far less likely to see conflicts between GIs originated from different countries. Furthermore, the producers of a region have a legitimate interest to use the geographical name of the region in order to indicate the origin of the products. Therefore, the recognition of foreign GIs would not prejudice general public interest but only affect a limited number of good faith prior trademark owners' rights or conflicting GI owners' interests.

#### 4. Protection of GI

We will examine first the content of GI protection in treaties and then the protection in Chinese dual system.

##### 4.1 Content of Protection in Treaties

Under the Lisbon Agreement, AO shall be protected against any usurpation or imitation.<sup>28</sup> The TRIPS Agreement instructs WTO members to prevent false indication or suggestion of a GI's geographical origin, acts that confuse or mislead the public regarding the good's geographical origin, and use that constitutes unfair competition in accordance with art. 10*bis* of the Paris Convention.<sup>29</sup> This article applies when a geographical indication which, although literally true as to the territory, region, or locality in which the goods originate, leads the public to believe that the goods originate in another territory. The second provision refers implicitly to the conflict between the New World and the Old World, which may happen in the New World, in the Old World, or in a third country. The misleading or confusing acts under these provisions should be determined by referring to the knowledge from local people of the region or country where the registration or protection is claimed. The TRIPS Agreement also offers additional protection for

<sup>26</sup>In fact, the international IP protection system has always developed with two limbs: the recognition of foreigners' rights in IP and the increasing level of IP protection among all countries. The former has been mainly achieved by national treatment and later by a minimum level of protection defined in treaties. National treatment guarantees that foreigners' trademarks or patent applications will be examined in the same manner as a national's applications, but it is not a recognition of foreign trademark or foreign patent that has been granted in another country.

<sup>27</sup>The creation of European Patent Office is a remarkable and unique achievement based on long-term efforts towards harmonization of national patent laws and practice amongst European countries.

<sup>28</sup>Lisbon Agreement, art. 3. Such protection applies 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 like.

<sup>29</sup>TRIPS Agreement, art 22.2.

GIs identifying wines and spirits: WTO members shall provide legal means for interested parties to prevent use of such GIs for wines or spirits not originating in the place indicated by the GI concerned (WTO, 1994: art 23.). It is evident that this additional protection comes from the Lisbon Agreement's protection of AO.

The Geneva Act replaced the protection against usurpation in the Lisbon Agreement and the TRIPS Agreement with a four-legged protection.<sup>30</sup> It has combined elements of the Lisbon Agreement, the TRIPS Agreement, and the Paris Convention, and introduced a better-quality GI protection rule. The first element of the protection prohibits use of GIs on goods which do not satisfy the requisite conditions for use, a prohibition which is more GI-specific than art. 22.2 of the TRIPS Agreement is. The second element applies the trademark dilution theory on GIs, which provides new and enhanced protection for GIs' reputation. The third element is the adoption of art.10*bis* (3)3 of the Paris Convention for GI matters. And the fourth element is the extension of additional protection of GIs under art.23.1 of the TRIPS Agreement for wines and spirits to other kinds of products, which is a direct response to the requirement from developing countries in the negotiation under art. 23.4 of the TRIPS Agreement.

On the contrary, none of the three treaties has required a specific legal form for these protections. They neither qualify the content of protection as rights, nor create obligations on procedures or measures for the implementation of such protection. The Geneva Act stipulates that a public authority or any interested party for GIs, of a private or public nature, are eligible to bring proceedings in national procedures.<sup>31</sup> Furthermore, the TRIPS Agreement has deliberately excluded the obligation to provide availability of judicial procedures for GI protection.<sup>32</sup> This demonstrates the divergence among countries on this issue as well as the flexibility of the treaty implementation.

## 4.2 Protection of GI in China

The Chinese *sui generis* system and trademark law provides two kinds of protection for GIs.

### 4.2.1 Protection in Sui Generis Systems

The 'Rule on the Protection of GI Products of AQSIQ' prohibits the unauthorized use of GIs or their special logos,<sup>33</sup> use of GIs on products which do not satisfy conditions to use the GIs, or use of signs similar to a GI's logo that would mislead consumers.<sup>34</sup> The AQSIQ GI system's main objective is to control and maintain the quality of products. GI products are products of special quality which have also been examined by governmental authorities. Therefore, the qualified GI producers should respect the conditions required for use of the GI while, concurrently, non-GI producers are prohibited from using signs which may mislead consumers into believing their products are GI products. The 'Rule on the Administration of Agricultural Products' simply prohibits unauthorized use of agricultural product GIs or a GI's special logo. If this rule is violated, local agricultural authorities can seize illegal products and impose a fine.

<sup>30</sup>See Geneva Act, art. 11. Daniel Gervais qualified it as three-legged right. Gervais (2015).

<sup>31</sup>Geneva Act, art. 14.

<sup>32</sup>See TRIPS Agreement.

<sup>33</sup>The special logo for GIs is a logo designed by AQSIQ which forms the common part of all GIs registered with AQSIQ.

<sup>34</sup>Rule on the Protection of GI Products (Order No. 78 of the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China, effective as of 15 July 2005), art. 21, 'The local quality inspection organizations shall protect the geographical indication protection products according to law. For the unauthorized use or falsification of the name of the geographical indication and the special mark; the use of name of the product that does not meet the requirements of the geographical indication product and the management code; or the use of a name or logo that is similar to the special mark and text or logo that may be misleading the consumer, which can cause the consumer to mistake the product for the behavior of the geographical indication, the quality and technical supervision department and the entry-exit inspection and quarantine department will investigate and deal with it according to law. Social groups, companies and individuals can supervise and report.'

