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The Noodle Bowl Effect on the Table of Geographical Indications

A case study on the GI-specific provisions of the Sino-EU and Sino-US
Agreements

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Abstract: China has recently signed two bilateral agreements with the EU and the US which included specific provisions for the protection of foreign Geographical Indications. Firstly, drawing upon secondary sources, we investigated the complex legal and economic framework that encloses the Agreements, and explored the Chinese food import market. Then, we untangled the web of crisscrossing obligations by analyzing in detail relevant clauses and possible conflicts. Collectively, our results appear consistent with previous literature confirming that the two economic powers' vertical shift to parallel negotiation has caused added complexity to the discipline of Intellectual Property in general, and, we demonstrated, to the protection of foreign Geographical Indications specifically. We concluded that the *Noodle bowl effect* theory can be applied to this case, as the result of the EU and US policy export race, which is on a route marked out by the *de facto* interplay of Trademarks and Geographical Indications.

Keywords: Geographical Indications; US-China relations; EU-China relations; Intellectual Property; Spaghetti bowl effect; bilateralism.

Contents

前言	4
Foreword.....	7
1 Development of the International Legal and Economic Framework	11
1.1 Forum shifting in IPR negotiations	11
1.1.1 IPRs and PTAs: a “Marriage of Convenience”	14
1.1.2 The Asia-Pacific “Noodle Bowl” of IPRs	19
1.2 The Debate over Geographical Indications.....	24
1.2.1 The Legal Function of Geographical Indications.....	26
1.2.2 The Socio-Economic Function of Geographical Indications	30
1.2.3 From National Regulatory Systems to Policy Export	37
1.3 The Value of China’s Food Import Market	46
1.3.1 The World’s Largest Food Importer	46
1.3.2 The Evolution of the Chinese Dietary Consumption Pattern	50
1.3.3 Evidence from the Wine and Dairy Import Sectors	54
2 A Case Study: the Sino-EU and Sino-US Agreements.....	59
2.1 The Sino-EU Agreement	59
2.1.1 A backgrounder	59
2.1.2 Body and Structure of the Agreement.....	62
2.1.3 Assessing the treatment of Geographical Indications.....	64
2.2 The Sino-US Agreement	74
2.2.1 A backgrounder	74
2.2.2 Body and Structure of the Agreement.....	78
2.2.3 Assessing the treatment of Geographical Indications.....	79
2.3 Analysis of Possibly Conflicting Obligations	87
2.3.1 Geographical Indications and Trademarks	87
2.3.2 Approval and Cancellation of Geographical Indications.....	91
Conclusions	94

The Noodle Bowl Effect on the Table of Geographical Indications	94
Future Perspectives	96
References	99

前言

本文通过《中美第一阶段经贸协议》和《中欧地理标志协议》及其关于地理标志条款的谈判过程、谈判背景和主要内容，分析这两份协议中义务冲突和利益冲突之间的关系。本文为阐述上述问题，共分两章。第一章分为三个部分，每个部分详细介绍这两份协议的法律条文与经济背景。第二章对中美第一阶段经贸协议及中欧地理标志协议做了阐述与分析，并试图从研究中得出结论。最后，本文将“意大利面条碗”效应移植应用于描述地理标志国际保护的问题，并且通过案例分析证明意大利面条碗的现象可适用于这两份协议上。

所谓的意大利面条碗是一种有趣的经济现象。意大利面条碗现象指在大量的特惠贸易协议(如双边自由贸易协定和区域贸易协定)下，各个协议规则不同；¹在每个区域和双边协议中，关于知识产权条款的总数日益增加，从而造成更为复杂的国际环境，并导致知识产权逐步走上了碎片化。这些国际贸易协议的规则就像碗里的意大利面条，一根根地绞在一起，剪不断，理还乱。

意大利面条碗效应根植于后 TRIPS 时代中。在后 TRIPS 时代，很多签署国开始意识到，TRIPS 协议不能全力保护国家的利益，尤其是国内知识产权保护水平高于 TRIPS 协定保护标准的国家。这一认识使得知识产权法律一体化格局发生新的变化。²全球市场面临新一轮国际经济合作，国际社会出现了绕过 TRIPS 协议的现象，区域双边贸易协定成为了这一时期的发展重点。继 TRIPS 协议之后，美国和欧盟主导谈判的协议在后 TRIPS 时代以双边、区域条约为载体。³一般来说，知识产权条款已成为贸易谈判不可缺少的一部分；美国和欧盟在知识产权领域主导谈判并确立的高于 TRIPS 协定的标准即为所谓的“TRIPS-plus”标准。⁴此背景下，随着区域或双边贸易日益活跃，“意大利面条碗”效应变得愈发严重了。

这项研究的作者的观点，意大利面条碗效应在欧美对地理标志保护问题的讨论中尤为明显。欧盟和美国对地理标志观点大相径庭，这种差异似乎使事情更加复杂，并反映在中美和中欧协议中。在一定程度上，这种分歧源于欧洲和美国历史、经济和文化差异。在此基础上，美国和欧洲针对不同的社会和经济环境发展出了两套截然不同的规则。

¹ J. N. Bhagwati, *US Trade policy: The infatuation with free trade agreements*, Discussion Paper Series N. 726, Columbia University, 1995.

² S. Sell, *Private power, Public law: The Globalization of Intellectual Property Rights*, Cambridge University Press, 2003

³ L. Helfer, *Regime-shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Policymaking*, *Yale Journal of International Law*, 2004.

⁴ C. Antons, D. Thampapillai, *An overview of Free Trade Agreements in the Asia-Pacific Region with a particular focus on Intellectual Property*, 2015

在欧洲，优秀的技术知识和深厚的乡村传统并存。对欧洲人而言，地理标志不仅是一种知识产权，还是特色产品品质特征和信誉的标志，以及区域经济的重要组成部分。因此，欧洲制定了一项专门的法律，并建立了极高保护程度的系统以便给自己的传统产品提供最完善的保护。此外，欧盟也一贯是致力于积极推动地理标志保护的主要国际力量，以便达成协议来保护国内外的地理标志产品。欧盟的地理标志保护制度是在各成员国国内法的基础上发展起来的，该制度的完备和详细均为世界独一无二。⁵

事实上，达到进一步加强对商品地理标志的国际保护是欧洲共同农业政策的重要组成部分。2019年，习近平主席同马克龙总统见证了关于《中华人民共和国政府与欧洲联盟地理标志保护与合作协定》谈判的结束。⁶在合作共赢的基础上，双方一起开创更广阔的市场商机，实现双赢。从经济方面而言，协议附录共纳入双方各275个地理标志性产品，它们将于协定生效之日起开始受到保护。从政治方面而言，中国的签署充分显示了政府继续深化改革开放、保护知识产权的坚定决心，致力于追求更严格的保护标准。此外，这也许意味着中国继续与欧洲法律接轨。对于地理标志与商标的关系，中欧地理标志协定完全采取了与欧盟一致高水平的保护规则，甚至可以说中国进行了法律移植。⁷

相反，在美国，对地理标志保护程度并没有那么高，政府将其视为商标的子集，所以地理标志的知识产权是通过商标法保护的。事实上，许多欧洲保护的地理标志产品名称（如帕尔马干酪、羊乳酪、波萝伏洛干酪等）在美国属于通用名称。在地理标志范围内，通用名称是指该产品的惯用名，尽管这些名称表示产品的来源地。该名称现在可用于指称任何产品上，换言之，美国商家可以将那些被欧洲保护的地理标志产品名称用来描述自己的商品，尽管这些名称与产品的来源地没什么关系。但是，如欧洲地理标志产品在华获得保护，美国就也要遵守中国的规则，不会将非法的产品出口到中国。在实际中，这会限制美国在中国市场的准入水平。美国政府并不赞

⁵ B. Wang 王笑冰, “ōuméng duì dìlǐ biāozhì de bǎohù” 欧盟对地理标志的保护 [The EU protection policy towards geographical indications], Chinese Trademark Office 中华商标, 1 July 2008.

⁶ Xinhua News 新华社, “wàijiāobù zhōnggōu dìlǐ biāozhì xiédìng de qiānshǔ xiǎnshì le zhōngguó zhèngfǔ bǎohù zhīshì chǎnquán de juéxīn” 外交部：中欧地理标志协定的签署显示了中国政府保护知识产权的决心 [Foreign Ministry: The signing of the Agreement on EU-China Geographical Indications shows the determination of the Chinese Government to protect intellectual property rights], 中华人民共和国中央人民政府, 11 September 2019. http://www.gov.cn/xinwen/2019-11/06/content_5449541.htm? zbs_baidu_bk [last visit: 21/06/1997]

⁷ Unitalen Attorneys At Law 北京市集佳律师事务所, “Zhōngguó yú ōuméng dìlǐ biāozhì bǎohù fǎlǜ chāyì de míhé jiāntán zhōnghuá rénmin gònghéguó zhèngfǔ yú ōuzhōu liánméng dìlǐ biāozhì bǎohù yú hézuò xiédìng” 中国与欧盟地理标志保护法律差异的弥合—浅谈《中华人民共和国政府与欧洲联盟地理标志保护与合作协定》 [Bridging the Differences between the Laws on the Protection of Geographical Indications of China and the EU - A Brief Discussion on the Agreement between the Government of the People's Republic of China and the European Union on Protection of and Cooperation on Geographical Indications], 北京市集佳律师事务所, 7 February 2021. <http://www.unitalen.com.cn/xhtml/report/21020657-1.htm> [last visit: 22/03/2021]

成欧洲的方法；设置了高保护水平的欧盟地理标志保护制度被视为走向贸易保护主义的政策。

中美双方于 2020 年 1 月 15 日在美国华盛顿正式签署《中华人民共和国政府和美利坚合众国政府经济贸易协议》，即《中美第一阶段经贸协议》。协议第一章的内容就是紧密关系到知识产权，且涵盖地理标志的问题。就地理标志而言，该协议与《中美第一阶段经贸协议》在欧洲和美国的利益之间产生冲突，且这两份协议可能具有值得研究的义务冲突。

在日趋激烈的市场竞争中，欧洲和美国的食品生产商现在渐渐相信，现如今跟中国人开展贸易合作是千载难逢的绝佳机会。随着经济的腾飞，中国成为了世界上最大的粮食进口国；不仅如此，中产消费阶层也有着持续升温的需求和不断上升的购买力。与此同时，消费者的购买意愿逐渐呈现差异化，越来越追求个性化的、具有情感属性的产品。这就是为什么中国人对优质食品与地理标志产品日益感兴趣。换言之，中国进口食品市场已经成为了一个利润丰富的市场。此背景下，就欧美国家而言，对中国地理标志商品保护问题逐渐变成具有争议的话题。

从这项研究中我们能够得出，欧盟和美国在后 TRIPS 时代以双边，区域条约为载体，对地理标志保护的问题导致了更多的复杂性，因此意大利面条碗效应也适用于该狭窄知识产权的领域。毫无疑问，这种现象促使我们从竞争的角度研究优质食品对中国市场的出口，以便深入地了解市场上商标与地理标志的重要性，并揭示跟美国、欧洲和中国有关的经济和市场的动态。最后，我们通过案例分析证明了意大利面条碗的效应可适用于国外地理标志保护的问题上，据我们所知，这项研究首次发现并证明上述的现象与地理标志之间的关系。

FOREWORD

Drawing upon the process, background, and main contents of the negotiations for the settlement of the Sino-US Phase One Agreement and the Sino-EU Agreement on the Protection of Geographical Indications, this paper uncovers the connections between conflicts of interests and possibly conflicting obligations related to the protection of foreign Geographical Indications in China. To better research on this issue, the paper is separated into two main chapters. The first chapter consists of three sections, each meant to further investigate the legal and economic background of the Agreements. The second chapter is dedicated to the case analysis, where the net of crisscrossing obligations of each Agreement is untangled, and the possibly conflicting clauses interpreted. Finally, building upon the Agreements analysis, we demonstrate that the so-called "Spaghetti bowl" or "Noodle bowl" effect also applies to this narrow field of Intellectual Property, that is the protection of foreign Geographical Indications.

The Spaghetti bowl is an interesting phenomenon of trade economics. It highlights the harmful effects of the growing number of trade agreements and its consequent spread of crisscrossing and overlapping obligations around the globe,⁸ which result in a more complex international regulatory environment and cause the gradual fragmentation of the IP discipline. The regulations of this complex net of trade agreements are like spaghetti in a bowl: clauses are overlapping with each other as if each were a strand of pasta in a bowl, crisscrossing disorderly and chaotically with others.

The Spaghetti bowl phenomenon has roots in the post-TRIPS era, where many countries soon realized the Agreement was just partially safeguarding their interests.⁹ This was especially true for those countries that had already established a very high level of Intellectual Property protection domestically, such as Europe and the United States. As the international community has bypassed TRIPS to start a new chapter of international cooperation to be held mainly on a parallel level, a new challenge was brought to the standardization of the IP discipline around the world.¹⁰

⁸ J. N. Bhagwati, *US Trade policy: The infatuation with free trade agreements*, Discussion Paper Series N. 726, Columbia University, 1995.

⁹ S. Sell, *Private power, Public law: The Globalization of Intellectual Property Rights*, Cambridge University Press, 2003

¹⁰ L. Helfer, *Regime-shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Policymaking*, Yale Journal of International Law, 2004.

The United States and the European Union utilized bilateral and regional treaties as a vehicle to advance national interests where higher standards of Intellectual Property were regarded as a *sine qua non* for the settlement of trade agreements. The aim was to impose on third countries the so-called “TRIPS-plus” obligations, provisions of greater scope or higher standards than the previous TRIPS Agreement.¹¹ As agreements below multilateral level started dominating the market, the Spaghetti bowl effect has become increasingly serious.

In this paper, we concluded that the Spaghetti bowl effect is especially evident in the debate over the protection of foreign Geographical Indications. In fact, the European Union and the United States hold very different views on the matter, which reflect on the two bilateral Agreements the countries have recently signed with the PRC.

This divergence is deeply rooted in the two countries’ historical, economic and cultural differences. In fact, according to the economic and legal environment, the United States and Europe have developed two very different sets of rules for the protection of Geographical Indications. In Europe, technical knowledge and rural tradition are inextricably linked. For Europeans, GIs are not only a form of Intellectual Property, but a symbol of the quality and prestige of their local products, and an important part of the regional economy. Therefore, the European Union has issued a special law system that provides the highest degree of protection for its traditional products. The completeness and detail of the European protection system is unique in the world.¹²

The EU has always been a major international force committed to actively promoting the protection of GIs outside the Union’s borders. Fostering the protection of Geographical Indications abroad is an important element of the European Common Agricultural Policy. In 2019, President Xi and President Macron concluded the negotiations for the “Agreement between the European Union and the Government of the People’s Republic of China on cooperation on, and protection of, Geographical Indications”.¹³ The Agreement was signed the 20 July 2020 and came into force on 1

¹¹ C. Antons, D. Thampapillai, *An overview of Free Trade Agreements in the Asia-Pacific Region with a particular focus on Intellectual Property*, 2015

¹² B. Wang 王笑冰, “ōuméng duì dìlǐ biāozhì de bǎohù” 欧盟对地理标志的保护 [The EU protection policy towards geographical indications], Chinese Trademark Office 中华商标, 1 July 2008.

¹³ Hereinafter referred as the “Sino-EU Agreement”. Xinhua News 新华社, “wàijiāobù zhōngōu dìlǐ biāozhì xiédìng de qiānshǔ xiǎnshì le zhōngguó zhèngfǔ bǎohù zhīshì chǎnquán de juéxīn” 外交部: 中欧地理标志协定的签署显示了中国政府保护知识产权的决心 [Foreign Ministry: The signing of the

March 2021. In synergic cooperation, the two sides are expected to work together to create new market opportunities. From an economic point of view, the Agreement includes 275 GI products from both sides to be protected from the date of the Agreement's entry into force. From a political point of view, China's signature testifies the government's firm determination to continue reform and protect Intellectual Property, and commitment to stricter protection standards. On top of that, this Agreement could possibly mean that China is leaning towards the Old World approach to GI protection. As for the relationship between Geographical Indications and trademarks, the Sino-EU Agreement has adopted the same high level of protection of the EU regulations, indicating that China has carried out a real "legal transplant".¹⁴

In contrast, in the United States, the protection provided to Geographical Indications is more relaxed, Geographical Indications are regarded as a subset of trademarks protected by US Trademark Law. Furthermore, many geographical names protected in Europe (such as Parmesan, Feta, Provolone, etc.) are regarded as common names within the United States borders. In the context of Geographical Indications, generic terms are names which, although they denote the place of production, have become the term customary for such a product, and therefore, can be used for marketing purposes.

In other words, American businesses can use the names for GI products protected in Europe to describe products produced domestically, even though the manufacturing process is held outside the European designated area of production. However, if a European GI is protected in China, the United States will not be allowed to market a similar product using the name of that protected Geographical Indication in the foreign territory, thus limiting market access to American businesses that rely on that name for marketing purposes, or even for their trademark name or logo. Therefore, the US government stands against the European strategy and regards such a high level of protection as a protectionist move of the Union.

Agreement on EU-China Geographical Indications shows the determination of the Chinese Government to protect intellectual property rights, 中华人民共和国中央人民政府, 11 September 2019. http://www.gov.cn/xinwen/2019-11/06/content_5449541.htm? zbs baidu bk [last visit: 21/06/1997]

¹⁴ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974; Unitalen Attorneys At Law 北京市集佳律师事务所, 2021.

The 15 January 2020, China and the United States formally signed Phase One of the “Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China” in Washington.¹⁵ The content of the first chapter of the Agreement is entirely dedicated to Intellectual Property and covers the issue of foreign Geographical Indications recognized in China. As far as Geographical Indications are concerned, between the Sino-EU and Sino-US Agreements, there is a strong conflict of interests, and possibly of obligations, that is worth investigating.

In today’s fiercely competitive market, European and American food producers have come to believe that trading their products to China can be a golden opportunity. Due to the rapid socio-economic development and its large population, China has already become the world's first food importer, with a surge in middle-class buying power and a rising demand shifting towards high-quality foods. On top of that, Chinese consumers' purchase intention is increasingly differentiated, and more and more oriented to personalized and emotionally stimulating products. As a result, Chinese consumers are showing a growing interest in high-quality food and GI products. We can well say that China's food market can be very profitable to foreign high-quality food producers, and therefore, as far as the United States and Europe are concerned, the debate over foreign GIs protection in China has become more and more controversial.

Collectively, our results appear consistent with previous literature confirming that the two economic powers' vertical shift to parallel negotiation for the settlement of beyond WTO provisions has caused added complexity to the discipline of Intellectual Property in general, and, we demonstrated, to the protection of foreign Geographical Indications specifically. This has driven us to study the Chinese food import market, to provide an informative framework that could explain the importance of the two distinctive signs and reveal the economic and political dynamics related to China, Europe, and the United States. And finally, through case analysis, we demonstrated that the theory of the Spaghetti bowl effect is also applicable to this very narrow field of Intellectual Property, that is the protection of foreign Geographical Indications. To our knowledge, this is the first research to demonstrate and explain the relationship between the transatlantic debate over Geographical Indications and Bhagwati’s Spaghetti bowl effect theory.

¹⁵ Hereinafter referred as the “Sino-US Agreement”.

1 DEVELOPMENT OF THE INTERNATIONAL LEGAL AND ECONOMIC FRAMEWORK

1.1 FORUM SHIFTING IN IPR NEGOTIATIONS

Twenty-five years ago, the most comprehensive multilateral agreement on Intellectual Property to date, TRIPS, was finally signed. It sweeps in scope covering substantial matters in copyright, trademarks, industrial design, patents, geographical indications, etc. However, in recent times, its regulations appear to be relatively timid and permissive despite the pressing global market challenge.¹⁶ At first, many countries believed the TRIPS negotiation extensively covered the matter of Intellectual Property rules, only to find later that the agreement is just partially safeguarding their interests.¹⁷

To obtain TRIPS, Europe and the United States attempted a horizontal forum shifting, leaving an international organization for another that could better advance their interests.¹⁸ The shifts of the two economic powers affected all countries, but predominantly Asian countries. In fact, investment opportunities in the Asia-Pacific region attracted the attention of western investors that began to lobby their governments to enhance IP protection in the East.¹⁹

“The rules of a regime are tailored to the national interests of hegemons”,²⁰ in other words, high bargaining power countries often determine changes in international organization rules. In fact, an international organization often limits the influence of hegemons to allow weaker states the opportunity to have their voice heard.²¹ In contrast, the most influential state members may pull the brakes on the development of some discussions unfavorable to them by threatening to leave a regime that fails

¹⁶ *International Enforcement of Intellectual Property Rights and American competitiveness* S. HRG. 110–1073, US Government Printing Office, July 15, 2008 (statements concerning IP and TRIPS of J. Kindler, CEO and Chairman of Pfizer Inc. and J. Barton, Professor of Law at Stanford Law School).

¹⁷ S. Sell, *Private power, Public law: The Globalization of Intellectual Property Rights*, Cambridge University Press, 2003

¹⁸ L. Helfer, *Regime-shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Policymaking*, Yale Journal of International Law, 2004.

¹⁹ C. Antons, R. Hilty, *Introduction: IP and the Asia-Pacific “Spaghetti bowl” of Free Trade Agreements*, MPI Studies on Intellectual Property and Competition Law, Vol. 24, 2015

²⁰ E. B. Haas, *Why Collaborate? Issue-linkage and International Regimes*, 1980

²¹ L. Helfer, *Regime-shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Policymaking*, Yale Journal of International Law, 2004

to promote their interests.²² This further exacerbates competition between organizations and ostracizes weaker states.²³ However, the difficulty in creating a new efficient regime discourages even the most powerful countries to leave the organization.²⁴ Given the circumstances, hegemons rely on two different strategies that allow them to alter the *status quo*, that are: moving to another international organization, *horizontal forum shift* or *intra-regime shift*, or else pursuing parallel lawmaking agendas with other countries through bilateral, regional and plurilateral negotiations, *vertical forum shift* or *inter-regime shift*.²⁵ Consequently, there appears to be a high level of fragmentation in agreements concluded both in national and international fora, which in turn led to the fragmentation and inconsistency of the discipline of Intellectual Property around the globe, as we will see more extensively under chapter 1.1.2.²⁶

The horizontal shift from WIPO to WTO is exactly the dynamic by which, in 1994, Europe and the United States obtained the well-known TRIPS Agreement, that required all WTO members to adhere.²⁷ Furthermore, horizontal forum shifting can lead to vertical forum shifting, since hegemons often engage in agreements below multilateral level when they are unable to achieve their objectives within an international organization.²⁸ For example, prior and throughout TRIPS negotiations, US weakened the resistance of developing countries through bilateral and regional negotiations. In the 1980s, a point in history in which unilateral trade sanctions policies were dominating the American market, the United States managed to conclude asymmetric negotiations using increased market access and potential future investments as a leverage for enhanced IP protection.²⁹ According to Morin, “*asymmetry in economic power presents powerful states with an alternative path in creating desired norms they would not be able to achieve at a multilateral level*”.³⁰ Using this asymmetrical economic positioning, high bargaining power countries can coerce

²² *Id.*

²³ E. Benvenisti, G. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 2007

²⁴ L. Helfer, 2004

²⁵ *Id.*

²⁶ S. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA and TTP*, *Journal of Intellectual Property Law*, Vol. 18, Art. 5, 2011

²⁷ L. Helfer, *Regime-shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Policymaking*, *Yale Journal of International Law*, 2004

²⁸ S. Sell, 2011

²⁹ L. Helfer, 2004

³⁰ J. F. Morin, *Multilateralizing TRIPS-plus agreements: Is the US Strategy a Failure?*, *World Intellectual Property*, 2009

weaker countries to comply with strategies that do not pursue national best interest.³¹

At first, the conclusion of the WTO/TRIPS 1994 was regarded as a breakthrough in the IPR dispute. Later, governments from industrialized economies realized there was much more yet to settle on that matter. Soon it became clear that the WTO's Doha Development Agenda (DDA), which started in 2001, was unlikely to accomplish a multilateral format agreement that could satisfy EU and US further requests, and would have instead been brought to a dead-end.³² In fact, to date, progress of DDA discussions are still extremely sluggish.³³ Consequently, both the EU and US moved again the negotiation beyond TRIPS provisions to a parallel level, causing one more vertical shift in the negotiation of IP international standards.³⁴ Bilateral, regional and plurilateral negotiations have been put once again on the two governments agenda. The aim was alternatively to expand or ration access to IP through the so-called "TRIPS-plus"³⁵ (and "TRIPS-minus") provisions that were often included in trade agreements of wider scope.³⁶ TRIPS-plus provisions can also include an extension of IP protection and mutual recognition of Geographical Indications.

This approach to TRIPS-plus typically applies to the strategy of Europe and the United States and has been further enhanced after the global financial crisis. In the post-Global Financial Crisis environment, the EU and US became primarily concerned about internal affairs, while for India and China, thanks to the industrial revolution, started big export earnings.³⁷ From that moment, China and ASEAN countries, together with other developing countries, became increasingly involved

³¹ S. Sell, 2011

³² *Id.*

³³ C. A. Braga, B. Hoekman, *Future of the Global Trade Order*, European University Institute, 2nd edition, 2017

³⁴ S. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA and TTP*, *Journal of Intellectual Property Law*, Vol. 18, Art. 5, 2011.

³⁵ TRIPS-plus is a group of agreements that imposes obligations of greater scope or higher standards than the previous TRIPS Agreement (C. Antons, D. Thampapillai, 2015). *An overview of Free Trade Agreements in the Asia-Pacific Region with a particular focus on Intellectual Property*, 2015.

³⁶ C. Antons, D. Thampapillai, 2015; S. Maragkidou, *Competing Regionalism between EU and the US: a race for regulatory influence?*, Department of International and European Studies, University of Macedonia, Greece

³⁷ C. Antons, R. Hilty, *Introduction: IP and the Asia-Pacific "Spaghetti bowl" of Free Trade Agreements*, *MPI Studies on Intellectual Property and Competition Law*, Vol. 24, 2015

with norm-setting activities concerning IPR. At the same time, EU and US were also focusing on protection of Intellectual Property abroad to safeguard MNEs.³⁸

Regarding Geographical Indications, on the basis of the EU's "Trade, growth and Intellectual Property - Strategy for the protection and enforcement of Intellectual Property Rights in third countries" (2014) and the research of L. Helfer (2004), we can assume that the European Commission initially foresaw an economic advantage in shifting back from WTO to WIPO the hearth of the dispute concerning Intellectual Property Rights and, in particular, Geographical Indications. Through WIPO, the EU obtained the Lisbon Agreement which provides for the protection of appellations of origin, and its annex, the Geneva Act, that reinforces the international registration system protecting geographical indications. Conversely, the United States never signed this Agreement as it constitutes a threat to its agri-food market, as we will see in chapter 1.3.³⁹ However, recently the EU is yet again focusing on WTO and parallel negotiations to promote better protection of Geographical Indications abroad.⁴⁰

1.1.1 IPRs and PTAs: a "Marriage of Convenience"

In the literature, the expression "*Marriage of Convenience*" well-describes the relationship between PTAs and IPRs, in which Intellectual Property regulations are used as a sort of "*bargaining currency*" in trade negotiations.⁴¹

Intellectual Property Rights are territorial in nature (*i.e.*, rights are asserted, awarded and enforced on national level). This is why attempts to harmonize the discipline

³⁸ S. Sell, 2011.

³⁹ 2019 *Special 301 Report*, Office of the United States Representative, April 2019

⁴⁰ "In the post-TRIPS era, however, only a few significant multilateral IPR agreements have been concluded (e.g. WIPO's internet treaties, and the Marrakesh and Beijing treaties). As the 2010 evaluation study noted, "The Commission was an active contributor to IP enforcement at multilateral level, in particular at the WTO TRIPS Council, but it reaped only limited rewards owing mainly to third country opposition." Regarding geographical indications, longstanding negotiations [*i.e.*, "negotiations regarding the extensions of protection provided under Article 23 TRIPS to products other than wines and spirits"] have been taking place in the WTO and will continue to be pursued by the EU. A plurilateral approach can be effective for smaller groups of countries sharing similar policy objectives [...] we will continue to promote better protection of geographical indications in the WTO and will also promote sound protection of GI's on the internet. At the same time it may be appropriate to reflect on a new strategy for WIPO to make the organisation better deliver on its mandate." Passage of: *Trade, growth and intellectual property - Strategy for the protection and enforcement of Intellectual Property Rights in third countries*, Communication from the Commission to European Parliament, the Council and the European Economic and Social Committee, Strasbourg, 2014.

