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RESEARCH ARTICLE

The Essence of Genuine Geographical Indication Protection and a Unified Legislative Framework on Geographical Indications in China*

WANG Xiaobing[a]

Abstract

As an independent type of intellectual achievement, genuine geographical indications (GIs) are essentially product categories rather than commercial marks, and the legislation on them is a product protection system rather than a set of rules for mark protection. The scarcity, non-industrial nature, and public nature inherent to GIs are attributes of product categories. Their premium effect, their role in safeguarding traditional culture, and their function in supporting local development are all realized through product protection. A genuine GI system follows the legal logic of products in matters such as name genericization, reputation attributes, the scope of protection, and the relationship with trademarks. And its operational mechanisms in terms of the allocation of authority, the forms of expression, confirmation review, enforcement supervision, and even extraterritorial effect are all centered on product compliance supervision, which falls squarely within the domain of public law. The compromise and co-existence of product protection and mark protection in positive laws are the result of international realpolitik. *Sui generis* legislation, trademark law, and comprehensive industrial property codes providing the protection of GIs, according to the attribute orientation, could be divided into product protection mode, commercial mark mode, and hybrid mode. It is recommended that China's legislative approach to GIs be unified under a dedicated special statute, anchored in a product protection mode, and integrated with a national quality management system. GIs should be divorced from private law so that the protection of GI trademarks could be withdrawn from the product-specific regime and governed by the general law applicable to commercial marks.

Keywords geographical indications (GIs); appellations of origin; product protection; trademark law; anti-unfair competition law

I Introduction

The construction of a geographical indication (GI) system is crucial for the development of industries with local features, the promotion of ecological civilization, the preservation of historical culture, and the facilitation of rural revitalization. The Outline for Building a

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[a] School of Law, Shandong University, Qingdao 266237, China

Country Strong on Intellectual Property (2021–2035) issued by the Central Committee of the Communist Party of China (CPC) and the State Council proposes that efforts should be made to "explore the formulation of special laws and regulations for GIs ... and improve the unified GI protection system that coordinates special protection and trademark protection," "promote the organic integration of GIs with the development of industries with local features, the promotion of ecological civilization, the preservation of historical culture, and the facilitation of rural revitalization, and enhance the brand influence and product added value of GIs."

As Montesquieu said, laws are the necessary relations arising from the nature of things.[1] A unified GI protection system must be one that conforms to the "nature of things" of GIs. What exactly is a GI? How does it drive the development of industries with local features, promote ecological civilization, preserve historical culture, and facilitate rural revitalization? How does it differ from other intellectual property rights in promoting socio-economic development? Answering these questions is necessary for formulating the special laws and regulations for GIs and establishing a unified GI protection system.

It is generally accepted that GIs, like trademarks and other marks, have the function of source indication or identification, belong to the intellectual property rights of the mark category, and should be included in the protection system of commercial marks. This understanding is prevalent in domestic and international academic works and official documents and remains largely unchallenged.[2] Although the academic community has discussed the differences between GIs and other marks, including trademarks, these differences are typically interpreted as variations among types of commercial marks. Their institutional differences are seen as merely reflecting different specific rules of the mark protection system, rather than distinct differences in the nature of the systems themselves.[3] Based on this understanding, countries such as the United States, Germany, and the United Kingdom have traditionally provided trademark or source indication protection for GIs through trademark laws, anti-unfair competition laws, or passing-off litigation, and countries like India, Mexico, and Russia have either legislated them separately as an independent type of commercial mark or incorporated them into industrial property laws or civil codes

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[1] See Montesquieu, 论法的精神 (*The Spirit of the Laws*), Vol. 1, translated by ZHANG Yanshen, 商务印书馆 (The Commercial Press), at 1 (1961).

[2] See WU Handong, 知识产权法 (*Intellectual Property Law*), 法律出版社 (Law Press・China), at 730 (2021); ZHANG Zhicheng, 地理标志保护的法理基础及相关问题研究 (Research on the Legal Basis of Geographical Indication Protection and Related Issues), 6 中国政法大学学报 (*Journal of CUPL*), 171 (2022). See also *WIPO Intellectual Property Handbook*, WIPO Publication No. 489 (E), at 121 (2004); Christopher Heath & Delphine Marie-Vivien, *Geographical Indications and the Principles of Trade Mark Law—A Distinctly European Perspective*, 46 IIC, 841 (2015); Geographical Indication Protection in the United States, at 1, available at the official website of USPTO.