The provisions protecting GIs in the *sui generis* systems are quite simple, their main objective being to prevent any unauthorized use of GIs in order to control the quality of GI products and avoid consumer deception regarding the quality and origin of products. Such protection, if interpreted broadly, can generally cover the entire scope of GI protection in the Lisbon Agreement or part of the scope of protection in the TRIPS Agreement. With this said, such protection is much narrower than the protection provided by the Geneva Act. In addition, the only procedural remedy available to protect GI interests is that local administrative authorities can seize the illegal products and impose a fine.

#### 4.2.2 Protection in Trademark Law

GIs registered as collective trademarks or certification trademarks in China benefit from the same protection as other kinds of trademarks: they are protected from unauthorized use on identical or similar goods which may result in a likelihood of confusion<sup>35</sup> and, if they are well-known in China, against dilution.<sup>36</sup> If the criterion of likelihood of confusion is not interpreted narrowly, the protection against the misleading use of GI trademarks can cover the usurpation or imitation of GIs in the sense of the Lisbon Agreement and the misleading or confusing use of GIs in the sense of the TRIPS Agreement or the Geneva Act. For example, in *Margaux*,<sup>37</sup> the plaintiff, CIVB, was the owner of the registered GI collective trademark BORDEAUX and its Chinese translation on wines in China since 2012. The defendant distributed wines with BORDEAUX without authorization. The court decided that the use of the word BORDEAUX on the defendant's wines created a likelihood of confusion amongst the relevant public, who could be misled into believing that the wines were made by a member of the CIVB. The court held that the defendant engaged in trademark infringement and was liable to pay CIVB damages of 150,000 CNY. The protection of well-known trademarks can cover the requirements of the Geneva Act regarding the anti-dilution protection of GIs.

In practice, the Chinese courts have refused to protect collective trademarks or certification trademarks under the likelihood-of-confusion rule because it was considered that these two kinds of trademarks do not have the distinguishing function. In the case of *Fiji*,<sup>38</sup> the court held that it is not required for a certification trademark to be distinctive as its function is to certify the quality of the products. In the more recent NAPA VALLEY trademark opposition case,<sup>39</sup> the Beijing High People's Court recognized the supplier-distinguishing function of a GI certification

<sup>35</sup>PRC Trademark Law, art 57, 'Where the owner of a registered trademark or any interested party has evidence proving that another party is committing or will soon commit an act that infringes upon his exclusive right to the use of its registered trademark and that, unless it is stopped promptly, will cause irreparable harm to his legitimate rights and interests, he may, before filing a lawsuit, apply to the People's Court for ordering the cease of the act and for adopting measures to preserve his property'; Judicial Interpretation of the Chinese Supreme People's Court on Certain Issues Concerning Trademark Registration and Invalidation (2017), art. 17, 'If the geographical indication stakeholder claim that the trademark of another person shall not be registered or invalidated according to Article 16 of the Trademark Law, and the commodity specified by the trademark is not the same as the product of the geographical indication, but the geographical indication interested person can still prove the use of the trademark on the product is likely to cause the relevant public to misunderstand that the product originated in the region and therefore has a specific quality, reputation or other characteristics, the people's courts shall support.

If the geographical indication has been registered as a collective or certification mark, the right holder or interested party of the collective mark or certification mark may choose to claim rights according to the article or separately in accordance with Articles 13 and 30 of the Trademark Law.'

<sup>36</sup>PRC Trademark Law, art. 13; Judicial Interpretation of the Chinese Supreme People's Court on Certain Issues concerning Trademark Registration and Invalidation (2017), art. 17.

<sup>37</sup>Changsha Intermediate People's Court, *Margaux* (2016), Xiang 01 Min Chu No.1775, [https://law.wkinfo.com.cn/judgment-documents/detail/MjAyMzkwODI5OTE%3D?searchId=506f52b0f2c343bb9a617f63e7fb2f95&index=1&q=%E7%8E%9B%E6%AD%8C\(20 June 2019\).](https://law.wkinfo.com.cn/judgment-documents/detail/MjAyMzkwODI5OTE%3D?searchId=506f52b0f2c343bb9a617f63e7fb2f95&index=1&q=%E7%8E%9B%E6%AD%8C(20 June 2019).)

<sup>38</sup>*Fiji Pure Mahogany*, supra note 20.

<sup>39</sup>*Napa Valley*, Jing Xing Zhong No. 2295, <https://law.wkinfo.com.cn/judgment-documents/detail/MjAwOTQ2MDQxNTY%3D?searchId=d6924cfdb0f6448695b666de8c2000c2&index=1&q=Napa%20Valley> (19 June 2019).

trademark and rejected the application of an ordinary trademark composed of ‘NAPA’ on the basis of the existence of a prior certification trademark ‘100% NV NAPA VALLEY’ in class 33 on wines. The *Judicial Interpretation of the Chinese Supreme People’s Court on Certain Issues Concerning Trademark Registration and Invalidation of 2016* clarified that the likelihood of confusion criterion and the anti-dilution criterion both apply to GI collective trademarks and certification trademarks, just as they apply to all ordinary trademarks.<sup>40</sup>

### 4.3 Common Functions of GI and Trademark

Though GIs and trademarks apparently have different functions as far as the legal regimes are concerned, they share essentially common functions (WIPO, 2004). In other words, all the legal functions of GIs can be protected by trademark law (Ibele, 2009: 36–49; Gangjee, 2012: 2–8). A key feature of GIs is that the characteristics of agricultural products are inherently determined by the land where they are produced (Calboli, 2015: 433–434), and thus special agricultural products are known by their geographical origin. The local producers have a legitimate interest to use the GI to indicate the true origin of their products and to benefit from the special reputation of the products from the region. With this right to use the geographical names, there concurrently exists the right to prevent others from using the names in order to prevent false indications of a product’s origin and free-riding on the reputation of the products of the region. This serves to protect both producers’ interests and consumers’ interests, the primary objective of GI protection. Mr. Dev Gangjee has summarized the various arguments that justify the protection of GIs (See Gangjee, 2012: 274).<sup>41</sup> Some of these arguments are of a cultural, political, or economic nature (Blakeney, 2017: 162–173),<sup>42</sup> while some are an indirect consequence of GI protection.<sup>43</sup> From a legal perspective, the following legitimate interests should be protected:

- (1) Consumer interest in receiving accurate information about the geographical origin of products in order not to be misled;
- (2) Producer and consumer interests in distinguishing the products from those of others;
- (3) Producer interest in protecting a widely-developed reputation;
- (4) Producer and consumer interests in identifying specific characteristics of GI products.