⁴¹ C. A. Primo Braga, *Innovation, trade and IPRs: Implications for trade negotiations*, Working paper, East-West Center Workshop on Mega-Regionalism, 2016

can be traced back to the 19th century.⁴² The addition of IPR-related clauses in trade agreements is argued to be necessary by a group of trade economists on the basis of the positive relationship between IPR enforcement and trade flows.⁴³ On this rationale, IPRs-holders and their governments share an interest in minimizing piracy and counterfeiting.⁴⁴ By contrast, most Asia-Pacific governments are driven by all the benefits that arise from deepened trade linkages with strong economic bodies that can be obtained through preferential trade agreements. Therefore, less developed countries may accept further IP protection even though this approach may hinder national economic development.⁴⁵

Since 2006 “Global Europe” communication, the EU, together with the US, has become the largest regulatory exporter in many sectors, including Intellectual Property, using the incentive of market access to promote national values and regulations in third countries.⁴⁶ It appears from the statistics that the two economic powers, despite the fact that today they just account for 30% share in the inflation-adjusted global GDP⁴⁷ with a population that is only equivalent to 15% of the total world population, they yet have determined 80% of norms and standards regulating world markets in the past decade.⁴⁸ In this regard, the United Nations may argue that the EU and US parallel negotiation rationale is not always for the sake of fair market access and market advantage, but also part of a race to geo-political advantage as in the case of the European Partnership Agreement with ACP countries.⁴⁹ In fact, a debated issue is whether the EU and US will act as rivals in the policy export challenge, while new emerging economic powers are beginning to participate to this heated IP discussion.⁵⁰

⁴² C. A. Braga, B. Hoekman, *Future of the Global Trade Order*, European University Institute, 2nd edition, 2017

⁴³ C. Fink, C. A. Primo Braga, *How stronger protection of Intellectual Property Rights affects International Trade Flows*, 2005

⁴⁴ *Id.*

⁴⁵ R. Caso, P. Guarda, *Copyright Overprotection Versus Open Science: The Role of Free Trade Agreements*, University of Trento Faculty of Law, 2019

⁴⁶ G. De Bosio, *The Global Struggle between Europe and United States over Geographical Indications in Asia*, 2015

⁴⁷ H. Plecher, *Share of the EU in the global gross domestic product adjusted for economic purchase power*, February 9th 2021, Statista 2021 and H. Plecher, *United States share of global gross domestic (GDP) 2025*, January 6th 2021, Statista 2021. [Last Visit: 22/02/2021]

⁴⁸ Sapir A., *Europe and the Global Economy*, in *Fragmented Power: Europe and the Global Economy*, 2007

⁴⁹ R. Mayne, *Regionalism, bilateralism, and “TRIPS-plus” Agreements: The threat to developing countries*, Human Development Report 2005, UNDP

⁵⁰ Sapir A., 2007

Overall, EU and US main objectives pursued through TRIPS-plus Agreements are analogous. The two governments aim at: increasing competitiveness, securing foreign markets, and providing safe and advantageous export opportunities to local companies.⁵¹ In the realization of this ambitious plan, a strong backup of IP protection is considered a *sine qua non*. In fact, despite most WTO members have adopted legislation implementing such minimum standards, and despite that Least Developed Countries in 2006 have at least adapted to these minimum standards, levels of piracy and counterfeiting are still increasing year after year.⁵² Thus, if the level of IP protection is too low, the value of foreign market access would be significantly reduced by the negative impact of IPR violations. The European Community identified five dimensions that would suffer the impact of IPR violations by third countries, that are: economic and social, of health and consumer protection, of public order and security, and fiscal.⁵³

In 2014, the European Council, in its “Strategy for the protection and enforcement of Intellectual Property Rights in third countries”, reaffirmed the importance of IPR enforcement as a key driver for economic growth, innovation, and competitiveness. The EU should rely on the innovation factor to stay competitive relatively to countries with lower labor, raw materials and energy costs to trade his way out of the crisis. Besides, was observed that a pragmatic and flexible approach would perfectly fit developing countries, helping them maximize their intellectual assets. In the European plan, today’s most pressing challenges, such as the digital market, are also considered.

The Council proposes a revised IPR strategy *vis à vis* with third countries, that takes shape in negotiation of multilateral and mostly bilateral agreements, as well as in monitoring adequacy to Intellectual Property protection and enforcement and in cooperating with third countries to address specific IPR-related issues. Similarly, according to the European Commission, the way forward for the protection of Geographical Indications abroad involves, on one hand, the protection of GIs on the Internet and further reflection on a new strategy for WIPO; on the other hand, the development of negotiations with third countries, also through FTAs and specific

⁵¹ W. H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, Congressional Research Service Report, Feb 26, 2014; European Commission, *External Trade, Global Europe: Competing in the World*, 2006

⁵² *Strategy for the enforcement of intellectual property rights in third countries*, Official Journal of the European Union, 2005/C 129/03.

⁵³ *Id.*

agreements concerning the treatment of GIs within the partner's territory. Thus, several active discussions with third countries are now under way, including the IP Dialogue and IP Working Group with China,⁵⁴ that is now the "priority 1" country for the EC in IPR matters.⁵⁵

According to the "Report on the protection and enforcement of intellectual property rights in third countries" published by the Congressional Research Service (CRS), the protection and enforcement of IPR abroad is also a critical component of the overall US international trade policy. The current international trade policy aims at achieving clear-cut trade negotiating objectives and reducing existing economic losses that are punctually illustrated in the report mentioned above. The focus shall be on the protection of trademarks, copyright, patents and trade secrets from infringement, piracy, counterfeiting and theft, with special regard to US IP-intensive industries. In fact, a study of the Business Action to Stop Counterfeiting and Piracy (BASCAP), building on the joint OECD-EUIPO study of 2016, estimated that the total value of counterfeited and pirated goods may reach 1.9\$ to 2.8\$ trillion dollars by 2022.⁵⁶ Moreover, the CRS reported a study done by the private Commission on the Theft of American Intellectual Property that estimates the consequent national economic loss to be hundreds of billions of dollars per year.⁵⁷

More specifically, the Congress is especially concerned with foreign rather than domestic infringement of US Intellectual Property Rights. Since 1988, the Congress has considered IPR enforcement as a critical trade negotiating objective in trade agreements according to the Trade Promotion Authority (TPA). In 2020, the United States has already concluded 14 FTAs with 20 countries, most of which are covering to different extents further IPR commitments than the TRIPS Agreement. The congress is also considering additional policy options for countries that are not currently involved in a negotiation. Emphasis is placed on the resolution of new and currently evolving issues in emerging markets that may be an obstacle to fair access of national companies in the global market and to the development of new technologies currently threatened by the theft of Intellectual Property. Congress is

⁵⁴ *Trade, growth and intellectual property - Strategy for the protection and enforcement of Intellectual Property Rights in third countries*, Communication from the Commission to European Parliament, the Council and the European Economic and Social Committee, Strasbourg, 2014;

⁵⁵ *Report on the protection and enforcement of intellectual property rights in third countries*, Commission staff working document, Brussels, 2020, SWD (2019) 452 final/2.

⁵⁶ Frontier Economics, *The economic impacts of Counterfeiting and Piracy*, A Report commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP), Feb 2017

⁵⁷ *Intellectual Property Rights and International Trade*, Congressional Research Service, May 2020

also concerned with the challenges digital trade has launched to IPR enforcement, and so may include related matters in future bilateral agreements.⁵⁸

Observing the two hegemons' plans in international trade and IPR enforcement abroad, a question arises: do these two strategies allow for genuine multilateral cooperation with third countries?⁵⁹ In the post-TRIPS era, IPR protection has become a *sine qua non* in the settlement of trade agreements, but nonetheless some countries run the risk of huge conflict of interests in relation with the national degree of development and technological nature of domestic activities.⁶⁰ In fact, as the World Bank emphasized in 2001,⁶¹ the main beneficiaries of TRIPS are developed countries which already have an important role in producing technical innovation.

In a simple scheme, we can affirm there are four groups of countries with substantially different needs concerning IPR:⁶²

- a. "Traditionally developed countries": domestic IP related standards go beyond TRIPS level. Therefore, there is an interest in having these standards respected abroad.
- b. "Newly developed countries": domestic standards should be in line with internal economic development. There is an interest in further enhancing IP standards.
- c. "Developing countries": the interest in IP enhanced standards is limited. A certain level of IP protection may foster domestic industries to invest in innovation.
- d. "Underdeveloped countries": IP protection is not in the government interest.

For non-traditionally developed countries, the risk would be to establish excessive Intellectual Property protection at the cost of slowing down internal development. According to Maskus (2000), there are many shortcomings in strengthening IPRs within developing countries that would occur before benefits could even be appreciated. The main drawbacks include higher import prices for technologies and

⁵⁸ *Intellectual Property Rights and International Trade*, Congressional Research Service, May 2020

⁵⁹ R. Mayne, 2005

⁶⁰ S. Lall, *Indicators of the Relative Importance of IPRs in Developing Countries*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, June 2003

⁶¹ World Bank, *Intellectual property: balancing incentives with competitive access*, Global Economic Prospects, 129-150, Washington, DC, 2001

⁶² Hilty R. M., Jaeger T., *Legal Effects and Policy Considerations for Free Trade Agreements: What Is Wrong with FTAs?*, Springer-Verlag Berlin Heidelberg, 2015 and R. Caso, P. Guarda, *Copyright Overprotection versus Open Science: The Role of Free Trade Agreements*, 2019

even risk of monopoly prices by IPR-holders, loss of economic activities employed in copying unauthorized goods, possible abuse of protection by IPR-holders, the burden for costs of administration and enforcement, etc.⁶³

However, in the chessboard of international bargaining, not fully developed countries are still tempted to exchange further IPR enforcement for advantageous trade agreements, giving shape to the so-called “Marriage of convenience” between PTAs and IPR enforcement.⁶⁴

1.1.2 The Asia-Pacific “Noodle Bowl” of IPRs

The EU and US vertical shift to parallel negotiation for the settlement of beyond WTO provisions, has caused an inhomogeneous net of trade agreements that included, to various extents, IPR-related provisions,⁶⁵ including Geographical Indications.⁶⁶ The Asia-Pacific region makes no exception. In fact, since 1990s, alongside a multilateral approach, Asian countries have increasingly relied on FTAs for deepening production networks connecting global MNEs and emerging local firms.⁶⁷

Three main factors determined the spread of PTAs in Asia:⁶⁸ first among is the need for market-driven economic integration through trade, both within Asia and with the world main economic powers, namely the United States and Europe. Secondly, the 1997-1998 Asian financial crisis made clear to countries in the Asia-Pacific region that cooperation is needed to avoid being cut off from the global market. Lastly, during the Doha round, the debate focused on access to agricultural goods for developing countries and to non-agricultural goods for developed countries, but slow progress in the discussion highlighted parallel negotiation as a much more viable solution.

The proliferation of PTAs generated the so-called “Spaghetti Bowl” or “Noodle Bowl” effect, a term first used in 1995 by Jagdish N. Bhagwati, Professor of economics and

⁶³ K. E. Maskus, *Intellectual Property Rights and Economic Development*, Case Western Reserve Journal of International Law, Vol. 32 Issue 3, 2000

⁶⁴ R. Caso, P. Guarda, *Copyright Overprotection versus Open Science: The Role of Free Trade Agreements*, 2019

⁶⁵ S. Sell, 2011

⁶⁶ As we will see in the analysis of the GI-specific provisions included under the Sino-EU and Sino-US Agreements of chapter 2.

⁶⁷ M. Kawai and G. Wignaraja, *Asian FTAs: Trends, Prospects, and Challenges*, ADB Economics Working Paper Series, N.226, October 2010

⁶⁸ *Id.*

law, in his paper “US Trade policy: The infatuation with free trade agreements”.⁶⁹ This play on words highlights the harmful effects of the large number of trade agreements, that are still growing in number today, and the consequent spread of crisscrossing and overlapping regulations around the globe and East Asia in particular. Bhagwati’s research primarily focused on Rules of Origin, *i.e.*, devices employed to evaluate which goods do or do not enjoy preferential tariffs. This set of rules would have caused discrimination of goods according to origin, being, in fact, another potentially harmful aspect of FTAs in Asia that caused increasing administrative costs and added complexity for traders and SMEs in developing countries.⁷⁰

The Spaghetti bowl or Noodle bowl effect not only applies to Rules of Origin, but also to all the other provisions that have extensively been spread all over the world through PTAs,⁷¹ such as tariffs, regulatory environment, IP protection and enforcement, etc. and, we assume, Geographical Indications as well. The proliferation of agreements below multilateral level has produced diverging levels of IP standards around the world with the distinction being drawn between TRIPS-minus and TRIPS-plus trade agreements.⁷² Indeed, as we saw in the previous chapter, PTAs often include IP-related provisions. The proliferation of PTAs has caused the multiplication of IPR parallel obligations and the consequent fragmentation of the discipline of Intellectual Property around the globe.⁷³ And most importantly, as reported in the “Bilateral and Regional Trade Agreements – Commentary and Analysis”, inside this patchwork of trade agreements are also present “*overlapping, supporting and possibly conflicting obligations*”.⁷⁴

⁶⁹ J. N. Bhagwati, *US Trade policy: The infatuation with free trade agreements*, Discussion Paper Series N. 726, Columbia University, 1995 and J. N. Bhagwati, A. O. Krueger, *The Dangerous Drift to Preferential Trade Agreements*, *AEI Special Studies in Policy Reform*, American Enterprise Institute, 1995.

⁷⁰ M. Manchin, A. O. Pelkmans-Balaoing, *Rules of Origin and the Web of East Asian Free Trade Agreements*, World Bank Policy Research Working Paper N. 4273, July 2007.

⁷¹ C. A. Braga, B. Hoekman, *Future of the Global Trade Order*, European University Institute, 2nd edition, 2017

⁷² C. Antons, R. Hilty, 2015

⁷³ S. Sell, 2011

⁷⁴ S. Lester, B. Mercurio, L. Bartels, *Bilateral and Regional Trade Agreements – Commentary and Analysis*, 2nd Edition, 2015

First, it is important to assert what constitutes a conflict of norms in the substance of international law.⁷⁵ According to the International Law Commission, there are two relationships that are possibly intercurrent between two norms, that are: the relationship of interpretation by which “one norm assists in the interpretation of another ... both norms are applied in conjunction” and the relationship of conflict by which “both [norms are] valid and applicable [and] point to incompatible decisions so that a choice must be made between them”.⁷⁶ Therefore, we can recognize if norms are supporting or in conflict by asserting the compatibility or incompatibility of these norms on the subject covered in relation to a *de facto* standard. In particular, the *de facto* relationship of conflict is established by the overlap of two or more binding obligations *ratione materiae*, *ratione personae* or *ratione temporis*.⁷⁷

Regarding the IP “noodle bowl” and GIs, part of the crisscrossing obligations in FTAs can be possibly related on all three dimensions: *ratione materiae*, as the matter covered is Intellectual Property and Geographical Indications; *ratione personae*, as a country is party to TRIPS and to one or more PTAs; *ratione temporis*, as these obligations are generally long-term.⁷⁸ Conflicting scenarios include discrepancies between TRIPS and TRIPS-plus provisions, and between prior and later trade agreements including IP-specific provisions.

The potential conflict of TRIPS and TRIPS-plus provisions is to be considered minimal and even negligible.⁷⁹ TRIPS, in fact, allows any enhancement in protection through future agreements.⁸⁰ In principle, subsequent agreements can extend IP protection as long as subsequent agreements do not contravene TRIPS, but not reduce it with the so-called TRIPS-minus clauses, in accordance with the TRIPS “minimum standard approach” principle.⁸¹ Moreover, according to the “principle of

⁷⁵ M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682 13 April 2006

⁷⁶ *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission, vol. II (2), United Nations, 2006.

⁷⁷ Hilty R. M., Jaeger T., 2015

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Morocco, WIPO Publication, N. 233 (E), 15 April 1994

⁸¹ H. G. Ruse-Khan, *Protecting Intellectual Property Under Bits, Ftas, And Trips: Conflicting Regimes Or Mutual Coherence?*, Max Planck Institute for Intellectual Property And Competition Law Research,

favorability”, Agreements which provisions are more favorable to IPRs-holders shall prevail. Common examples include the Berne convention, the Rome Convention and the Universal Copyright Convention, according to which later provisions respectively more favorable to authors, performers and artistic works shall prevail.⁸²

In contrast, the potential conflicts that would possibly arise between crisscrossing provisions included in two or more PTAs are more complex to evaluate. First, it is important to note that all obligations in international agreements apply *inter partes* only, therefore limiting their effects to the signing parties and not to third countries.⁸³ However, obligations possibly conflict in case a right is granted from country A to country B in Agreement X, and that right is conflicting with the right country A granted to country C in Agreement Y.

Fortunately, IP-specific provisions included in different FTAs generally move in the same direction, that is going beyond WTO. This is especially evident in trade agreements the EU and US have concluded on the matter. This comes as no surprise, given the fact that the strategies and interests concerning the IP discipline of the two main policy exporters are characterized by the same final objectives.⁸⁴ The high degree of similarity between European and US agreements is not only due to analogous strategies, but also to other factors. In fact, EU and US established a similar network of trade agreements to stay on a par with each other. Furthermore, during negotiations the PTA partners maintained a similar position that was determined by country-specific needs.⁸⁵ In addition, much of the content that had already been settled by the WTO regime and GATT Article 24⁸⁶ served as a starting point to both EU and US negotiations.⁸⁷ Consequently, IP-specific provisions included in PTAs signed by the EU and US are generally coherent.⁸⁸

On the other hand, if the EU and US aim at going beyond TRIPS and move in the same direction for Intellectual Property in general, their approaches towards

Paper N. 11-02, 2010 and M. M. J. M. Smulders, *TRIPS-plus in Four Mega-Regional Agreements a Plus for Developed Countries?*, Tilburg Law University, 2020.

⁸² Hilty R. M., Jaeger T., 2015.

⁸³ *Id.*

⁸⁴ As reported extensively under section 1.1.

⁸⁵ M. J. Garcia, *Same aims, different approaches? Recent EU and US free trade agreement in Asia*, Article arose from Prof. Garcia’s presentation at UACES Arena’s seminar, 4 December 2013.

⁸⁶ GATT Article 24 allows for the creation of PTAs.

⁸⁷ M. J. Garcia, 2013.

⁸⁸ Hilty R. M., Jaeger T., 2015.

Geographical Indications and trademarks are opposite poles.⁸⁹ For the two economic powers, the narrow field of Geographical Indications is an area of conflict in Intellectual Property discipline: the EU pushes for a TRIPS-plus level of protection for Geographical Indications, while the US aims at reducing them to a subset of trademarks.⁹⁰ “*The differences in EU and USA FTAs represent those issues which decades of EU-USA cooperation have failed to resolve*”, as Garcia emphasized.⁹¹ In light of these differences, the world two main policy exporters use PTAs as a vehicle to advance national interests, according to a strategy in which timing in closing deals is key to getting a geopolitical advantage.⁹²

For example, the plurilateral trade agreement of Trans-Pacific Partnership (TPP) required the registration of Geographical Indications in trademark regimes and included several grounds for opposition and cancellation of GIs registration.⁹³ The United States Trade Representative under President Barack Obama declared to be satisfied with the final Agreement on Geographical Indications observing that it will maintain “*generic terms available for US producers*”.⁹⁴ Moreover, he maintained: “*The TPP will enhance due process and other disciplines on the use of GIs to address growing concerns of U.S. exporters, whose access to foreign markets can be undermined through overly expansive GI protections advocated by certain countries whose agricultural producers compete with U.S. exporters*”.⁹⁵ However, some parties of the TPP Agreement already had existing obligations with the EU concerning GIs, and therefore conflicting obligations could possibly arise.⁹⁶ Some parties, such as Vietnam, Australia and Singapore have already agreed to some of the EU clawbacks.⁹⁷

⁸⁹ G. de Bosio, *The Global Struggle Between Europe And United States Over Geographical Indications In Asia. The Korean Compromise*, Milan University, 2015.

⁹⁰ M. J. Garcia, 2013 and G. de Bosio, 2015.

⁹¹ M. J. Garcia, 2013.

⁹² G. de Bosio, 2015 and R. Mayne, 2005.

⁹³ Article 18.30, 18.31, 18.32, 18.33, 18.34, 18.35, 18.36 of the *Trans-Pacific Agreement*, 2015.

⁹⁴ M. Rimmer, *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, 2020.

⁹⁵ United States Trade Representative statement quoted in M. Rimmer, 2020.

⁹⁶ S. Frankel, *Geographical Indications and Mega-Regional Trade Agreements and Negotiations*, in *Geographical Indications at the Crossroads of International and National Trade*, Cambridge University Press, June 2017.

⁹⁷ S. Frankel, 2017, referring to the *EU-Australia Wine Agreement*, the *EU-Vietnam Free Trade Agreement* and the *EU-Singapore Free Trade Agreement*.

In November 2019, the EU and China reached the *Agreement on cooperation and protection of Geographical Indications*.⁹⁸ Despite the Agreement contains only 14 articles, it establishes a quite high level of protection for Geographical Indications. Moreover, although this recent TRIPS-plus Agreement on GIs perfectly abides with the regulations the WTO has put in place, it may conflict *de facto* with some IP-specific provisions included in the *Sino US Economic and Trade Agreement*, that was reached in January 2020.⁹⁹ The possibly conflicting obligations are analyzed extensively under chapter 2.

Overall, given the fact that many countries are currently involved with relevant trade negotiation, is clear that whether the United States and European governments decide to cooperate or compete over Intellectual Property, the consequences for the global economy will be huge.¹⁰⁰ Moreover, the two powers competing over the export of national Intellectual Property policies abroad, will certainly alter the overall IPR scenario causing added complexity and fragmentation.¹⁰¹ Thus, a fight between the two protagonists over alliances with emerging economic powers may be detrimental to global economic development.¹⁰² As regards Geographical Indications, third countries, especially strong rising economies like that of China, may ultimately determine the balance of power between Europe and the United States over the treatment of Trademarks and Geographical Indications around the globe and Intellectual Property in general.

1.2 THE DEBATE OVER GEOGRAPHICAL INDICATIONS

According to T. Josling (2006), the disagreement over Geographical Indications between Europe and the United States is indeed a disagreement over *terroir* as a sound basis for Intellectual Property protection.¹⁰³ Following on Article 22.1 of

⁹⁸ Agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Morocco, WIPO Publication, N. 233 (E), 15 April 1994

⁹⁹ Hereinafter referred as the Sino-US Agreement; G. Hu, *Evaluating the treatment of geographical indications in China*, Hu Gang of CCPIT examines protection of geographical indications in China, assessing the Sino-US Economic and Trade Agreement and EU-China Agreement, March 17 2020. Article posted on ManagingIP.com, last visit: 26/02/2021

¹⁰⁰ Sapir, 2007 and J. Bhagwati, *US Trade policy: The infatuation with free trade agreements*, 2005.

¹⁰¹ Sapir, 2007 and J. Bhagwati 2005.

¹⁰² Sapir, 2007.

¹⁰³ T. Josling, *The war on terroir: Geographical Indications as a Transatlantic Trade Conflict*, Freeman-Spogli for International Studies, Stanford University, 2006.

TRIPS Agreement any good to be protected is required to be produced in the territory of designation. *Terroir* is “the unique connection between place and product that indeed lies at the basis of the entire GI concept”.¹⁰⁴ The concept of *terroir* transcends the direct English translation of territory, since the actual meaning involves three distinct properties of one geographical area, that are: natural factor, human factor and history.¹⁰⁵ *Terroir* is the result of intertwined forces: the know-how of several producers and the natural environment over the years. Therefore, GIs are qualified as a collective, not private Intellectual Property Right.¹⁰⁶ On the *terroir* concept basis, Europe developed a *sui-generis* legal system for the recognition and enforcement of GIs, while the United States preferred trademarks and certification marks over a GI-specific legislation. Multiple forms of protection are applied to GIs both around the world and even within the same legal system, possibly causing confusion or even conflicts. For example, if the EU and US serve as representative models of legal and public policy on the protection of Geographical Indications, third countries such as China are considered to be hybrid,¹⁰⁷ as we shall see in detail under section 1.2.3.

The world two largest markets’ contrasting approaches on the matter of Geographical Indications protection is reflected in their bilateral and multilateral negotiations. If Europe aims at consolidating international protection for GIs as a public intellectual property, the United States attempts to protect its trademarks and sees the European strategy as a barrier to market access and an unfair form of protectionism.¹⁰⁸ It is evident from the analysis of relevant trade agreements that both countries have emerged as policy exporters who hope to minimize possibility of opposition to their preferred GI-protection regulatory system.¹⁰⁹ This chapter explains and puts into context the legal and socio-economic rationales for legitimacy of this very peculiar form of Intellectual Property Right, and lastly illustrates the differences in approach taken by the EU and the US towards GI protection.

¹⁰⁴ T. Broude, *Taking “Trade And Culture” Seriously: Geographical Indications And Cultural Protection In WTO Law*, Penn Law: Legal Scholarship Repository, 2014.

¹⁰⁵ E. Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 *Journal of Rural Studies*, 2003.

¹⁰⁶ D. Marie-Vivienne, D. Chabrol, *Geographical Indications (GIs), biodiversity and poor communities*, CIRAD - UMR Innovation, 2014.

¹⁰⁷ D. Giovannucci, T. Josling, W. Kerr, B. O’ Connor, M. T. Yeung, *Guide to Geographical Indications: Linking products and their origin*, International Trade Center, 2009.

¹⁰⁸ *Id.*

¹⁰⁹ M. J. Garcia, *Same aims, different approaches? Recent EU and US free trade agreement in Asia*, Article arose from Prof. Garcia’s presentation at UACES Arena’s seminar, 4 December 2013.

1.2.1 The Legal Function of Geographical Indications

To further understand the ongoing GI debate, it is useful to consider the main legal functions associated with this very peculiar form of IP. The main reason in support of GIs legitimacy and GI-specific TRIPS-plus protection is linked to a twofold protective function: protection against misleading use and protection against dilution of GIs.¹¹⁰

This twofold protective function finds its origin in the common nature that binds Geographical Indications with Trademarks. GIs and TMs are both distinctive signs and therefore are meant to fulfill similar tasks in the marketplace.¹¹¹ First, they convey relevant information to the consumer, reducing the information asymmetry between the latter and the producer. Second, they serve as a factor of differentiation from products of other competitors.¹¹² Thanks to these factors of differentiation, producers can exploit the reputation built around their distinctive sign, reach new segments of the market and apply a “price premium” on the standard value of the product.¹¹³

The principle of protection against misleading use is involved in the wider sphere of consumer protection. The aim is to protect the consumer from deceptive use of the product name on the label. In fact, reading a geographical name on the label, the public is possibly led to believe the good coincides with a well-known product from a certain geographical area for which the indication has traditionally been used.¹¹⁴ Many national laws provide against the misleading use of geographical names. For instance, this principle is also laid down in Article 10.1.7 of China Trademark Law: *“the signs of fraud that may easily mislead the public in the characteristics such as the quality of goods, or place of production shall not be used as trademarks”*.

¹¹⁰ D. Rangnekar, *Geographical Indications: Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, June 2003

¹¹¹ D. Rangnekar, *The Socio-Economics of Intellectual Property: A Review of the Empirical Evidence in Europe*, ICTSD Project on IPRs and Sustainable Development: Issue Paper N. 8, ICTSD-UNCTAD, 2004; M. Riccheri, B. Gorchach, S. Schlegel, H. Keefe, A. Leipprand, *Assessing the Applicability of Geographical Indications as a Mean to Improve Environmental Quality in Affected Ecosystems and the Competitiveness of Agricultural Products*, WP3, IPDEV, 2004.

