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# Reciprocity and Mutual Benefits: EU-China cooperation on and protection of geographical indications Weinian Hu

## Abstract

Geographical indications are a distinctive type of intellectual property rights, protected by the TRIPS Agreement. The EU and China started to negotiate the Agreement on the Cooperation on, and Protection of, Geographical Indications in March 2011. It has recently been revealed that one or two more rounds of negotiations may be necessary to conclude the Agreement. Recall that in July 2017, as a major step forward in the negotiations, the EU and China each published a list of 100 GI products that may be granted protection under the other's jurisdiction. Both Europe and China are endowed with a sophisticated food culture, featuring many high-quality GI products protected in their respective territories. An agreement on GI protection will facilitate more GI exports and further enhance overall bilateral trade in foodstuffs, which has seen steady and quick growth over the last decade. According to the latest statistics, China is Europe's second-largest export market for foodstuffs (over the last few years), while Europe is China's fifth largest.

This report illustrates that, in the context of negotiating the GI Protection Agreement, the EU succeeded in extending its GI protection philosophy, i.e. the so-called 'old-world' approach, and model to China, paving the way for more GIs to be registered in the country for future protection. The EU leverages GI protection to enhance its food quality policy, which goes hand in hand with the reform of the common agricultural policy. As for China, although further work on technical details, including strengthening GI enforcement, is required, doubling down on GI exports to Europe and through ambitious trade agreements with other trading partners should be a goal. Thus China's ancient food culture would serve the modern purposes of enhanced trade – just as the EU has achieved.

Moreover, the forthcoming GI Protection Agreement between the EU and China is instilled with the principles of reciprocity and mutual benefits, which should be a *sine qua non* for trade relations applicable to all partners. In this regard, both sides should strive to extend their constructive cooperation on GI protection to other trade areas to facilitate a win-win spirit in overall bilateral trade relations. The Report covers in extensive detail the Chinese aspects of GI protection, as they are not well-known in Europe.

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# Reciprocity and Mutual Benefits: EU-China Cooperation on and Protection of Geographical Indications

Weinian Hu

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It is often held that EU-China trade is insufficiently reciprocal due to the absence of a level playing field, among other things, and benefits that are not genuinely mutual. However, the general situation has become in recent years, as some claim, the same cannot be said of cooperation on, and protection of, geographical indications (GI), a distinctive type of intellectual property rights (IPR) protected by the TRIPS Agreement in multilateral fora. The present CEPS Research Report provides a detailed assessment of a perfectly ‘reciprocal’ deal between the EU and China on protection of so-called “2 x 100 GIs”, with an emphasis on the Chinese aspects, as they are not well-known in Europe. On 2 June 2017, China and the EU each published a list of 100 selected GI products that may be granted protection under the jurisdiction of the other side. At the time, both parties aimed to conclude, by the end of 2017, the Agreement on the Cooperation on, and Protection of, Geographical Indications, which the EU and China have been negotiating since March 2011.<sup>1</sup> While the delay is obvious,<sup>2</sup> after the last round of negotiations took place in January 2018 it is revealed that concluding the Agreement would require one or two more rounds of negotiations. In any case, the publication of 2 x 100 GI products is a necessary exercise, a step closer to concluding an agreement that reflects EU practice in negotiating GI protection with third countries.

Both Europe and China are rich in history and endowed with a sophisticated food culture with abundant GIs produced in their respective territories. An agreement on GI protection will provide consumers in the EU and China with quality GI products and enhance overall bilateral trade in foods, wines and spirits, which has quickly and steadily increased over the last decade, thus producing mutual benefits. In recent years, China has shared with the EU GI protection policy objectives, including in rural development.

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<sup>1</sup> See Joint Communiqué of the Directorate General for Agriculture and Rural Development of the European Commission and of the Ministry of Commerce of the People’s Republic of China on the negotiation of the Agreement on Cooperation on, and Protection of, Geographical Indications, 2 June 2017 (<https://ec.europa.eu/agriculture/sites/agriculture/files/newsroom/2017-06-02-joint-comm.pdf>). On the other hand, reflecting on the EU’s practice of negotiating GI protection with third countries, once the parties have come to an agreed position and the prospects of completing the negotiations of the entire agreement look good, they will exchange a list of GI products for protection in another’s jurisdiction. An objection proceeding under the respective jurisdiction will then start. After the objection proceeding is completed, the lists of GIs will be finalised and annexed to a GI protection agreement (Engelhardt, 2015: 794-795).

<sup>2</sup> The last round of negotiations took place in January 2018, when the EU and China discussed the opposition files that they have received during the opposition procedure (see oriGin, nd).

China's GI protection system encompasses trademark, *sui generis* and primary agricultural product protection, and all of the three schemes are competent to provide protection to foreign GIs. The GI *sui generis* protection scheme started to develop in 1999, under the influence of the European system of *appellation d'origine contrôlée*. For protecting a foreign GI under the *sui generis* protection scheme, details were published in March 2016, when the Measures on the Protection of Overseas Geographical Indication Products were issued.

Initially, trademark and *sui generis* GI protection were respectively enforced by the State Administration of Industry and Commerce (SAIC) and the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ). Since 22 March 2018, after the reorganisation of the State Council was launched, SAIC and AQSIQ, together with the China Drug and Food Administration, merged to form the State Administration for Market Regulation.<sup>3</sup> Consequently, GI enforcement structure and procedures should be improved and streamlined. For example, prior to the merger, weaker GI protection in China often resulted in duplicated and opaque GI enforcement procedures, as the Report will demonstrate below. All changes are yet to be announced by the new administration, while abolishing the old rules requires time, thus the two valid GI protection schemes are explained in detail below so readers will have a comprehensive understanding of China's overall GI protection system. At the time of writing, the State Administration for Market Regulation is still reorganising. The exercise is expected to complete by the end of 2018.

Section 1 of this Research Report provides a summary of EU-China GI cooperation and protection agreement, which is currently in the final stages of negotiation. In brief, equivalent protection rules and enforcement for recognised GIs will be agreed for the 2 x 100 GI products from the two sides. This is a follow-up of the experimental pilot project on 2 x 10 GIs concluded in 2012. Section 2 places this GI agreement against the backdrop of swiftly rising EU-China trade in foodstuffs. In section 3, China's three parallel GI protection schemes will be introduced. Subsequently, it will uncover strengths and intrinsic weaknesses of China's GI protection system, especially with regard to possible conflicts which may arise between the trademark and the *sui generis* GI protection schemes, with the 'Jinhua ham' saga as a case study. In this respect, China and the EU share the notion of 'coexistence' with respect to *sui generis* protection and prior registered trademark of a GI product as long as the prerequisite of 'fair use' is fulfilled and the quality of 'honesty and good faith' is met. Section 5 highlights the distinct approaches of GI protection by the EU and China in their respective free trade agreements (FTAs) concluded so far, with the EU having assumed a strategic and purposeful direction whereas China has barely begun to articulate its GI interests in FTAs. Therefore, the upcoming EU-China agreement on GI protection represents a completely new approach for China. As of 16 May 2018, there were 4,150 GI products registered in China. Building on the experience gained from negotiating with the EU on the GI protection agreement, China should exploit

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<sup>3</sup> Also integrated into the State Administration of Market Regulation are the price supervision and inspection and anti-monopoly enforcement of the National Development and Reform Commission, the business operator centralised anti-monopoly enforcement of the Ministry of Commerce, the anti-monopoly commission office of the State Council, etc.

foreign markets for its GI exports. Finally, the question of enforcing GI protection is addressed. China suffers from a major enforcement challenge: damage is inflicted upon its own GIs due to domestic counterfeiting, but these GIs also suffer from counterfeiting abroad; in addition, China has long been known as the leading producer of counterfeit products worldwide, on a scale far greater than anywhere else (see EURACTIV, 2017a). Again, with a new administration being installed, some institutional improvement for better GI enforcement could be expected. Section 6 concludes the Research Report.

## 1. Negotiating the Agreement on the Cooperation on and Protection of Geographical Indications

Although the exact terms of negotiation have never been published, according to oriGin the scope of the Agreement covers agricultural products, wines and spirits, and the EU and China are discussing some flexibility in the language that could allow in the future the protection of non-agricultural GIs once the EU has passed regulation.<sup>4</sup> On technical aspects, the Agreement aims to specify the relationship of coexistence between GIs and prior registered trademarks, a high-level protection of GIs and the possibility for Chinese GIs to be protected under the Agreement in order to use EU logos in the Chinese market (see oriGin, nd). On institutional issues, according to the EU-China 2020 Strategic Agenda for Cooperation, the agreement will centre on cooperation and supervision and combating GI counterfeiting, with the aim of protecting GI products and boosting bilateral trade (see EU & China, 2013). On the latter, since detailed provisions for registering foreign GIs under the *sui generis* protection scheme were published by the Measures on the Protection of Overseas Geographical Indication Products in March 2016, “cooperation” will imply advising China on streamlining its GI registration and protection mechanisms so as to facilitate more EU GI-protected goods to penetrate the Chinese market and *vice versa*. For the purpose of streamlining, aspects concerning registration, compliance and supervision, opposition and revocation are likely to be emphasised in order to approximate GI protection provisions between the EU and China.