<sup>40</sup>Art. 17 of the Judicial Interpretation of the Chinese Supreme People’s Court on Certain Issues Concerning Trademark Registration and Invalidation (2016); see also Dong, Song, Wang, & Xia (2017) at 35–43. These four authors are judges of the IP Chamber of the Chinese Supreme People’s Court.

<sup>41</sup>These arguments include: (1) the consumer interest in accurately labelling and reducing search costs; (2) the producer interest in protecting a collectively developed reputation, along with the incentive to invest in quality; (3) acknowledging that aspects of local or national cultural heritage are associated with GI production or sometimes even consumption; (4) recognizing the *savoir faire* or traditional knowledge which has sustained and improved these products over time; (5) emphasizing their role in achieving agricultural policy goals; (6) environmental benefits associated with GI protection, such as the preservation of biodiversity by incentivizing the use of non-mainstream plant varieties or animal breeds; (7) stressing their potential for rural development or improving the economies of developing countries; (8) responding to a growing consumer demand for regional produce which is often perceived as more desirable on a qualitative basis. See also European Commission (2003).

<sup>42</sup>The Recitals (2), (3), and (4) of the EU Regulation 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs indicated the rationale for GIs: (2) The diversification of agricultural production should be encouraged so as to achieve a better balance between supply and demand on the markets. The promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less-favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas. (3) A constantly increasing number of consumers attach greater importance to the quality of foodstuffs in their diet rather than to quantity. This quest for specific products generates a demand for agricultural products or foodstuffs with an identifiable geographical origin. (4) In view of the wide variety of products marketed and the abundance of product information provided, the consumer should, in order to be able to make the best choices, be given clear and succinct information regarding the product origin.

<sup>43</sup>*Ibid.*

The first interest is protected by trademark law,<sup>44</sup> competition law,<sup>45</sup> and even consumer protection law.<sup>46</sup> This interest is just a peripheral element for GIs because it is protected even with respect to non-GI products.<sup>47</sup> The other three interests are the key factors of GIs and they are the basis for the legal functions of GIs. The second interest gives rise to the function of GIs in distinguishing product suppliers, the same as the function of trademarks. The fact that the producers of GI products are a group of entities while a general trademark is used by one entity cannot justify the denial of this function. In the event of co-ownership or license of a trademark, there can also be several producers under a general trademark. As GIs are usually geographical names, they are therefore not inherently distinctive because they are descriptive of the geographical origin of products in most cases.<sup>48</sup> In fact, the reason for the protection of GIs is different from that of the protection of ordinary trademarks. The latter is due to the distinctive character of the sign which is derived from the arbitrary relationship between the sign and the products; the former is justified by the legitimate interests of the producers and consumers regarding a specific product. The unique link between a GI and the producers regarding a product from a specific area, as well as a GI's special reputation, are characteristics which establish the distinctiveness of the GI in law, and the GI registration's objective is to recognize and preserve the unique link and special reputation in law. The distinctive character of GIs should be viewed from this perspective.

The third interest implies that a GI is a carrier of the products' or producers' reputation. This is also a function of a trademark. The scope of a trademark's protection is defined by two factors: the specialty principle (the trademark sign and designated goods) and the reputation of the trademark (the higher the reputation, the greater the scope of protection). The same principle is applicable to GIs. The protection of a product's reputation performs two functions: to allow GI producers to benefit from the reputation they have developed and to prohibit others from free-riding on that reputation. It is also in this regard that competition law may complement trademark law for such protection.

The fourth interest highlights the important role that GIs perform in promoting local products in the market: consumers recognize GI products by their geographical origin as well as the specific characteristics that differentiate them from the competing products. The protection of this interest is assured by the indication and guarantee of quality that serves as a GI's function. This function is also assumed by trademarks, as consumers not only distinguish the supplying origin of a product via its trademark but also recognize the different characteristics of products under different trademarks. The difference between a general trademark and a GI or GI certification or collective trademarks lies in two aspects. First, the characteristics of products under general trademarks are not defined or indicated in any legal documents and are perceived by consumers who follow their evolution in the consumption practice, and suppliers can, in principle, change or modify these characteristics as they wish (Passa, 2006: 53–55). In contrast, the characteristics of GI products are explicitly defined and described in published legal documents which bind GI producers. The second aspect is that general trademarks have no explicit or regulated means for guaranteeing the characteristics of products, whereas the conditions to guarantee the characteristics of GI products are defined and regulated in legal documents that are binding to GI producers.

It is clear that the four legitimate interests of GIs that should be protected by law are common to those of trademarks (Gangjee, *supra* note 32 at 4; Feng, 2017a: 3–10. Dong *et al.*, 2017). In fact,

<sup>44</sup>Art. 10.7 of PRC Trademark Law. This provision prohibits the registration or use of deceptive signs as trademark if this will mislead the public as to quality or geographical origin, etc. See also art. 6 of the Chinese Anti-Unfair Competition Law, arts. 8, 19 and 50 of the Chinese Consumer Protection Law.

<sup>45</sup>Art. 5.4 of PRC Anti-Unfair Competition Law (1993).

<sup>46</sup>Arts. 8 and 56 of PRC Consumer Protection Law (rev. 2013).