¹¹² *Id.*

¹¹³ D. Rangnekar, 2003

¹¹⁴ L. Baeumer, *Protection of geographical indications under WIPO treaties and questions concerning the relationship between those treaties and the TRIPS Agreement*, WIPO, 1999

Protection against deceptive use of indications of origin is also provided under the TRIPS Agreement with Article 22.4, however, protection of the geographical name for the term *per se* is only limited to the specific category of wines and spirits. Moreover, according to Article 23.1 of TRIPS, protected goods other than wine and spirits still require the “misleading test” to be conducted, which is meant to prove the misleading use of the term for products produced outside the designated territory.¹¹⁵ Unfortunately, it is very burdensome to prove the public misled. This is conceivably the most criticized provision on the matter: in fact, it was reached not in virtue of these goods' special characteristics but rather for a compromise in favor of WTO's wine-making nations.¹¹⁶ However, the EU aims at reaching this level of protection also for other types of registered goods, not only for wines and spirits but also for other products like meat and cheese.¹¹⁷ Currently, the extension of Article 23 of TRIPS to all categories of goods or agricultural products, and not mainly wines and spirits (that are mostly produced in Western countries) is still debated. The extension is argued for several reasons:¹¹⁸

- a. On one hand, the extension would address the “unfair special treatment” now applied to alcohol-based products. In fact, WTO members are producers of a wide range of agricultural products that should also receive adequate protection. An obvious counterargument lays its foundation on countries' asymmetry in the production of GIs: not every country would equally benefit from GIs absolute protection, as some members have geographical indications for many types of products (*e.g.*, Europe) while others only have a few (*e.g.*, United State).
- b. The extension would guarantee fair market access to producers of non-alcohol-based products. However, as IPRs are territorial in nature, extension of Article 23 requires specific geographical names to be recognized in the market of destination. Finding a common ground on GIs registration may cause added complexity. This is a common problem with European and

¹¹⁵ Council for Trade-Related Aspects of Intellectual Property Rights, *Proposal from Bulgaria, Cuba, The Czech Republic, Egypt, Iceland, India, Jamaica, Kenya, Liechtenstein, Mauritius, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Turkey And Venezuela*, WTO IP/C/W/247/Rev.1, 17 May 2001.

¹¹⁶ S. C. Srivastava, *Geographical Indications under TRIPS Agreement and Legal Framework in India: Part I*, Journal of Intellectual Property Rights, Vol. 9, January 2004.

¹¹⁷ Council for Trade-Related Aspects of Intellectual Property Rights, *Proposal from Bulgaria, Cuba, The Czech Republic, Egypt, Iceland, India, Jamaica, Kenya, Liechtenstein, Mauritius, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Turkey And Venezuela*, WTO IP/C/W/247/Rev.1, 17 May 2001.

¹¹⁸ L. P. Lukose, *Rationale and Prospects of the Protection of Geographical Indication: An Inquiry*, Journal of Intellectual Property Rights, Vol. 12, March 2007.

United States production and export of agricultural products. The two countries have yet to find an agreement over some of Europe's most iconic GI products names, which are considered generic in the United States but protected within the European Union.

- c. Concerning costs, supporters advocate that no extra cost would follow the implementation of Article 23, and that minimizing the current amount spent in litigation would partially amortize costs. As a counterargument to the extension, some argue that serious costs would be suffered by governments and businesses, in the form of enforcement, relabeling and repackaging.

The principle of protection against dilution of GIs addresses the issue of producer protection and introduces some elements of unfair competition.¹¹⁹ Unfair competition results from the so-called practice of “free-riding” on reputable indications, from which businesses should theoretically be protected.¹²⁰ For example, geographical names such as “Darjeeling” for tea and “Bukhara” for carpets confer great trade value.¹²¹ For the producer, the factor of differentiation (constituted by a distinctive quality or sign etc. such as the indication of origin or a trademark) is an opportunity to enhance its value proposition.¹²² Counterfeit producers, by affixing a geographical name on the label or trademark that is not true to origin or source, may exploit the reputation of the original product to advance their own goods in the market. The counterfeit product allows consumers to purchase the “status” coming with the label without paying for the premium. The original firm thus suffers fierce price-competition from the counterfeit producer.¹²³ In addition, the exploitation of a geographical name can lead to “diluted reputation” of GIs on account of misappropriation of marks, as the reiterated use of that name can cause the consumer to perceive that name as a common name for that product (e.g., Parmesan for hard grating cheese or Champagne for sparkling wine). Because of this practice, many GIs are now considered generic outside the country of origin, such as Feta, Arabica Coffee, Cheddar cheese, kiwifruit, etc.¹²⁴ Generic terms do not benefit of any protection as they are now recognized by the public as generic names for products.

¹¹⁹ D. Rangnekar, 2003

¹²⁰ *Id.*

¹²¹ IP/C/W/247/Rev.1, 2001

¹²² M. Riccheri, B. Gorlach, S. Schlegel, H. Keefe, A. Leipprand, *Assessing the Applicability of Geographical Indications as a Mean to Improve Environmental Quality in Affected Ecosystems and the Competitiveness of Agricultural Products*, WP3, IPDEV, 2004

¹²³ D. Rangnekar, 2003

¹²⁴ IP/C/W/247/Rev.1, 2001

However, it should be mentioned that a group of researchers argues that the existence of property rights for GIs in international law is not built on a sound basis, therefore GIs today still struggle to find their place in the world of Intellectual Property. This argument is justified on several grounds, such as:¹²⁵

- a. Supporters argue that legitimacy is conferred by John Locke's labor desert theory, by which people own the fruit of their labor, and therefore works of the intellect are property just as goods manufactured by a workman.¹²⁶ This principle is often invoked to justify GIs as a form of IP, even if the originators of these products are long dead. A counterargument is that property rights are transferred from one person to another over time, though labor desert principle restricts power to transfer property rights.¹²⁷
- b. GIs legitimacy is also argued on the ground of the principle of ancestral firstness. However, it would be hard for descendants to claim this right, as the originators of the product disappeared long time ago. This also introduces the issue of immigrants, such as today's Italo-Americans who should also enjoy this privilege.
- c. Moral rights of the author and community are also a legal principle applied to the legitimation of GIs. In civil law countries moral rights – or *droit moral* in France – are centered on the creator or *auteur*, who imprinted the work with his personality, and not on the creation itself, as common law countries primarily do with *copyright*. This moral principle is argued on the basis of *terroir*. According to some,¹²⁸ the existence of a non-human element (that is natural environment) in *terroir* does not necessarily vitiate the moral right conferred to the community, however, what isn't convincing most opponents are the concept of group personality and the preclusion to copy not the technique but the geographical name itself.

On the other hand, it should be mentioned that many foundations to GIs, though not directly supported by law, swipe in scope from ethical to cultural and social rationales.¹²⁹ Ethical, since others should not misappropriate a product reputation

¹²⁵ K. Raustiala, S. R. Munzer, *The Global Struggle over Geographic Indications*, European Journal of International Law, Volume 18, Issue 2, April 2007

¹²⁶ UKEssays, *Intellectual Property Labor Desert Theory Philosophy Essay*, November 2018. [Accessed 10 March 2021]; Available from: <https://www.ukessays.com/essays/philosophy/intellectual-property-labor-desert-theory-philosophy-essay.php?vref=1>

¹²⁷ S.R. Munzer, *A Theory of Property*, 1990

¹²⁸ K. Raustiala, S. R. Munzer, 2007

¹²⁹ L. P. Lukose, 2007

built painstakingly over the years. Cultural, as GIs are matter of territorial pride and cultural patrimony, so protection shall be enforced to safeguard the quality of these products. Social, as protection of GIs can empower small businesses and foster rural development.¹³⁰

To conclude, Geographical Indications struggle to find their place in the world of Intellectual Property. This is due to their collectivistic nature as well as their roots in the natural environment and traditional local know-how. However, in order to fulfill their functions of distinctive signs, GIs also need to be protected in this hypercompetitive market to fend off those who would *pass off* counterfeits as the legitimate branded article. To prevent the *passing off* of a product (like sparkling wine) for a well-known product with an established reputation from a certain geographical area (like Champagne), protection shall be ensured to both the consumer and the producer.¹³¹ This is fundamental to avoid that the monopoly rents associated with the designation will be eroded in the absence of barriers to entry, causing diluted reputation and genericization of the geographical term, as seen above.¹³² For this number of reasons, there are two major legal mechanisms in place for the protection of Geographical Indication, as we will see in chapter 1.2.3.

1.2.2 The Socio-Economic Function of Geographical Indications

“Today’s global challenges are transforming the way we produce, market, consume and think about food.” Cities are changing, transforming our food systems.¹³³ At the pace of rapid increase in socio-economic status and urbanization, people keep food safety and food quality high on their priorities whereas governments are dealing with the challenge of a pressing demand by consumers for a basket that is increasingly safer, larger and fuller, at an affordable price.¹³⁴ As the world is facing an extraordinary convergence of environmental and socio-economic pressures, the success of Origin Products in the market is due to their ability to answer consumers’ requests in terms of control and authenticity in front of food massification, whilst valuing old cultural

¹³⁰ *Id.*

¹³¹ C. Viju, M. T. Yeung, W. A. Kerr, *Geographical Indications, Barriers To Market Access And Preferential Trade Agreements*, CATPRN Commissioned Paper, 1 February 2012

¹³² IP/C/W/247/Rev.1, 2001

¹³³ FAO, *The Future of Food Safety*, First FAO/WHO/AU International Food Safety Conference, CA3247EN/1/02.19, 2019.

¹³⁴ European Commission, *Global food supply and demand Consumer trends and trade challenges*, EU Agricultural Markets Briefs, N. 16, September 2019.

traditions; this success pointed out the effectiveness of agri-food product's territorial origin to become a strategic tool for differentiation.

Today, labels are used worldwide to inform consumers about the production process ("OGM-free", "cruelty-free", "organic" etc.), nutritional content ("good source of vitamin C", "low-fat", etc.) or health benefits ("promotes cardio-vascular health", "may prevent cancer", etc.),¹³⁵ but also about the area of origin, with a GI-label, or a brand name, through a trademark. Nevertheless, food labels are all about quality, and, as we will see, have a tangible impact on consumers' choices.

When doing groceries, shoppers look for the highest affordable food quality, but the choice is not easy at all. Industrialization and the growth of a market-oriented economy allow producers and traders to put on the shelves a variety of goods of the same category. These products, despite appearances to the contrary, generally differ in quality, price and other characteristics.¹³⁶ However, the buyer cannot always observe the quality of foodstuff right at the supermarket. Instead, it is the case that buyers form a good idea of the product quality after consumption that is more accurate than the original estimate at the time of purchase.¹³⁷ Consumers need to be given the guidance that will allow them to evaluate viable alternatives and make their own choices about what to pick up from the shelves. In this context, labels are used as quality cues, at least to the extent they are understood from the purchaser. In fact, easy identification of quality relying on distinctive signs makes price comparison and choice simpler for the purchaser.¹³⁸ This is why both voluntary and mandatory labels are used all over the world to disseminate information about the quality of the foods we consume.

Trademarks and Geographical Indications have traditionally been viewed as functioning to identify the source or origin of the goods to which they are affixed.¹³⁹

¹³⁵ K.C. Clayton, *Policy and Economic Issues*, Paper Presented at AAFA Food & Agricultural Marketing Policy Section Conference Emerging Roles for Food Labels Labels: Inform, Protect, Persuade, Washington, March 2003.

¹³⁶ *Introduction to Trademark Law & Practice - The Basic Concepts*, WIPO Publication N. 653 (E), 1993.

¹³⁷ D. Rangnekar, *The Socio-Economics of Geographical Indications*, ICTSD-UNCTAD Project on IPRs and Sustainable Development, Issue Paper N. 8, 2004.

¹³⁸ S. Marchesini, H. Hasimu, D. Regazzi, *Literature review on the perception of agro-foods quality cues in the international environment*, Poster Paper for EAAE Seminar "International Marketing and International Trade of Quality Food Products", Bologna, 8-10 March 2007, 2007.

¹³⁹ E.W. Hanak, *The Quality Assurance Function of Trademarks*, *Fordham Law Review*, Vol. 43, Issue 3, 1974; E. W. Ibele, *The Nature and Function of Geographical Indications in Law*, *The Estey Centre Journal of International Law and Trade Policy*, Vol. 10, N. 1, p. 36-49, 2009.

This judicial conception of the economic role of these two types of distinctive signs has its origins in the uses to which marks were put in the Middle Ages.¹⁴⁰ Recently, distinctive signs have been recognized as serving a second key function, that is ensuring the purchaser a certain degree of uniformity or quality in the group of products to which the signs are attached.¹⁴¹ In fact, the economic rationale for the protection of Geographical Indication is essentially linked to the function of the indication of origin, which can be used by consumers as a quality cue when the resources of the region represented in the label are perceived as quality attributes.¹⁴²

Trademarks and Geographical Indications are business branding tools aimed at promoting product recognition, customer loyalty and enhancing the reputation of the product and its producer (or region of origin).¹⁴³ Agri-food producers and policymakers have long realized the potential of geographical origin to impact product evaluation and international trade flows. This trend is reflected in the steadily escalating number of foods marketed with an indication of origin.¹⁴⁴ According to Herrmann and Teuber (2010), the debate over Geographical Indications is not just on conflicting laws and regulations, but a debate over the function that Trademarks and Geographical Indications should fulfill in the marketplace.¹⁴⁵ To outline this debate over the economic role of Geographical Indications, drawing upon secondary sources, we will outline the socioeconomic impacts of Geographical Indications.

Indications of geographical origin (IGOs), one of the earliest types of trademark, are used by traders to evoke a particular geographical area and exploit local reputation. This is relevant to our study as many researchers have found that origin is an important determinant of consumers attitude and behavior towards food products. In US, surveys have shown that consumers are willing to pay an additional price ranging from 38% to 58% for US certified meat.¹⁴⁶ Also in Europe, a similar survey

¹⁴⁰ F. Schechter, *The Historical Foundations of the Law Relating to Trade-Marks*, 1925.

¹⁴¹ E.W. Hanak, 1974.

¹⁴² C. Bramley, E. Biénabe, J. Kirsten, *The Economics Of Geographical Indications: Towards A Conceptual Framework For Geographical Indication Research In Developing Countries, The Economics of Intellectual Property*, WIPO, 2009.

¹⁴³ *Marketing and Branding Strategies: Use of Trademarks, Geographical Indications, and Industrial Designs for Business Success: Case Studies*, WIPO/SMES/SHA/04/2, 1 December 2004.

¹⁴⁴ R. Herrmann, R. Teuber, *The Economics of Geographically Differentiated Agri-Food Products*, 2010.

¹⁴⁵ *Id.*

¹⁴⁶ M. L. Loureiro, W. J. Umberger, *Estimating Consumer Willingness to Pay for Country-of-Origin Labeling*, *Journal of Agricultural and Resource Economics*, Vol. 28, No. 2, August 2003

has demonstrated that 40% of European consumers are willing to pay a premium price of 10% for origin-guaranteed products.¹⁴⁷

Moreover, researchers have shown that the influence of IGOs on consumers' positive behavior is strong, especially for weak brands. For instance, it has been proven that in the case of Galician veal¹⁴⁸ (Spain), Bavarian Beer¹⁴⁹ (Germany), Makò Onion¹⁵⁰ (Hungary) and wines¹⁵¹ (Italy), the presence of an origin label plays a determining role in the WTB¹⁵² or WTP.¹⁵³ However, the interaction of a GI label can have a weaker or even negative effect on already established and well-known trademarks, such as for Lowenbrau¹⁵⁴ (Bavaria), Camembert cheese, Comté cheese, and dry-cured ham (France).¹⁵⁵ In other words, valorization of the origin attribute is stronger when the label is associated with a store brand that is not very popular instead of being related to a locally strong brand. This is a clear example of the possibly positive effects of Geographical Indications on rural development.

GIs potentially impact rural development in a twofold way. First, the GI label provides a series of direct benefits. For instance, it can increase the product ability to obtain price premia, allowing remuneration for high-quality agri-food producers, especially nowadays, since quality has become an important selling point for foods. Additionally, a GI enables producers to potentially enjoy larger income flows from their true to origin agri-foods, by protecting geographical names and prohibiting free-riding, and therefore restricting market access to competitors' unlawful

¹⁴⁷ L. P. Lukose, *Rationale and prospects of the Protection of Geographical Indication: An Inquiry*, *Journal of Intellectual Property Rights*, Vol 12, March 2007

¹⁴⁸ M. L. Loureiro, W. Umberger, *A Choice Experiment Model for Beef: What US Consumers Responses tell us About Relative Preferences for Food Safety, Country-of-Origin Labelling and Traceability*, *Food Policy*, Vol. 32 (4): 496-514, 2017.

¹⁴⁹ A. Profeta et al., *Der Einfluss geschützter Herkunftsangaben auf das Konsumentenverhalten bei Lebensmitteln – Eine Discrete-Choice-Analyse am Beispiel Bier und Rindfleisch*, 2006.

¹⁵⁰ A. Traegar, A. Torok, M. Gorton, *Geographical indications and upgrading of small-scale producers in global agro-food chains: A case study of the Mako' Onion Protected Designation of Origin*, *Environment and Planning*, Vol. 48, 2016

¹⁵¹ A. Hertzberg, *La domanda di vino in Italia: analisi delle preferenze del consumatore*, Università di Bologna, 2008.

¹⁵² Willingness to Buy

¹⁵³ Willingness to Pay

¹⁵⁴ A. Profeta et al., *Der Einfluss geschützter Herkunftsangaben auf das Konsumentenverhalten bei Lebensmitteln – Eine Discrete-Choice-Analyse am Beispiel Bier und Rindfleisch*, 2006.

¹⁵⁵ C. Bonnet, M. Simioni, *Assessing consumer response to Protected Designation of Origin labelling: A mixed multinomial logit approach*, *European Review of Agricultural Economics* 28(4):433-449, 2001; D. Hassan, S. Monier-Dilhan, *National Brands and Store Brands: Competition through Public Quality Labels*. *Agribusiness*, Vol. 22 (1): 21-30, 2006; P. Mérel, *Measuring Market Power in the French Comté Cheese Market*, *European Review of Agricultural Economics*, Vol. 36(1), 31-51, 2009.

products.¹⁵⁶ In this way the GI-quality label leads to a more equitable distribution of value for local producers and small communities that can fully enjoy their positive long-established reputation in the production of traditional region-specific food. Secondly, it provides a series of indirect benefits to the producers and the region. For instance, legal certainty associated with GI protection can attract local and foreign investments,¹⁵⁷ whilst the agribusiness in the region can boost employment, agro-tourism and environmental spin-offs.¹⁵⁸

The rural development aspect is especially significant for less-developed or less-favored geographical areas. The same applies to small companies, who cannot afford large-scale marketing and production. GIs' ability to foster rural development processes derives from its connection with the *terroir*. Less-developed regions and companies often cannot compete in terms of productivity and efficiency but nevertheless can compete in terms of tradition, authenticity and high-quality production. This is relevant not only for developing countries, but also for Europe, and Southern Europe in particular, where small and micro-firms are over-represented, in contrast with countries like Japan and the United States which hold relatively more large firms.¹⁵⁹ The European Commission presents Geographical Indications as one main pillar of its agricultural quality policy along with organic and other food quality certification systems.¹⁶⁰ This strategy is supported by the fact that geographically differentiated agri-food can contribute to the survival and development of small-scale producers by facilitating the production and recognition of high-quality products based on a solid legal and commercial basis while preserving cultural heritage and local reputation at the same time.¹⁶¹

It should also be mentioned that Geographical Indications can be adopted as a valid internationalization tool. The world market is experiencing the convergence of a series of pressing socio-economic forces: growing demand for and attention to food

¹⁵⁶ D. Zografos, *Geographical indications and socio-economic development*, IQSensato, Working paper no 3, 2008.

¹⁵⁷ *Id.*

¹⁵⁸ D. Barjolle, S. Reviron, B. Sylvander, *Creation et distribution de valeur économique dans les filières de fromages AOP. Economies et Sociétés, Systèmes agroalimentaires*, Paris, AG no. 29, 9/2007, 2007.

¹⁵⁹ OECD, *OECD SME and Entrepreneurship Outlook 2019*, OECD Publishing, Paris, 2019.

¹⁶⁰ *Quality Schemes Explained*, European Commission - European Commission, ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en. [Last visit: 10 May 2021]

¹⁶¹ *European Policy for Quality Agricultural Products*, Luxembourg: Office for Official Publications of the European Communities, January 2007.

safety and quality intensified and social amplified awareness of food safety,¹⁶² establishment of socio-cultural status through the consume of certain foods and a renewed interest in and nostalgia for old culinary tradition, etc.¹⁶³ In this context, IGOs can be an answer as several studies surveyed that consumers perceive the regional product origin as a cue for food quality and food safety: the indicator of quality revealed to be associated to origin by consumers both inside and outside the labels' area of influence;¹⁶⁴ the origin indicator was also associated with food safety in several surveys, as it reduces purchasers' perception of risk involved with consuming the product.¹⁶⁵ Moreover, academics believe that penetration of international markets can be eased using quality signs to both satisfy foreign minimum safety and quality standard and serve as differentiation tools,¹⁶⁶ and the agri-food sector is not an exception.¹⁶⁷ Thanks to the use of Geographical Indications foreign consumers will be able to recognize the origin symbols whereas producers will gain instant recognition and purchasers' confidence in the quality of their products abroad, at least to the extent the label is acknowledged and valued by consumers.¹⁶⁸

¹⁶² K. Bergman, *Dealing with Consumer Uncertainty: Public Relations in the Food Sector*, Berlin, Springer-Verlag, 2002; P. Slovic, *The Perception of Risk*, London, Earthscan, 2000.

¹⁶³ G. Belletti, T. Burgassi, E. Manco, A. Marescotti, A. Pacciani, S. Scaramuzzi, *The impact of geographical indications (PDO and PGI) on the internationalisation process of agro-food products*, EAAE Seminar 'International Marketing and International Trade of Quality Food Products', Bologna, Italy, March 8-10, 2007.

¹⁶⁴ R. Adrian, M.-C. Laura, B. Margarita, B. Rodolfo, *Perceptions of geographical indication labels as quality indicators inside and outside the labels' area of influence: the case of spring fruits*. *Renewable Agriculture and Food Systems*, 1–7. Cambridge University Press, 2021; I. A. Van Der Lans, K. Van Ittersum, A. De Cicco, M. Loseby, *The Role of the Region of Origin and EU certificates of Origin in Consumer Evaluation of Food Products*, *European Review of Agricultural Economics*, Vol. 28 (4): 451-477, 2001; M. Jekanowski, D.R. Williams, W.A. Schiek, *Consumer's Willingness to Purchase Locally Produced Agricultural Products: An Analysis of an Indiana Survey*, *Agricultural and Resource Economics Review*, Vol. 29 (1): 43-53, 2000; R. Skaggs, C. Falk, J. Almonte, M. Cardens, *Product-Country Images and International Food Marketing: Relationships and Research Needs*, *Agribusiness*, Vol. 12, No. 6, 593-600, 1996.

¹⁶⁵ M. R. Mørkbak, T. Christensen, D. Gyrd-Hansen, *Consumer preferences for safety characteristics in pork*, *British Food Journal* 112, 775–791, 2010; R. Kim, *Japanese consumers' use of extrinsic and intrinsic cues to mitigate risky food choices*, *International Journal of Consumer Studies* 32, 49–58, 2008; M.L. Loureiro, W.J. Umberger, *A choice experiment model for beef: what US consumer responses tell us about relative preferences for food safety, country-of-origin labeling and traceability*, *Food Policy*, 32: 496-514, 2007.

¹⁶⁶ S. Marette, J.M. Crespi, A. Schiavina, *The role of common labelling in a context of asymmetric information*, *European Review of Agricultural Economics*, 26: 167-178, 1999.

¹⁶⁷ D. Barjolle, J.M. Chappuis, B. Sylvander, *From individual competitiveness to collective effectiveness: a study on cheese with Protected Designations of Origin*, EAAE-ISHS Seminar, *Competitiveness: does economic theory contribute to a better understanding of competitiveness?*, 1998.

¹⁶⁸ *Id.*

We can well say the origin cue appears to be an important price determinant in the international food market. Looking at specific sectors and regions, Traegar (2007) has proven that consumers from many countries around the world are willing to pay higher prices for coffee coming from a region they perceive very suitable for coffee-producing activities.¹⁶⁹ Similarly, Schamel's (2006) research on wine origin and reputation showed that wine products can achieve higher prices thanks to the reputation of the region, even after a control over quality differences has happened.¹⁷⁰ These results imply that, in the specialty coffee and wine sector, coffees and wines from individual growing regions that are reputed to be suitable for production receive price premia due to that reputation. Geographically differentiated products can grow in economic value if the origin is valued by consumers. Therefore, there are incentives for agri-food producers to engage in differentiation of their products by origin, but it should be mentioned that IGOs and GIs are by no means self-runners. IGOs and GIs can make the product more appealing to the purchaser, to the extent the purchaser acknowledges the label value.¹⁷¹ Therefore, an accurate promotion activity is necessary to increase consumer awareness, especially outside the label's area of influence. In fact, as we will see under chapter 2.1.3, possible limitations of Geographical Indications influence on foreign consumers' perception was taken into consideration under the Sino-EU Agreement which included provisions about the promotional activity of the Parties' Geographical Indications to be deployed in the country of destination. This passage is crucial for the success of international GI trade.

In conclusion, Geographical Indications have great potential both in the national and international market. The added value achieved through the origin label leads to a differentiation of the marketed product based on its qualities. Within a collective monopoly, this contributes to form a niche market within the product is protected and enhanced. Moreover, although the price premium may be small, a Geographical Indication, by differentiating products by its area of origin and restricting market entry to competitors, may act as a powerful marketing tool that could improve profitability and market access for GI producers. For instance, products

¹⁶⁹ R. Teuber, *Geographical Indications of Origin as a Tool of Product Differentiation: The Case of Coffee*, Journal of International Food & Agribusiness Marketing, 2007

¹⁷⁰ A. M. Angulo, J. M. Gil, A. Gracia, M. Sanchez, Hedonic prices for Spanish red quality wine, British Food Journal, 2000;

¹⁷¹ S. Marchesini, H. Hasimu, D. Regazzi, *Literature review on the perception of agro-foods quality cues in the international environment*, Poster Paper for EAAE Seminar "International Marketing and International Trade of Quality Food Products", Bologna, 8-10 March 2007, 2007.

trademarked with a name that evokes a particular geographical area or producing a good similar or marketed as similar to another origin product without being true to origin, would be shortchanged in the marketplace.

It goes without saying that the prohibition of commercial use of protected geographical names on a national and international level would cause harm to exporting firms which were employing these terms to trademark, describe or market food products of the same category in a given market. Intangible costs would include the loss of trademark rights associated with terms that were originally considered generic, as well as a loss in the branding power and commercial magnetism associated with the long-standing use of such terms.¹⁷² Additionally, tangible costs that unlawful users of these terms would suffer include those associated with packaging and label redesign and those relating to marketing and advertising practices, which would need to create awareness and knowledge of new terms used to market these products.¹⁷³ A great effort in terms of branding would be needed to develop the special appeal customers have towards the traditional term for a new commercial name, as the traditional term has been established through decades of use.

For all the reasons stated above, European producers would reasonably hope the commercial use of protected geographical names is prohibited both on a national and international level, especially for Europe most iconic products that today are traded all-around the globe, such as Champagne, Prosecco, Feta, Gorgonzola, Parmesan, etc. In contrast, the United States would hope to protect national firms that are currently employing these terms to trademark, describe or market food products of the same category both within and beyond American borders. In fact, some of the abovementioned GI names are currently being used as generic terms within many countries outside Europe, including the United States, which does not grant protection for a number of those terms under its *Trademark Law*.