The aims of “equal protection” and “mutual benefits” that European GI producers in particular have been supporting will hopefully be attained as a consequence. Enforcement is certainly one crucial area for bilateral cooperation, not least because GI enforcement often requires concerted efforts between GI producers in the EU and various enforcement authorities in China, as the two Cognac infringement cases have demonstrated. Indeed, as will be disclosed later in the Report, enforcement action succeeded when the *Bureau National Interprofessionnel du Cognac* (BNIC) cooperated closely with various GI enforcement authorities in Shantou (in southern China). This included organising a workshop on IPR protection which was attended by the local AQSIQ and SAIC offices, the Public Security Bureau,

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<sup>4</sup> The European Commission is exploring the possibility of extending GI protection to non-agricultural products, such as Scottish Tartans, at EU level. An independent study was published in February 2013. In October 2015, the European Parliament adopted a resolution on the possible extension of protection of GIs to non-agricultural products. For the next step, the Commission will undertake an inception impact assessment to evaluate several policy options covering legislative and non-legislative alternatives to protect non-agricultural GIs.

the Intellectual Property Office, the Food and Drug Administration as well as the Anti-Counterfeiting Office. However, in another Cognac case in Shantou, enforcement succeeded only partly after criminal procedures against infringement were triggered by SAIC following a raid.<sup>5</sup>

The efforts mentioned above aim to export more GI products to the other's market and to facilitate effective protection so that the added value of a GI product will not be eroded. After all, geographical indications is a distinctive form of IPR in which protection is obligatory, while the minimum standards are set down by the TRIPS Agreement. It is expected that, following the conclusion of the Agreement, the number of existing GIs currently protected in both markets will increase, since both sides will espouse a similar GI *sui generis* protection system for facilitated GI registration in future. Ultimately, the trade volume of GI products can be boosted, thereby attaining the policy objectives of GI protection.

Presently, among the EU's 100 products proposed for GI protection, cheese, wines and spirits dominate. This is not surprising given their export increased sharply in China in recent decades and their potential is yet to be realised.<sup>6</sup> Note that among these 100 EU GIs, 21 are already protected in China after direct application (but they will nevertheless eventually be attached to the EU-China bilateral agreement on GI protection). Moreover, 10 of these 21 EU GIs are presently protected under China's *sui generis* protection scheme, in the wake of the China-EU Geographical Indications of the "10+10 Project" completed towards the end of 2012 (see Table 1). On the Chinese side, the GI products submitted for protection in the EU are mainly fruits (e.g. pears, apples), tea, rice and other agricultural products (e.g. bamboo shoots, black fungus, mushrooms). Certainly, the 200 GIs largely represent the leading food exports from the EU to China and from China to the EU.

Table 1. The 10+10 GIs from the EU and China

The 10 EU GIs registered under China's <i>sui generis</i> GIs protection scheme		
Designations	Countries	Type of product
Comté	France	cheese
Grana Padano	Italy	cheese
Priego de Córdoba	Spain	olive oil
Prosciutto di Parma	Italy	ham
Pruneaux d'Agen/Pruneaux d'Agen mi-cuits	France	dried fruit
Roquefort	France	cheese

<sup>5</sup> After the raid, BNIC and the French Embassy further requested AQSIO to stop the production and sales of infringing products but received no reply from AQSIO (see Zhong, 2014).

<sup>6</sup> For example, from 2015 to 2016 exports of European spirits to China increased 16% while total exports amounted to €479 million. Over 10 years (2006-16), European spirits exported to China increased 175%. Among all EU spirits exports, more than 200 spirits are registered as GI products and protected by the EU; in total they account for two-thirds of EU spirits exports (see SpiritsEurope, nd). Nonetheless, spirits from Europe occupy only 1% of the spirits market in China, where consumption is concentrated mainly in the richer coastal cities. Therefore, the potential for more European spirits exports to China is still to be realised.

Scottish Farmed Salmon	UK	salmon
Sierra Mágina	Spain	olive oil
West Country Farmhouse Cheddar	UK	cheese
White Stilton Cheese/Blue Stilton Cheese	UK	cheese
<b>The 10 Chinese GIs added to the EU GI register</b>		
<b>Designations</b>	<b>Latin Transcriptions</b>	<b>Type of product</b>
平谷大桃	Pinggu Da Tao	peach
盐城龙虾	Yancheng Long Xia	crayfish
镇江香醋	Zhenjiang Xiang Cu	rice vinegar
东山白芦笋	Dongshan Bai Lu Sun	asparagus
金乡大蒜	Jinxiang Da Suan	garlic
龙井茶	Longjing cha	tea
琯溪蜜柚	Guanxi Mi You	honey pomelo
陕西苹果	Shaanxi ping guo	apple
蠡县麻山药	Lixian Ma Shan Yao	yam
龙口粉丝	Longkou Fen Si	vermicelli/noodles

Source: European Commission (2012), "EU-China Geographical Indications – '10+10' project is now complete", Press release, Brussels, 30 November ([http://europa.eu/rapid/press-release\\_IP-12-1297\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1297_en.htm)).

## 2. EU and China are strong trade partners in foodstuffs

The market for imported food in China is large and growing. Among European food exports, the total value of GIs exported outside the EU is estimated at €11.5 billion, which represents 15% of total EU food and drinks exports (Chever et al., 2012). In recent years, the bilateral trade volume of foodstuffs has been rising steeply, with China becoming the EU's second-largest food export destination after the United States in 2017-18, and China becoming the EU's fifth-largest food supplier. The total food export amount from the EU to China from March 2017 to February 2018 was valued at €11.896 billion, an increase of €307 million – or 2.6% – over March 2016 to February 2017. From 2006 to 2016 China's demands for EU food have steadily grown at an annual rate of 23.7%. Moreover, the increase of total EU agri-food imports from China was €347 million from March 2017 to February 2018, an increase of 6.8% compared to March 2016 to February 2017 (see European Commission, nd). Even for dairy products, which are not staple foods of the traditional Chinese diet, China is the number one importer of EU dairy products, with EU exports of dairy products to the country worth more than €1.1 billion in 2016 which was around one tenths of the global export.<sup>7</sup> As Chinese consumers have become richer, their demands for exotic foodstuffs have become higher, which is one reason for the flourishing EU export of foodstuffs to China. Additionally, since factors such as food safety, quality, and origin

<sup>7</sup> Also, among the aforementioned 100 GI products that the EU submitted for protection in the Chinese market, there are 14 cheeses from Denmark, Greece, Spain, France, Italy and the UK (see European Dairy Association, nd: 20-21).



of ingredients have become increasingly important to the Chinese, EU foodstuffs, which are known for their high quality, have excellent potential for huge commercial gains if only they can penetrate the Chinese market<sup>8</sup> and, in the meantime, execute effective GI protection measures, as GIs bring added value to a food product. This assumption should be applicable to Chinese GI-protected products exported to the EU.

European and Chinese GI products are of different kinds, between mainly wines, spirits, cheese and meat on the EU side and local specialities such as tea, vinegar and fruits on the Chinese side. Cooperation on GI protection is therefore less likely to result in direct competition. Rather, it will bring complementarity and greater variety of quality food choices to each market, benefitting consumers on both sides. After all, just like EU GIs, some Chinese GIs are popular throughout the world, such as Zhenjiang vinegar (see profile in Box 1), Long Jing tea, Shaoxing rice wine, Changyu wines and Tsing Tao beer. Building on the experience gained from cooperating with the EU on GI protection, China may wish to expand trade in foodstuffs with other trade partners, eventually by emphasising effective GI protection as the EU does. In recent years, China has aligned its GI protection objective towards better food quality, poverty eradication and rural development, which is similar to the EU's common agricultural policy, in which GI protection is a component. Therefore, a bilateral GI protection agreement should also help the EU and China to pursue their respective domestic policy objectives.

*Box 1. Zhenjiang vinegar from China: A successful case for leveraging GI protection as a tool for economic benefits*

Zhenjiang (or Chinkiang) vinegar is a rice-based black vinegar widely used in Chinese cuisine, which takes its name from Zhenjiang, a city between Nanjing and Shanghai. Historical records show that black vinegar first appeared around 1,400 years ago. In modern times, the primary producer of Zhenjiang vinegar – the Jiangsu Hengshun Vinegar Industry Company – was established in 1840.

Production of Zhenjiang vinegar begins when a vinegar pei mixture (wheat bran, rice hull, alcohol obtained from stratification of glutinous rice and vinegar seed from a prior batch) is poured into an urn until it is half-full. The mixture is kept warm for up to three days in summer and six days in winter. At that point, rice hull is added and mixed with other ingredients once a day until the urn is full. Salt is added and the urn is stored for up to three months during which it undergoes an aging process. The vinegar is then leached and liquid drained from water-soaked, parched rice is added as a colour and flavour enhancer (for more on the process, see [https://en.wikipedia.org/wiki/Zhenjiang\\_Vinegar](https://en.wikipedia.org/wiki/Zhenjiang_Vinegar)).