<sup>47</sup>In the field of IP law, Art. 10 (1) on border measure and 10bis on the repression of unfair competition of Paris Convention are both applicable to GIs.

<sup>48</sup>Blakeney (2012); Heath and Marie-Vivien, (2015) 46(7), IIC, at 819–842.

both collective trademarks and certification trademarks have the common functions of all trademarks (distinguishing suppliers of goods, indicating quality of goods, carrying reputation of suppliers, etc.) besides their respective unique functions (identifying members of trademark owner organizations for collective trademarks or certifying specific characteristics of goods for certification trademarks) (Passa, 2006: 510–12; Heath and Marie-Vivien, 2015; Winters, 2016: 157–159; Feng, 2017a: 3–10). Already, a non-GI collective trademark may be registered for use by a group of members defined by, among other things, their geographical location, and a non-GI certification trademark may well be registered to certify, among other things, the geographical source of the designated goods. The difference between a non-GI collective trademark or certification trademark and a GI collective trademark or certification trademark lies in the following: first, GI producers, in general, have no choice but to adopt the GI sign as used in practice, while a non-GI trademark applicant is free to choose a sign to register; second, the quality or characteristics of GI goods have already been decided, while a non-GI trademark applicant is free to define it; third, there must be a connection between the quality or characteristics of a GI product and its geographical origin, while such connection is not required for non-GI trademarks; fourth, GI trademark users (producers) are usually fixed, while non-GI trademark users can be anyone who wishes to join the users' group and provide compliant goods. Notably, if a collective trademark or certification trademark protects a GI, the GI does not change the nature, the function, or the content of the collective trademark or certification trademark; it only becomes a subset of the collective trademark or certification trademark.

For all these reasons, it can be concluded that trademark law is capable of assuming the responsibility of protecting the functions of GIs. Therefore, once a GI is registered as a certification trademark or collective trademark, it is protected against all acts that prejudice the above-mentioned functions of the GI. However, as far as Chinese law and practice is concerned, in the *sui generis* systems, only administrative procedures are available. On the other hand, trademarks are protected by both administrative and judicial procedures and measures, as GI trademark owners can bring lawsuits for compensation in the event of infringement. The availability of a broader range of remedies is evidence that trademark law provides a more efficient and complete protection relative to the *sui generis* systems.

## 5. Conflict between GI and Trademark

The relationship between GIs and trademarks is complex and it is one of the main debated issues in the negotiation of the Geneva Act for revision of the Lisbon Agreement (Micara, 2016). As GIs are an independent subject matter of IP with regard to trademarks, the conflict between GIs and trademarks is a conflict between two types of IP. This is true even in countries where GIs are protected as trademarks because GI trademarks are a special type of trademark. However, in Chinese law, the said conflicts are not mentioned in the *sui generis* systems and the related rules exist only in trademark law. As for treaties, the Lisbon Agreement has not dealt with the issue of conflict between GIs and trademarks. The TRIPS Agreement and the Geneva Act both have established rules to govern conflicts between prior GIs and subsequent trademarks, as well as conflicts between prior trademarks and subsequent GIs.

### 5.1 Prior GI v. Subsequent Trademark

The TRIPS Agreement requires that the registration of a trademark should be refused or invalidated if it contains or consists of a GI indicating goods not originating in the territory portrayed or if use of the GI in the trademark for such goods would mislead the public as to the true place of origin.<sup>49</sup> The Geneva Act requires that the registration of a trademark should be refused or

<sup>49</sup>Arts. 22.3 and 23.2 of TRIPS Agreement.

invalidated if the use of the trademark would result in the situations covered by art. 11 paragraph (1), i.e., the use of GIs on goods not satisfying conditions of GI use, diluting use of GIs, consumer-misleading use of GIs, or imitating use of GIs.<sup>50</sup> The Geneva Act defines the conflicts between prior GIs and subsequent trademarks from the perspective of GI infringement, which is a more complete and systematic approach as compared to the TRIPS Agreement. The TRIPS Agreement merely prevents the registration of trademarks which would mislead consumers regarding geographical origin and does not even cover trademark registrations for goods which originate from the GI area but do not satisfy the criteria for GI goods.

In Chinese Trademark Law, it is prohibited to register or use a trademark consisting of a GI while the goods do not originate from the area indicated by the GI if the registration or the use of the trademark would mislead the public. This provision was introduced with the revision of the PRC Trademark Law in 2001 for the implementation of the TRIPS Agreement. For the application of this provision, the CTO or the courts first need to determine if the claimed GI satisfies the definition of a GI in the trademark law. If the GI has been registered as a GI trademark or is registered with the AQSIQ or the MOA, the CTO and the courts will, in general, directly recognize it as a valid GI. Nonetheless, the related documents on the GI must still be provided along with the GI certificate so that a formal examination can be performed. For non-registered GIs, the authorities will carry out an examination. This indicates, at the same time, a willingness from the CTO and the courts to protect non-registered GIs.

In the *Yangliuqing* Case,<sup>51</sup> the Beijing High People's Court recognized that 'Yangliuqing' is a non-registered Chinese GI on traditional Chinese New Year pictures and paper cuttings and therefore its registration as trademark by an entity without relation to the GI must be rejected. In the *Pomerol* case,<sup>52</sup> a Chinese individual registered a Chinese-character trademark (*bomeilong* by pronunciation), which corresponds to the generally known translation of 'Pomerol' in China. INAO applied for the invalidation of the trademark on the grounds that the trademark consists of a GI. The court considered that it was not enough for INAO to provide just the French Regulation which protects Pomerol as an AO, but that evidence should also be provided on the given quality, reputation or characteristics of the wines, the human and natural factors of the area, and the causation between both. Though this invalidation action was rejected due to insufficient evidence, the Chinese courts have demonstrated their willingness to protect foreign GIs, even if they have not been registered in China.