1.2.3 From National Regulatory Systems to Policy Export

As evidenced in their trade agreements, Europe and the United States, apply and interpret the legal protection of GIs in two fundamentally different ways, according to two very different philosophies.¹⁷⁴ Civil law systems are more oriented to treat

¹⁷² S. Agarwal, M. J. Barone, *Emerging Issues for Geographical Indication Branding Strategies*, MATRIC Research Paper 05-MRP 9, January 2005.

¹⁷³ *Id.*

¹⁷⁴ T. Josling, 2006

GIs as a public good, whereas common law systems view it more as a private right, similarly to other forms of IPR.¹⁷⁵ On the *terroir* concept basis, the EU developed a *sui-generis* legal system for the recognition and enforcement of GIs, whereas the US preferred trademarks and certification marks over a GI-specific legislation. Multiple forms of protection are applied to GIs both around the world and within the same legal system. This lack of harmonization causes confusion, inconsistency and even incompatibility between these legal systems.

For years, Europe has played a major role in the protection and development of Geographical Indication on both a national and international level. Development of GIs has become integral part of the official agricultural policy as a territorial approach that encourages diverse agricultural production, consumers' protection and fair competition.¹⁷⁶ In 1992 the EU created a *sui generis* legal system to include different rules linked to its "quality logos" (*i.e.*, PDO, PGI and TSG).¹⁷⁷ More specifically, the EU protects by legislation product names linked to a specific territory and production method, and therefore purchasing an EU quality labelled product guarantees both its quality and authenticity. The current EC system is based on two main categories for protection of agri-food GIs: Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI). A PDO covers the term used to describe foodstuffs that are produced, processed and prepared within a specific territory by using recognized method (such as *Mozzarella di Bufala Campana*). A PGI indicates a connection with the designated territory in at least one of the stages of production, processing or preparation (such as *Aceto Balsamico di Modena*). The link with the geographical area is therefore stronger for PDOs.

Article 13 of the EC Regulation 510/2006 provides as follows:

Registered names shall be protected against: (a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name; (b) any misuse, imitation or evocation, even

¹⁷⁵ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, *Guide to Geographical Indications – Linking Products and Their Origins*, Geneva: International Trade Centre, 2009

¹⁷⁶ *European Policy for Quality Agricultural Products*, Luxembourg: Office for Official Publications of the European Communities, January 2007

¹⁷⁷ Council Regulation (EC) No. 510/2006 *on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*, Official Journal L 93/12, 2006.

*if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar; (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin; (d) any other practice liable to mislead the consumer as to the true origin of the product.
[...]*

In accordance with Article 13, PDOs and PGIs, inter alia, shall be protected against any direct or indirect commercial use related to non-protected products in a way that could mislead consumers about the true origin of the product. Moreover, GI names cannot be sold or delocalized, and, at the same time, are accessible to producers who operate within the designated territory of origin and meet the certification criteria. Individual companies can also add their own criteria and develop sub-brands that are eligible for protection under the trademark system.¹⁷⁸ It is evident that the EU is very committed to apply strict protection to its Geographical Indications.

By contrast, the United States and other common law countries see GIs as a private right,¹⁷⁹ more specifically reducing it to a subset of trademarks.¹⁸⁰ There are multiple ways by which the United States benefits from protecting Geographical Indications through its Trademark system. In addition to fulfilling all the requirements imposed by the TRIPS Agreement, this system offers some practical advantages. In fact, the Trademark system was well-known and highly efficient across the whole country when GI-protection was introduced, and therefore it was convenient to expand it to accommodate new features or enhancements to already existing functions. Additionally, unlike the *sui generis* scheme, a Trademark system does not provide for *ex officio* enforcement and therefore the States' governments did not have to commit additional enforcement resources to ensure compliance with it.¹⁸¹

¹⁷⁸ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, 2009

¹⁷⁹ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, 2009

¹⁸⁰ M. J. Garcia, 2013 and G. de Bosio, 2015

¹⁸¹ *Geographical Indication Protection in the United States*, United States Patent and Trademark Office, n.d.

US rationale for the use of its Trademark law in this case is clear and very simple to understand: GIs “like trademarks are: 1) source-identifiers, 2) guarantees of quality, and 3) valuable business interests”.¹⁸² In fact, unlike the EU, the US does not have a GI-specific legislation,¹⁸³ it does, however, provide protection within the scope of US law. GIs are protected by utilizing two sub-categories of Trademark law: certification marks¹⁸⁴ and collective marks.¹⁸⁵ These two distinctive signs are well described under the US Trademark Act § 45 (15 U.S.C. § 1127):

The term “certification mark” means any word, name, symbol, or device, or any combination thereof— (1) used by a person other than its owner, or (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person’s goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

The term “collective mark” means a trademark or service mark — (1) used by the members of a cooperative, an association, or other collective group or organization, or (2) which such cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, and includes marks indicating membership in a union, an association, or other organization.

US farmers mainly rely on collective and certification marks to promote their products and help market them on an international level,¹⁸⁶ in particular, certification marks are largely used to protect GIs within the United States. This is because Trademarks, in general, cannot be linked to a geographical area, whereas certification marks can, and thus can be used as a viable tool to avoid this type of limitation.¹⁸⁷ Certification marks are a type of trademark used to show consumers

¹⁸² *Geographical Indication Protection in the United States*, United States Patent and Trademark Office, n.d.

¹⁸³ Except for wines.

¹⁸⁴ or certification trademarks

¹⁸⁵ D. J. Hayes, S. H. Lence, B. Babcock, *Geographic Indications and Farmer-Owned Brands: Why Do the US and EU Disagree?*, the Agricultural Economics Society and the European Association of Agricultural Economists, 2005

¹⁸⁶ *Id.*

¹⁸⁷ T. Josling, 2006

that a particular good and/or service have met certain standards. Note that there is a subtle but fundamental difference between collective and certification marks: collective marks can be used by the organization members which owns them, whereas certification marks require users to comply with a set of standards defined by the owner of the certification mark.¹⁸⁸ GIs could also be protected by a collective trademark and the members of the collective could use that symbol for marketing purposes.¹⁸⁹ Collective marks, despite they seem relatively public in scope, are owned by collectives, which can be both public or private entities (such as associations, cooperatives, organizations and unions, or public institutions).

The United States' GI protection system, and its enforcement, implies that products can be sold in the country by using names of origin from a particular region in the EU even when they are not actually produced in that area. This misleads American consumers, whilst shortchanging European producers.¹⁹⁰ However, as Secretary Tom Vilsack said, the EU's scheme "*doesn't fit well into our trademark system because US law seeks to protect the end agricultural product, not the process through which it is made.*"¹⁹¹ It should be mentioned that the divergence in the protection systems is also an impediment to the Transatlantic Trade and Investment Partnership discussion on GIs, as the United States would not agree to EU demands to reserve certain food names for EU producers, but EU officials publicly declared their intentions to uphold Geographical Indications protection as part of the T-TIP negotiations.¹⁹² Greece has also threatened to veto the Agreement unless it ensures increased protection for key agricultural geographical indicators.¹⁹³ In this regard, Vilsack commented: "*This is not an easy issue. It's an issue that is going to require a lot of work, and some very creative thinking to be able to navigate this thicket where you want to protect value.*"¹⁹⁴

¹⁸⁸ D. J. Hayes, S. H. Lence, B. Babcock, 2005

¹⁸⁹ T. Josling, 2006

¹⁹⁰ *Agriculture and Geographical Indications (GIs) in TTIP - A guide to the EU's proposal*, European Commission, 21 March 2016

¹⁹¹ A. Marshall, *Vilsack: Biotech, Geographical indications, Cloning Discussed at 'Historic' TTIP Meeting*, Agri-Pulse, 17 June 2014.

¹⁹² *Agriculture and Geographical Indications (GIs) in TTIP - A guide to the EU's proposal*, European Commission, 21 March 2016

¹⁹³ S. Michalopoulos, *Greece to Block TTIP Unless Geographical Indications Are Protected*, EurActiv, 17 May 2016. Article available at: <https://www.euractiv.com/section/trade-society/news/greece-to-block-ttip-unless-geographical-indications-are-protected/> [last visit: 29/03/2021]

¹⁹⁴ *Id.*

For developing countries involved in Trade Agreements with either Europe or the United States, these very divergent approaches can pose different challenges to their own national GI and trademark efforts for protection. In cases such as China, new systems are emerging: China's system for GI protection is compounded with parallel regimes, administered by different government agencies.¹⁹⁵ The Ministry of Agriculture (MoA) focuses on the protection of agricultural products; whereas the State Administration for Industry and Commerce (SAIC) and China Trademark Office (CTMO) protect GIs exclusively as a trademark right;¹⁹⁶ before 2018, General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) provided *sui generis* protection for GIs, now all GI-related affairs have been transferred to China National Intellectual Property Administration (CNIPA).¹⁹⁷ In fact, geographical names can be protected through three different registration procedures in China, allowed under the *Trademark Law*, the *Regulations on the Protection of Geographical Indication Products* and the *Measures for the Administration of Geographical Indication of Agricultural Products*.¹⁹⁸ Until 2019, 2,385 Geographical Indications and 5,324 Geographic Indication trademarks were approved in China,¹⁹⁹ and therefore we can interpret the Chinese system as a hybrid form between the *sui generis* and the trademark systems.

We can well say, that the national regulatory systems applied to Geographical Indications reflect how unique cultural heritage and economic interests are to each country.²⁰⁰ GIs can be protected in several ways: individual trademarks, collective or certification marks, denominations of origin, trademarks and *sui generis* systems, and even under laws on unfair competition, consumer protection or truth in

¹⁹⁵ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, 2009

¹⁹⁶ Y. Li, *Protection of Geographical Indications in China*, CCPIT and Trademark Law Office, 4 May 2017

¹⁹⁷ T. Zhang, L. Zhao, China trademark: China improves rules on protection of foreign GI products, 22 January 2020. Article posted on ManagingIP.com [last visit: 29/03/2021]

¹⁹⁸ Unitalen Attorneys At Law 北京市集佳律师事务所, “Zhōngguó yú ōuméng dìlǐ biāozhì bǎohù fǎlǜ chāyì de míhé jiāntán zhōnghuá rénmin gònghéguó zhèngfǔ yú ōuzhōu liánméng dìlǐ biāozhì bǎohù yú hézuò xiédìng” 中国与欧盟地理标志保护法律差异的弥合—浅谈《中华人民共和国政府与欧洲联盟地理标志保护与合作协定》 [Bridging the Differences between the Laws on the Protection of Geographical Indications of China and the EU - A Brief Discussion on the Agreement between the Government of the People's Republic of China and the European Union on Protection of and Cooperation on Geographical Indications], 北京市集佳律师事务所, 7 February 2021. <http://www.unitalen.com.cn/xhtml/report/21020657-1.htm> [last visit: 22/03/2021]

¹⁹⁹ G. Yao, M. Ma, *The Intellectual Property Review: China*, the Law Reviews, Law Business Research, 14 May 2020

²⁰⁰ H. Ilbert, M. Petit, *Are Geographical Indications a Valid Property Right? Global Trends and Challenges it*, Overseas Development Institute, Development Policy Review, 2009

labelling.²⁰¹ In this wide range of combinations, European and American systems for protection can be considered two country-models as they are representative of the diverse approaches utilized around the world.²⁰²

“Culture affects legal systems just as laws affect changes in culture”.²⁰³ The cultural dimension naturally exercises an influence on the legal system of one country, just as law shapes the society it regulates. As anticipated above, one subtle but decisive difference lays in the divergent views Europe and the United States have of Intellectual Property in general: US and other common law countries perceive IPR as an *ex-ante* incentive structure for wealth-creation, whereas the EU and other civil law countries view it as a moral entitlement granted by the status of *auteur*.²⁰⁴ And therefore, in other words, we can deduce that the EU views GIs as a sign of an original autochthonous product that needs to be safeguarded and an instrument for the development and safeguard of ancient traditions developed in its agricultural regions, whereas the US has a more business-oriented and product-oriented approach by which GIs distinctive signs serve better as a marketing tool.²⁰⁵ A notable example are Idaho potatoes. Idaho leads the whole nation in potato production, producing nearly a third of all US potatoes.²⁰⁶ This product is sold across the country also thanks to the GI distinctive sign, which makes a strong selling point for the good. Differently from most European GIs, Idaho potatoes are not produced in small farms, but on a large-scale level.²⁰⁷ The GI sign is oriented to marketing, rather than to the protection of local SMEs and the region old agricultural tradition.

²⁰¹ G. Allaire, M. Ansaloni, D. Barjolle, G. Belletti, E. Bienabe, et al. *SINER-GI Strengthening International Research on Geographical Indications: from research foundation to consistent policy. Instrument: specific targeted research or innovation project*, Thematic priority: priority 8.1, Policy-oriented research (SSP), D9 - Synthesis and scenarios, 2008.

²⁰² D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, *Guide to Geographical Indications – Linking Products and Their Origins*, Geneva: International Trade Centre, 2009

²⁰³ V. Iris I., V. Katrin *The Relationship Between Culture and Legal Systems and the Impact on Intercultural Business Communication*, *Global Advances in Business Communication*: Vol. 3, Article 3, 2014

²⁰⁴ J. Hughes, *The Spirited Debate Over Geographic Indications*, Volume 20, No. 10, 2003 and K. Raustiala, S. R. Munzer, *The Global Struggle over Geographic Indications*, *European Journal of International Law*, Volume 18, Issue 2, April 2007

²⁰⁵ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, *Guide to Geographical Indications – Linking Products and Their Origins*, Geneva: International Trade Centre, 2009

²⁰⁶ *Discover the Idaho state facts of a diverse and productive agricultural industry*, Agamerica Landing, 7 November 2018

²⁰⁷ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, *Guide to Geographical Indications – Linking Products and Their Origins*, Geneva: International Trade Centre, 2009

For what concerns the economic side, national history has clearly played a major role. Countries with old agrarian roots and rich culinary tradition, like France and Italy, are naturally more interested in exploiting the value of their Geographical Indications, whereas countries that for specific historical reasons do not possess this type of agricultural heritage, like the United States and Australia, fear *sui-generis* GI protection could even be detrimental to the agri-food industry.²⁰⁸ In fact, as mentioned above, some concerns about the legitimacy of Geographical Indications is fueled by the asymmetry in the number of GIs protected around the world. In terms of regional distribution, Europe has the largest number of GIs in force across all regions, accounting for 57.4%, followed by Asia (28.3%), Latin America and the Caribbean (which together account for 8.4% of the total).²⁰⁹ Europe is famous for the diversity of its agricultural production which derives from the region natural environment and local farming methods, which were developed over centuries of agricultural activity. Not surprisingly, food and beverage constitute a major part of the cultural identity of Europe's peoples and regions. In fact, one of European greatest assets in today's globalized market is its reputation for producing quality foodstuffs.²¹⁰ To date the EU *sui generis* system counts a total of 3,869 GIs and 1,574 PDO and PGI food products. These figures include non-EU GIs, which account for 361,²¹¹ and Italy confirms its absolute leadership in the field, accounting for 309 food products in the European register.²¹²

The European and American systems for protection of Geographical Indications are at odds with each other from the outset because the two countries' rationales for protection are unrelated.²¹³ This is where lies the real root of the problem. For the EU, Geographical Indications are neither a trademark nor a subcategory of trademarks, but an IPR of its own kind, as the use of the Latin phrase "*sui generis*" implies. In fact, both GIs and trademarks enjoy the rights of exclusivity and priority, but, on the

²⁰⁸ H. Ilbert, M. Petit, *Are Geographical Indications a Valid Property Right? Global Trends and Challenges it*, Overseas Development Institute, Development Policy Review, 2009

²⁰⁹ WIPO, *World Intellectual Property Indicators 2019*, Geneva: World Intellectual Property Organization, 2019

²¹⁰ *European Policy for Quality Agricultural Products*, Luxembourg: Office for Official Publications of the European Communities, January 2007

²¹¹ Source: eAmbrosia – the EU geographical indications register and GIview [last visit: 29/03/2021] We exclude wine and other alcohol-based products as they were already protected by the TRIPS Agreement, and therefore are not relevant to the issue of trade agreements and policy export addressed with this research.

²¹² *Italy on top of the PDO, PGI, TGS F&B ranking*, Italian Food News, 27 October 2020

²¹³ W. Hu, *Dinner for three: EU, China and the US around the geographical indications table*, CEPS, Policy Insights, 2020

ground of its uniqueness, a GI can shut off market access to trademarks that are exploiting its name and reputation.

For all the reasons stated above, in its Trade Agreements, Europe aims at the consolidation of the international reputation of Geographical Indications by public protection abroad.²¹⁴ The EU is concerned that, if not protected, the value of its quality products could be eroded, and consumers that are looking for European most iconic products short-changed. It is in the interest of consumers and producers to ensure that quality products are protected from misleading use of their geographical names, whether in the EU or elsewhere in the world.²¹⁵

By contrast, the United States has been focusing on increasing market access and has viewed EU's GI protection agenda as somewhat protectionist.²¹⁶ More specifically, American food producers are concerned that the EU is using GIs as a mean to impose restrictions on the use of food names considered generic in the US territory — such as parmesan, feta, and provolone cheeses — with the aim of putting the brakes to US food companies that are marketing similar foods abroad. Complicating this issue further are agreements with third country markets that are trading partners with both the EU and US, as they often include GI-specific IPR provisions.²¹⁷ For instance, the name “Mozzarella di Bufala” or “Buffalo Mozzarella” is protected in Europe, but generic in the US and therefore is used without restrictions by American dairy companies. Whether Europe concludes an Agreement for the protection of that name and its translations with a third country, US producers that are users of that name won't be allowed to sell their products in the market in question as long as they are marketing it or have trademarked it using that protected name. It would still be possible to engage in sales without the incriminated trademark, however, an important product selling point for the American side would have been eroded.²¹⁸

²¹⁴ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, *Guide to Geographical Indications – Linking Products and Their Origins*, Geneva: International Trade Centre, 2009

²¹⁵ *European Policy for Quality Agricultural Products*, Luxembourg: Office for Official Publications of the European Communities, January 2007

²¹⁶ D. Giovannucci, T. Josling, W. A. Kerr, M. T. Yeung, *Guide to Geographical Indications – Linking Products and Their Origins*, Geneva: International Trade Centre, 2009

²¹⁷ R. Johnson, *Geographical Indications (GIs) in U.S. Agricultural Trade*, Congressional Research Service, 21 July 2016

²¹⁸ C. Viju, M. T. Yeung, W. A. Kerr, 2012

The use of GIs has become a contentious international trade issue, particularly for wine, cheese, and sausage producers.²¹⁹

In conclusion, GIs are protected as Intellectual Property according to the US, the EU legislation, and the TRIPS Agreement. However, laws and regulations governing GIs in the United States and Europe differ, this leads to conflicting views on whether generic or semi-generic names can be protected as Geographical Indications. Furthermore, given the conflicting GI agendas of the major trading countries and the proliferation of trade agreements – meaning countries may be a party to more than one trade agreement – it is not surprising that conflicts in commitments can possibly arise.²²⁰ In the long term, third countries may ultimately determine the balance of power between Europe and the United States over Trademarks and Geographical Indications.

1.3 THE VALUE OF CHINA’S FOOD IMPORT MARKET

China’s demand for imported foods is critical to any assessment of agricultural export potential to the country. In this chapter we will illustrate China’s recent emergence as a major agricultural importer which followed the evolution of the Chinese dietary consumption pattern. We will explore the effects that newly established consumption trends in the country have produced on GIs and high-quality food exporters, by putting them into the context of the Sino-EU and Sino-US bilateral trade relationships. In fact, China has developed two strong agricultural trading partnerships with both Europe and the United States, and these relationships are likely to persist, develop and collide into the future.

1.3.1 The World’s Largest Food Importer

*“The Chinese consumer demand for imported food has been going in only one direction for several years — upwards.”*²²¹ In fact, China is officially the world's largest food importer after overtaking both the United States and the European Union in 2020

²¹⁹ R. Johnson, *The U.S. Wine Industry and Selected Trade Issues with the European Union*, Congressional Research Service, 25 July 2016.

²²⁰ C. Viju, M. T. Yeung, W. A. Kerr, 2012

²²¹ V. Menzel, *Western Food on Chinese Tables – How China’s Market for Imported Food Reflects the Rise and Development of the Country*, China Today, 11 December 2018. Article posted on: http://www.chinatoday.com.cn/ctenglish/2018/et/201812/t20181211_800151152.html [last visit: 27/04/2021]

and importing a staggering \$133.1 billion worth of food products.²²² What's more, the composition of China's imports is also rapidly transforming, as we will see under the following sections. Whereas bulk products once prevailed, high-value consumer-oriented goods are now surging ahead, eclipsing the former for the first time in 2019. For instance, imports of wine, beer, cheese, milk, meats, breads, cookies, ice cream, extracts of coffee and tea are growing rapidly.²²³ China's market for imported agricultural products in China is increasingly larger, showing high-growth potential in food and beverages for both European and American exports.²²⁴

In fact, Sino-US agri-food trade is on the growth track. China is now the first largest source of US agricultural imports, with a total \$28.75 billion of agricultural goods and related products exported to China in 2020. Moreover, in accordance with the Phase One Agreement, China has pledged to purchase substantially more agricultural and seafood products from the US in the coming years. At the time of the signature, analysts expressed reservations about the agricultural goods target, which was about 25% above 2013's all-time high of \$29 billion. However, despite today's total value of imports is still missing the \$36.5 billion targeted under the Phase One trade deal, the numbers are still very significant.²²⁵ Moreover, USDA projections for 2014-23 anticipate a continuation of China's recent upward trend in agricultural imports.²²⁶

Sino-EU agri-food trade is equally remarkable. Chinese consumers appreciate the safety, quality and authenticity of European foods,²²⁷ and has become the third biggest food export market for the EU27. The value of this export reached €16.3 billion between January and November 2020, after a huge increase of +1,934 million

²²² H. Jiang, *China: Evolving Demand in the World's Largest Agricultural Import Market*, International Agricultural Trade Reports, United States Department of Agriculture, 29 September 2020; C. Dupe, *China officially the world's biggest agricultural products importer*, Countryman, 8 October 2020.

²²³ F. Gale, J. Hansen, M. Jewison, *China's Growing Demand for Agricultural Imports*, USDA Economic Research Service, EIB-136, February 2015.

²²⁴ *EU and China sign landmark agreement protecting European Geographical Indications*, IP/20/1602, Press Release, Brussels, 14 September 2020. [last visit: 27/04/2021]

²²⁵ *U.S. 2020 Farm Good Exports To China Miss Phase 1 Trade Goal – USDA*, Hellenic Shipping news, 8 February 2020. [last visit: 24/04/2021] <https://www.hellenicshippingnews.com/u-s-2020-farm-good-exports-to-china-miss-phase-1-trade-goal-usda/#:~:text=The%20United%20States%20exported%20%2428.75,the%20Phase%201%20trade%20deal>

²²⁶ F. Gale, J. Hansen, M. Jewison, *China's Growing Demand for Agricultural Imports*, USDA Economic Research Service, EIB-136, February 2015.

²²⁷ *Id.*

euros (+38%) compared to 2019.²²⁸ This major growth, despite being also tied to the outbreak of African Swine Fever in China and the impact of the COVID-19 pandemic,²²⁹ represents a further confirmation of this promising bilateral trade relationship which developed in recent years.

Moreover, China is the second destination for the export of European iconic products protected by Geographical Indications.²³⁰ In 2017, the share of European GI exports had reached 42% of total agri-food sales, with 20% of intra-EU markets and 22% of extra-EU markets, having United States, China and Singapore as the three most popular destinations.²³¹ In 2021, the value of European GI export to China is estimated at 11.5 billion euros, accounting for 9% of the total GI exports, including agri-food, wines and spirits.²³² Hopefully, the Sino-EU trade agreement on the protection of Geographical Indications will definitely pave the way for bilateral trade of GIs between Europe and China.

Finally, it should be mentioned that China's food supply and demand have significant implications for the country's national food security and international trade. China's capacity to meet growing demands for agricultural products has been assessed by analysts since the 1980s.²³³ Several scholars argue that Chinese consumers' demand for an increasingly healthy and varied diet, compounded with the country's lack of natural resources, and more specifically of land and water scarcity, is posing a new threat to the nation's food security and pushing China to further open to the world market.²³⁴ In this regard, researchers both inside and

²²⁸ *Monitoring EU Agri-Food Trade: Developments January-May 2020*, Eurostat COMEXT, European Commission, May 2020.

²²⁹ *Id.*

²³⁰ Agricultural and Rural Development, *EU-China agreement protecting geographical indications enters into force*, European Commission News, 1 March 2021. Available at: https://ec.europa.eu/info/news/eu-china-agreement-protecting-geographical-indications-enters-force-2021-mar-01_en#:~:text=In%202020%2C%20China%20was%20the,food%20products%20and%20spirit%20drinks. [last visit: 12/05/20]

²³¹ Á. Török, L. Jantyik, Z. M. Maró, H. V. J. Moir, *Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature*, 12 November 2020.

²³² European Commission, *EU-China agreement protecting geographical indications enters into force*, News, Brussels, 1 March 2021. [last visit: 24/04/2021] https://ec.europa.eu/info/news/eu-china-agreement-protecting-geographical-indications-enters-force-2021-mar-01_en

²³³ F. Gale, J. Hansen, M. Jewison, *China's Growing Demand for Agricultural Imports*, USDA Economic Research Service, EIB-136, February 2015.

²³⁴ Q. Cao 曹前满, "kāifàng shìchǎng tiáojiàn xià quánqiú jiàzhí tǐxì duì zhōngguó liángshí ānquán yú nóngyè fāzhǎn de kùnrǎo" 开放市场条件下全球价值体系对中国粮食安全与农业发展的困扰

outside the country have anticipated that opposing market forces would induce the government to increasingly rely on import of grains and other land-intensive crops. In point of fact, China is facing a difficult equation to solve: how to feed 21% of the world's population with quality food, using only 6% of the world's total water resources and 9% of the arable land?²³⁵ The fact that the term “food security” translates literally as “grain security” in Chinese (粮食安全)²³⁶ is not an accident of history, China has in fact become a consistent grain importer. The issue is also linked to a significant increase in grain and animal products consumption. By 2030 total grain consumption is expected to increase by 20.2% to 846.2 million tons, of which 50.2% will be consumed for feeding animals.²³⁷

Leamer (1995) made the very valid point that trade can compensate for the unequal distribution of resources.²³⁸ Hence, many scholars affirm that trade helps with meeting the growing demand for a varied and high-quality diet in China by correcting disproportionate distribution of resources around the world. All this brings attention to the complementarity of Chinese production with that of Europe and the United States. China has a comparative advantage in production of labor-intensive products, such as fruits and vegetables,²³⁹ whereas Europe and the United States' agricultural sectors are characterized by an abundance of land and capital,

[Challenges to China's Food Security and Agricultural Development caused by the Global Value Chain within an Open Market], 当代经济管理, 2021; Y. Chen, C. Lu, *Future Grain Consumption Trends and Implications on Grain Security in China*, Sustainability, vol. 11, no. 19, 2019, p. 5165; Zhang et al., 2017; B. Ghose, *Food Security and Food Self-sufficiency in China: From Past to 2050*, Food and Energy Security, vol. 3, no. 2, 2014; K. Anderson, A. Strutt, *Food Security Policy Options for China: Lessons from Other Countries*, Food Policy, vol. 49, 2014; J. Zhang 张璟, G. Ni 倪国华, F. Zheng 郑风田, “2030 nián shìjiè liángshì fāzhǎn zhànlüè xuǎnzé jí qí duì zhōngměi liǎngguó guójiā de yǐngxiǎng” 2030 年世界粮食发展战略选择, 及其对中美两国国家的影响 [World development strategy for the production of grain in 2030 and its effects on China and the United States], 射界农业, 2014.

²³⁵ J. Liu et al., *Food Losses and Waste in China and Their Implication for Water and Land*, Environmental Science & Technology, vol. 47, no. 18, 2013.