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<sup>8</sup> Statistics reveal that infant food and pork meat were the EU's top two agri-food exports to China in 2016, with a yearly increase of 42.8% and 88.1%, respectively. This could be a consequence of the food scandals that took place in China in recent years involving products ranging from melamine milk to "lean meat powder" pork; deaths occurred and consumer confidence in food safety dropped drastically (see, for example, The Associated Press, 2015). The top Chinese agri-food exports to the EU in 2016 were vegetables and prepared vegetables, fruits or nuts.

In the wake of the EU-China “10+10” Pilot Project, Zhenjiang vinegar, which is the first-ever Chinese condiment to obtain GI protection in the EU, achieved rapid growth in terms of both industrial development and brand value. Its annual output increased from less than 100,000 tonnes before GI protection was granted to over 300,000 tonnes by the end of 2014. At the same time, the number of specialised producers has risen from three to 26, with an annual total output value of RMB 1 billion (€14 million). Today, Zhenjiang vinegar, the top vinegar product exported by China, is sold in over 60 countries and regions around the world.



<sup>a</sup> See EU Geographical Indication Application Scheme for Zhenjiang vinegar, a Protected Geographical Indication Product, by Guoxing Shao from Zhenjiang Quality and Technical Supervision Bureau of Jiangsu Province, presentation at the EU-China Seminar on GI Protection, 11-12 December 2014, Beijing.

China’s GI protection framework encompasses trademark protection and product protection (also known as *sui generis* GI protection), as well as raw agricultural product protection. For the GI *sui generis* protection scheme, China and the EU share the same ‘old world’ approach, as opposed to the ‘new world’ approach advocated by countries like the United States where GI is regarded as a subset of trademarks (see Box 2 below for a discussion of the differences between these two approaches). In the EU tradition, geographical indication signifies all the elements attributed to quality, reputation and characteristics of a particular product, including area of production, methods of production, etc., and, in addition, all the immaterial substance that the denomination is endowed with: tradition, landscape, regional identity value, etc. (Thévenod-Mottet, 2001: 8).

That said, within the remit of trademark protection, when a GI product is protected either by a collective mark or certification mark as stipulated by China’s Trademark Law, it seems that China follows the ‘new world’ approach after all. Yet China’s *sui generis* GI protection scheme evolved from Europe’s GI protection concept of protected designation of origin as a result of Sino-French cooperation dating back to 1994<sup>9</sup> and subsequently thanks to technical cooperation pursued by the EU for decades. To date, a third of all the foreign GIs registered under the *sui generis* GI protection scheme are from France. France has the most GIs protected in China and bilateral cooperation between the two countries encompasses most areas of GI protection.<sup>10</sup>

<sup>9</sup> Sino-French cooperation on GI protection was launched by the State Bureau of Quality and Technical Supervision and the French Ministry of Agriculture, Ministry of Economics and the *Bureau National Interprofessionnel du Cognac*.

<sup>10</sup> Available at <http://www.cgi.gov.cn/Home/Detail/923/> (in Chinese).

*Box 2. Differences between the ‘old world’ and the ‘new world’ approaches to GI protection*

Globally, the ‘old world’ and the ‘new world’ approach divides the way in which GIs may be protected. The ‘old world’ approach is led by the EU with its *sui generis* GI protection scheme. For the ‘new world’ approach, which is advocated by countries like the United States and Australia, GI is regarded as a subset of trademarks and is therefore protected by trademark law. The TRIPS Agreement sets down the minimum standards for GI protection and, by virtue of Art. 22(2) WTO members are at their discretion to decide the specific means of protection. Under the US Lanham Act, GI is protected as a certification or a collective mark, based on the premise that, as trademarks, GIs are source-identifiers, guarantees of quality and valuable business interests. The United States does not protect geographical terms or signs that are generic for goods/services, because they are not capable of identifying a specific business source or a collective producing source. Once a geographical designation is generic in the United States, any producer is free to use the designation for its goods/services. For this reason, for the United States, feta cheese is a generic type of “white” cheese, not deserving special recognition, nor GI protection. Conversely, Feta cheese qualifies as an EU GI because it is culturally and geographically distinct and attributable to a certain region in Greece.

Moreover, under America’s trademark/GI system, the trademark or GI owner has the exclusive right to prevent the use of the mark/GI by unauthorised parties. In this way, a prior right holder has priority and exclusivity over any later users of the same or similar sign on the same, similar, related or in some cases unrelated goods/services where consumers would likely be confused by the two uses. This principle is at odds with EU’s position of coexistence between GIs and prior registered trademarks. See also Geographical Indication Protection in the United States, United States Patent and Trademark Office.

China follows both the ‘old world’ and the ‘new world’ approaches for GI protection. The saga of Jinhua ham (described in Box 3 below) illustrates the conflict that may arise between the two approaches, especially when the holders of the two distinctive rights are different entities. Such conflict entails that a trademark holder may authorise the use of the mark under trademark law, but a GI producer may not under the *sui generis* GI protection scheme.

### 3. The three parallel GI protection schemes in China

In accordance with Art. 22.1 of the TRIPS Agreement, GIs are indications which identify a good of which a given quality, reputation or other characteristic is essentially attributable to its geographical origin.

China has many famous food products which have acquired a strong identity based on geographical origin over the country’s long history of civilisation. Nonetheless, GI protection was a foreign concept unknown to Chinese society until a couple of decades ago. Building a comprehensive GI protection framework was prompted, most likely, by China’s WTO accession negotiations. In the beginning of this process, China exploited different means, for example,



administrative orders or bilateral agreements to enforce GI protection. From the outset, the policy objectives laid down by Chinese GI legislation did not aim at economic development, as is usually the case in other jurisdictions, but at better regulation and administration for food quality and standardisation. But as mentioned above, it was only in recent years that China reoriented its policy objectives for GI protection.

GI protection in China is guaranteed by three parallel and independent schemes (see also Table 2):

- 1) Trademark Law (2014), and its implementing rules and the Measures for the Registration and Administration of Collective Marks and Certification Marks (2003);
- 2) Provisions on the Protection of Geographical Indication Products (2005);
- 3) Measures for the Administration of Geographical Indications of Agricultural Products (2008), and Administrative Measures for the Safety of Places of Origin of Agricultural Products (2006).

Table 2. China's three parallel GI protection schemes

Types of GIs protection	<i>Sui Generis</i>	Trademark	Primary agricultural products
Laws/rules/regulations	Provisions for the Protection of Products of Geographical Indication (2005).	Trademark Law (2014).	Measures for the Administration of Geographical Indications of Agricultural Products (2007).
Administrative bodies  Note that, since 22 March 2018, AQSIQ, SAIC and China Food and Drug Administration merged to form State Administration for Market Regulation. At the time of writing, the new administration is still under development.	General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) for nation-wide GIs protection.  At local level, Bureau of Quality, Technical Supervision, Entry-Exit Inspection and Quarantine for GIs protection	State Administration for Industry and Commerce (SAIC).	Agricultural Product Quality Centre under Ministry of Agriculture.
Roles and main functions	In charge of national quality, metrology, entry-exit commodity inspection, entry-exit health quarantine, entry-exit animal and plant quarantine, import-export food safety, certification and accreditation, standardisation, as well as administrative law-enforcement.	To maintain market order and protect the legitimate rights and interests of businesses and consumers by carrying out regulations in the fields of enterprise registration, competition, consumer protection, trademark protection and combating economic illegalities.	The Ministry of Agriculture: in charge of the registration of geographical indications of agricultural products for the whole of China.  The Agricultural Product Quality Safety Centre under the Ministry of Agriculture: in charge of the examination and

			expert appraisal of geographical indications of agricultural products.
GI definition	<p>Products that originate from a particular geographical region with the quality, reputation or other characteristics substantially attributable to the natural and human factors of the region, and denominated with the name of the region upon examination and approval.</p> <p>The products of geographical indication include: (1) those grown or cultivated in the region; (2) those made, wholly or partially, of the raw materials from the region and produced or processed with the particular techniques in the region.</p>	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.	<p>Agricultural product: primary products sourced from agriculture, namely, plants, animals, microorganisms and the products thereof obtained in agricultural activities.</p> <p>GIs of agricultural products: special agricultural product indications which are named after territories and meant to indicate the agricultural products are from a specific area and that the quality and major characteristics of the products mainly lie in the natural and ecological environment as well as cultural and historical factors of the area.</p>
Scope of protection	<p>1) Those grown or cultivated in the region; and</p> <p>2) Those made, wholly or partially, of the raw materials from the region and produced or processed with the particular techniques in the region.</p>	Any goods (see GI definition).	Primary agricultural products.
Objectives of GI protection	To effectively protect the products of geographical indication, regulate the use of the names and exclusive indications of the products of geographical indication, and ensure the quality and special characteristics of the products.	To improve the administration of trademarks, protect the exclusive right to the use of a trademark, and to encourage producers and dealers to guarantee the quality of their goods and services and preserve the credibility of trademarks, so as to protect the interests of consumers, producers and dealers and promote the development of the “socialist market economy”.	To regularise the use of geographical indications of agricultural products, guarantee the quality and characteristics of agricultural products with geographical indications and improve the market competitiveness of agricultural products.
Level of protection	The Product Quality Law, the Standardisation Law and the Inspection of Import and Export Commodities Law.	Trademark law, Anti-Unfair Competition Law, Civil Procedure Law.	Law on the Quality and Safety of Agricultural Products.
Method of protection	The <i>sui generis</i> GIs protection system.	GI mark as a certification mark or a collective mark.	Primary agricultural products.
GI symbols used			

Original source: Wang (nd: 62-63); elaborated and updated by the author.