## 5.2 Prior Trademark v. Subsequent GI

According to the TRIPS Agreement, registration or use of trademarks shall not be prejudiced by GIs where trademark rights have been acquired via registration or used in good faith before entry into force of the relevant WTO member's accession protocols or before the GI is protected in the country of origin.<sup>53</sup> This means that good faith in trademark registration or use is not enough to prevent the protection of GI; and that once the TRIPS Agreement has entered into force in a country, a GI protected in one member of the WTO will have the possibility to affect the registration or use of trademarks in another member of the WTO if such registration or use has taken place after the entry into force of the TRIPS Agreement in the member concerned. In addition, the Panel in the WTO dispute settlement case *EC-Geographical Indication* (WTO, 2005) held that EU law, which permits the coexistence of a GI and a prior trademark right, can be justified by art. 17 of the TRIPS Agreement because this constitutes a permitted exception to trademark

<sup>50</sup> Art. 11(3) of TRIPS Agreement.

<sup>51</sup> *Yangliuqing*, [http://www.cnipr.net/article\\_show.asp?article\\_id=23104](http://www.cnipr.net/article_show.asp?article_id=23104) (5 July 2019).

<sup>52</sup> *Pomerol*, Gao Xing Zhong Zi No.1567, [www.pkulaw.cn/case/pfnl\\_a25051f3312b07f3ec6ab63bc408812b796243b0240ef-ba5bdfb.html?keywords=%E7%BB%88%E5%AD%97%E7%AC%AC1567%E5%8F%B7&match=Exact](http://www.pkulaw.cn/case/pfnl_a25051f3312b07f3ec6ab63bc408812b796243b0240ef-ba5bdfb.html?keywords=%E7%BB%88%E5%AD%97%E7%AC%AC1567%E5%8F%B7&match=Exact) (19 June 2019).

<sup>53</sup> Art. 24.5 of TRIPS Agreement.

rights.<sup>54</sup> The Geneva Act has reiterated this rule of the TRIPS Agreement and requires, regarding the said Panel's decision, that, in the case of limited exception to trademark rights in favour of a GI, the protection of the GI shall not limit the rights conferred by that trademark in any other way.<sup>55</sup> This is an effort to limit the impact and scope of the Panel's decision on the exception to trademark rights in favour of GIs.

In Chinese Trademark Law, prior GI related trademark registrations are incontestable in two situations. First, though the Chinese Trademark Law 2001 revision introduced GI protection, this does not affect GI-related trademarks registered in good faith prior to 1 December 2001, the date the revised trademark law was promulgated.<sup>56</sup> Second, if the registration of a trademark prejudices a third party's rights, the invalidation action should be launched within five years from the trademark's registration date.<sup>57</sup> Therefore, all trademarks that have been registered for more than five years can no longer be invalidated except in the case of bad faith registration of well-known trademarks. This incontestability of GI-related prior trademarks in these two situations has given rise to obstacles for subsequent registration as trademarks or continuous use of GIs in China. There are still a significant number of Chinese and foreign GIs that have not yet been registered as trademarks. In seeking to resolve this conflict, the Chinese courts have permitted the coexistence of prior trademarks and subsequent trademark applications or continuous use of GIs in order to protect the legitimate interests of GI producers. The rationale for this coexistence has evolved to reflect the understanding of GIs in Chinese judicial practice.

One such example exists in the *Enshi Yulu* case,<sup>58</sup> where Yueyang Tea Factory registered 'YULU' as a trademark on tea in 2000. Enshi Yulu Tea Association then applied for the registration of the GI certification trademark 'ENSHI YULU' on tea in 2008. Yueyang Tea Factory filed an opposition on the basis of its prior trademark registration. The evidence showed that 'Enshi' is the name of a region in China and 'Enshi Yulu' is a GI for a local tea also called YULU. The Court considered that the function of a certification trademark is only to indicate the given characteristics of the goods and has no function of distinguishing goods suppliers. Therefore, it was decided that an ordinary trademark cannot constitute an obstacle to the registration of a certification trademark because there is no likelihood of confusion. In this way, the Chinese courts permit the coexistence between prior trademarks and subsequent GI trademark applications. However, the CTO and the TRAB consider that GI certification trademarks or GI collective trademarks do have the function of distinguishing goods suppliers, and their coexistence with an ordinary trademark would cause confusion among consumers. From a legal point of view, the CTO and the TRAB are right, but the opinion of the Chinese Courts must be looked at from a political point of view. The courts consider that the existence of the GI significantly predates the registration of the prior ordinary trademark. Therefore, while it is no longer possible to invalidate the prior ordinary trademark, to refuse the subsequent GI trademark application is unfair. The denial of the function of supplier distinction for certification trademarks and collective trademarks is a pragmatic solution that the courts have found to allow the coexistence between a subsequent GI trademark and a prior ordinary trademark. However, the denial of a distinguishing

<sup>54</sup>According to this article, (WTO) members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

<sup>55</sup>Art. 13 of Geneva Act.

<sup>56</sup>The TRIPS Agreement entered into force in China on the 11 December 2001.

<sup>57</sup>The only exception to the five-year time limit applies to well-known trademarks as a prior right. PRC Trademark Law, art 45, 'If registered trademarks are used on coarsely manufactured goods that are passed off as quality goods, thus deceiving consumers, the administrative departments for industry and commerce at various levels shall, on the merits of each case, order rectification of the situation within a time limit and may, in addition, circulate a notice on the matter or impose a fine, or the Trademark Office may revoke the registered trademarks.'