²³⁶ D. Cen 岑丹, T. Li 李太平, “liángshì ānquán shípǐn ānquán jí shíwù ānquán de nèihán biànxī” 粮食安全、食品安全及食物安全的内涵辨析 [Analysis of grain security, food security and food safety and relative connotations], 中国食物与营养, 2020.

²³⁷ Y. Chen, C. Lu, *Future Grain Consumption Trends and Implications on Grain Security in China*, Sustainability, vol. 11, no. 19, 2019, p. 5165; Zhang et al., 2017.

²³⁸ E. E. Leamer, J. Levinsohn, *Handbook of International Economics, International Trade Theory: The Evidence*, North Holland, 1995.

²³⁹ G. Cheng, *China's Agriculture within the World Trading System*, China's Agricultural Trade: Issues and Prospects Symposium, International Agricultural Trade Research Consortium, Beijing, July 2007.

that is, for example, key to grain production, which also serve as animal feed.²⁴⁰ Not surprisingly, the Chinese food import market, that is gradually opening to international trade, is very appealing for European and American exporters. Transcending the limits imposed by national borders, the Sino-EU and Sino-US trade relations help counterbalance China's internal deficiency of resources while offering European and American producers a whole new market of opportunities abroad. This match of supply and demand of food, as we will see in the next two chapters, is not mainly due to the type of product, but also to quality of the food.

1.3.2 The Evolution of the Chinese Dietary Consumption Pattern

"The fact that more and more foreign food is consumed in China reflects the country's growing prosperity and the new demands of Chinese consumers," says Phillip Chilton, head of the International Business department at Nestlé Waters China.²⁴¹ In fact, the driving force of this flow of high-quality foods to the country lies in the internal socio-economic evolution. Chinese consumers ask for a basket that is increasingly safer, larger and fuller, at an affordable price. The country is experiencing sustained growth in personal income and, consequently, an evolution in the dietary consumption pattern. In this respect, some scholars argue that the Chinese diet is becoming more and more westernized. The forces of rapid economic and income growth, urbanization, and globalization are leading to a dramatic transformation of Chinese eating habits which is now showing signs of convergence towards the Western diet.²⁴² According to Pingali (2004) there are six key facts about this change:²⁴³

- i. reduced per capita consumption of rice;
- ii. increased per capita consumption of wheat and wheat based food;
- iii. increased variety of the food groups consumed;
- iv. increased consumption of high protein and calorie dense diets;
- v. increased consumption of temperate zone products; and

²⁴⁰ A. Marinelli, *EU-China Relations on Food Security and Agri-Food Trade*, UNU-CRIS Working Paper Series, n. 4, 2020; C. Shuai, X. Wang, *Comparative advantages and complementarity of the Sino-US agricultural trade: An empirical analysis*, Czech, 57, 2011 (3): 118–131.

²⁴¹ V. Menzel, *Western Food on Chinese Tables – How China's Market for Imported Food Reflects the Rise and Development of the Country*, China Today, 11 December 2018. Article posted on: http://www.chinatoday.com.cn/ctenglish/2018/et/201812/t20181211_800151152.html [last visit: 27/04/2021]

²⁴² P. Pingali, *Westernization of Asian Diets and the transformation of food systems: Implications for research and policy*, FAO, ESA Working Paper, N. 04-17, 2007.

²⁴³ *Id.*

vi. the growing popularity of convenience food and beverages.

At the time of China's socioeconomic reform, more than 82% of the population lived in rural areas and primarily consumed rice and vegetables.²⁴⁴ With the acceleration of urbanization and industrialization, rural population shrunk drastically to 39%,²⁴⁵ leaving the land unattended and creating a middle class that advanced new dietary preferences. Demand for food in China is not only growing but is evolving. Moving from “吃饱” (eat one's fill) to “吃好” (eat satisfying and healthy foods), a growing interest for a healthy, varied and sustainable diet is emerging.²⁴⁶ The Chinese diet macronutrient composition is more than ever oriented to the consumption of more high-fat and calorie dense foods like fish, meats, dairy, eggs, oils and sugar but fewer staples like rice and flour.²⁴⁷

Furthermore, food safety has the potential to be another driver to the appreciation of European and American foods. In fact, the Green Revolution occurred in China during the 1980s and 1990s driven by the aspiration to food self-sufficiency.²⁴⁸ This has put a great load of pressure on farmers, who developed harmful agricultural practices, e.g., overly intensive farming,²⁴⁹ waste-water irrigation,²⁵⁰ excessive use of

²⁴⁴ X. Wang 王雪, H. Qi 祁华清, “xīn shídài zhōngguó jūmín shíwù xiāofèi jiégòu biànhuà yú zhōngguó shíwù ānquán” 新时代中国居民食物消费结构变化与中国食品安全 [The Chinese emerging food consumption pattern and national food security], 农村经济与科技, 2021; National Bureau of Statistics of China, “guójiā tǒngjì jùjú” 国家统计局 2020 [China Statistical Yearbook 2020], China Statistics Press, 2020. www.stats.gov.cn/tjsj/ndsj/2020/indexeh.htm

²⁴⁵ National Bureau of Statistics of China, “guójiā tǒngjì jùjú” 国家统计局 2020 [China Statistical Yearbook 2020], China Statistics Press, 2020. www.stats.gov.cn/tjsj/ndsj/2020/indexeh.htm

²⁴⁶ Q. Guo 郭清仪, “jiāntán lǜsè shípǐn shìchǎng de péiyù yú yíngxiāo duìcè” 浅谈绿色食品市场的培育与营销对策 [A few words on the cultivation of the green food market and corresponding marketing strategies], 大众投资指南, 2020; F. Zhang 张富国, Y. Tian 田岩, Z. Xia 夏兆刚, H. Wang 王华飞, P. Liu 刘平, H. Zhao 赵辉, “wǒ guó yǒu jīnóngyè fāzhǎn yōushì wèntí jí duìcè yánjiū” 我国有机农业发展优势、问题及对策研究 [Benefits and drawbacks of China's organic production and a research on corresponding countermeasures], 农产品质量与安全, 2017; V.P. Gandhi and Z. Zhou, *Food Demand and the Food Security Challenge with Rapid Economic Growth in the Emerging Economies of India and China*, Food Research International, vol. 63, 2014.

²⁴⁷ X. Guo, T. A. Mroz, B. M. Popkin, F. Zhai, *Structural Change in the Impact of Income on Food Consumption in China 1989-93*, 1999.

²⁴⁸ Q. Xu 徐庆龙, C. Wu 吴春华, J. Chen, 陈景香 “zhōngguó yǒu jīnóngyè fāzhǎn xiànzhuàng yú zhǎnwàng” 中国有机农业发展现状与展望 [Present situation and outlook of China's organic agricultural development], 农村实用技术, 2020; Ghose, *Food Security and Food Self-sufficiency in China: From Past to 2050*, Food and Energy Security, vol. 3, no. 2, 2014.

²⁴⁹ D. Norse, X. Ju, *Environmental Costs of China's Food Security*, Agriculture, Ecosystems & Environment, vol. 209, 2015.

²⁵⁰ Y. Lu et al., *Impacts of Soil and Water Pollution on Food Safety and Health Risks in China*, Environment International, vol. 77, 2015, pp. 5–15.

pesticides,²⁵¹ etc. and a series of food safety incidents, e.g., melamine milk,²⁵² gutter oil,²⁵³ etc. Within a decade the environmental impact of these practices became apparent, with soil becoming degraded and water polluted.²⁵⁴ As a result, food safety became a major concern among Chinese consumers and policymakers.²⁵⁵ The importance attached to food among consumers developed even more during the coronavirus crisis. When the pandemic hit China's food supply chain, the public shifted towards high-value organic food for its safer characteristics, such as lower microbiological risks and chemical contaminants.²⁵⁶ Luckily for European exporters, their food is often associated positively with the concept of food safety,²⁵⁷ an issue that acquired a certain level of importance among Chinese buyers. Moreover, Europe is also pioneer in organic food production and a strict regulator on food control,²⁵⁸ towards which Chinese consumers have shown a growing interest after the pandemic.²⁵⁹ Additionally, GI products are deeply interconnected with food safety and food control. The GI protection system must ensure the product compliance with a set of high-quality standards and the fulfillment of safety

²⁵¹ M.B. Zolin, *Food Security, Food Safety and Pesticides: China and the EU Compared*, SSRN Electronic Journal, 2017.

²⁵² M.B. Zolin et al., *Food Security and Trade Policies: Evidence from the Milk Sector Case Study*, *British Food Journal*, vol. 123, no. 13, 2021; C. M. Gossner et al., *The Melamine Incident: Implications for International Food and Feed Safety*, *Environmental Health Perspectives*, vol. 117, no. 12, 2009; 孙岑.对食品安全的经济学思考—基于三鹿奶粉事件的案例分析[J].中国集体经济,2013(09):20-21 [C., Sun, *Reflecting on Food Security Economy – A case study on the melamine milk incident*, 2013].

²⁵³ F. Lu, X. Wu, *China Food Safety Hits the 'Gutter'*, *Food Control*, vol. 41, 2014.

²⁵⁴ . Fang 方建新, P. Wang,王璞 “wǒ guó tǔrǎng wūrǎn xiànzhuàng fēnxī jí fángzhì duìcè yánjiū” 我国土壤污染现状分析及防治对策研究 [Research on the present situation of soil pollution in China and corresponding countermeasures], 资源节约与环保, 2019.

²⁵⁵ X. Xie et al., *Generational Differences in Perceptions of Food Health/Risk and Attitudes toward Organic Food and Game Meat: The Case of the COVID-19 Crisis in China*, *International Journal of Environmental Research and Public Health*, vol. 17, no. 9, 2020; Q. Xu 徐庆龙, C. Wu 吴春华, J. Chen, 陈景香 “zhōngguó yǒu jīnóngyè fāzhǎn xiànzhuàng yú zhǎnwàng” 中国有机农业发展现状与展望 [Present situation and outlook of China's organic agricultural development], 农村实用技术, 2020.

²⁵⁶ X. Xie, L. Huang 2 , J. Li, H. Zhu, *Generational Differences in Perceptions of Food Health/Risk and Attitudes toward Organic Food and Game Meat: The Case of the COVID-19 Crisis in China*, *Int. J. Environ. Res. Public Health* 2020.

²⁵⁷ O. Wang, X. Gellynck, W. Verbeke, *Perceptions of Chinese traditional food and European food among Chinese consumers*, *British Food Journal*, 2016.

²⁵⁸ European Commission, *Organic farming in the EU - A fast growing sector*, *EU Agricultural Markets Briefs*, n. 13, March 2019.

²⁵⁹ X. Xie, L. Huang 2 , J. Li, H. Zhu, *Generational Differences in Perceptions of Food Health/Risk and Attitudes toward Organic Food and Game Meat: The Case of the COVID-19 Crisis in China*, *Int. J. Environ. Res. Public Health* 2020.

regulations through a guarantee scheme. Quality controls also include hygiene, traceability and environmental considerations.²⁶⁰

The evolution of the Chinese dietary pattern is relevant to our research as it reflects the trend of national food imports and thus explains why the Chinese market is so appealing to both European and American food exporters. In particular, imported consumer-oriented products are on the upswing, led by meat, dairy, and horticultural products.²⁶¹ Moreover, slow growth in domestic supply compounded with rising costs in animal feed, labor and land are making imported products more competitive in the market.²⁶² In 2019, the top three categories of imported food in China were meat and related products (\$18.9 billion), sea food products (\$16.1 billion), and dairy products (\$12 billion).²⁶³ With the rise of purchasing power, Chinese consumers are willing to spend more for high-quality, healthy and even exotic options. It should be noted that, compared to traditional food, Western food belongs to a whole new dietary civilization in the view of Chinese consumers, and its consumption is perceived as a fashionable trend.²⁶⁴

In conclusion, we can say that being China the world's biggest agri-food importer due to its high demand and limited supply, and the demand rapidly shifting towards high quality food, it has become a very appealing market to GI producers and high-quality food exporters, like that who operate in Europe and the United States. In fact, Chinese demand for European and American exports shows great potential for growth. Not surprisingly, the Chinese dietary consumption pattern is showing signs of convergence with the West and this, compounded with attraction for Western products and a general income growth, determined growing demand

²⁶⁰ M. De Rosa, *The Role of Geographical Indication in Supporting Food Safety: A not Taken for Granted Nexus*, Italian Journal of Food Safety, 2015.

²⁶¹ H. Jiang, *China: Evolving Demand in the World's Largest Agricultural Import Market*, United States Department of Agriculture, International Agricultural Trade Reports, 29 September 2020. Available at: <https://www.fas.usda.gov/data/china-evolving-demand-world-s-largest-agricultural-import-market> [last visit: 27/04/2021]

²⁶² F. Gale, J. Hansen, M. Jewison, *China's Growing Demand for Agricultural Imports*, EIB-136, U.S. Department of Agriculture, Economic Research Service, February 2014.

²⁶³ H. Jiang, *China: Evolving Demand in the World's Largest Agricultural Import Market*, United States Department of Agriculture, International Agricultural Trade Reports, 29 September 2020. Available at: <https://www.fas.usda.gov/data/china-evolving-demand-world-s-largest-agricultural-import-market> [last visit: 27/04/2021]

²⁶⁴ O. Wang, X. Gellynck, W. Verbeke, *Perceptions of Chinese traditional food and European food among Chinese consumers*, British Food Journal, 2016; K.R. Curtis, J.J. McCluskey, T.I. Wahl, *Consumer preferences for Western-style convenience foods in China*, China Economic Review, Vol. 18 No. 1, pp. 1-14, 2007.

for European and American foods, especially among the Chinese middle-class. Increase in consumers' demand for imported high-quality food appears to be mainly due to a twofold rationale: this uprising trend in demand is determined by the socio-economic evolution of the Chinese society, which has been shaped by a number of forces, such as income growth, globalization and urbanization. This socio-economic evolution, in turn, has determined an evolution of the traditional dietary consumption pattern, to which the potential of these two trade relationships is inextricably tied.

1.3.3 Evidence from the Wine and Dairy Import Sectors

Over recent years a fast-growing demand has elevated China to become a top destination for European exports, thanks to a growing middle-class that is increasingly attracted by European most iconic GI products. In fact, China is now the second destination for the export of European agri-food products protected by Geographical Indications.²⁶⁵ Chinese consumers appreciate the safety, quality and authenticity of European foods.²⁶⁶ In 2017, the share of European GI exports had reached 42% of total agri-food sales, with 20% of intra-EU markets and 22% of extra-EU markets, having United States, China and Singapore as the three most popular destinations.²⁶⁷ In 2021, the value of European GI export to China is estimated at 11.5 billion euros, accounting for 9% of the total GI exports, including agri-food, wines and spirits.²⁶⁸ The majority of the exported European GIs is pulled by a very few GI products (*e.g.*, Scotch Whisky) and came primarily from France, Italy and the United Kingdom.²⁶⁹ Hopefully, the Sino-EU trade agreement on the protection of Geographical Indication will pave the way for trade of even more GIs coming from both countries.

²⁶⁵ Agricultural and Rural Development, *EU-China agreement protecting geographical indications enters into force*, European Commission News, 1 March 2021. Available at: https://ec.europa.eu/info/news/eu-china-agreement-protecting-geographical-indications-enters-force-2021-mar-01_en#:~:text=In%202020%2C%20China%20was%20the,food%20products%20and%20spirit%20drinks. [last visit: 12/05/20]

²⁶⁶ *Id.*

²⁶⁷ Á. Török, L. Jantyk, Z. M. Maró, H. V. J. Moir, *Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature*, 12 November 2020.

²⁶⁸ European Commission, *EU-China agreement protecting geographical indications enters into force*, News, Brussels, 1 March 2021. [last visit: 24/04/2021] https://ec.europa.eu/info/news/eu-china-agreement-protecting-geographical-indications-enters-force-2021-mar-01_en

²⁶⁹ Á. Török, L. Jantyk, Z. M. Maró, H. V. J. Moir, *Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature*, 12 November 2020.

It may surprise some to discover that China is the most profitable extra-EU market for the wines of Bordeaux (France), a product protected as a GI in China since 2015.²⁷⁰ Bordeaux wines had been the most well-known across China for two decades, with a remarkable consumer awareness of 52%.²⁷¹ In fact, red wine is exceptionally popular in the country: what used to be a trend limited to special occasions, turned into a new gift-giving habit to slowly transform into a personal consumption habit. Originally, wine was a drink for men, but has now seduced new segments of the population, including women and young people in general. Some even expect wine to replace the widely popular traditional drink of Baijiu for the rising middle class, especially among younger generations who are particularly health conscious and fascinated by western lifestyles.²⁷² Chinese consumers consider consumption of Western foods as being fashionable, aesthetically pleasing and a symbol of high social status.²⁷³

A staggering number of 213 million bottles of wine were imported into China during the first half of 2020.²⁷⁴ France, Italy and Spain rank among China's top five wine importers, whereas the United States finds itself at the sixth place, behind much smaller countries.²⁷⁵ Moreover, wines and spirits account for 51.1% of GIs in force worldwide, and Europeans hold most of those GIs. The wine sector has traditionally been an area of competitiveness between Europe and the United States. The American Wine Institute claims that the European GI protection system provides protection for a group of "inappropriate GIs" (e.g., Prosecco), and therefore restricts fair competition and consumer choice whilst it appropriates of private property rights for the benefit of only a handful of European winemakers.²⁷⁶ To Prosecco wine,

²⁷⁰ W. Hu, 2020; N. Wang, *Bordeaux suffers sales dip at home and in China*, 7 November 2018. Article posted on the [thedrinksbusiness.com](https://www.thedrinksbusiness.com) [last visit: 27/04/2021]

²⁷¹ *INS Global's 2020 Guide to Wine in China*, INS Global Expansion Simplified, 9 September 2020. [last visit: 27/04/2021] <https://ins-globalconsulting.com/ins-globals-2020-guide-to-wine-in-china/>

²⁷² A. Jourdan, *China's baijiu, drink of generals, pushed to bargain bin*, 2013. Available at: <https://www.reuters.com/article/us-china-baijiu-idUSBRE9891C920130910> [last visit: 29/04/2021]

²⁷³ K. R. Curtisa, J. J. McCluskey, T. I. Wahl, *Consumer preferences for western-style convenience foods in China*, *China Economic Review* 18, 2007.

²⁷⁴ S. Wu, *China wine imports down by a third*, *Decanter*, 14 August 2020. Article available at: <https://www.decanter.com/wine-news/china-wine-imports-coronavirus-slow-recovery-from-june-442583/#:~:text=A%20total%20of%20160%20million,31%25%20to%20752.9%20million%20USD> [last visit: 12/05/2021]

²⁷⁵ N. Wang, *China's top 10 wine importing countries in 2018*, 27 February 2019. [last visit: 27/04/2021] <https://www.thedrinksbusiness.com/2019/02/chinas-top-10-wine-importing-countries-in-2018/2/>

²⁷⁶ Wine Institute's Tom LaFaille, *TTIP Opportunities and Challenges for the U.S. Wine Sector*, May 21, 2014.

for instance, protection has been granted under the Sino-EU Agreement on Geographical Indications, along with many other wine names that are considered generic or semi-generic in the US, like Chianti and Porto. US Congress openly showed its concern over the recognition of European Geographical Indications abroad and the issue of restricted market access for American agricultural producers and winemakers.²⁷⁷ This applies, also to the case of the Sino-EU Agreement on Geographical Indications, as well as to other Agreements the EU has signed with third countries, such as Canada and South Korea. Some GI-specific provisions included in those agreements have raised concerns among American winemakers as they provide an increased level of protection for European protected wines in these countries.²⁷⁸ Such regulations could restrict US exports to these non-EU countries of some wine and food products that use for marketing purposes what within the United States is considered a “semi-generic” or “generic” name.²⁷⁹

China is also the world’s top market for dairy imports, valued at \$12 billion in 2019,²⁸⁰ and even for dairy products, which are not staple foods of the traditional Chinese diet, China is the first EU importer.²⁸¹ Cheese has become another promising export to China, thanks to its reputation as being rich in protein and calcium. An intriguing detail in this new booming commerce is that despite the majority of the Chinese people, like much of Asians, actually being lactose intolerant,²⁸² per capita consumption of milk is on the rise, accounting for 35 kilograms per year.²⁸³ In 2020, China purchased over 129 thousand metric tons of cheese, scaling up from about 115 thousand tons in the previous year, of which 7 thousand coming from the US, and

²⁷⁷ WIPO, *World Intellectual Property Indicators 2019*, Geneva: World Intellectual Property Organization, 2019

²⁷⁸ R. Johnson, *The U.S. Wine Industry and Selected Trade Issues with the European Union*, Congressional Research Service, 25 July 2016.

²⁷⁹ *Id.*

²⁸⁰ H. Jiang, *China: Evolving Demand in the World’s Largest Agricultural Import Market*, United States Department of Agriculture, International Agricultural Trade Reports, 29 September 2020. Available at: <https://www.fas.usda.gov/data/china-evolving-demand-world-s-largest-agricultural-import-market> [last visit: 27/04/2021]

²⁸¹ W. Hu, 2020.

²⁸² Y. G. Wang, Y. S. Yan, J. J. Xu, R. F. Du, S. D. Flatz, W. Kühnau, G. Flatz, *Prevalence of primary adult lactose malabsorption in three populations of northern China*, Hum Genet, 1984.

²⁸³ H. Jiang, *China: Evolving Demand in the World’s Largest Agricultural Import Market*, United States Department of Agriculture, International Agricultural Trade Reports, 29 September 2020. Available at: <https://www.fas.usda.gov/data/china-evolving-demand-world-s-largest-agricultural-import-market> [last visit: 27/04/2021]

more than 15 thousand is imported from France, Italy and Denmark.²⁸⁴ All this testifies the recently emerging Chinese fresh taste for food and underscores the potential of the Sino-EU and Sino-US trade relationships in the dairy sector. Undoubtedly, it is a green light for European exporters in the industry. In fact, the Vice President of International Dairy Foods Association (IDFA), which advocates on behalf of America's dairy industry, expressed the American concern that “*whether the US industry waits too long to engage, even more market share may be lost to competitors like the European Union*”.²⁸⁵

Not surprisingly, among the products the EU submitted for protection under the Sino-EU Agreement are many cheese names, mainly coming from Italy, France and Spain. This effort from the EU to claim exclusive use of these cheese names (*e.g.*, asiago, feta, gorgonzola, fontina, etc.), dramatically affects the American dairy industry that commonly uses those terms to market its cheeses around the world. Last October, the US Dairy Export Council (USDEC) and National Milk Producers Federation (NMPF) submitted a comment on the major trade obstacles the US dairy industry is facing in its key export markets, China, Mexico and Canada. Among the biggest impediments to the Chinese cheese market cited by organizations were Geographical Indications.²⁸⁶ A very representative example is Feta cheese, which Europe recognized as a Greek GI, whereas in the United States the name “feta” simply refers to a style of cheese, being classified as generic. Under the Sino-EU Agreement, also China recognized Feta cheese as a foreign GI,²⁸⁷ and therefore products labelled “feta” coming from the US or any other country could not be sold in the market as long as they make use of that protected name. This is similar to what

²⁸⁴ Y. Ma, *Cheese import volume in China 2014-2020*, Statista, 1 April 2021; Y. Ma, *Volume of cheese imported to China in 2020, by leading exporting country*, Statista, 8 March 2021; iiMedia.cn 艾媒报告, “2019-2020 zhōngguó rǔyè hángyè yùnxíng dàshùjū jí shìchǎng qūshì yánjiū bàogào” 2019-2020 中国乳业行业运行大数据及市场趋势研究报告[*Statistical research on the Chinese dairy industry and its relative market trends*], 2020; CNII, “zhōng guó chǎn yè xìn xī wǎng nián zhōng guó nǎi lào háng yè chǎn liàng jìn kǒu qíng kuàng jí wèi lái háng yè xiāo fèi fēn xī yùcè” 中国产业信息网, 年中国奶酪行业产量、进口情况及未来行业消费分析预测[图] [*Production and import of Cheese products in China in 2020 and future development of this consumption trends (with charts)*], 21 February 2021.

²⁸⁵ B. Rasdall, *An Outlook on U.S. Dairy Exports to China*, 10 September 2020. Available at: <https://www.idfa.org/news/an-outlook-on-u-s-dairy-exports-to-china#:~:text=Grated%20cheese%20exports%20to%20China,the%20same%20period%20last%20year.> [last visit: 12/05/2021]

²⁸⁶ *USTR report cites impediments to U.S. dairy exports*, Dairy Foods, 1 April 2021. Available at: <https://www.dairyfoods.com/articles/94940-ustr-report-cites-impediments-to-us-dairy-exports> [last visit: 29/04/2021]

²⁸⁷ At some special conditions we shall see in chapter 2.1.3.

happened with the EU-Korea FTA, about which the American Congressional Dairy Farmers commented: *“America’s dairy industry will not be able to maintain, let alone enhance, its current level of exports if we do not combat European efforts to carve out the sole right for their producers to use many of the commonly used cheese names most familiar to consumers around the world (e.g. feta, parmesan, gorgonzola, provolone, etc.)”*.²⁸⁸

²⁸⁸ *Dairy GI Issue Related To Korea FTA Still Unresolved Despite Auto Deal*, Letter from Congressional Dairy Farmers Caucus to USTR Ron Kirk, September 27, 2010; World Trade Online, December 8, 2010.

2 A CASE STUDY: THE SINO-EU AND SINO-US AGREEMENTS

2.1 THE SINO-EU AGREEMENT

2.1.1 A backgrounder

The 14th of September 2020, after eight years, the negotiation for the EU-China Agreement on cooperation on and protection of Geographical Indications was finally concluded. This deal has been described as a “*landmark*”²⁸⁹ agreement by the EC Press, as its signature carries promising meanings.²⁹⁰ In fact, it has understandably been hailed as such because of several high notes. The Agreement has shown that the Parties trade relation have entered a stage of high-quality development and marks the beginning of a commercial exchange of premium quality, certified and authentic product between the two countries.²⁹¹ Moreover, it proves both countries positive progress and commitment in IPR protection and encourages China in improving the system now in place for the protection of Geographical Indications.²⁹²

“*With its signature, China decided to go for the European system of protecting the quality of products based on their origin,*”²⁹³ proudly states Inma Rodríguez-Piñero, responsible for Sino-EU trade relations. Some say this deal may lead to the Chinese transition from a US-modelled trademark regime to a more EU-inspired *sui generis* protection system.²⁹⁴ In fact, we can well say that the RPC engaged in a “*legal transplant*”,²⁹⁵ adopting some important EU provisions to correct the asymmetry in GI protection on a national level.²⁹⁶ The signature of this deal marks the beyond-WTO protection

²⁸⁹ *EU and China sign landmark agreement protecting European Geographical Indications*, IP/20/1602, Press Release, Brussels, 14 September 2020. [last visit: 18/03/2021]

²⁹⁰ S. Xia, *100-100 GI Agreement China – EU: Finally Official!*, Mondaq, 13 November 2020 [last visit: 19/03/2020]

²⁹¹ *Id.*

²⁹² Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

²⁹³ *Mutual recognition of geographical indications is encouraging sign for EU-China cooperation*, S&D - Socialists & Democrats in the European Parliament, 11 November 2020. Article posted on socialistsanddemocrats.eu [last visit: 18/03/2021]

²⁹⁴ F. Cazzini, *EU and China around the Same Table: The New Agreement on Geographical Indications, Trade, Labor and EU Law Perspectives*, Wolters Kluwer, 1 December 2020. Article posted on Kluwer Regulating for Globalization Blog. [last visit: 18/03/2021]

²⁹⁵ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974

²⁹⁶ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021. [last visit: 22/03/2021]

for many European GIs in the Chinese territory and vice versa according to the “*Old-World*” approach.²⁹⁷ Thus, it manifests EU’s rule-making power in external trade.²⁹⁸

Furthermore, the Sino-EU Agreement links the two markets by a double thread to propel trade of high-quality agri-food to new highs.²⁹⁹ From the date of signature on, Europe and China expect a collaboration aimed at an effective implementation and enforcement of the Agreement on both sides, and promotion of their iconic GI products in the two markets.³⁰⁰ The Parties’ objective to cooperate for the development and trade of protected Geographical Indications is emphasized in the Agreement preamble:

“CONSIDERING that the Parties agree to promote between them harmonious cooperation and the development of geographical indications as defined in Article 22(1) of the Agreement on Trade - related Aspects of Intellectual Property Rights (the “TRIPS Agreement”) and to foster the trade of products carrying such geographical indications originating in the territories of the Parties”.