Producers may choose to register the name of a GI product under more than one GI protection scheme in China.<sup>11</sup> This is also often the case elsewhere in the world.

China first opted to provide GI protection with trademark protection, coinciding with its accession to the Paris Convention in 1985 and when SAIC (now the State Administration of Market Regulation) started to enforce GI protection with administrative orders. “Danish Butter Cookies” and “Champagne” were the two well-known cases during this period, when SAIC instructed local SAIC bureaus to order the cessation of illegal use of the names “Danish Butter Cookies” and “Champagne”, respectively.<sup>12</sup>

In 1994, within the remit of trademark protection, China started to provide GI protection with legal means, as opposed to enforced by administrative order, when SAIC promulgated the Measures for the Registration and Administration of Collective Marks and Certification Marks. The Korla pear thus became the first GI product registered under a certification mark of protection in China.<sup>13</sup> Provisions for GI protection were “formally” incorporated into China’s Trademark Law when it was amended for the second time in 2001. Since then, it has been acknowledged that 1) registered trademarks include special types of trademarks which are collective and certification marks, and that 2) GI protection falls under this category of trademark protection. On this premise, a GI product may be registered either as a collective or a certification mark under the Trademark Law.<sup>14</sup> At the same time, GI marks are provided with the same level of legal and economic protection as any other logos, names or marks which are registered as a trademark. GI registrants under the Trademark Law are groups, associations or other types of organisations.

In addition to providing trademark protection, China started to develop the *sui generis* GI protection scheme. Though the scheme was voluntarily adopted by China, the European Commission probably had exerted credible influence in order for China to develop a parallel EU-style GI protection scheme. In 1999, the State Bureau of Quality and Technical Supervision

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<sup>11</sup> Before the provisions of relevant international treaties became applicable in China, in terms of trademark and GI protection, producers and traders often used a geographical place to name their products; brand names were not used. That was the case before China started its WTO negotiations. Sharing the same name of a geographical place nonetheless resulted in a *de facto* “place of origin” system. Later, before the “place of origin” system was established, some companies registered a general name of a traditional product as their own product brand. This business practice was prejudicial to the interests of traditional producers and consumers, which was unfair (see Wang, nd: 58).

<sup>12</sup> Available at <http://www.cipedu.com/News/Detail/378.html> (in Chinese).

<sup>13</sup> Available at [http://www.saic.gov.cn/sbj/dlbz/xwbd/201707/t20170708\\_267423.html](http://www.saic.gov.cn/sbj/dlbz/xwbd/201707/t20170708_267423.html) (in Chinese). The Korla pear is one of the 100 Chinese GIs for which China applied for protection in the EU, submitted for opposition in June 2017.

<sup>14</sup> Within the remit of the Trademark Law, a collective trademark refers to one that is registered in the name of a group, association, or any other organisation for use in business by its members to indicate membership; a certification trademark refers to one that is controlled by an organisation which is capable of exercising supervision over a particular kind of good or service and that is used by a unit other than the organisation or by an individual for its or his or her goods or services, and is designed to certify the indications of the place of origin, raw materials, mode of manufacture, quality, or other specified properties of the said good or service. Article 3, Trademark Law (2013).

issued the Regulations for the Protection of Products from Place of Origin, which provided the definition, administrative protection system for GI protection, and administration of special names and indications of GI products.<sup>15</sup>

China's present *sui generis* GI protection scheme is governed by the Provisions on the Protection of Geographical Indication Products (2005).<sup>16</sup> Enforced by AQSIQ (now the State Administration of Market Regulation), the Provisions regulate the use of designations and special signs of GI products and guarantee their quality and characteristics (Art. 1). Thanks to the Provisions, "geographical indication" is given for the first time in China a definition focusing on product characteristics. Reflecting Art. 22.1 of the TRIPS Agreement, Art. 2 of the Provisions stipulates that GIs refer to "products that originate from a particular geographical region with the quality, reputation or other characteristics substantially attributable to the natural and human factors of the region, and denominated with the name of the region upon examination and approval".<sup>17</sup> What is also noticeable is that Art. 26 of the Provisions stipulates that specific provisions for foreign GI registration and protection in China would be separately formulated. As is mentioned above, this pledge was met in March 2016 when AQSIQ promulgated the Measures on the Protection of Overseas Geographical Indication Products. In an effort to build up a more comprehensive *sui generis* GI protection scheme, China Protected Geographical Indication Products website ([www.cgi.gov.cn](http://www.cgi.gov.cn)) was set up in January 2017.

During the legislative development of China's *sui generis* GIs protection scheme, the EU has maintained a close relationship with AQSIQ, through for example technical cooperation within the framework of EU-China IPR Dialogue, ever since the Memorandum of Understanding (MOU) dated 30 October 2003 was signed.<sup>18</sup> A full cooperation programme on GI protection was then launched, including experts' seminars, visits to GI production sites, trainings, etc. (see Kireeva et al., 2009: 149-150). The cooperation led to the EU-China "10+10" Pilot Project (2007-12). Within the framework of the project, which was an exercise for the EU and China to better understand each other's *sui generis* GI protection schemes and how their respective mechanism worked, such as examination and opposition procedures, 10 EU GIs became the first foreign GIs to be registered and receive protection under China's *sui generis* GI protection scheme. Based on the principle of reciprocity, 10 Chinese GIs were concurrently admitted for

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<sup>15</sup> See Kireeva et al. (2009: 99). The State Bureau of Quality and Technical Supervision and the State Bureau of Entry-Exit Inspection and Quarantine in 2001 merged to become the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ). Since then, AQSIQ has been responsible for implementing the *sui generis* GI protection system in China. AQSIQ ceased to exist after the reorganisation of the State Council, an exercise launched in March 2018. AQSIQ is now part of the State Administration of Market Regulation.

<sup>16</sup> The Provisions on the Protection of Geographical Indication Products repealed 1) the Regulations for the Protection of Products from Place of Origin (1999); 2) the Provisions on the Administration of Marks of Origin (2001).

<sup>17</sup> The products of geographical indication include: (1) those grown or cultivated in the region; and (2) those made, wholly or partially, of the raw materials from the region and produced or processed with the particular techniques in the region.

<sup>18</sup> On 'horizontal discussions', the EU-China IPR Dialogue covers all IP sectors on issues concerning institutional, legislative, enforcement and public awareness of consumers and right-holders. See MoU of EU-China IPR Dialogue ([http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc\\_151584.pdf](http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151584.pdf)).



protection in the EU. It may be fair to say that the EU-China “10+10” Pilot Project also served as a driver to facilitate AQSIQ to settle the details for foreign GIs to be protected in China. As noted before, although foreign GIs may be protected by AQSIQ in their own right by virtue of the Provisions for the Protection of Products of Geographical Indication, details were not worked out in 2005 and no foreign GIs were registered prior to the conclusion of the “10+10” Pilot Project. Following the “10+10” Project, in 2015 AQSIQ issued the Guiding Opinions on Promoting the International Application of the China-EU “10+10” Internationally Mutually Protected Chinese Geographical Indications, in order to push forward the international application of GIs and to promote the use of special marks for protected Chinese GIs in overseas markets (WTO, 2016: 108).

The Ministry of Agriculture (MoA) is responsible for GI protection of raw agricultural products, such as plants, animals, microorganisms and the processed products thereof obtained in agricultural activities (Art. 2(1), Measures for the Administration of Geographical Indications of Agricultural Products, 2007), in order to guarantee the quality and characteristics as well as the market competitiveness of agricultural products (Art. 1). In recent years, the MoA also issued a series of rules and regulations in relation to GI protection while implementing the Law of Agriculture, such as Measures for the Administration of Geographical Indications of Agricultural Products (2008), and Administrative Measures for the Safety of Places of Origin of Agricultural Products (2006).<sup>19</sup> Note that Art. 24 of the Measures stipulates that applications for the registration of foreign agricultural GI products may be accepted for registration and protection in China, but the specific measures would be worked out in another initiative.