<sup>58</sup>*Enshi Yulu* (2013), Gao Xing Zhong Zi No.1201, [www.pkulaw.cn/case/pfnl\\_a25051f3312b07f365ab754f3cb515b107727-ca3fdb8fdbf.html?keywords=%E6%81%A9%E6%96%BD%E7%8E%89%E9%9C%B2&match=Exact](http://www.pkulaw.cn/case/pfnl_a25051f3312b07f365ab754f3cb515b107727-ca3fdb8fdbf.html?keywords=%E6%81%A9%E6%96%BD%E7%8E%89%E9%9C%B2&match=Exact) (19 June 2019).

function for certification trademarks and collective trademarks would lead to mass coexistence between such trademarks (not only GI related trademarks) and ordinary trademarks, which would mislead the related public regarding the origin and characteristics of products. This is, in fact, a legal permission to counterfeit collective trademarks or certification trademarks. In truth, another solution may be considered more preferable to this. In the general trademark practice on evaluating likelihood of confusion, not only should the similarity between trademarks and between goods be taken into account, but also the reputation of the marks in the market (Feng, 2017b: 92–94). In other words, without denying the distinguishing function of certification trademarks or collective trademarks, the coexistence of prior ordinary trademarks and subsequent GI certification trademarks or collective trademarks can be justified by the fact that there is no likelihood of confusion in the market, since the reputation of the GI usually is sufficient to permit the related public to distinguish GI trademarks from ordinary trademarks. It is in this type of situation that we can see how it is important to take into account the particular facets of a GI: reputation and special characteristics of GI products drawn from their geographical origin, which differ from non-GI certification trademarks or collective trademarks.

In the enforcement of trademarks, GI products can be an exception to trademark rights. In *Jinhua Ham*,<sup>59</sup> the plaintiff registered the trademark ‘Jinhua Ham’ in 1979 and the defendant was a producer of the GI products known as ‘Jinhua Ham’ that were registered with AQSIQ in 2002. A lawsuit was brought against the use of the words ‘JINHUA HAM’ on the defendant’s products. The court determined that both the trademark owner and the GI producer have the right to use JINHUA HAM in the forms that had been registered with the respective authorities. The use of the words by the GI producer is a fair use that the trademark owner has no right to prohibit. However, the GI producer should use the words ‘JINHUA HAM’ in the manner prescribed by AQSIQ in order to be distinguished from the registered trademark.

Another way that the Chinese courts permit the use of the GIs with regards to a prior trademark is to recognize a GI as a generic product name, but this is not a correct practice. In the case *Qinzhou Yellow*,<sup>60</sup> the plaintiff had been the owner of the registered trademark ‘Qinzhou’ (an ancient region name in Chinese history) on millets since 1991 (Wang, 2018: 73–88). The defendants are producers of the GI product ‘QINZHOU YELLOW’, which was registered with AQSIQ on millets in 2003. The plaintiff sued the defendants for the infringement of its trademark. The Chinese Supreme People’s Court upheld the judgment of the Shanxi Provincial High People’s Court, in which Qinzhou Yellow was recognized as a generic product name of the region. This finding justifies the defendant’s use of the trademark at issue because a trademark owner cannot prevent others from using the generic name of goods even if the generic name is part of the trademark.<sup>61</sup> However, though the Court’s objective is understandable, a GI should not be qualified as a generic term, as this will put it in the public domain. A GI is not a generic term though it belongs to a group of related producers of the region. A generic term designates a class or category of products whose producers are unlimited as there is no requirement on the geographical origin of the products. On the other hand, a GI designates a particular product whose producers are geographically limited and whose specific quality or characteristics are attributable to its geographical origin. A GI can only ‘become generic if the direct link between the geographical origin of the product and a specific quality of that product, its reputation or another characteristic of the product, attributable to that origin has disappeared, such that the name does no more than describe a style or type of

<sup>59</sup>*Jinhua Ham*, supra note 13.

<sup>60</sup>*Qinzhou Yellow*, supra note 13. In fact, it was not the first time that Chinese courts recognized GIs as a generic product name. In 2009, the Shandong Provincial People’s Court recognized ‘LUJIN’ as a generic name of a special handmade textile in the local region while it is a GI, Lu Min San Zhong Zi No.34, <https://law.wkinfo.com.cn/judgment-documents/detail/MjAwMDA0Nzg0NjQ%3D?searchId=719da4ca9aad4518b4906340c0669dbf&index=3&q=%E9%B2%81%E9%94%A6> (19 June 2019). This case was qualified as a guiding case (No. 46) by the Chinese Supreme People’s Court.

<sup>61</sup>Art. 49 of the Regulation for the Implementation of PRC Trademark Law of 2002.

product'.<sup>62</sup> In both of the above cases, the qualification of the GIs as a generic name did not prevent the registration as GI certification trademark or GI products with AQSIQ.<sup>63</sup> This proves also that their qualification as generic names is incorrect. In reality, there are different ways to arrange the interests of related parties. Another solution can be to recognize the coexistence of a trademark and a GI. As GI trademarks of the CTO, GI products of the AQSIQ, and agricultural GI products of the MOA are respectively all marked with a special sign of GIs, and as the GI products enjoy certain reputation in the market, these two factors can enable the public to distinguish the trademark owner and GI producers as different suppliers.

Considering the above discussions of the conflicts between trademarks and GIs, it should be noted that the principal condition which should be satisfied to allow coexistence of a GI with a prior registered ordinary trademark, regarding either subsequent applications for GI trademark registration or for continued use of GI, is that the GI should have existed *before* the registration of the prior ordinary trademark.<sup>64</sup> With this approach, the principle of priority can be applied, but the priority would not be based on the time of registration but on the prior existing legitimate interests: the legitimate interests of GI producers on the GIs which existed before the prior trademark's registration prevail, and the principle of exclusivity is equitably applied since an exception in favour of GI producers is granted to the rights of the prior trademark owner (Gangjee, 2007: 1253). It can also be considered that, from a different point of view, a special or preferential status has been given to GIs in this solution, as non-GI trademarks cannot be treated in the same way (Gangjee, 2012: 255–259). In truth, this solution is equitable and justified because a simple and absolute application of the 'first in time, first in right' principle of trademark registration system would be disadvantageous to GI producers (ibid.: 257–264).