China and Europe both have a long and successful culinary tradition, endowed with abundant GI products that sometimes even characterize their place of origin.³⁰¹ The Agreement includes a list of 100 European GIs and 100 Chinese GIs to be protected against misuse and usurpation. Another list of 175 will follow.³⁰² China proposed many famous GI products, ranging from varieties of tea, like 安吉白茶 *Anji Bai Cha* (Anji White Tea), 松溪绿茶 *Songxi Lü Cha* (Songxi Green Tea), to fruit well-known around the world like 吉县苹果 *Jixian Pingguo* (Jixian Apple).³⁰³ Among the names Europe has advanced there are some very iconic Western cheeses, like *Grana Padano*, but also foods and wines, like *Champagne* and *Prosciutto di Parma*; and some others that are as iconic as they are controversial, like *Feta* and *Asiago*.³⁰⁴ Debates will

²⁹⁷ T. Josling, *The war on terroir: Geographical Indications as a Transatlantic Trade Conflict*, Freeman-Spogli for International Studies, Stanford University, 2006

²⁹⁸ W. Hu, 2020

²⁹⁹ *China-EU landmark Geographical Indications Agreement to propel trade of high-quality products to new highs*, Xinhua News, 8 January 2021. [last visit: 18/03/2021]

³⁰⁰ J. Wojciechowski, *EU-China agreement protecting geographical indications enters into force*, Agriculture and Rural Development, Brussels, 1 March 2021. [last visit: 18/03/2021]

³⁰¹ W. Hu, 2020

³⁰² *EU and China sign landmark agreement protecting European Geographical Indications*, IP/20/1602, 2020. [last visit: 18/03/2021]

³⁰³ Annex V and VI of the Sino-EU Agreement.

³⁰⁴ Annex III and IV of the Sino-EU Agreement.

possibly arise considering that a number of these GI products are considered generic and exported around the world by the US.³⁰⁵ The EU GI agenda is referred to as “aggressive” and “highly concerning” by the USTR.³⁰⁶ The reason is the possible and significant impairment of the scope of trademarks and other IP rights held by US,³⁰⁷ and the consequent undercut of market access for American exporters,³⁰⁸ as we will further investigate as we go through each GI-specific Article of the Sino-US Agreement under section 2.2.3.³⁰⁹

“I am proud to see this agreement getting one step closer to its entry into force, reflecting our commitment to work closely with our global trading partners such as China. [...] This agreement will contribute to do this, while also strengthening our trading relationship, benefitting our agri-food sector and consumers on both sides,” proudly states Agriculture and Rural development Commissioner Janusz Wojciechowski.³¹⁰

As implied by the previous commentary, the Sino-EU Agreement is in all respects a deal concluded by two especially important trading partner countries. In 2020, China has overtaken the United States, to become the top trading partner in goods for both the EU (and US itself).³¹¹ Most importantly, China is the third destination for EU agri-food products, having reached €16.3 billion in exports in 2020.³¹²

Note that issues related to food safety and food security represent an area of concern for the RPC. China is in fact facing an equation not easy to solve: how to feed 21% of the world’s population with only 12% of land available and 9% of the water? Trade and innovation can provide an answer to this mathematical brain teaser.³¹³ The two trading partners’ collaboration in the field of agri-food is not limited to Geographical Indications. In accordance with the EU-China Cooperation Plan of 2020, the two countries are going to keep cooperate for innovation and research, with an eye to sustainable agriculture. Both the ongoing and future projects in the agri-food field

³⁰⁵ Feta is probably the most flagrant example. *Feta cheese exports to the United States skyrocket*, Ekathimerini, 9 September 2012. Article posted on Ekathimerini.com [last visit: 23/03/2021]

³⁰⁶ *S2019 Special 301 Report*, Office of the United States Representative, April 2019

³⁰⁷ *Id.*

³⁰⁸ C. Viju, M. T. Yeung, W. A. Kerr, *Geographical Indications, Barriers To Market Access And Preferential Trade Agreements*, CATPRN Commissioned Paper, 2012

³⁰⁹ Under chapter 2.2.

³¹⁰ *EU and China sign landmark agreement protecting European Geographical Indications*, IP/20/1602, 2020

³¹¹ W. Hu, 2020 and A. Timsit, *China dethroned the US as Europe’s top trade partner in 2020*, Quartz, 15 February 2021. Article posted on qz.com [last visit: 19/03/2021]

³¹² *EU-China Geographical Indications Agreement – Factsheet*, Press Release, Brussels, 2020

³¹³ J. Sun, J. Lepeintre, *Building Food Safety Governance in China*, Luxemburg Publication Office of the European Union, 2018

will be strongly oriented to create a sound food market for the two nations, focusing on food security and safety.³¹⁴ In fact, the diplomatic incidents under Trump administration pushed China to call for closer cooperation with the EU rather than the US in both trade and innovation.³¹⁵ The signature of *EU–China Comprehensive Agreement on Investment* (CAI) is a sign of this rapprochement.

2.1.2 Body and Structure of the Agreement

The 1st of March 2021, the EU-China Agreement on cooperation and protection of geographical indications has entered into force. It is a standalone agreement that makes its way beyond WTO provisions. The deal sets out some interesting rules about co-existence with prior Intellectual Property Rights, which naturally include Trademarks,³¹⁶ and leaves the door open to broadening the scope of mutual protection to new GIs in the future.³¹⁷

According to the published text, the Agreement contains only 14 articles, but it sets a *de facto* quite high level of protection rules and requirements for Geographical Indications.³¹⁸ The body of the Agreement is therefore broken into 14 units, that specifically are: Scope of the Agreement, Established Geographical Indications, Addition of Geographical Indications, Scope of Protection of Geographical Indications, Right of Use of Geographical Indications, Relationship with Trademarks, Enforcement of Protection, General Rules, Transparency and exchange of information, Joint Committee, Cooperation, Territorial Scope, Authentic texts, and Entry into force, amendments and termination. In terms of GI protection, we split the analysis in three sections: protection of Geographical Indications, relationship with Trademarks, and commitments to foster bilateral trade of GIs.

One of the most interesting issues is certainly addressed under Article 6 for the relationship with Trademarks. In fact, this segment attracted special attention, as some relevant contents and crisscrossing obligations may cause international disputes on the treatment of Geographical Indications.³¹⁹ It can be said that the RPC

³¹⁴ EU-China 2020 Strategic Agenda for Cooperation

³¹⁵ J. Chan, *What's New About China's Latest EU Policy Paper?*, *The Diplomat*, 14 February 2019. Article published on thediplomat.com [last visit: 19/03/2020]

³¹⁶ H. Gang, 2020

³¹⁷ According to Article 3 and 10, as we will further investigate below.

³¹⁸ G. Hu, *Evaluating the treatment of geographical indications in China*, posted on ManagingIP.com, March 17 2020 [last visit: 19/03/2021]

³¹⁹ G. Hu, 2020; W. Hu, 2020.

engaged in a real “*legal transplant*”,³²⁰ adopting some important EU provisions to correct the asymmetry in GI protection on a national level.³²¹

Six annexes are attached to the Agreement. Annex I is divided in Part A and Part B, that respectively concern the Legislation of the People's Republic of China and the European Union legislation. It consists in a list of the Parties most relevant legislations to the issue of Geographical Indications protection and enforcement in their territory. This is especially important since the Agreement in question is expected to provide mutual protection in the territory of the Parties. The Geographical Indications in the Annexes are going to be incorporated in the Parties relevant register with effect from the date of the entry into force of the Agreement,³²² therefore the legislation of the Parties can be regarded as an important precondition to effective enforcement. As we will see further in the investigation, the *Trademark Law of the People's Republic of China*, the *Regulations for the Implementation of the Trademark Law of the People's Republic of China* and the *Measures for Protection of Foreign Geographical Indication Products* are particularly relevant to the application and enforcement of GI protection in the Chinese territory.

Annex II is a form to be filled in compliance with GIs technical specification. As provided under Article 2.2 and 2.3, both sides shall first exchange relevant information concerning the Geographical Indications proposed for mutual protection in Annex III and IV. At a later date, GIs listed under Annex V and VI shall also undergo this procedure.³²³

Annex III and IV are two lists that respectively concern one hundred European GIs and one hundred Chinese GIs. These Geographical Indications shall be incorporated in the counterpart relevant register with effect from the date of entry into force of this Agreement.³²⁴ Annex V and VI are also two additional lists of GIs respectively from the European and Chinese side, of 175 GIs each. The list of 175 GIs from both sides will be protected within the 4 years after the date of entry into force of the Agreement, the 1st of March 2021.³²⁵

³²⁰ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974

³²¹ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³²² Article 4.1 of the Sino-EU Agreement.

³²³ Article 3 of the Sino-EU Agreement.

³²⁴ Article 4.1 of the Sino-EU Agreement.

³²⁵ *China-EU: Entry into force of the GIs stand-alone bilateral agreement*, oriGIn, 2021. <https://www.origin-gi.com/117-uk/news/15576-02-03-2021-china-eu-entry-into-force-of-the-gis-stand-alone-bilateral-agreement.html> [last visit: 22/03/2021]

Finally, Annex VII includes a list of 17 GIs identifying products originating and protected in the Chinese territory that, upon enlargement of the scope of protection of GIs under the Agreement, shall be given priority for protection.³²⁶ This is a special list of GIs as it mainly includes handicrafts, a type of good yet to be protected in Europe.

2.1.3 Assessing the treatment of Geographical Indications

2.1.3.1 Protection of Geographical Indications

Article 1 Scope of the Agreement

1. This Agreement applies to the cooperation on, and protection of, geographical indications of products which originate in the territories of the Parties.

2. The Parties agree to consider extending the scope of geographical indications covered by this Agreement after its entry into force to other product classes of geographical indications not covered by the scope of the legislation referred to in Article 2, and in particular handicrafts, by taking into account the legislative development of the Parties.

For the purposes referred to in the first subparagraph of this paragraph, the Parties have included in Annex VII names identifying products originating and protected in their territory that, upon enlargement of the scope of protection of this Agreement, shall be given priority for protection in accordance with the procedures set out in Article 3 of this Agreement.

The Parties shall review the progress made in enlarging the scope of protection of this Agreement within two years from the date of entry into force of this Agreement and conduct a review every two years thereafter.

Article 1 is an example of the dual nature of the Agreement, which oscillates between hard and soft law: on one hand, the Parties aim at a binding commitment to mutual protection of national GIs; on the other hand, the Parties show their intention to engage in further discussion on a few points that can foster long-term bilateral collaboration in the field. In fact, the Agreement involves mutual protection of agricultural GIs (Art. 1.1) but may be enlarged to include other classes of GIs (Art. 1.2).

³²⁶ Article 1 of the Sino-EU Agreement.

The level of “*legal inflation*”³²⁷ is, as usual, higher for the European rather than American agreements.³²⁸ However, openness to dialogue appears to be more than just soft law for the EU. The willingness of the Parties is supported by some binding bilateral commitments as well as by a real interest from the Western side to conclude the Agreement with such an important fast-growing market like China.³²⁹ As mentioned above, under the second paragraph, the European Party has pledged to consider broadening the scope of protection to include other classes of GIs, in particular handicrafts. This can be considered an issue that is worth to comment on, as it was a cause of delay in the Sino-EU negotiations.³³⁰

At Union level, only agricultural GIs are eligible for protection,³³¹ as reported under some regulation listed in Annex I, such as (EEC) No 1601/91 and (EC) No 110/2008 of the European Parliament.³³² By contrast, handicraft and other non-agricultural products represent an important piece of the puzzle for Chinese long-established traditional production.³³³ An extension in scope of protection could help the EU in its bilateral negotiations with countries that, similarly to China, are already protecting non-agricultural GIs.³³⁴ China is an important new player in both multilateral and below multilateral level negotiations, therefore a transition to an EU-inspired GI protection system may change the global balance of power on the GI issue.³³⁵

Under Article 1.2, the Parties agreed to consider legislative development so that is possible to cooperate for the protection of non-agricultural GIs across state borders. Despite the level of bindingness is low, as it would be very difficult to prove that the Parties have not “*considered*” to extend the scope of protection,³³⁶ we can well say the EU has shown a genuine interest in this matter over the years and is currently

³²⁷ *i.e.*, the amount of non-legally enforceable provisions.

³²⁸ H. Horn, P. C. Mécrodis, A. Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 2009

³²⁹ As seen under chapter 1.3.

³³⁰ *Non-Agricultural Products' Names in the EU*, oriGIn, 2021. Article posted on origin-gi.com [last visit: 22/03/2021]

³³¹ W. Hu, 2020

³³² Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³³³ *Id.*

³³⁴ *Non-Agricultural Products' Names in the EU*, oriGIn, 2021. Article posted on origin-gi.com [last visit: 22/03/2021]

³³⁵ H. Ilbert, M. Petit, *Are Geographical Indications a Valid Property Right? Global Trends and Challenges*, Development Policy Review, 2009

³³⁶ H. Horn, P. C. Mécrodis, A. Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 2009

assessing the feasibility of this extension.³³⁷ Moreover, in the second and third paragraph of Article 1.2, the Parties agreed on two more binding commitments: a precise list of Chinese GIs to prioritize was selected³³⁸ and a clear date to review their progress in the extension of GI protection was set.

Under Article 2.1, the China-EU Agreement on Geographical Indications avoids more complicated and time-consuming legal amendments or interpretations, and partially solves the problem of differences in the definition of "Geographical Indications" in the national laws from the two sides by advancing the definition the two Parties have agreed on under TRIPS.³³⁹ Note that the TRIPS definition leaves the door open to extending the scope of protection to categories of Geographical Indications not yet covered by EU laws, in particular handicrafts.³⁴⁰

Under Article 2.2, the Parties ensured that both national legislations allow for an effective IP protection. This point is fundamental to guarantee that a symmetrical commitment on both sides is achievable. For the reader convenience, we will analyze only the most relevant points of this Article.

The level of protection set out for GIs is very solid. Note that point (e) provides for the *ex officio* enforcement in the Parties territory. *Ex officio* enforcement is one of the privileged GI protection instruments granted under a *sui-generis* system; it implies that competent authorities in the territory must take the necessary measures to stop GI infringement in the territory. In contrast, whether a geographical name is protected under the trademark system, it is a producer's own responsibility to enforce his rights through civil or criminal procedure.³⁴¹ As seen under chapter 1.2.3, the Chinese national GI system can be classified as a hybrid form between the *sui generis* and trademark system,³⁴² and therefore *ex officio* enforcement can also be granted.³⁴³ Point (g) allows for an unspecified opposition procedure that "*takes into account*" the interests of prior users of geographical names, which naturally include

³³⁷ In 2013, a Study on non-agricultural Geographical Indications in the European Union was published. In 2015, the European Parliament adopted a resolution on the possible extension of GIs protection to non-agricultural goods. And, at the moment, the EU is undertaking an impact assessment study for the evaluation of several policies covering legislative and non-legislative alternatives to protect non-agricultural GIs on the Union level.

³³⁸ Annex VII of the Sino-EU Agreement

³³⁹ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³⁴⁰ *Id.*

³⁴¹ W. Hu, 2020

³⁴² D. Giovannucci, T. Josling, W. Kerr, B. O' Connor, M. T. Yeung, 2009

³⁴³ This right is also reaffirmed under Article 7 of the Sino-EU Agreement.

trademark owners and users of generic terms.³⁴⁴ Under point (g) the level of legal inflation appears to be very high, as it is difficult to prove if and to what extent the interests of prior users should be considered.³⁴⁵ On one hand, in case disagreement is raised on legitimacy of a GI in the list, this represents an advantage. On the other hand, this allows much freedom of performance to the other Party.

The Article goes on to say:

2. Having examined the technical specifications set out in the form laid down in Annex II for the geographical indications of the People's Republic of China listed in Annex III, [...] the European Union undertakes to protect those geographical indications according to a level of protection no less than that laid down in this Agreement.

3. Having examined the technical specifications set out in the form laid down in Annex II for the geographical indications of the European Union listed in Annex IV, [...] the People's Republic of China undertakes to protect those geographical indications according to a level of protection no less than that laid down in this Agreement.

Article 2.2 and 2.3 set out two obligations mirroring one another that provide for the protection of Geographical Indications of 100 GIs. This provision has a significant meaning as it provides that the EU will treat equally the rights of Geographical Indications acquired through three different registration procedures in China, that are allowed under the *Trademark Law*, the *Regulations on the Protection of Geographical Indication Products* and the *Measures for the Administration of Geographical Indication of Agricultural Products*.³⁴⁶ Moreover, both Parties allow for the simplification and unification of the registration procedures of the listed Geographical Indications.³⁴⁷ We can well say these mirror obligations are the milestone achieved throughout the negotiation, as the EC press emphasized.³⁴⁸ Note that the level of protection laid down by this Agreement is naturally going beyond TRIPS, as there is an extension of full protection to non-alcohol-based products. This is exactly what the United States is trying to avoid, as it may represent an obstacle to its agri-food exporters.³⁴⁹

³⁴⁴ G. Hu, 2020.

³⁴⁵ H. Horn, P. C. Mecroidis, A. Sapir, 2009.

³⁴⁶ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³⁴⁷ *Id.*

³⁴⁸ *EU and China sign landmark agreement protecting European Geographical Indications*, IP/20/1602, 2020

³⁴⁹ C. Viju, M. T. Yeung, W. A. Kerr, 2012

Article 4 provides specific guidelines concerning what the Parties should protect the counterpart's GIs from. This matter naturally involves other IPR-holders, such as Trademarks' owners, and users of generic terms.³⁵⁰ Article 4.1 and 4.2 is especially worth noting, as it provides for a very solid GI protection³⁵¹ and can be defined as a real "legal transplant" from the EU regulations.³⁵²

Article 4 Scope of protection of geographical indications

1. In respect of the geographical indications listed in Annex III or IV, including geographical indications added thereto pursuant to Article 3 of this Agreement, each Party shall protect them against (4):

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use of a geographical indication identifying an identical or similar product not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation³⁵³, transcription³⁵⁴ or transliteration,³⁵⁵ or accompanied by expressions such as "kind", "type", "style", "imitation" or the like;

(c) any use of a geographical indication identifying an identical or similar product not compliant with the product specification of the protected name.

Article 4.1 starts settling down protection against the misleading use of protected names in a manner which misleads the public as to the geographical origin of the good. We can see that China has fully adopted European rules on this matter.³⁵⁶

³⁵⁰ G. Hu, 2020

³⁵¹ *China-EU: The Signature of the stand-alone GIs Agreement*, oriGIN, 14 September 2020. <https://www.origin-gi.com/activities/policy-and-advocacy/259-advocacy-origin-alerts/15221-14-09-2020-china-eu-the-signature-of-the-stand-alone-gis-agreement.html> [last visit: 22/03/2021]

³⁵² Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³⁵³ Translation is providing the equivalent of a word in another language.

³⁵⁴ Transcription involves writing the sounds of one language using the script of another language.

³⁵⁵ Transliteration means using the script of one language to write a word from another language.

³⁵⁶ See Article 16 and Article 23 of *Regulation (Ec) No 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89*, 15 January 2008

Subparagraph (b) goes the extra mile in advancing the protection of GIs,³⁵⁷ as it prohibits the use of a protected geographical name that indicates a similar product not originating from the area in question. This rule also applies when the geographical name is used in translation, transcription or transliteration, or accompanied by de-localizers such as "kind", "type", "style", "imitation" or the like, notwithstanding the indication of the true origin.³⁵⁸

In contrast with a *sui generis* system, trademark registration usually does not include translation, transliteration or transcription, nor prohibits the use of de-localizers.³⁵⁹ Therefore, the use of protected names to suggest a good is originated in a certain geographical area other than the true place of origin, will not be allowed to be included in trademarks names in the Parties' territories.³⁶⁰ This cause restricted market access for unlawfully trademarked products concerning the names in the lists,³⁶¹ thereby justifying the concern of the United States agri-food exporters regarding the issue of market access to China.

Besides, in the case of the Sino-EU trade, the specification given under subparagraph (b) is especially relevant. In China, obtaining protection for a translation of GIs can be a real challenge. Homophonic synonyms are one of the causes. Having homophonic ideograms means that several combinations of Chinese ideograms sound alike and may refer to the same geographical name.³⁶² The matter gets even more complicated when there is no equivalent for a direct translation (as often happens for traditional European products in Chinese), this can lead to several translators spelling the same word in different ways.³⁶³ It is therefore important to minimize the risk of goods entering the market hiding behind a translation,

³⁵⁷ T. Lu, *European Council authorises signature of the EU-China agreement on geographical indications*, the IPKat, 28 July 2020. Article posted on IPKitten.blogspot.com [last visit: 22/03/2021]

³⁵⁸ *China-EU: The Signature of the stand-alone GIs Agreement*, oriGIn, 14 September 2020 [last visit: 22/03/2021]

³⁵⁹ W. Hu, 2020

³⁶⁰ With a few exceptions.

³⁶¹ C. Viju, M. T. Yeung, W. A. Kerr, *Geographical Indications, Barriers To Market Access And Preferential Trade Agreements*, CATPRN Commissioned Paper, 2012

³⁶² T. Little, *Overcoming the challenge of obtaining protection for the Chinese translation of GIs*, *World Trademark Review*, 17 December 2019. Article posted worldtrademarkreview.com [last visit: 22/03/2021]

³⁶³ W. Hu, 2020

transcription or transliteration carefully designed with the aim of misleading the consumer and exploiting the original product reputation.³⁶⁴

Furthermore, the choice to protect GIs against misleading use of translation and de-localizers is not only beneficial to consumer protection, but also prevents the phenomenon of “*passing off*”.³⁶⁵ In this hypercompetitive market, to fulfill their functions as distinctive signs, GIs need to be protected to fend off those who would *pass off* counterfeits as the legitimate branded article.³⁶⁶ According to the EU, prevent this phenomenon also safeguards GIs from dilution of reputation, as the use of the protected names is limited to the original products.³⁶⁷

2.1.3.2 *Relationship with Trademarks*

Article 6 is the most relevant to the issue of restricted market access and misleading trademarked products. Under the Agreement, the level of protection provided to GIs is particularly high, as the Parties have fully adopted the rules of the European Union³⁶⁸ concerning *Protection of Geographical Indications, Relation between trademarks and geographical indications, etc.*³⁶⁹

Article 6 sets out the expected way to resolution of conflicts in a several possible scenarios.³⁷⁰

Article 6 Relationship with trade marks

1. *The Parties shall, ex officio or at the request of an interested party, refuse or invalidate the registration of a trade mark which consists of a geographical indication or its translation or transcription, with respect to identical or similar products not having the origin indicated by that geographical indication, in accordance with their respective rules, provided that the application for registration of the trade mark has been submitted after the date of protection for the geographical indications listed in Annex III or IV, or after*

³⁶⁴ S. Michalopoulos, *EU member states to take China to court over fake geographical indications*, Euractiv, 11 August 2017. Article posted euractiv.com [last visit: 22/03/2021]

³⁶⁵ W. Hu, 2020

³⁶⁶ C. Viju, M. T. Yeung, W. A. Kerr, 2012

³⁶⁷ D. Rangnekar, 2003

³⁶⁸ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³⁶⁹ *Id.* See Article 16 and Article 23 of *Regulation (EC) No 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89*, 15 January 2008

³⁷⁰ W. Hu, 2020

the date of application for protection for the geographical indications referred to in Article 3 of this Agreement, in the territory concerned.

2. The Parties shall also, at the request of an interested party, refuse or invalidate the registration of a trade mark which indicates that the good in question originates in a geographical area other than the true place of origin with respect to identical or similar products, provided that the application for registration of the trade mark has been submitted after the date of protection for the geographical indications listed in Annex III or IV, or after the date of application for protection for the geographical indications referred to in Article 3 of this Agreement, in the territory concerned.

In the first scenario (Article 6.1 and 6.2), if a GI name is already protected in the territory or the application for protection has already been submitted, pending or future requests for registration of Trademarks that are against the regulation provided under Article 4, shall be refused or invalidated.³⁷¹

3. Nothing in this Agreement shall oblige a Party to protect a geographical indication of the other Party under this Agreement where, in the light of a reputed or well-known trade mark, the protection would be liable to mislead the consumers as to the true identity of the product.

In the second scenario an exception to full protection is provided (Article 6.3).³⁷² Though the *sui generis* system would appear superior to trademark protection,³⁷³ if the coexistence of a well-known Trademark with a GI would mislead consumers, it's up to the Party to decide whether a GI shall or shall not be protected by the Agreement.³⁷⁴ Since consumer protection is one of the main rationales for GI protection,³⁷⁵ it comes as no surprise it is a priority for both Parties to ensure compliance with this principle.

4. The protection provided to the geographical indications listed in Annexes III and IV, under this Agreement, is without prejudice to the continued use and renewal of a trade mark which, in good faith, has been applied for, registered, or established through use if such possibility is provided for in the

³⁷¹ China-EU: *The Signature of the stand-alone GIs Agreement*, oriGIn, 14 September 2020. [last visit: 22/03/2021]

³⁷² W. Hu, 2020

³⁷³ *Id.*

³⁷⁴ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

³⁷⁵ As reported under chapter 1.2.1

legislation of the Party concerned, prior to the date of protection for the geographical indications listed in Annex III or IV, or prior to the date of application for protection for the geographical indications referred to in Article 3 of this Agreement.

In the third scenario the only possible condition to coexistence of TMs and GIs is provided (Article 6.4).³⁷⁶ If a trademark has been applied for, registered or established by use in good faith before the date of application for protection of the GI was submitted, the Trademark may continue to be used even if the Geographical Indication is protected by this Agreement, *i.e.*, the prior trademark and the Geographical Indication may coexist.³⁷⁷

Likewise, two additional lists of 175 GIs (Annex V and Annex VI) from both sides will be protected within the 4 years after the entry into force of the Agreement, and a list of Chinese handicraft GIs (Annex VII) might be protected in the future depending on the legislative development of the Parties as provided under Article 1.2, where the parties agreed to consider extending the scope of protection to other classes of GIs after the entry into force of the Agreement.³⁷⁸

We can well say that, according to the Sino-EU Agreement, GI protection date is decisive in the assessment of Trademarks treatment. This is the logical result of IPR territorial principle. Since this form of IP is issued on a territorial basis, it is natural that protection can only be awarded after the date of protection in the other Party's territory.