Until today (mid-2018), foreign entities may apply for GI protection in China under each of the three protection schemes (Arts 17, 18, 25, Trademark Law, 2013). Within the remit of the Trademark Law, because foreign entities may appoint a local agent to apply for trademark registration and handle trademark-related matters (Art. 18, Trademark Law, 2013), many foreign GIs have registered for GI protection in China by means of brand protection, and therefore registered their respective brand as a collective mark in China. For example, the Scotch Whisky Association acquired trademark protection for Scotch whisky as a collective mark in China in 2008. As for protecting foreign GIs under the GI *sui generis* protection system, following the conclusion of the EU-China “10+10” Pilot Project, and after 10 EU GI products were admitted under the scheme for protection, Bordeaux wines were subsequently granted protection under the same GI protection scheme in June 2015; a year later, wines from 45 sub-regions in Bordeaux, including the sub-region of Barsac, also received *sui generis* GI protection in China. Note that China is the biggest export market worldwide for Bordeaux wines. Each year, approximately 65 million bottles of Bordeaux wine are exported to China. It is good news that for the sake of legal certainty, provisions are now made very clear as to how foreign GIs may acquire protection in China.

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<sup>19</sup> For details of the laws and implementing rules governing GI protection in China, see [www.wipo.int/wipolex/en/results.jsp?countries=CN&cat\\_id=5](http://www.wipo.int/wipolex/en/results.jsp?countries=CN&cat_id=5).



Promulgated by AQSIQ, the Measures on the Protection of Overseas Geographical Indication Products provide rules for application, examination, approval, supervision, as well as protection, modification and revocation of foreign GI products seeking protection in China. As a matter of principle, foreign GI protection in China is granted on the basis of reciprocity. This means that only those products originating from countries that have “established the corresponding communicative and cooperative relationship with China” can qualify for protection. In any event, an applicant seeking to register a foreign GI in China must prove that the GI in question is protected in its country of origin. On the other hand, if the right holder of a foreign GI decides to register its GI for trademark protection, the protection period granted will be the same as for other trademarks, that is, 10 years and renewable for successive periods of 10 years indefinitely. When a foreign GI is protected in China under the *sui generis* or as a raw agricultural product under the MoA, once registered, protection is permanent.

#### 4. Coexistence between *sui generis* protection and prior registered trademark of a GI product

When a GI product is protected by the *sui generis* protection scheme while at the same time is prior registered under trademark protection as a certification or a collective mark, conflicts may arise between the two protection schemes due to the question of priority right. The Chinese judiciary upholds the position of coexistence as long as the prerequisites of fair use and the quality of “honesty and good faith” are met, as the decision on the Jinhua ham case (2003) illustrates (see Box 3 below). This position was also taken by the ECJ in 2009 in its decision in *Bavaria NV, Bavaria Italia Srl v Bayerischer Brauerbund eV*.<sup>20</sup> Nonetheless, such conflicts may be rare in jurisdictions other than the Chinese simply because the question of priority was perhaps settled in other jurisdictions but not yet in China. This could be due to the fact that, as highlighted before, China’s three independent GI protection schemes started to evolve almost concurrently, therefore hard technical details were not fully elaborated in time in the process. Having said that, pursuant to the decision set down by the Jinhua ham case, Art. 59 of the Trademark Law (2013) has since made the position of “coexistence” explicit. This is an important step, since China and the EU are “formally” in sync with regard to the relationship of “coexistence” between GIs and prior registered trademarks, a provision on which the European Commission insists in all of its trade agreements with respect to GI protection.

##### Box 3. The Jinhua ham saga

The Jinhua ham saga illustrates the conflict that may arise between the trademark and the *sui generis* GI protection schemes, especially when the holders of the two distinctive rights are different entities. This includes the conflict with respect to authorisation which means a trademark holder may authorise the use of the mark under trademark law, while a GI producer may not authorise its use under the *sui generis* GI protection scheme.

<sup>20</sup> Case C-343/07, *Bavaria NV, Bavaria Italia Srl v Bayerischer Brauerbund eV*, ECJ, 2 July 2009.

Named for the city of Jinhua where it is produced, in the Zhejiang Province in China.<sup>a</sup> Jinhua ham is a high-quality dry-cured ham known in almost every household in China, with a history of production dating back almost 1,200 years.<sup>b</sup>

In 1979, the Zhejiang Pujiang County Food Company applied to register the “Jinhua ham” trademark with SAIC. In March 1983, the Zhejiang Food Company, in effect a government agency in charge of supervising every agri-food company in the Zhejiang province at the time, transferred the trademark to the company itself and became the owner of the “Jinhua ham” trademark. The company itself did not produce Jinhua ham but outsourced production to hundreds of enterprises and expanded the authorised production area of Jinhua ham through licensing. These enterprises, including Jinhua city producers, must pay a licensing fee to use the trademark “Jinhua ham”.

In 1994, when the 10-year validity period for a registered trademark expired, Jinhua ham producers from the city of Jinhua refused to continue paying licensing fees to the Zhejiang Food Company. As a result, they were no longer entitled to use the “Jinhua ham” trademark, while in the meantime the Jinhua town council requested the recovery of the brand name of Jinhua ham for local use. But this request was refused by the Zhejiang Food Company. The producers from Jinhua then registered other trademarks to designate their ham products. However, the Zhejiang Food Company alleged that these ham products were counterfeits and that its trademark of “Jinhua ham” was infringed.

After the protection scheme of “place of origin” was introduced in China in 1999, in accordance with the Regulations for the Protection from Place of Origin (now repealed), the Jinhua ham Producers’ Professional Association applied to the State Bureau of Quality and Technical Supervision (later AQSIQ, now State Administration of Market Regulation) for protection of their Jinhua ham produced in the city. In 2002, the ham produced in Jinhua and in the nearby city of Quzhou was granted protection as a product of “place of origin”. As a consequence, the same GI product, i.e. Jinhua ham, which was owned by two distinctive production entities, became protected under trademark and product protection with two different rights enforced by SAIC and the State Bureau of Quality and Technical Supervision, respectively.

In February 2003, Zhejiang Food Company reported those ham producers in Jinhua city to SAIC for infringing the “Jinhua ham” trademark. The ham producers in question were thus sequestered by SAIC in Hangzhou, Ningbo, Suzhou, Shanghai, etc., for alleged distribution of forgeries. The “Jinhua ham” dispute thus evolved into a conflict between the two GI protection schemes, i.e. the trademark and the “place of origin” protection schemes.

However, the Shanghai Court decided that no rights had been infringed. The decision confirmed the coexistence relationship between prior registered trademarks and the “place of origin” protection schemes for GI protection. The “place of origin” protection scheme was later developed into the *sui generis* GI protection scheme in accordance with the 2005 Provisions on the Protection of Geographical Indication Products.

The court decided that the exclusive rights conferred by the Trademark Law were not infringed. The plaintiff, the Zhejiang Food Company, the registrant of the “Jinhua ham” trademark, did not have the right to prohibit another person’s fair use of the registered trademark because the exclusive rights of a registered trademark and the products of “place of origin” are both protected by law in China.<sup>c</sup> This position is now made explicit by Paragraph 1 of Art. 59 of the Trademark Law (2013). Accordingly, the holder of a registered trademark cannot prohibit others from the proper use of the generic name, or

information, as it directly indicates the quality, main raw materials, functions, purposes, or geographical locations contained in the registered trademark.<sup>d</sup>

Finally, the principle of honesty and good faith while exercising the exclusive rights of trademark protection was also taken into account before the court reached its conclusion that no infringement of the trademark of “Jinhua ham” ever took place. This is to say that when the proprietor of an IPR exercises his rights, his conduct should strictly conform to legal provisions in order to avoid conflicts between different rights. If a conflict of rights does arise between parties, the parties concerned should respect each other’s IPRs and exercise their own rights in accordance with the relevant provisions. In the Jinhua ham case, while owing to historical factors the “Jinhua ham” trademark and the “place of origin” product belong to the different proprietors, they both should use their respective signs in strict conformity with relevant legal provisions in order to avoid possible conflicts which may arise between the two distinctive rights.<sup>e</sup>

<sup>a</sup> Presently, based on information available on the SAIC website, “Jinhua ham from Jinhua City” is the only certification mark registered for protecting Jinhua ham under the GI trademark protection scheme. The registrant is the Committee of Certification Mark Protection in Jinhua City. The website shows that other marks related to Jinhua ham, such as the “Jinhua ham” mark applied for by the Jinhua Ham Co. Ltd., located in Hangzhou City, is no longer valid. The GI database managed by AQSIQ shows that Jinhua ham produced in Jinhua City, consisting of 15 counties within the territories, is protected as a GI *sui generis* product. Available at [www.cgi.gov.cn/Enterprise/Index/?CategoryID=114&page=3](http://www.cgi.gov.cn/Enterprise/Index/?CategoryID=114&page=3) (in Chinese).

<sup>b</sup> For detailed description of the specific quality and product differentiation, see Wang (nd: 67-70).

<sup>c</sup> For detailed discussion on “fair use” in the context of GI product as a certification or a collective mark, see H. Zhang, D. Hu and Y. Li (2016: 1-25). For “fair use” under the Trademark Law, see Art. 4 of its implementing rules.