### 5.3 When American GI vs. European GI in China

What will happen when an American GI trademark encounters a European GI in China if the two GIs are identical but refer to different American and European regions? To date, no such cases have come before the Chinese authorities, but it can be predicted how the law will be applied according to legal rules and the current practice.

Before AQSIQ, according to the *Methods on the Protection of Foreign GI Products of 2016*, if an application for GI product registration is filed by an American or European GI owner, the GI needs to be filed both in its original language and in its Chinese translation. The rule states that the adopted Chinese translation of the GI shall not be in conflict with any Chinese GI, but there is no provision regarding conflict between GIs in their original languages.<sup>65</sup> Nevertheless, an opposition procedure is available for anyone once the application is published following the formal examination. In the event of opposition, AQSIQ will first organize a

<sup>62</sup>*Bavaria Italia Srl v. Bayerischer Brauerbund eV* (C-343/07) [2009] European Trade Mark Reports 61 (ECJ), [106]–[107]; see also Gangjee (2012): 244–255.

<sup>63</sup>In 2014, 'JUANCHENG LUJIN' was registered as a GI certification trademark. Juancheng is the name of the local region concerned by the GI product.

<sup>64</sup>That means, in the case of a newly created GI, there is no reason to allow its coexistence with a prior registered trademark. The producers in such a situation should adopt a different sign from their GI, which is a reasonable and fair solution in view of the legal rights of the prior trademark owner and the freedom of choice for the newly created GI producers.

<sup>65</sup>Methods on the Protection of Foreign GI Products of 2016 (released by AQSIQ on 28 March 2016), art. 4, 'The protected names of foreign geographical indication products in China include Chinese names and original names.'

(1)The Chinese name consists of a name with a geographical indication function and a common name that reflects the true attributes of the product; it may also be the name of the 'conventional convention'.

(2)The original name refers to the name of the geographical indication registration protection in the country of origin or region.

(3)The above name is not a generic name in China and does not conflict with the name of the Chinese geographical indication product.'

negotiation between the parties. If no agreement can be reached, then AQSIQ will make a decision. That means, it is up to the related foreign GI owners to utilize their right of opposition against conflicting GI applications. If the opposition is not filed by the deadline, one may apply for cancellation of the registered GI products if the GI has ceased to be protected in the country of origin, or if a Chinese court has decided the GI protection should be cancelled or if there is any serious violation of Chinese law.<sup>66</sup> From this, it can be concluded that, if the use of a registered GI with AQSIQ is deemed as infringing on a trademark in China, this can be a possible ground for the cancellation of the GI product.

Before the CTO, if an American or European GI is filed for registration as a collective trademark or certification trademark, an examination will be carried out regarding the conditions to qualify the GI and the protection of the sign as a GI in its country of origin. In addition, the CTO will examine whether Chinese consumers would be misled regarding the geographical origin of the goods<sup>67</sup> and whether there are prior trademarks identical or similar to the filed GI trademark.<sup>68</sup> Whether Chinese consumers would be misled depends on what the Chinese consumers understand about the GI. In the case *CALISSONS D'AIX*,<sup>69</sup> a Chinese individual applied for the registration of the said trademark with the CTO while the mark had already been registered from 1991 as a certification trademark in France on the special almond cake from the region of Aix.<sup>70</sup> The French producers' association filed an opposition against the registration. The CTO considered that 'AIX' is a French geographical name with which the Chinese public is familiar and 'CALISSONS' is a French specialty of the region. Therefore, the registration of the mark would mislead the Chinese public about the geographical origin of the products. Another misleading situation would be an American GI being incorrectly understood by the relevant Chinese public to be a region of Europe, which will cause the related trademark application to be refused. These are the types of situations that art. 22.4 of the TRIPS Agreement attempts to address.<sup>71</sup> However, if the Chinese consumers do not know what the GI means, then there is no risk of being misled.

As for the conflict between a prior ordinary trademark and a subsequent GI trademark application, if the GI was protected in the country of origin before the prior trademark registration, the CTO and the courts will generally permit their coexistence. This practice is in conformity with the case law of the WTO in *EC-Geographical Indications*. As for the conflict between two identical or similar GI trademark applications, one from US and the other from Europe, the later application will be rejected and coexistence would only be possible in two situations: 1) if it

<sup>66</sup>Methods on the Protection of Foreign GI Products of 2016 (released by AQSIQ on 28 March 2016), art. 33, 'If one of the following circumstances exists in the protection of foreign geographical indication protection products in China, the AQSIQ shall issue an announcement to revoke it:

- (1)being revoked in the country of origin or region;
- (2)China's domestic judicial authorities ruled that the protection should be revoked;
- (3)Serious violations of relevant domestic laws and regulations.'

<sup>67</sup>PRC Trademark Law, art. 10, para. 1(7), 'those constituting exaggerated and deceitful advertising'.

<sup>68</sup>Chinese Trademark Law, art. 30, 'Any person may, within three months from the date a trademark is announced, raised an objection to the trademark that has undergone preliminary examination and obtained approval. Where no objection is raised at the expiration of the time limit, the trademark shall be registered upon approval, a trademark registration certificate shall be issued, and the matter shall be announced.'

<sup>69</sup>*Calissons D'Aix* (2017), Trademark Opposition Decision No. 0000045753. In this case, the trademark applicant filed for registration of 'Calissons D'Aix' on sugar, honey, and biscuits. In fact, calissons D'Aix is a French specialty: calisson is the common name of a kind of soft candy and Aix is a region of France.

<sup>70</sup>During the opposition procedure, the registration of 'Calissons d'AIX' as an EU GI was still pending.