More specifically, there are three applicable GI protection dates as set out under Articles 6.4 and 6.5. Firstly, for the 100+100 GIs from EU and China listed in Annexes III and IV, published for protection on 2 July 2017, the date of protection is the date of entry into force of the Agreement, 1 March 2021. Secondly, for those GIs listed in Annexes V and VI, which were published for opposition at the date of entry into force of the Agreement, 1 March 2021, which corresponds to the application date. Thirdly, the date of protection for GIs under Annex V and VI is the date of entry into force of the Agreement.³⁷⁹

³⁷⁶ *China-EU: The Signature of the stand-alone GIs Agreement*, oriGIn, 14 September 2020 [last visit: 22/03/2021]

³⁷⁷ *Id.*

³⁷⁸ *China-EU: The Signature of the stand-alone GIs Agreement*, oriGIn, 14 September 2020. Article posted origin-gi.com [last visit: 22/03/2021]

³⁷⁹ W. Hu, 2020

Furthermore, under this Agreement, the EU has found two viable solutions to prevent that possible controversies arise over protected and generic names. In fact, the absence of an international agreement for the recognition of GIs has caused that some terms protected in some countries are simply considered generic in others.³⁸⁰ Some precautionary clauses set out two exceptions to full protection that specifically refer to some EU GIs which have been labelled as generic in some countries, such as Feta in the United States.³⁸¹

The first exception provided is phasing out:³⁸² for a period of transition the geographical name protected is still allowed to be used for that category of products, on condition that it can be proven that the product concerned has been placed on the Chinese market before 3 June 2017 and that the use of the term does not mislead consumers. It should be mentioned that it can be challenging to prove whether the public is misled.³⁸³ This strategy solely concerns a handful of terms, that are: Feta, Asiago and Romano (cheeses).³⁸⁴

The second exception concerns a small group of multi-component terms.³⁸⁵ If the individual component of a GI is not protected, the individual component is not protected term and therefore it is allowed for use for marketing purposes. The multi-component term as whole, however, is protected. For instance, under the Sino-EU Agreement, China agreed to protect some foreign Geographical Indications which name is a compound term, such as *Pecorino Romano* (a type of cheese) or *Vino nobile di Montepulciano* (a type of wine). In that compound name may be included an individual term that is considered generic, such as “pecorino” or “vino nobile di”. GI registration shall not provide protection for the individual generic terms of some specific compound.³⁸⁶ This exception to full protection solely concerns the terms: *queso, prosciutto, pecorino, vino nobile di, and mozzarella*.³⁸⁷

³⁸⁰ C. Viju, M. T. Yeung, W. A. Kerr, 2012

³⁸¹ These provisions are included in the notes under Annex IV.

³⁸² W. Hu, 2020 and *China-EU: The text of the GIs Agreement is now public*, oriGIn, 6 January, 2020. <https://www.origin-gi.com/activities/policy-and-advocacy/259-advocacy-origin-alerts/14880-06-01-2020-china-eu-the-text-of-the-gis-agreement-is-now-public.html> [last visit: 23/03/2021]

³⁸³ IP/C/W/247/Rev.1, 2001.

³⁸⁴ Notes of Annex VI.

³⁸⁵ W. Hu, 2020

³⁸⁶ C. Viju, M. T. Yeung, W. A. Kerr, 2012

³⁸⁷ Notes of Annex VI.

2.1.3.3 Commitments to foster bilateral trade of GIs

As introduced in the preamble, cooperation for bilateral trade is an integral part of the Agreement. In fact, even though the two countries did not agree on a precise volume of imports and exports, the intention to foster bilateral trade is indirectly but clearly proven by the Parties' commitments. Despite these obligations do not produce a direct impact on IPR enforcement and the fact that they present a certain level of legal inflation, these commitments are worth mentioning as they constitute an important output of the international European strategy, with the aim of pushing for the development and recognition of Geographical Indications around the world.

In accordance with Article 5.2, the Parties are authorized to bear each other's official GI symbols for the GIs listed in the Agreement. This arrangement is a 'first-ever' for both countries, and it should especially be of benefit to Chinese GIs accessing EU markets.³⁸⁸ Thanks to the use of the original distinctive signs consumers from both countries will be able to recognize the original symbols. And therefore, producers will gain instant recognition and confidence in the quality of the products.³⁸⁹ Moreover, Article 11 sets out that the Parties are responsible for promoting information on geographical indications and promoting public awareness.³⁹⁰

Finally, it should be mentioned that favorable conditions to bilateral protection of new GIs in the future have been set out. The Party have in fact established a Joint Committee (Article 10). The Committee consists of representative from both sides that, among other functions, are in charge of collecting and exchanging information for the purpose of considering the mutual protection of new GIs.³⁹¹ This clearly remarks the reciprocal intention to establish a long-term collaboration in the field.

2.2 THE SINO-US AGREEMENT

2.2.1 A backgrounder

"Today, the two most powerful economies in the world began to restore a positive, mutually beneficial trade relationship, and dairy producers and processors across the United States are

³⁸⁸ W. Hu, 2020

³⁸⁹ *Id.*

³⁹⁰ Article 11 (d) of the Sino-EU Agreement.

³⁹¹ Article 10 of the Sino-EU Agreement.

grateful,”³⁹² says Michael Dykes, President of the International Dairy Foods Association, on signing of Phase One US-China Deal.³⁹³

In fact, a particularity of the Sino-US Agreement is that it offers a glimpse into the current geopolitical situation.

This deal lays its foundation during a deterioration period of the relationship between the East and the West major economic powers. As Swaine emphasized: *“The U.S.-China relationship is confronting its most daunting challenge in the forty years since the two countries established diplomatic ties. Current trends portend steadily worsening relations over the long term, with increasingly adverse consequences for all actors involved. Specifically, Beijing and Washington are transitioning from a sometimes contentious yet mutually beneficial relationship to an increasingly antagonistic, mutually destructive set of interactions. The often positive and optimistic forces, interests, and beliefs that sustained bilateral ties for decades are giving way to undue pessimism, hostility, and a zero-sum mindset in almost every area of engagement”*. Certainly, both sides bear responsibility for this deterioration, but Trump administration (2017-2021) has primarily contributed to it, at least publicly. The American power has turned its back on the shared battle to transnational threats, such as climate change, and imposed heavy tariffs on China, with the aim of pushing Beijing towards a weaker involvement of State actors in national affairs.³⁹⁴

According to the Financial Times, the signature of the Phase One of the Agreement on 15 January 2020 was meant to pause the trade war that has weighed on the global economy for nearly two years.³⁹⁵ All this political pressure is reflected in the Agreement Preamble:

*“The Government of the United States of America and the Government of the People’s Republic of China (collectively the “Parties”),
RECOGNIZING the importance of their bilateral economic and trade relationship;
REALIZING that it is in the interests of both countries that trade grow and*

³⁹² Statement from Michael Dykes, President & CEO of the International Dairy Foods Association (IDFA), on Signing of Phase One U.S.-China Deal.

³⁹³ Hereinafter referred as the Sino-US Agreement.

³⁹⁴ M. D. Swaine, *A Relationship Under Extreme Duress: U.S.-China Relations at a Crossroads*, China Program of The Carter Center and the Institute of American Studies, Chinese Academy of Social Sciences, January 16, 2019

³⁹⁵ J. Politi, *US and China sign deal to pause trade war*, Financial Times, 16 January 2021. Article posted on ft.com [last visit: 16/03/2021]

that there is adherence to international norms so as to promote market-based outcomes;

CONVINCED of the benefits of contributing to the harmonious development and expansion of world trade and providing a catalyst to broader international cooperation;

*ACKNOWLEDGING the existing trade and investment concerns that have been identified by the Parties; and
RECOGNIZING the desirability of resolving existing and any future trade and investment concerns as constructively and expeditiously as possible”.*

The Agreement comes as an exchange which involves a relief in tariffs for purchasing commitments in services, manufactured goods, agri-food³⁹⁶ and energy, and IP mutual protection.³⁹⁷ The deal includes commitments by China to increase purchase of US products by at least \$200 billion over 2017 levels in the following two years.³⁹⁸ China also agreed not to manipulate its currency, to protect foreign intellectual property, and to stop pressuring foreign companies to engage in technology transfer.³⁹⁹ The importance of the Chinese commitment is emphasized in section A of the Intellectual Property Chapter, under the General Obligations:

“The United States recognizes the importance of intellectual property protection. China recognizes the importance of establishing and implementing a comprehensive legal system of intellectual property protection and enforcement as it transforms from a major intellectual property consumer to a major intellectual property producer. China believes that enhancing intellectual property protection and enforcement is in the interest of building an innovative country, growing innovation-driven enterprises, and promoting high quality economic growth.”

³⁹⁶ Note that China is US first agri-food export market, and EU third top export destination, after UK and US. The importance of agri-food trade for the world two main policy exporters is more extensively covered in chapter 1.3.

³⁹⁷ A. Williams and J. Jacobs, *Chinese purchases of US exports fall far behind trade deal pledge*, 22 January 2021 and D. Lawder, A. Shalal, J. Mason, *What’s in the U.S.-China Phase 1 trade deal*, Reuters, 15 January 2021 [last visit: 16/03/2021]

³⁹⁸ Purchase commitments may not be fully reached, this is probably due to the economic crisis caused by the global pandemic. The Parties will probably consult with each other on the basis of Article 7.6.2, as this delay may be classified as the result of an unforeseeable event.

³⁹⁹ V. Bisio, C. Horne, A. Listerud, K. Malden, L. Nelson, N. Salidjanova, S. Stephens, *The U.S.-China “Phase One” Deal: A Background*, US-China Economic and Security Commission, 4 February 2020.

The Chinese intention of strengthening the overall national legal system for Intellectual Property protection is emphasized by the General Obligations the Chinese Party agreed to undertake. The first thing that catches the eye is that this set of obligations is much lighter on the American side. For instance, the IP chapter even requires China to promulgate an Action Plan which outlines the structural changes that the country will undertake in order to implement its obligations. China must also provide to the American Party a public comment period of at least 45 days for all proposed implementation measures.⁴⁰⁰ This appears to be one of the many US attempts to establish a sounder basis to IPR-enforcement in China and to monitor its ongoing implementation. The Western side's claims on these points are substantiated by the asymmetry of the two countries in beyond-WTO IP protection, which we have explored under chapter 1.

US wary approach is also reflected in the drafting of GI-specific provisions. The American side has in fact settled precautionary clauses not only to safeguard trademark priority, but also to mark out a more definite path to opposition and cancellation of foreign GIs.⁴⁰¹ Moreover, in the last years, US has continually engaged with China to ensure that the country complies with the commitments undertaken on an international level and adheres to best practice standards.⁴⁰²

It should be mentioned that of the two only the United States comes under the category of "Traditionally developed countries", and thus largely benefits of a beyond-WTO level of protection, as we saw in chapter 1.1.1.⁴⁰³ On the other hand, the RPC has undergone a rapid evolution, at the pace of its fast-evolving economy in the last two decades. 20 years ago, the Commission on IPRs of the British government categorized China as a developing country that has benefited from a "weak" Intellectual Property regime. This allowed the Middle Kingdom⁴⁰⁴ ample time to develop its technologies, also through imitation, yet without suffering any

⁴⁰⁰ *Economic and Trade Agreement Between the United States of America and the People's Republic of China – IP Fact Sheet*, Economic and Trade Agreement Between the United States of America and the People's Republic of China, Press Office of the United States Representative, 2020

⁴⁰¹ Referring to Articles 1.15-1.17 of the Sino-US Agreement.

⁴⁰² *2018 Report to Congress on China's WTO Compliance*, United States Trade Representative, February 2019.

⁴⁰³ Hilty R. M., Jaeger T., *Legal Effects and Policy Considerations for Free Trade Agreements: What Is Wrong with FTAs?*, Springer-Verlag Berlin Heidelberg, 2015 and R. Caso, P. Guarda, *Copyright Overprotection versus Open Science: The Role of Free Trade Agreements*, 2019

⁴⁰⁴ Chinese name for China.

compensation.⁴⁰⁵ Over the years, this policy further exacerbated the Sino-US debate over unfair competition, especially under Trump administration.⁴⁰⁶ Recently, China demonstrated an increasing interest towards IP, that according to CNIPA (China National Intellectual Property Administration) has been brought to new heights.⁴⁰⁷ Furthermore, according to Maskus theory,⁴⁰⁸ we can assume that this change in the IP strategy is connected with the robust increase in national economic development. Today's ever innovative China would in fact benefit from beyond-TRIPS protection, as emphasized in the very first part of the Agreement opening chapter.

2.2.2 Body and Structure of the Agreement

The Agreement opens with a chapter on Intellectual Property, addressing issues at the core of the USTR's March 2018 Section 301 investigation.⁴⁰⁹ The choice of devoting the first chapter to IP comes as an evidence of both countries strong interest in stipulating the importance of respecting each other Intellectual Property.⁴¹⁰ The IP Chapter addresses numerous longstanding concerns section by section, including Geographical Indications.⁴¹¹

The chapter is broken in nine units: General Obligations, Trade secrets and Confidential Business Information, Pharmaceutical-Related Intellectual Property, Patents, Piracy and Counterfeiting on E-Commerce Platforms, Geographical Indications, Bad-Faith Trademarks, Bilateral Cooperation on Intellectual Property Protection, and Implementation.⁴¹² In terms of IP protection it is split into five parts: protection of Trade Secrets, patent link of pharmaceuticals, protection of Geographical Indications, treatment of malicious rush to trademark registration, law enforcement and protection surrounding counterfeited products.⁴¹³

⁴⁰⁵ Y. Li, *The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?*, Pacific Basin Law Journal, 20(1), 2002 and Maskus, 2000

⁴⁰⁶ N. Bose, A. Shalal, *Trump says China is 'killing us with unfair trade deals'*, Reuters, 7 August 2019. Article posted on Reuters.com [last visit: 16/03/2021]

⁴⁰⁷ Summary of 2020: Chinese IP System to a New Height, China IP News, CNIPA, 27 January 2021. News posted on CNIPA official website, english.cnipa.gov.cn [last visit: 16/03/2021]

⁴⁰⁸ Maskus, 2000

⁴⁰⁹ *Section 301 Report into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, Press Office of the United States Representative, USTR Archives, 27 March 2018

⁴¹⁰ G. Hu, 2020

⁴¹¹ *Id.*

⁴¹² Sino-US Agreement, Chapter 1.

⁴¹³ G. Hu, 2020

One of the most interesting issues among them is certainly addressed in section F, which prescribes the rules for protection of Geographical Indications. In fact, this section attracted special attention, as some relevant contents and crisscrossing obligations may cause international disputes on the treatment of Geographical Indications in China.⁴¹⁴

In general, this GI-specific section strongly enhances protection for U.S. trademarks against *sui-generis*-based Geographical Indications. The section is subdivided in three Articles: 1.15, 1.16, 1.17. These Articles have set down a couple of precautionary clauses to help address the “*potential for inappropriately overprotecting Geographical Indications*” in ways that shut out US agricultural and food producers.⁴¹⁵ In the following chapter we will analyze all three of them.

2.2.3 Assessing the treatment of Geographical Indications

2.2.3.1 Article 1.15: Restricted Market Access and Trademarks

“Article 1.15: Geographical Indications and International Agreements

- 1. China shall ensure that any measures taken in connection with pending or future requests from any other trading partner for recognition or protection of a geographical indication pursuant to an international agreement do not undermine market access for U.S. exports to China of goods and services using trademarks and generic terms.*
- 2. China shall give its trading partners, including the United States, necessary opportunities to raise disagreement about enumerated geographical indications in lists, annexes, appendices, or side letters, in any such agreement with another trading partner.*
- 3. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.”*

Article 1.15 sets out that any measures on GIs protection carried out in connection with another international agreement shall not undermine market access for U.S. exports to China, as long as it is concerning trademarks and generic terms, that together represent the two main factor for conflict of law that could arise.⁴¹⁶ In

⁴¹⁴ *Id.*

⁴¹⁵ *Economic and Trade Agreement Between the United States of America and the People’s Republic of China – IP Fact Sheet*, Economic and Trade Agreement Between the United States of America and the People’s Republic of China, Press Office of the United States Representative, 2020

⁴¹⁶ *Id.*

connection with fair market access, the American party is concerned for the agri-food sector and the possible negative impact of international agreements that include provisions on Geographical Indication.⁴¹⁷ As seen above under chapter 1.1.2, potential conflicts could arise between crisscrossing provisions included in two or more PTAs. In fact, even though obligations in international agreements always apply *inter partes*, a conflict arises when a right granted from country A to country B in Agreement X is conflicting with a right country A granted to country C in Agreement Y.⁴¹⁸

A reduction in market access may occur if an importing country recognizes the *sui generis*-based system of a third trading partner when signing a preferential trade agreement.⁴¹⁹ The use of protected geographical names to suggest a good is originated in a certain geographical area other than the true place of origin, may not be allowed for sale purposes in the territory of the importing country, that is, in this case, China. In other words, whether a trademark conflicts with a now-recognized GI, the court or other competent authorities could rule that the sale of the imported trademarked product infringes the rights of exclusivity of the GI-holder. Consequently, the court could force the trademarked product to be withdrawn from the market concerned. This decision would represent a loss of market access for the trademark owner.⁴²⁰

Therefore, under Article 1.15.1, the American party is setting a precautionary clause by claiming the right of priority for both generic terms and US trademarks registered in the Chinese territory over future requests for the protection of GIs.⁴²¹ However, it is important to note that the decision to force the withdrawal of that trademarked product from the market does not imply that it is now prohibited from the sale of the product itself. In fact, it would still be possible to sell the product marketing it without the incriminated trademark. However, being allowed to engage in sales only without the distinctive signs of the trademark, could even mean an *ipso facto*

⁴¹⁷ G. Hu, 2020

⁴¹⁸ Hilty R. M., Jaeger T., 2015

⁴¹⁹ C. Viju, M. T. Yeung, W. A. Kerr, *Geographical Indications, Barriers To Market Access And Preferential Trade Agreements*, CATPRN Commissioned Paper, 1 February 2012

⁴²⁰ *Id.*

⁴²¹ G. Hu, 2020

*nullification or impairment of the benefits*⁴²² coming with the trade agreement, as an important product selling point would have been eroded.⁴²³

Finally, under Article 1.15.2, the Western side also guaranteed itself the opportunity to raise disagreements about Geographical Indications included in other agreements China would close with third trading partners in the future.⁴²⁴ The American party *de facto* claimed the right of opposition to the protection of Geographical Indications granted through other Agreements with third countries, by bringing the GI that applied for protection under tighter scrutiny,⁴²⁵ on which, we shall see, it set out some interesting requirements.⁴²⁶

Clearly, this is a defensive move. In fact, the EU also relies on mutual recognition for the protection of GIs abroad. This strategy is currently carried out throughout the stipulation of a list of GIs to be recognized under bilateral negotiations. This approach naturally better fits to countries that haven't signed the Geneva Act, a multilateral treaty for the protection of Geographical Indications managed by the WIPO of the Lisbon Agreement, such as China.⁴²⁷ This is due to the fact that its signatories allow for the international registration of Geographical Indications in the other parties' territory.⁴²⁸

2.2.3.2 Article 1.16: Generic terms and Genericization

"Article 1.16: General Market Access-related GI Concerns

1. China shall ensure that:

(a) competent authorities, when determining whether a term is generic in China, take into account how consumers understand the term in

⁴²² *Nullification or Impairment of a Benefit* (NVNB) is a basis of claim under the WTO dispute settlement system. In the case above is referred to the benefit a party could reasonably expect to accrue under the agreement that is being nullified or impaired as a result of a measure not consistent with the overall agreement. This was originally thought to reduce ambiguous domestic regulatory arrangements set out to avoid fulfilling of obligations intercurrent on an international level.

⁴²³ C. Viju, M. T. Yeung, W. A. Kerr, 2012

⁴²⁴ Art. 1.15.2 of the Sino-US Agreement.

⁴²⁵ W. Hu, *Dinner for three: EU, China and the US around the geographical indications table*, CEPS, April 2020

⁴²⁶ Art. 1.16 of the Sino-US Agreement.

⁴²⁷ *Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations Under the Geneva Act of the Lisbon Agreement*, WIPO Publication N. 239, Geneva, 20 May 2015

⁴²⁸ *EU becomes member of treaty for better protection of geographical indications*, Agriculture and Rural Development, Brussels, 26 November 2019. Article posted on ec.europa.eu [last visit: 18/03/2021]

China, including as indicated by the following: (i) competent sources such as dictionaries, newspapers, and relevant websites; (ii) how the good referenced by the term is marketed and used in trade in China; (iii) whether the term is used, as appropriate, in relevant standards to refer to a type or class of goods in China, such as pursuant to a standard promulgated by the Codex Alimentarius; and (iv) whether the good in question is imported into China, in significant quantities, from a place other than the territory identified in the application or petition, and in a way that will not mislead the public about its place of origin, and whether those imported goods are named by the term, and

(b) any geographical indication, whether granted or recognized pursuant to an international agreement or otherwise, may become generic over time, and may be subject to cancellation on that basis.

2. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.”

With regards to the protection of generic terms, the key point is definitely the accurate identification of them.⁴²⁹ The difficulty in defining them is the direct consequence of the fragmentation of the IP discipline around the globe.⁴³⁰ In fact, the absence of an international agreement on mutual recognition of GIs signed by a large number of countries, compounded by the fact that IPRs are enforced on a territorial basis, has meant that many geographical names are considered generic in some countries while being protected in others.⁴³¹

For example, Feta cheese in the EU is recognized as a Greek GI, whereas in the US the name feta simply refers to a style of cheese. If a third country, like China, recognized GIs protection on the basis of a *sui-generis*-based system, products labeled “feta” from the US could only be sold in the market on condition that they avoid the use of that protected name. However, this could be argued as a *nullification* or *impairment of the benefit* granted by a PTA.⁴³² This is why, in regards to the EU-Korea FTA, US Congressional Dairy Farmers wrote: “*America’s dairy industry will not be able to maintain, let alone enhance, its current level of exports if we do not combat*

⁴²⁹ G. Hu, 2020

⁴³⁰ This trend in the IP discipline is explained more extensively under chapter 1.1.

⁴³¹ C. Viju, M. T. Yeung, W. A. Kerr, 2012

⁴³² *Id.*

*European efforts to carve out the sole right for their producers to use many of the commonly used cheese names most familiar to consumers around the world (e.g. feta, parmesan, gorgonzola, provolone, etc.)”*⁴³³

Furthermore, the absence of protection can cause the dilution of GIs reputation, and the consequent genericization of the term, as seen above.⁴³⁴

Note that Article 10 of *Provisions on Several Issues concerning the Trial of Administrative Cases involving Trademark Authorisation and Confirmation* issued by the Supreme People's Court of China in 2017⁴³⁵ had already stipulated some criteria for the recognition of generic names:⁴³⁶

“Article 10. Where a disputed trademark is a legal commodity name or a commodity name established by usage, the people’s court shall determine it as a common name specified in item (1), paragraph 1, Article 11 of the Trademark Law. A trademark that is a common name of a commodity under the provisions of the law or the national standards and industry standards shall be recognized as a common name. Where relevant public generally believes that a certain name is able to refer to a category of goods, it shall be recognized as a common name “established by usage.” A trademark that is listed as a commodity name by professional reference books, dictionaries and other items may be used as reference for recognizing the common name established by usage.”

The Article goes on to say:

“Common names established by usage shall generally be judged according to the common understanding of the relevant public across the country. A title of a fixed commodity on relevant market formed due to historical traditions, customs, geographical environment and other reasons that is commonly used on the relevant market may be recognized as a common name by the people’s court. [...] The people’s court shall examine and judge whether a disputed

⁴³³ *Dairy GI Issue Related To Korea FTA Still Unresolved Despite Auto Deal*, Letter from Congressional Dairy Farmers Caucus to USTR Ron Kirk, September 27, 2010; World Trade Online, December 8, 2010.

⁴³⁴ The issue of diluted reputation is addressed more extensively under chapter 1.2.1.

⁴³⁵ Translation published by the CCPIT Patent & Trademark Law Office of the 法释（2017）2号 最高人民法院 关于审理商标授权确权行政案件若干问题的规定 [Interpretation No. 2 [2017] of the Supreme People's Court, Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases involving Trademark Authorization and Confirmation]

trademark is a common name generally according to the de facto status on the date when an application is filed for the trademark. Where the de facto status changes when the registration is approved, whether it is a common name shall be judged according to the de facto status when the registration is approved."

Shortly, Article 10 states that the recognition of a generic term⁴³⁷ in China shall be based on the common perception of the relevant public nationwide and to the common name in use in the related market.⁴³⁸ Specifically, it refers to the 俗成的通用名 which can be translated with a common name that is established as such by the everyday use by the people. Moreover, some viable sources for the examination are also proposed. Finally, it is established that is up to the court to examine and judge whether a trademark includes *de facto* a generic term.

Clearly, the recognition criteria for generic terms settled under the Sino-US Agreement are much stricter, as they go beyond PRC national rules. The American side has set out some more items the court shall consider with the aim of promoting an examination based on more objective criteria,⁴³⁹ such as whether a good is imported in significant quantities, the compliance with the Codex Alimentarius, analysis of websites and dictionaries, how the good is marketed, etc.⁴⁴⁰

The use of the language, in this case, is central to the full understanding of these two provisions and their level of bindingness. In the original version of Article 10 of the court's provisions reported above, the choice fell on two Chinese words, that are: the Chinese adverb 一般⁴⁴¹ and the Chinese verb 可以.⁴⁴² In this case, the adverb 一般, "generally", is used to indicate how the procedures for the assessment of generic terms and *de facto* status of the trademark on the date of registration are expected to be generally carried out. The Chinese verb 可以, "may", addresses the possibility, the freely made choice, to rely on certain sources for the examination. It is thus clear

⁴³⁷ Common term and generic term are synonyms, in this case.

⁴³⁸ G. Hu, 2020

⁴³⁹ G. Hu, 2020

⁴⁴⁰ *Economic and Trade Agreement Between the United States of America and the People's Republic of China – IP Fact Sheet*, Economic and Trade Agreement Between the United States of America and the People's Republic of China, Press Office of the United States Representative, 2020

⁴⁴¹ Refers to the sentence "约定俗成的通用名称一般以全国范围内相关公众的通常认识为判断标准。" and the sentence "人民法院审查判断诉争商标是否属二通用名称，一般以商标申请日时的事实状态为准。", both cited from the Chinese version of Art. 10 of the *Provisions on Several Issues concerning the Trial of Administrative Cases involving Trademark Authorisation and Confirmation*.

⁴⁴² Refers to the sentence "被与业工具书、辞典等列为商品名称的，可以作为认定约定俗成的通用名称的参考。" under the Chinese version of Art. 10 of the *Provisions on Several Issues concerning the Trial of Administrative Cases involving Trademark Authorisation and Confirmation*.

that the court decided to leave ample space to the judges, which decisions can be justified case by case. We can well say this choice of words denotes a not really binding interpretation of the norms.

In contrast, in the Chinese version of Article 1.16 under the Sino-US Agreement, the force of words is used differently. In fact, the Chinese verb 应该,⁴⁴³ “shall”, is used to describe obligations, whereas 可以, “can” or “may”, is used to seek permissions. Therefore, by signing the Sino-US Agreement, China is undertaking the binding obligation of considering all the criteria for recognition of generic terms set out in the Agreement, at least for what concerns foreign GIs.

The American side not only has obtained the right of raising disagreements towards a Geographical Indication on the basis of Article 1.15 but has also ensured there are some specific criteria for the recognition of generic terms, which are clearly defined under Article 1.16. Moreover, according to Article 33 of the *New Measures on the Protection of Foreign Geographical Indications* (2019): “CNIPA may revoke a foreign GI product that has been protected in China under one of following circumstances, and any entity or individual may request CNIPA to revoke it and provide relevant evidence materials: (I) The GI protection has been revoked in the country or region of origin. (II) It is considered a generic name in China or evolves into a generic name. (III) There are serious violations of relevant laws or regulations of China”.⁴⁴⁴ It follows that in the future, having the criteria been set, it will be easier to put GIs under tighter scrutiny, to prove a term generic, and to better predict the outcome of a dispute with regards to the eligibility for protection of a GI.⁴⁴⁵ Furthermore, it appears that the GI right-holder may be expropriated of his right without any consideration for his actions taken to preserve the right, or passivity, or even consent for the use of the GI as a generic term.⁴⁴⁶

Furthermore, note that under Article 1.16 (b) is stated the possibility of a GI to become generic over time. This is contrary to Article 12 of the WIPO *Geneva Act of*

⁴⁴³ Refers to the sentence “中国应确保：（一）主管部门在确定某一名称在中国是否为通用名称时，考虑中国消费者如何理解这一名称，包括以下因素 [...]” from the “中华人民共和国政府和美利坚合众国政府经济贸易协议”, i.e., the Chinese version of the Sino-US Agreement.