<sup>d</sup> Paragraph 1 of Art. 59 of the Trademark Law (2013) stipulates, “The holder of the exclusive right to use a registered trademark shall have no right to prohibit others from properly using the generic name, graphics or models of a commodity contained in the registered trademark, or such information as directly indicates the quality, main raw materials, functions, purposes, weight, quantity or other features of the commodity, or the names of the geographical locations as contained therein.”

<sup>e</sup> As a result, the Court held that the plaintiff’s exclusive right to the prior registered trademark was protected by the Trademark Law, and any violation of such right should be legally responsible. Nonetheless, the plaintiff was not entitled to prohibiting others’ fair use of the mark. On the other hand, because “Jinhua ham” was granted protection as a product of “place of origin” by AQSIQ (formerly State Bureau of Quality and Technical Supervision), the defendant therefore was entitled to the exclusive use of the special mark of origin “Jinhua ham”, by virtue of the Provisions on Protection of Designations of Origin Products (repealed). However, the defendant should exercise its rights in accordance with the standards stipulated by the Provisions, and both the defendants and the plaintiff should respect each other’s intellectual property rights and exercise their rights accordingly. For detailed discussion on the Jinhua ham case, see Kireeva et al. (2009: 127-131).

## 5. GI protection in EU trade agreements with third countries and China’s approach

### 5.1 GI protection in EU trade agreements with third countries

Within the EU, GIs, including wines, spirits, agricultural products and foodstuffs other than wines and spirits, are protected by a series of regulations. Over the years, some EU countries, notably France, Italy and Spain, have taken the worldwide lead in identifying and protecting their GIs. The Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI) are the two EU schemes that attest to the specific traditions and qualities of food

products, wines and spirits produced in the EU or other countries, with a precise link to the region from which the product comes.

The EU has made it clear that GI protection is an important instrument for rural development and for advancing the Union's agricultural policies. In addition, GI product sales represent an increasingly significant volume of EU external trade, and EU export of GI products to China already speaks for this fact. In terms of external trade negotiations, a satisfactory chapter of GI protection is a "must-have" for the EU (Engelhardt, 2015: 783).

In order to best protect EU GIs in third countries for higher trade volumes, while concluding an agreement on GI protection, either as a stand-alone agreement or a chapter on GI protection within a trade agreement, the European Commission is often able to persuade its partners to adopt its GI protection system and philosophy. Once this exercise is complete, future registration and protection of EU GIs in third countries will be significantly facilitated because the list of EU GIs annexed to an EU trade agreement consist of only a fraction of GIs protected in the territories. More EU GIs will need to be registered for protection in the country concerned after a trade agreement concluded with the EU comes into force. Additionally, installing an EU-like GI protection system in third countries could help the EU to build an alliance for providing "TRIPS-plus" GI protection standards, which the EU has been advocating for in multilateral fora. This means extending Art. 23 of the TRIPS Agreement for higher protection to all GI products, beyond wines and spirits, and guaranteeing the relationship of coexistence between GI products and prior registered trademarks if the latter were registered in good faith.<sup>21</sup> The two objectives are of course intertwined.

The aforementioned strategies may be exemplified by the EU-Vietnam FTA which is expected to come into force (at least provisionally) in early 2019. In effect, the EU aims for the EU-Vietnam FTA to set a precedent for other trade agreements that are under negotiation or will be negotiated in the region, for example with other ASEAN countries such as Malaysia, Indonesia and the Philippines.<sup>22</sup>

The EU-Vietnam FTA GI protection section<sup>23</sup> foresees protection in Vietnam for 171 EU GIs (Annex GI-I Part A) at a comparably high level to that under EU GI legislation,<sup>24</sup> as well as protection in EU markets of 39 Vietnamese GIs, which is the current number of GIs under protection in Vietnam.<sup>25</sup> On enforcement, protection of EU GI products will be assured on the

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<sup>21</sup> According to Advisory Group International Aspects of Agriculture (2012), the EU's other goals are: phasing out prior uses of names originating in the EU; obtaining administrative protection; avoiding any reliance on mere individual applications for protection in the other country; ensuring a right of use and ensuring ongoing cooperation through the establishment of a designated mechanism. See Engelhardt (2015: 785-7).

<sup>22</sup> Available at [https://ec.europa.eu/agriculture/newsroom/243\\_en](https://ec.europa.eu/agriculture/newsroom/243_en).

<sup>23</sup> Art. 6 Geographical Indications, Chapter 12 Intellectual Property, EU-Vietnam Free Trade Agreement.

<sup>24</sup> However, exceptions to full protection apply to some GIs, such as "Asiago", "Fontina", "Gorgonzola" and "Feta". For details, see Art. 6.5a, Exceptions, Chapter 12 Intellectual Property, EU-Vietnam Free Trade Agreement.

<sup>25</sup> See agreed text as of January 2016, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>. It's worth highlighting that the 171 EU GIs which will receive immediate protection in Vietnam once the EU-Vietnam FTA comes into force are only a fraction of the more than 3,000 GIs protected in the EU. This explains why the

Vietnamese market by appropriate administrative action, and such enforceability will have direct effect at the request of an interested party at least with regard to Art. 6.5 for Protection of Geographical Indications and Art. 6.7 concerning Relationships with Trademarks of the Agreement.<sup>26</sup> In accordance with Art. 6.7 of Chapter 12 of the EU-Vietnam FTA, the relationship of coexistence between GIs and prior registered trademarks is guaranteed if the latter were registered or used in good faith. On the other hand, the EU GIs can neither become generic nor unilaterally be invalidated by the other party. Finally, in principle new GIs can be added in the future.<sup>27</sup>

Two lists of GI products are usually annexed to an EU FTA, and very often the EU's list of GIs is much longer than a third country's, reflecting the abundant GI products produced in EU markets.<sup>28</sup> Certainly, such a long list of GIs includes just a small number of GIs registered in the EU. Therefore, most EU GIs will need to undertake specific registration procedures in a third country for protection, after a trade agreement is concluded. To facilitate this process, ultimately for the purpose of increasing GI exports, the EU indeed actively seeks to have its GI protection regime and philosophy established in third countries through trade negotiations. For example, among other pledges to provide GI protection, such as establishing a GI registry, Singapore committed to passing new legislation on GIs before signing its FTA with the EU (see Lim, 2013). In relation to China, the EU has achieved this policy objective within a decade or so via a programme of technical cooperation.

## 5.2 Deficiencies hindering China from undertaking effective GI protection measures

China can do more and better in GI protection. Presently, GI protection is not a substantive component in China's trade agreements. Among the 15 FTAs that China has concluded so far,<sup>29</sup> GI protection often consists of one single clause and is only mentioned in FTAs with Peru, New Zealand, Australia and Switzerland. Moreover, such a clause is usually aspirational in nature, without laying down any specific protection measures. No FTAs are annexed with a list of GI products for protection, save for the China-Peru FTA, in which only 22 Chinese GIs – when 4,150

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European Commission is keen to ensure its trading partners will have a similar GI protection regime to facilitate future EU GI registration and protection in the countries concerned.

<sup>26</sup> Art. 6.8, Chapter 12 of the EU-Vietnam Free Trade Agreement (agreed text as of January 2016). This provision is a departure from the EU's usual position of "no direct effect" as far as enforcement is concerned. The majority of its FTAs explicitly rule out any direct effect. See, for example, Art. 356 on rights and obligations under the EU-Central America Association Agreement. All Council decisions on the signing of the present FTAs rule out any direct effects as well. For detailed discussions, see Engelhardt (2015: 787-789).

<sup>27</sup> Available at [http://ec.europa.eu/agriculture/newsroom/243\\_en.htm](http://ec.europa.eu/agriculture/newsroom/243_en.htm).

<sup>28</sup> In the case of the EU-Singapore FTA, applications for protection will be made in Singapore for 196 European GIs. As there are no GI products currently registered in Singapore, Singapore did not submit any GI products for protection in EU markets. See Section A Geographical Indications of the Union, and, Section B Geographical Indications of Singapore, Annex 10-A List of Names to be Applied for Protection as Geographical Indications in the Territory of the Parties, Chapter 10 Intellectual Property, EU-Singapore Trade and Investment Agreements (authentic texts as of April 2018).

<sup>29</sup> Available at <http://fta.mofcom.gov.cn/english/index.shtml>.

GIs were registered in the country as of May 2018 – and four Peruvian GIs are listed for protection, and the product numbers may increase as foreseen by the agreement.