<sup>71</sup>It reads 'The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, 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', [https://docs.wto.org/dol2fe/Pages/FE\\_Browse/FE\\_B\\_009.aspx?TopLevel=4482#/](https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_009.aspx?TopLevel=4482#/) (19 June 2019).

can be proved that the related Chinese public knows either of them well and can distinguish them in the market, or 2) a coexistence agreement can be reached between the two parties.<sup>72</sup> In trademark law practice, a coexistence agreement is a solution often adopted by companies who have similar trademarks. Indeed, the coexistence agreement can also be used by associations of GI owners or by governments in bilateral negotiations. They can even conclude a global coexistence agreement regarding certain GIs. One such agreement is the Canada–EU Trade Agreement, in which the two contracting parties have agreed on the adjusted protection level and scope of certain European GIs in a very pragmatic manner, taking into account the habitude of Canadian consumers and the interests of related industries.

## 6. Conclusion

The divergence among countries regarding the legal means of GI protection is significant and so the TRIPS Agreement leaves the freedom of choice to contracting parties but requests that substantial protection be guaranteed.<sup>73</sup> The Geneva Act has made the Lisbon Agreement more flexible in this regard so that countries without a *sui generis* GI regime can also implement the treaty with trademark laws. It is understandable that international treaties must be result-oriented and remain pragmatic regarding treaty implementation in order to reconcile the objectives of the treaty and the positions of the different contracting parties. Conversely, when a country creates or reforms its domestic laws, it has to start from its existing legal systems.

As far as the Chinese legal regimes are concerned, the General Principles of the Civil Law of 2017 has explicitly listed GIs as a subject matter of IP, which indicated the direction for the reform of the Chinese GI systems by clarifying the legal nature of GI. As a private right, GIs can only be protected by a law adopted by the National People's Congress or its Standing Committee because only these two institutions have the legislative power. The Chinese Trademark Law satisfies this condition and trademark rights are also a type of IP right. Another solution would be to adopt a new law on the *sui generis* system because the current regimes have only been created by administrative regulations of the AQSIQ or the MOA, which have a low status in China's legislative hierarchy. However, the point of the *sui generis* system is not to create a private right for producers or their associations but primarily to control the quality of products and avoid misleading consumers or cause confusion through administrative measures.<sup>74</sup> From this perspective, it would be more appropriate to continue with the reform under the framework of the Chinese Trademark Law and to reinforce the technical competence of the authorities regarding administration of GI products in order to achieve the dual objective: adequate protection of GI producers' interests from confusing or free-riding use of the GI and strict regulation of GI products' quality.

The next question is then whether it is possible to provide efficient protection to GIs in a manner that is compliant with the TRIPS Agreement and the Geneva Act within the Chinese Trademark Law. First, as discussed above, the four legitimate interests of GI producers and consumers will be well protected if the four legal functions of GIs can be protected: indicating geographical origin of product, distinguishing suppliers of products, indicating and guaranteeing the quality of product, and maintaining the collective reputation of GI producers or GI products. These functions can all be protected by trademark law. Second, the Chinese Trademark Law prohibits unauthorized use of an identical or similar trademark on identical or similar products which are likely to create confusion among consumers and prohibits their use on dissimilar products

<sup>72</sup>The Chinese Courts are more and more open in regards to trademark coexistence. See Feng (2017b: 94–96).

<sup>73</sup>The TRIPS Agreement says nothing about the legal means for protecting GIs. Its article 1.1 provides that 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'; art. 10 (1) of the Geneva Act of Lisbon Agreement provides that 'Contracting Party shall be free to choose the type of legislation under which it establishes the protection stipulated in this Act'. See also Ibele (2009).

<sup>74</sup>This is even true for the typical *sui generis* GI countries like France. See Passa (2006: 528–529).

which would constitute dilution of well-known trademarks. Third, GI collective trademark or certification trademark applications can be filed through both the international and the national trademark application procedures. The CTO and the Chinese courts are quite open to the recognition of foreign GIs, and only a formal examination is required. If China accepts the international registration procedures of the Geneva Act or of the TRIPS Agreement (if any), the current trademark application procedures and practices will be sufficient to implement the treaty. The only reform needed is to improve the CTO's technical competence regarding the examination of Chinese GIs so that a substantial examination can be made.<sup>75</sup> Fourth, the Chinese Trademark Law and practice permits the settlement of conflicts between GI trademarks and ordinary trademarks or between GI trademarks in a TRIPS and Geneva-compliant and equitable manner. Prior GIs, whether registered in China or not, can prevent or invalidate subsequent conflicting trademark registration, and subsequent GI trademark applications can be conditionally accepted even where there are conflicting prior ordinary trademarks. Where conflicting GI trademark applications occur, the coexistence is possible only if the Chinese consumers can distinguish them because of their reputation in China or a coexistence agreement can be found between the parties.

The Chinese solution can be of reference for other countries who need to implement the TRIPS Agreement and join the Geneva Act with an existing trademark system. As each country has a trademark registration system, it is better to profit from the existing resource of international and national procedures as well as institutions for the registration and recognition of GIs. All that is needed is to add certain special rules<sup>76</sup> into trademark law in consideration of the particular character of GIs, reinforce the trademark offices' technical examination competence, provide rules for settling conflicts between trademarks and GIs under trademark law in an equitable manner, and harmonies GI examination procedures at international level.

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<sup>75</sup>The substantive examination of Chinese GIs is necessary because we estimate this should be a condition for international recognition of Chinese GIs. For this purpose, there is no need to create a technical center within the CTO and it is adequate to engage certain external technical institutions, such as laboratories of universities.

<sup>76</sup>These rules include: GI trademarks cannot become generic unless it has become generic in the country of origin, and a GI trademark is protected without time limit.

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