⁴⁴⁴ China National Intellectual Property Administration 国家知识产权局, “guówài dìlǐ biāozhì chǎn pǐn bǎohù bànfǎ xiūdìng zhēngqiú yìjiàngǎo” 《国外地理标志产品保护办法（修订征求意见稿）》 [Measures for the Protection of Foreign Geographical Indicated Products (Revised Draft for Comments)], 27 November 2019; *New Measures on the Protection of Foreign Geographical Indications* (China), United States Department of Agriculture and Global Agricultural Information Network, 17 December 2019

⁴⁴⁵ W. Hu, 2020

⁴⁴⁶ A. R. de Almeida, *Geographical Indications Versus Trade Marks and Generic Terms: The US–China Agreement*, IIC - *International Review of Intellectual Property and Competition Law*, 2 March 2020

the Lisbon Agreement on Appellations of Origin and Geographical Indications, which constitutes an international standard for the protection of GIs.⁴⁴⁷ However, this is not relevant as nor the United States or the RPC have signed this treaty.

Anyway, Article 1.16 is particularly important. On its basis, a Geographical Indication which protected name becomes generic over time can be subject to cancellation, and therefore that term could be used again for marketing purposes. This would possibly allow for the restoration of the right to market access previously denied to US Agri-food producers.

As we have seen above, provisions under Article 1.15.1 not only refer to Trademarks, but also to generic terms. Regarding generic terms, there is one thing about US strategy that is better to highlight right away. Despite section F includes only three paragraphs, it in fact sets a quite high level of protection for generic terms, as we will further investigate throughout the analysis of the next article. Articles 1.15 and Article 1.16 are strictly correlated. Under Article 1.15, the American party has ruled out that future recognition of GIs shall not hinder the use nor of Trademarks or generic terms. In addition, Article 1.16 establishes a set of clear and definite criteria for the definition of a generic name (1.16 a) and the possibility of cancellation on the ground of genericization over time (1.16 b). On the basis of these two Articles, the American party has stipulated two viable ways to recover the right of use of trademarks and common names for sale purposes. In fact, if it can be proven that a name is to be considered generic in the Chinese territory, the US has two viable solutions for opposition: 1. on the spot, just after China has concluded an agreement with a third trading partner, (1.15.2); 2. or even after the protection has already been granted, as the GI can be subject to cancellation as the geographical name became generic over time (1.16.1 b).

2.2.3.3 Article 1.17: Multi-Component and Generic Terms

<i>Article</i>	<i>1.17:</i>	<i>Multi-Component</i>	<i>Terms</i>
<i>1. Each Party shall ensure that an individual component of a multi-component</i>	<i>term</i>	<i>that</i>	<i>is</i>
<i>protected as a geographical indication in the territory of a Party shall not be protected in that Party if that individual component is generic.</i>			

⁴⁴⁷ *China-US: The recent economic trade agreement and its implications for GIs, oriGIIn*, Press Release, 30 January 2020. <https://www.origin-gi.com/fr/content-page/item/14892-china-us-the-recent-economic-trade-agreement-and-its-implications-for-gis.html> [last visit: 19/03/2021]

2. When China provides geographical indication protection to a multi-component term, it shall publicly identify which individual components, if any, are not protected.
3. The United States affirms that existing U.S. measures afford treatment equivalent to that provided for in this Article.

On the basis of Article 1.17, also multi-component terms can be brought under tighter scrutiny before qualifying for GI *sui generis* protection in China.⁴⁴⁸ In fact, the Chinese party by signing agrees not to provide protection to individual components of multi-component terms, if the individual component is considered generic in the Chinese territory.⁴⁴⁹ Furthermore, both Parties shall publicly identify which individual components, if any, are not protected when recognizing protection to multi-component terms.⁴⁵⁰

For example, whether China agrees to protect certain foreign Geographical Indications which name is a compound term, such as *Pecorino Romano* (a type of cheese) or *Vino nobile di Montepulciano* (a type of wine), in that name may be included an individual term that is considered generic. The registration shall not cover the protection of individual generic terms. In fact, under the Sino-US Agreement, China and the US both reaffirmed their intention not to protect individual generic terms in compound names.⁴⁵¹ As early as 2014, the two countries had already agreed not to extend protection to individual terms. In November 2015 at the JCCT meeting, China further explained that this commitment applies also on an international level.⁴⁵²

2.3 ANALYSIS OF POSSIBLY CONFLICTING OBLIGATIONS

2.3.1 Geographical Indications and Trademarks

Despite that a trademark should enjoy the right of exclusivity and priority, the Sino-EU Agreement guarantees to the list of protected GIs included in the Sino-EU

⁴⁴⁸ W. Hu, 2020

⁴⁴⁹ *Economic and Trade Agreement Between the United States of America and the People's Republic of China – IP Fact Sheet*, 2020 and H. Jiao, Y. Liu, *An IP Roadmap for Phase-One Sino-US Economic and Trade Agreement*, 22 January 2020, article on Intellectual Property posted on Chinalawinsight.com [last visit: 18/03/2021]

⁴⁵⁰ *Id.*

⁴⁵¹ W. Hu, 2020

⁴⁵² *2018 Report to Congress on China's WTO Compliance*, United States Trade Representative February 2019

Agreement a dimension of coexistence with prior trademarks (Article 6.1 of the Sino-EU Agreement).⁴⁵³ This solution should also guarantee respect for prior trademark rights and fair market access to trade partners who mainly rely on trademarks or the use of generic terms, as provided under the Sino-US Agreement (preamble of section F under the Sino-EU Agreement).⁴⁵⁴

In contrast, if a trademark is registered after the date of protection or after the date of application for protection of a listed EU GI, the right of exclusivity of the Geographical Indication shall prevail (Article 6.1 of the Sino-EU Agreement). Besides, as a result of a legal transplant from the EU regulations,⁴⁵⁵ GIs are protected against misleading use of a translation, transliteration, or transcription, and de-localizers that can mislead the public over the true origin of the product (Article 4.1 of the Sino-EU Agreement).

It is crucial to follow how the Sino-EU and Sino-US Agreements will interact on the invalidation or refusal of a trademark in relation to the issue of fair market access. In fact, under the Sino-US Agreement, which entered into force by 14 February 2020, China agreed that *“any measures taken in connection with pending or future requests from any other trading partner for recognition or protection of a Geographical Indications pursuant to an international agreement shall not undermine market access for U.S. exports to China of goods and services using trademarks and generic terms”* (Article 1.15.1).⁴⁵⁶ In short, we can interpret this provision as a request advanced from the American side, by which they ask for the coexistence of trademarks and generic terms with GIs. It is not stated, however, how long this dimension of coexistence should last. There is a significant difference between allowing coexistence only for the time a GI is under scrutiny and allowing coexistence to trademarks that applied for registration in the time window for the final approval of a GI.

Under the Sino-EU Agreement, coexistence is prescribed only at condition that the trademark was established through use or registered in China prior to the date of protection or application of the GI (Article 6). If we interpret *“pending requests”*⁴⁵⁷ as

⁴⁵³ W. Hu, 2020

⁴⁵⁴ Preamble of Section F from the Sino-US Agreement.

⁴⁵⁵ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

⁴⁵⁶ *China-EU: The Signature of the stand-alone GIs Agreement*, oriGIn, 14 September 2020. [last visit: 22/03/2021]

⁴⁵⁷ Article 1.15.1 of the Sino-EU Agreement *“China shall ensure that any measures taken in connection with pending or future requests from any other trading partner for recognition or protection of a geographical*

referring to GIs “*published for opposition*”⁴⁵⁸, Article 1.15.1 of the Sino-US Agreement may possibly conflict with Article 6.1 of the Sino-EU Agreement, by which China committed to protect GIs from the moment they have been published for protection.

Pending requests should be assessed in accordance with the priority principle (*i.e.*, first in time first in right principle).⁴⁵⁹ The GIs listed under Annexes III and IV were published for protection on 2 July 2017, that is before the entry into force of the Sino-US Agreement. The date of protection for these two groups of GIs is the date of entry into force of the Agreement, which is 1 March 2021. It should be noted that all the European GIs listed under Annex IV enjoy priority over trademarks registered after the 3 June 2017 and before the starting date of the protection, 1 March 2021 (Article 6.6). Instead, for those GIs listed in Annexes V and VI, the date of application for protection is the date of entry into force of the Agreement, 1 March 2021 (Article 6.5 and 6.6 of the Sino-EU Agreement), that is after the date of entry into force of the Sino-US Agreement. It goes without saying that these crisscrossing provisions cause added complexity to the issue of TMs and GIs.

Though it looks as if protection of EU GIs in China would be under tighter US scrutiny, the actual impact of these precautionary requirements to the European list would be limited, also for those GIs which date of application follows the entry into force of the Sino-US Agreement (Annex V).

More specifically, for those GIs published for protection prior to the Sino-US Agreement entry into force (Annex III and IV), provisions under the Sino-US Agreement are irrelevant.⁴⁶⁰ For what concerns GIs listed in Annex V and VI, which have been published after the entry into force of the Sino-US Agreement, the EU is confident that the US influence will be limited since the number of possibly controversial GI names is only a handful, and future conflicts, if any, should be resolved with phasing-out or limited protection to multi-component terms.⁴⁶¹

indication pursuant to an international agreement do not undermine market access for U.S. exports to China of goods and services using trademarks and generic terms”.

⁴⁵⁸ Article 6.6 of the Sino-EU Agreement “*As regards geographical indications listed in Annex III on the date of entry into force of this Agreement, trade marks applied for in the European Union between the date of publication for opposition and the entry into force of this Agreement and corresponding to one of the situations referred to in paragraph 1 shall be presumed to have been applied for in bad faith*”

⁴⁵⁹ A. R. de Almeida, *Geographical Indications Versus Trade Marks and Generic Terms: The US–China Agreement*, *IIC - International Review of Intellectual Property and Competition Law*, 2 March 2020

⁴⁶⁰ W. Hu, 2020

⁴⁶¹ *Id.*

Moreover, in accordance with the phasing out an arrangement under the Sino-EU Agreement, Feta and Asiago iconic GIs shall coexist with trademarks and generic terms for a period respectively of eight and six years, on condition that it can be shown that the products concerned have been placed on the Chinese market before 3 June 2017 and that they would not mislead the public about the true origin of the product. After the end of the transition period, the term "feta" and "asiago" will not be used anymore in the RPC as a generic term for a style of cheese. It is unclear whether after the phasing out period this would cause a conflict of law in practice.⁴⁶² In fact, we can assume that, on condition that during the phasing out period the protected name has become generic, the GI should be subject to cancellation on that basis (Article 1.16 b of the Sino-US Agreement).

The second exception concerns a small group of multi-component terms.⁴⁶³ If the individual component of a GI is not protected, the individual component is not recognized as a protected term and therefore it is allowed the use for marketing purposes for any class of goods. This exception to full protection solely concerns the terms: queso, prosciutto, pecorino, vino nobile di, and mozzarella.⁴⁶⁴ It is not allowed, however, the use of the multi-component from unauthorized users.

As mentioned above, possibly controversial GI names are only a handful. To identify which GIs are controversial we can compare GIs from the Sino-EU Agreement and the EU-Canada Comprehensive Economic and Trade Agreement (CETA)⁴⁶⁵ and those highlighted by the literature and the press.⁴⁶⁶ Among them are Champagne, Asiago, Feta, and Gorgonzola, four GIs that are already protected in China as they are listed under Annex IV. Fontina, another worldwide famous type of cheese, is listed under Annex VI, and therefore may be at risk as it is currently going through a period of opposition. On the other hand, careful consideration should be given to the fact that all possible controversies over the legitimacy of these GIs are relative to the Chinese market. Chinese consumers' perception is influenced by a wide range

⁴⁶² G. Hu, 2020

⁴⁶³ W. Hu, 2020

⁴⁶⁴ Notes of Annex VI.

⁴⁶⁵ According to W. Hu (2020), this is the most suitable basis for comparison as it is an agreement concluded by the EU with a country which recognizes French as a second language and is strongly influenced by the European immigrants' culture in the agri-food sector.

⁴⁶⁶ K. William Watson, *Reign of Terroir: How to Resist Europe's Efforts to Control Common Food Names as Geographical Indications*, CATO Institute, 16 February 2016; M. Dalton, *Salty Issue in U.S.-European Trade Talks: Feta Cheese*, Wall Street Journal, 19 October 2015; A. Matthews, *Geographical indications (GIs) in the US-EU TTIP negotiations*, 19 June 2014.

of factors, such as culture and media, the number of western immigrants, whether the good is imported or produced in significant quantities, how the good is marketed, etc. and therefore, a term that may be considered generic in the US may still be eligible for protection in China.

Finally, it is important to note that the decision to force the withdrawal of that trademarked product from the market does not imply that it consequently prohibited the sale of the product itself. In fact, it would still be possible to sell the product marketing it without the incriminated trademark. However, being allowed to engage in sales only without the distinctive sign of a trademark, could even mean an *ipso facto nullification or impairment of the benefits*⁴⁶⁷ coming with the trade agreement, as an important product selling point would have been eroded.⁴⁶⁸ Article 1.15.1 of the Sino-US Agreement provides against it under Article 1.15.1 as it states that measures taken by the Chinese Party in relation to GIs yet to be protected in the territory shall “*not undermine market access for U.S. exports to China of goods and services using trademarks and generic terms*”. Therefore, we can say that the American party is safeguarding market access, specifically, for goods and services that actually rely on the use of trademarks and generic terms.

2.3.2 Approval and Cancellation of Geographical Indications

On 28 March 2016, the China General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) issued the *Measures on the Protection of Foreign GI Products* (hereinafter referred to as Measures). In response to the latest development in this area, on 28 November 2019, the China National Intellectual Property Administration (CNIPA) promulgated a revised version of the Measures.⁴⁶⁹

Article 3 of the revised Measures sets that protection of Geographical Indications shall be handled in accordance with international agreements and international treaties to which both countries involved have joined, or on the principle of reciprocity. Usually, bilateral and international agreements provide direct

⁴⁶⁷ *Nullification or Impairment of a Benefit* (NVNB) is a basis of claim under the WTO dispute settlement system. In the case above is referred to the benefit a party could reasonably expect to accrue under the agreement that is being nullified or impaired as a result of a measure not consistent with the overall agreement. This was originally thought to reduce ambiguous domestic regulatory arrangements set out to avoid fulfilling of obligations intercurrent on an international level.

⁴⁶⁸ C. Viju, M. T. Yeung, W. A. Kerr, 2012

⁴⁶⁹ 国家知识产权局关于修改《国外地理标志产品保护办法》的公告, 国家知识产权局, 2019年11月29日 [Translation: *Announcement of the China National Intellectual Property Administration on Amending the Measures for the Protection of Foreign Geographical Indication Products (2019)*, China National Intellectual Property Administration, 29 February 2019]

protection to foreign GIs, while the principle of reciprocity allows foreign GIs to obtain protection after CNIPA's examination and approval.⁴⁷⁰ During the examination is granted an objection period of 60 days during which any organization or person at home or abroad may raise an objection by writing to CNIPA's offices (Article 12 of the revised Measures).

In accordance with the Sino-US Agreement, China granted the American party the opportunity to raise disagreements about Geographical Indications enumerated in lists and annexes signed with other trading partners (Article 1.15.2). In addition, as mentioned above, the Sino-US Agreement has listed several regulatory requirements on GI protection with which China has pledged to comply. This commitment results in a more precise set of criteria for the assessment of whether a term is generic in China, and therefore to a much stricter evaluation procedure for foreign GIs.⁴⁷¹ As reported under Article 2 (g) of the Sino-EU Agreement, is up to the Chinese party to provide for an opposition procedure to allow the interests of prior users of the term to be "*taken into account*". Therefore, we can well say that Article 1.16 of the Sino-US Agreement and Article 6.3 of the Sino-EU Agreement are associated by a relationship of interpretation by which "*one norm assists in the interpretation of another ... both norms are applied in conjunction*".⁴⁷²

In accordance with the Sino-US Agreement, a few factors can determine whether a term is generic, and therefore whether a GI consisting of that term is eligible for protection. The list included in the Sino-US Agreement requires a well-rounded investigation about how the good is marketed, on compliance with standards regulated by the Codex Alimentarius, on the common use of the term, etc.⁴⁷³ Clearly, the US is promoting the formation of a more objective set of criteria for the protection of Geographical Indications.⁴⁷⁴ Consequently, although the products listed under the Sino-EU Agreement meet the definition of Geographical Indication promulgated by TRIPS, they may not meet the requirements of the Sino-US Agreement.⁴⁷⁵

⁴⁷⁰ T. Zhang, L. Zhao, *China trademark: China improves rules on protection of foreign GI products*, 22 January 2020. Article posted on managingip.com [last visit: 24/03/2021]

⁴⁷¹ W. Hu, 2020

⁴⁷² *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission, vol. II (2), United Nations, 2006.

⁴⁷³ W. Hu, 2020

⁴⁷⁴ G. Hu, 2020

⁴⁷⁵ *Id.*

The problem with generic terms is substantial not only to CNIPA's examination but also to the revoking procedure of foreign GIs protected. In fact, according to Article 33 of the revised Measures, any entity or individual may request CNIPA to revoke a GI by providing relevant evidence materials to testify that: 1. protection has been revoked in the country or region of origin, 2. the protected name is considered a generic name or evolved into a generic name, 3. serious violations of relevant Chinese laws or regulations were violated. This is consistent with both Article 1.16 of the Sino-US Agreement, by which "*any Geographical Indication granted or recognized through an international agreement may become generic over time and be subject to cancellation on that basis*" and Article 6.3 of the Sino-EU Agreement by which the Parties are free not "*to protect a geographical indication of the other Party under this Agreement where, in the light of a reputed or well-known trade mark, the protection would be liable to mislead the consumers as to the true identity of the product*". Moreover, under the Sino-US Agreement, a set of criteria that will imply a much stricter evaluation of the legitimacy of a GI was ratified.

However, as seen in the chapter above, though European GIs in China would be under tighter US scrutiny, the actual impact of the precautionary requirements the US has set out would be limited. The number of possibly controversial protected names is only a handful, and they are mostly protected under Annexes III and IV of the Sino-EU Agreement, which application for protection was submitted before the entry into force of the Sino-US Agreement.⁴⁷⁶

To conclude, it should be mentioned that China's trading partners, including the US, can oppose recognition of a foreign GI that they consider to be generic in China both on the spot, just after CNIPA's offices officially publish foreign GIs for protection (Article 1.15.2 of the Sino-US Agreement), or after the protection has been granted, as the GI can be subject to cancellation if the geographical name became generic over time (Article 1.16.1 b of the Sino-US Agreement). Therefore, on one hand, it cannot be ruled out that the US could reclaim market access for products relying on the use of trademarks or generic names in the future. On the other hand, by winning this race in policy export, the EU ensured protection to its most iconic and controversial GIs, which, otherwise, would have risked dilution of reputation which in turn could have caused those names to become generic over time.⁴⁷⁷

⁴⁷⁶ W. Hu, 2020

⁴⁷⁷ IP/C/W/247/Rev.1, 2001

CONCLUSIONS

THE NOODLE BOWL EFFECT ON THE TABLE OF GEOGRAPHICAL INDICATIONS

“You could say that geographical indications are the sleeping beauty of the Intellectual Property world,” put forward Marcus Höpperger⁴⁷⁸ at the opening of the Beijing Symposium in 2007.⁴⁷⁹ Recently, there has been a reawakening of interest towards GIs and the rapidly globalizing agri-food market. Consequently, Geographical Indications and trademarks have now become one of the key issues that led to the proliferation of Agreements below multilateral level.⁴⁸⁰

In the first half of this research, drawing upon secondary sources, we analyzed the complex legal and economic framework that encloses the Sino-EU and Sino-US Agreements, illustrated the differences in approach taken by the three countries involved, and finally explored the Chinese food import market to understand the attractiveness it exercises to European and American high-quality food exporters. We concluded that the two western powers' vertical shift to parallel negotiation for the settlement of beyond WTO provisions has caused an inhomogeneous net of trade agreements that included, to various extents, IPR-related provisions⁴⁸¹ and, as demonstrated, Geographical Indications as well.

Although IP-specific provisions comprised in different PTAs reached by Europe and the United States with third countries generally move in the same direction for Intellectual Property in general, therefore presenting a certain level of consistency, it is actually not the case for Geographical Indications specifically. This divergence, which exacerbates the phenomenon, is reflected in the GI-specific provisions included in the Sino-EU and Sino-US Agreements which recently entered into force.

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⁴⁷⁹ E. March, *Geographical Indications: From Darjeeling to Doha*, WIPO Magazine Editor, Communications and Public Outreach Division, July 2007

⁴⁸⁰ T. Zhang, L. Zhao, *China trademark: China improves rules on protection of foreign GI products*, January 2020. Article published on ManagingIP.com, [Accessed 16 March 2021] Available at: <https://www.managingip.com/article/b1kblk5ntg8c99/china-trademark-china-improves-rules-on-protection-of-foreign-gi-products>.

⁴⁸¹ S. Sell, 2011

In the second half of this study, by analyzing in detail the possibly conflicting obligations, we attempted to unravel this intricate net of national and international regulations to reveal its complexity and provide a possible interpretation to this conjunction of norms.

According to the press, the entry into force of the “*landmark*”⁴⁸² Agreement between the European Union and China on Cooperation and Protection of Geographical Indications, dated 1 March 2021, marks the beginning of new trade benefits that will drive Sino-European GI trade to a much greater level.⁴⁸³ In fact, even though the two countries did not agree on a precise volume of imports and exports, the intention to foster bilateral trade is proven by the Parties’ commitments to cooperate for the development and recognition of Geographical Indications around the world. Indeed, the Agreement includes a list of 100 European GIs and 100 Chinese GIs to be protected against misuse and usurpation within the two countries, to which another list of 175 GIs will follow. We concluded that China engaged in a real legal transplant with some of the strictest European provisions,⁴⁸⁴ enhancing the national level of protection for foreign GIs and formally leaning towards the so-called Old World approach. Furthermore, the level of protection laid down by the Sino-EU Agreement is going far beyond TRIPS, as there is an extension of full protection to products other than wines and spirits, and possibly a further extension to include handicraft and other non-agricultural products, which are an important part of the Chinese cultural heritage.

In 2020, the United States and China signed the Phase One of the Sino US Economic and Trade Agreement which included a set of GI-specific provisions which settled some preventative obligations aimed at ensuring market access to American agri-food imports. Precautionary clauses include a consultation mechanism before new GIs can be protected in China and other means for the US to oppose the protection of foreign Geographical Indications. In force of the Agreement, the United States

⁴⁸² *EU and China sign landmark agreement protecting European Geographical Indications*, European Commission Press release, Brussels, IP/20/1602, 14 September 2020

⁴⁸³ A significant number of newspaper articles from both the East and the West reported on this matter. H. Xu 徐海知, “zhōngōu jǔxíng shìpín jiāoliú huì tàntǎo dìlǐ biāozhì chǎnpǐn tuīguǎng” 中欧举行视频交流会探讨地理标志产品推广 [China and EU discuss geographical indication product promotion on video conference], 新华网, 2021.; Z. Chen 陈朝晖, “zhōngōu dìlǐ biāozhì xiédìng shēngxiào dàilái nǎ xiē lìhǎo” 中欧地理标志协定生效带来哪些利好? 天眼新闻 [What are the benefits coming from the entry into force of the Sino-EU Agreement on GIs?], 2021; M. Jingjing, *China-EU agreement on geographical indications injects new momentum to bilateral trade*, Global Times, 01 March 2021.

⁴⁸⁴ Unitalen Attorneys At Law 北京市集佳律师事务所, 7 February 2021.

could bring under tighter scrutiny a European GI by questioning its legitimacy and demonstrating the geographical name being generic in the Chinese territory. Nonetheless, further analysis showed that possible controversies would only be limited to a handful of European Geographical Indications for now,⁴⁸⁵ though ground for the opposition could possibly extend to geographic names that may become generic in the future.

In conclusion, concerning the treatment of foreign Geographical Indications and Trademarks in China, the two Agreements are characterized by crisscrossing obligations and a crossroads of norms and regulations on both national and international fora.

The case of the Sino-EU and Sino-US Agreements has been found to be representative of Bhagwati's Noodle bowl effect theory. In fact, through case analysis, we demonstrated that the recently signed Agreements connect the three countries involved through a complex web of crisscrossing obligations related to the treatment of foreign GIs, and more specifically to the relationship which must occur between Trademarks and GIs. This phenomenon is driven by the transatlantic conflict of interests over the matter of foreign GIs protection and, in this specific case, also by the attractiveness the Chinese market exercises on its counterparts. Our results provide evidence that such complexity is the outcome produced by the EU and US policy export race, that is on a route marked out by the *de facto* interplay of Trademarks and Geographical Indications.

To the best of our knowledge, this is the first study to explore the pertinence of Bhagwati's Spaghetti bowl effect theory to the transatlantic debate over Geographical Indications.

FUTURE PERSPECTIVES

"The differences in EU and USA FTAs represent those issues which decades of EU-USA cooperation have failed to resolve", as Garcia emphasized.⁴⁸⁶ For the two economic powers, Geographical Indications are an area of conflict in the IP discipline: the EU pushes for a TRIPS-plus level of protection for Geographical Indications, whereas the US aims at reducing them to a subset of trademarks and proposes a much more relaxed approach to the matter.⁴⁸⁷ In light of these differences, the world's two main

⁴⁸⁵ W. Hu, 2020.

⁴⁸⁶ M. J. Garcia, 2013.

⁴⁸⁷ M. J. Garcia, 2013; G. de Bosio, 2015

policy exporters use PTAs as a vehicle to advance national interests, according to a strategy in which timing in closing deals is key to getting a geopolitical advantage and protecting their national regulatory system abroad.

The disagreement towards GI protection is reflected in the two countries' parallel negotiations. If Europe aims at consolidating international protection for GIs as a public Intellectual Property, the United States attempts to protect its trademarked products and sees the European strategy as an impediment to market access and an unfair protectionist barrier.⁴⁸⁸ It is clear from the study of the international legal framework and the above case analysis, that both countries have emerged as policy exporters who hope to minimize the possibility for opposition to their preferred GI-protection regulatory system. For the EU, the conclusion of a GI protection agreement that is congruent with the Old World approach represents a geo-political and a consequent geo-economic advantage in the Chinese agri-food export market. In contrast, if the US manages to first impose a set of rules that allows the government to advance its interest on the matter, the European Commission would be hindered in achieving its objectives.⁴⁸⁹

This policy export race is causing added complexity on both national and international levels of agri-food trade regulations.⁴⁹⁰ Neither the TRIPS Agreement or the Geneva Act have been able to establish a widely accepted international GI registration or protection system and, in the short term, it's unlikely that the United States and Europe may find a common approach on the matter. In fact, harmonization between these two very different protection systems would demand major efforts from both sides. Moreover, Geographical Indications still constitute a niche market, and therefore to come forward with a position acceptable to both sides is not yet among the two powers' top priorities.

On the other hand, although it is clear that at the present moment Europe and the United States keep holding the strings, as the protagonists, of the international regulatory scene, countries like China and India are also emerging as major players

⁴⁸⁸ D. Giovannucci, T. Josling, W. Kerr, B. O' Connor, M. T. Yeung, 2009

⁴⁸⁹ S. Frankel, 2017

⁴⁹⁰ One of the most flagrant examples of this phenomenon can be found in the two agreements US and EU concluded with Singapore. The settlement of the conflict is summarized by a Letter from a Singapore Minister to the European Commission: the EU was not able to claim the coexistence between GIs and prior registered trademarks, because US already cemented trademark priority with Singapore in an FTA a few years before. In short, the conflict was just apparent. See: H. K. Lim, *EU-Singapore Free Trade Agreement – Geographical Indications*, Letter from Singapore Minister for Trade and Industry to European Commission Member Karel De Gucht, 21 January 2013.

in many fields, including that of Intellectual Property. The position taken by rising economic powers will possibly cause a shift away from a bipolar towards a multipolar discussion within international organizations. This could reduce fragmentation of Intellectual Property policies within and possibly across some of the world economic powers' largest areas of influence.

In the long term, it's the new global players who may ultimately determine the balance of power between Europe and the United States over much of the Intellectual Property discipline, and the treatment of Trademarks and Geographical Indications as well. This assumption might be addressed in future studies.

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*“Per avermi permesso di studiare
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ringrazio mia madre,
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Giada Osti Volpin