A chief reason for China’s seeming lack of ambition in exporting more GIs could be that the country’s policy-makers have so far been less well-informed of the economic benefits that GI products may bring. The objectives of China’s legislation on GI protection are better regulation, efficient administration and food safety (see Table 2); it has little to do with trade. Indeed, although labels such as “local special products” or “famous local specialties” are attached to many Chinese local products these days and could be relevant for the purpose of GI protection, they are used so far only for branding and therefore as part of trademark labelling. On the other hand, seeking to protect GI products is generally not a priority for Chinese food producers.<sup>30</sup>

There are cases where the GI symbol is not affixed to a GI product after protection is granted. A case in point is Changyu wine. Ranked among the “Top 10 Global Wine Brands 2017” by Drinks Business, with the world’s fourth-highest sales in 2016 (China News, 2017), Changyu wine, which is granted GI protection under trademark protection, has no GI symbol affixed to its wine packaging. The same happened to Tsing Tao beer, China’s most widely exported beer, sold in over 90 countries and regions around the globe. It was also reported that the producers of Zhangqiu scallion, a GI product protected under trademark protection as a certification mark, allowed the GI symbol awarded by SAIC to be used by other producers without royalties. Apparently, the producers of Zhangqiu scallion were more interested in promoting, rather than protecting, the use of the GI symbol (Kireeva et al., 2009: 147). Therefore, overall awareness of leveraging GI protection as a marketing and brand recognition instrument to add value is low in China. However, in the meantime, it must be pointed out that under trademark protection, affixing the GI symbol to the packaging of a GI product is optional, whereas under the *sui generis* protection scheme, it is mandatory.<sup>31</sup>

The lack of awareness of the added value that a GI symbol may bring also suggests that producers may neglect to emphasise unique features of a GI product while wanting to increase brand value or expand production scale for increased market share and more income. Such unique features are, nonetheless, often associated with high product quality. Such neglect may

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<sup>30</sup> In the meantime, it seems that Chinese producers are inclined to seek trademark protection for their GI products, since the number of GIs registered with AQSIQ is only half of those registered with SAIC. Statistics published by SAIC revealed that, as of end-2016, there was a total of 3,374 GIs registered either as a certification mark or a collective mark, among which 85 were foreign GIs. Under the *sui generis* protection scheme, at the time of writing, there are 1,744 registered GI products and 10 EU GIs, following the completion of the EU-China “10 plus 10” Pilot Project, Bordeaux wines and other foreign GIs, such as Tequila. There were 2,063 GI primary agricultural products protected under the Ministry of Agriculture in January 2017. Available at [www.saic.gov.cn/sj/tjsj/201704/t20170425\\_262204.html](http://www.saic.gov.cn/sj/tjsj/201704/t20170425_262204.html), [www.cgi.gov.cn/Products/](http://www.cgi.gov.cn/Products/), [www.cgi.gov.cn/Products/Abroad/](http://www.cgi.gov.cn/Products/Abroad/) and [www.aqsc.agri.cn/ncpdlbz/cpcx/201702/t20170222\\_249974.htm](http://www.aqsc.agri.cn/ncpdlbz/cpcx/201702/t20170222_249974.htm) respectively (in Chinese).

<sup>31</sup> See Art. 5 of the Measures for the Administration of Special Signs of Geographical Indication Products, and Art. 23 of the Provisions for the Protection of Products of Geographical Indication. Note also that within the remit of trademark protection, the GI symbol is termed “special sign” while it is “exclusive indication” under the *sui generis* GI protection scheme. For details of the respective GI logos, see Table 2.



also be a result of the government's past policy choices in GI legislation (see Table 2). It is only in recent years that China has become keen to promote GI protection as an instrument of rural development and poverty alleviation.<sup>32</sup> Clear evidence shows, for example, that once a product is registered as a GI, its price level increases by 50.11% on average, while farmers' income from GI production at the place of origin increases by 65.94%. Moreover, of all GI products, 53.38% have become regional economic pillar industries, and GIs may generate more than 30% of the economic impact on local employment, income and overall development.<sup>33</sup> It's worth noting that for price level increases, the above-mentioned estimate provided by the SAIC study seems very conservative. Based on a study published in October 2012, the average value premium rate achieved by EU GIs was 2.23.<sup>34</sup>

Certainly, promoting GI registration for rural development requires the prerequisite of effective protection. Like other IP-protected products, GI products may be subject to misuse and counterfeiting. For the EU, the most counterfeited GI products are wines, spirits, cheese, meat, fruit, vegetables and cereals.<sup>35</sup> Chinese GIs may fall victim to counterfeiting, too, both internationally and domestically. For example, Shaoxing rice wine, protected as a GI certification mark in China, was hit with a malicious trademark registration in Japan, Singapore and Australia in recent decades, and suffered from serious counterfeiting in the domestic market with an overall estimated loss of RMB 150 million (€19 million).<sup>36</sup>

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<sup>32</sup> For example, the 13th Five-Year Plan (2016-20) has emphasised the government's aim to use GI protection as an instrument to develop pollution-free agricultural products, green foodstuffs, organic agricultural products, and agricultural products. This forms one of the agricultural modernisation projects to enhance agricultural product quality and safety. See Section 3, Innovations in Rural Financial Services, Chapter 21 Improve Systems for Providing Support and Protection for Agriculture, the 13<sup>th</sup> Five-Year Plan for Economic and Social Development of China.

<sup>33</sup> The study of the Relationship between Trademark Protection and Economic Development was conducted by SAIC. The study was quoted by Cui Shoudong, Deputy Director of Trademark Protection at SAIC, when presenting an overview of SAIC's work on GIs protection at the 2017 International Symposium on Geographical Indication, 29 June-1 July 2017, Yangzhou, China ([http://home.saic.gov.cn/zt/fw/dlbz/201707/t20170708\\_267423.html](http://home.saic.gov.cn/zt/fw/dlbz/201707/t20170708_267423.html), in Chinese).

<sup>34</sup> According to the study Value of Production of Agricultural Products and Foodstuffs, Wines, Aromatised Wines and Spirits Protected by a Geographical Indication (GI) and based on the year 2010 with the prices retained at the regional wholesale stage (ex-factory/ex-winery), the value premium rates were higher for wines (2.75) and spirits (2.57) than for agricultural products and foodstuffs (1.55) (a value premium rate of 2 means that GI products were sold for twice as much as non-GI products for the same volume). For study details, see [https://ec.europa.eu/agriculture/external-studies/value-gi\\_en](https://ec.europa.eu/agriculture/external-studies/value-gi_en).

<sup>35</sup> The 2017 Situation Report on Counterfeiting and Piracy in the European Union, jointly drafted by Europol and the EUIPO, noted that in 2015 there was growth in the counterfeiting of such labels and that the practice is expected to continue. Most of the fraudulent products are premium high-value ones like wine and spirits, as well as cheese, meat, fruit, vegetable products (including olive oil) and cereals.

<sup>36</sup> Shaoxing rice wine, which is one of the most famous varieties of traditional Chinese wines, is fermented from rice. Often served at state banquets for heads of governments and states, Shaoxing rice wine originates from the region of Shaoxing, in the Zhejiang province of eastern China. The production of Shaoxing rice wine dates back more than 3,000 years, with sophisticated processing procedures. The overseas markets of Shaoxing rice wine reach 42 countries, and amongst them the United States, Japan, Canada, Malaysia and Singapore are the top markets with the Japanese market ranked first.

The main reasons for weak GI protection are many, including the lack of awareness of GI protection. The author feels that weak enforcement, which is in fact seen across the whole IPR protection spectrum in China, could also be a by-product of the all-out and all-round reforms in recent decades in China, which compelled constant policy and institutional changes that resulted in multi-layered and overlapping enforcement regulations and bodies. This causes enforcement delays and confusion, even among enforcement bodies themselves. The situation sometimes can become more complicated because certain enforcement bodies are empowered to issue departmental rules, and that is how a confusing enforcement structure came into being in China. This means that when it's time for enforcement action, it may be unclear which enforcement body should be in charge and, consequently, which enforcement law applies. The lack of institutional stability, a confusing enforcement structure, and the country's thus far limited capacity to master hard technical issues – sometimes inducing long delays in promulgating implementing rules, for instance – have all contributed to persistently weak IPR enforcement in China. When it comes to GI protection, there is no exception. The Cognac enforcement case, profiled in Box 4 below, illustrates this point. Due in part to an institutional restructuring exercise, identifying the applicable law and enforcement body caused delays in the enforcement action itself.

*Box 4. Cognac enforcement case, Shantou, Guangdong Province, December 2014*

The Cognac enforcement case took place in Shantou, Guangdong Province, in December 2014, when the local Bureau of Quality and Technical Supervision and the Food and Drug Administration in the same city were obliged to clarify who was the lead enforcement actor of the case before an enforcement action could be launched. This happened because the administrative authority of quality supervision for food production and processing in Guangdong Province was transferred to the food and drug supervision administrations in October 2013. But, between the two agencies, it was not made clear who should be the lead actor for enforcement against counterfeiting or illegal use of quality marks, including GI marks, by food producers. Therefore, official clarification was sought, and it was later confirmed that, for this particular case, enforcement power belonged to the Bureau of Quality and Technical Supervision.

Secondly, identifying the applicable law was a headache for the enforcement body, the Bureau of Quality and Technical Supervision. If conventional wisdom should have prevailed, the applicable provisions to protect the Cognac mark should have fallen within the remit of the Provisions of the Product Quality Law. But the law contains no clear provisions for punishing counterfeiting and unlawful use of marks for food products. Therefore, the law was not applicable to protecting the Cognac mark. On the other hand, given the fact that the alleged infringing product of the case, i.e. Cognac, fell under the food category of spirits, and because the unlawful act was part of an overall commercial activity, the Bureau of Quality and Technical Supervision transferred the case to the Food and Drug Administration in the same city. Eventually, the Regulations of Guangdong Province on Investigating and Punishing Unlawful Acts of Producing and Marketing Counterfeit and Shoddy Goods was identified as the appropriate legislation for protecting the Cognac mark from counterfeiting (Zhong, 2014).



The implication of the Cognac case is that neat institutional structures with clearer demarcation of powers among enforcement agencies, as well as specific GI protection legislation, are required for efficient GI enforcement.

Until 10 April 2018, when the State Administration for Market Regulations was inaugurated, the respective administrative authorities responsible for the trademark and the *sui generis* GI protection schemes were independent of each other. This institutional arrangement was usually blamed for delays and confusion, as seen in the Cognac enforcement case. One may expect that after the new administration is established, China's GI enforcement structure will be streamlined, and subsequently the web of opaque, sometimes contradictory, enforcement laws and regulations will be cleared up and become less cumbersome and more efficient. On the other hand, the roles, functions, and "scope of protection" of the trademark and the *sui generis* GI protection schemes lack clear demarcations, harmony, i.e. they are not cross-referenced, and they do not support, or link with, each other.<sup>37</sup>

This may not pose a problem if the GI product registered simultaneously under different protection schemes is owned by the same producer or product association; otherwise, a dispute will likely arise as seen by the Jinhua ham case. All this may, at the same time, cause concerns for institutional rivalry and conflict, especially between SAIC and AQSIQ, which would weaken and delay enforcement actions. It is therefore understandable that some Chinese scholars advocated for interdepartmental synergies in supervision or establishing a joint enforcement and information-sharing mechanism between the quality and technical supervision authorities and the food and drug supervision administration. In early 2016, SAIC solicited opinions from various departments on the establishment of a joint recognition mechanism for GI products.<sup>38</sup> It seems this produced a positive result – the newly established State Administration for Market Regulation – given that SAIC, AQSIQ and the Food and Drug Administration were all, in the past, involved in enforcing GI protection and have now merged into one organisation.

In the meantime, it's worth noting that some Chinese government agencies have recently started to clean up numerous rules, regulations, laws and policies (often with judicial powers and enforceability) that persisted in agencies for decades. For example, in 2016, China's State Intellectual Property Office (SIPO) combed through approximately 40,000 pieces of legislative documents, including departmental rules and regulatory documents (which were issued by SIPO alone), 214 of which were eventually declared invalid (SIPO, 2016: 29).<sup>39</sup>

<sup>37</sup> Furthermore, the three GI protection schemes use different special terms to describe GIs, and their definitions, as well as the system design of the legislation in question, also vary from one another (Wang & Kireeva, 2014).

<sup>38</sup> This is meant to implement the State Commission Office of Public Sector Reform's Opinions on Improving the Geographical Indications Protection System and Mechanism (SCOPSR [2011] No. 26), which calls for setting up a special GI protection regime and encourages the drafting of GI protection laws, regulations and comprehensive policies. See WTO (2016: 108).

<sup>39</sup> SIPO (2016), "Annual Report of the State Intellectual Property Office", p. 29.

China started to strengthen GI enforcement in recent years, at both public and expert levels to increase awareness,<sup>40</sup> and enhanced expertise in order to tackle technical GI protection issues. A series of expert roundtables has been systematically organised, for example, with the WIPO, the EU and the US.<sup>41</sup> Also, on conducting enforcement actions, SAIC revealed at the 2017 WIPO International Symposium on GIs in Yangzhou that it had launched a nation-wide campaign against GI mark infringement which lasted half a year in 2015. During the campaign, 117 infringement cases were dealt with, and the infringement amount reached RMB 1.11 million (€140,000).<sup>42</sup>

In multilateral fora, China advocates a TRIPS+ GI protection scheme. Under this scheme, China shares EU positions on: 1) extending the additional enhanced protection currently offered to wines and spirits to other GI products when, subject to a number of exceptions, they have to be protected even if misuse would not cause the public to be misled; 2) and creating a multilateral system of notification and registration that could cover all GI products (see Mwape, 2011).

## 6. Conclusion

The EU leverages GI protection, a distinctive type of IPR, to enhance its quality policy, which goes hand in hand with the reform of common agricultural policy. GI protection provides much added value to a food product; the total value of GI products exported outside the EU is estimated at €11.5 billion, which represents 15% of total EU food and drinks exports.<sup>43</sup> Protecting GIs in third countries is a *quid pro quo* for abandoning the management of production and protection of the EU market (O'Connor, 2015). With this interest at heart, the EU purposefully extends its GI protection model, i.e. the *sui generis* GI protection scheme, beyond its borders, and treats GI protection as a key element of trade negotiations. In this regard, the EU is very successful – in part because of its excellent, unique food products. The number of EU GIs protected in third countries generally exceeds the number of third country GIs that are protected in EU markets, reflecting the abundant GI products available within the Member States, which is a testimony to Europe's long history and rich food culture. Equally, through negotiation, the EU is successful at establishing in third countries the relationship of coexistence between *sui generis* protection and prior registered trademark of a GI product. In this regard, it seems the EU will repeat its success once the agreement on GI protection and cooperation is concluded with China – which will be soon.

As for China, it is recognised that the country has strived to install a comprehensive GI protection system from zero, including resorting to administrative orders for protection after

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<sup>40</sup> For example, a photo competition of GIs was launched to help visualise unique characteristics of GI products.

<sup>41</sup> It's worth mentioning that China hosted two biannual WIPO International Symposiums on GIs ten years apart, in Beijing in 2007 and Yangzhou in 2017. This may be a testament to China's being keen to learn from international experience to engage in GI protection as a tool for better regulation and ultimately rural development.

<sup>42</sup> Available at [www.saic.gov.cn/sbj/dlbz/xwbd/201707/t20170708\\_267423.html](http://www.saic.gov.cn/sbj/dlbz/xwbd/201707/t20170708_267423.html), in Chinese.

<sup>43</sup> Available at [https://ec.europa.eu/agriculture/external-studies/value-gi\\_en](https://ec.europa.eu/agriculture/external-studies/value-gi_en).

it pledged to provide GI protection. During the process, Chinese enforcement bodies for GI protection have settled many difficult technical issues. In view of the forthcoming conclusion of the EU-China Agreement on Cooperation on, and Protection of, Geographical Indications, it is time to reflect on the next steps that China might undertake to enhance GI protection.

First of all, there are additional difficult technical details to address in order to effectively implement GI protection legislation overall. This requires a holistic approach to overall IPR enforcement, especially in relation to trademark and *sui generis* protection for the same GI products. It was reported in the summer of 2017 that eight Member States would take legal action against China over 25 maliciously registered trademarks involving misleading Chinese transcript of GI products resulting in the passing off of the trademarks in question, alleging that China “absolutely refused” to cancel these trademarks (see EURACTIV, 2017b). In this case, invalidating a prior registered trademark is certainly a judicial question and goes beyond GI protection alone to include trademark enforcement that encompasses issues of consistency, fraudulent application, bad faith registration and rejection.<sup>44</sup> Also, there are issues concerning foreign well-known trademark recognition in general, while food law, food-related standards and regulation of cultures applied in food (European Union Chamber of Commerce in China, 2017: 78) may be regulatory areas which have to be developed in more technical detail if they are to help find an overall judicial solution that allows the European GIs in question to be effectively protected in China. In the context of EU-China GI protection cooperation, follow-up steps, such as supervision, post-registration controls and compliance verification, as well as enforcing encompassing rights and obligations entailed in using GI certification, will require assiduous action.

China has been a fast learner ever since it started to transplant trade legislation and practice from the West to its economic life four decades ago. Operating an independent, transparent, predictable and efficient enforcement system is nonetheless an art that the country has yet to master. With 4,150 GI products registered for protection (as of 16 May 2018), and a comprehensive GI protection system in place on par with the EU’s, fully exploiting the technical knowledge gleaned from negotiating the GI protection agreement with the EU and doubling down on GI exports through an ambitious trade agreement should be China’s ultimate goals. China’s ancient food culture would serve the modern purposes of enhanced trade.

In parallel, from conducting technical cooperation to installing its unique GI protection system in China, the EU finds an ally in multilateral fora for “TRIPS+” GI protection standards with respect to enhanced GI protection and an extended notification and registration system for all GI products.

Finally, the forthcoming EU-China GI cooperation and protection agreement is instilled with the principles of reciprocity and mutual benefits, which should be a *sine qua non* for trade relations applicable to all partners. Nevertheless, these principles seem to be missing at the moment in

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<sup>44</sup> The same issues of trademark protection were raised by the European spirits industry, revealed in an interview by the author with SpiritsEurope.

the discussions between the EU and China. Both sides therefore should consider extending their constructive cooperation on GI protection to other trade areas of trade, and to re-imbue their trade relations with a win-win spirit.

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