[3] According to the author's observation, there are mainly two viewpoints regarding the relationship between geographical indications and trademarks: One is to consider geographical indications as a subset of trademarks, and the other is to regard the two as different commercial marks. See WU, fn. 2 at 731; CAO Xinming, 中国知识产权法典化研究 (*Research on the Codification of Intellectual Property in China*), 中国政法大学出版社 (China University of Political Science and Law Press), at 303 (2005).

for protection. In these countries, the protection of GIs follows the legal principle of mark cognition. The substantive systems and rules are essentially congruent with those of the trademark law and do not have the legal principle basis for becoming an independent type of intellectual property rights.

However, this understanding and legislative approach regarding GIs are not universal. There are also legislations and understandings that truly give GIs an independent category attribute, such as the *sui generis* legal system and related cognitions originally adopted by Southern European countries like France and Italy. The true protection objects of this system are the products rather than the marks. The GIs protected by it should fall under the category of creative intellectual achievements. The essence of this system is a product protection system rather than mark protection rules. The GIs within this product protection system possess the character of genuine, independent entities, which are completely different from commercial marks. The separate *sui generis* legislation for GIs is conducive to the full realization of the functions of GIs.

At present, the studies conducted by the academic communities in China and abroad have not systematically revealed or expounded the product protection attributes of the indigenous special laws in Southern European countries and have not distinguished them from the trademark law and other mark protection systems.[4] They, mostly based on the commercial mark theory, especially the trademark theory, apply the doctrine of distinctiveness to study GIs as commercial marks and analyze, construct, or transplant the GI system, focusing on marks rather than on products. Such an approach can neither reveal the essence of GIs as an independent type of rights, nor truly distinguish the specialized protection from the protection provided by the trademark law and the anti-unfair competition law, nor properly handle the relationships between GIs and trademarks, as well as generic names, nor reasonably explain the legal logic regarding the intensity of GI protection and the source of the extraterritorial effect of such protection.

In China, the trademark law and the special laws (the Provisions for the Protection of Geographical Indication Products [hereinafter the Provisions] and the Measures for the Administration of Geographical Indications of Agricultural Products [hereinafter the Measures]) serve as parallel protection systems. Their overlapping and conflicts have caused confusion for GI applicants and users and local governments, affecting the role of GIs in supporting the development of industries with local features and hindering the implementation of the rural revitalization strategy and the advancement of agricultural and rural modernization. The fundamental cause of the conflict between the two systems lies in the inaccurate positioning of the attributes of the special system and trademark protection, which leads to the alienation of the quality supervision specifications of the special system

[4] A few scholars have mentioned that GIs are ontologically different from trademarks, but they have not provided specific arguments. See Dev Gangjee, "Quibbling Siblings: Conflicts between Trademarks and Geographical Indications," 3 *Chicago-Kent Law Review*, 1253–1291 (2007).

into the rules for authorized use of special marks, losing the function of distinguishing product categories. Meanwhile, trademark protection oversteps its boundaries and intrudes into the product domain, replacing the subjective cognitive logic of commercial marks with the objective rules for distinguishing products, disrupting the determination mechanism of trademark distinctiveness and infringement, and causing divergent interpretations and disputes in practice.

The essence of a genuine GI lies in the product category rather than the commercial mark. The special legislation should adopt a product protection mode, with products rather than marks serving as the core of the specifications. The special legislation and mark protection systems, including trademark law, belong to different institutional domains, and each follows its own regulatory goals and legal logic. Only in this way can we correctly distinguish these two types of systems with different natures and reasonably divide and adjust the domains, establish a standardized and orderly coordination mechanism, and form an organic and unified protection system.

II Essence, Characteristics, and Functions of Genuine GIs

The linkage between product and origin is a core element of GI. There are two types of linkage: One is that the product has the qualities or characteristics attributed to the natural and human factors of the origin, that is, the characteristics of the product have an objective causal relationship with the environmental conditions of the origin. This is an objective linkage that forms the conceptual basis of the *sui generis* law protection in Southern European countries like France and Italy, which is expressed as the concept of "appellations of origin." The other type is the association between a product and a specific origin made by consumers through a GI. It is the consumers' subjective cognition to a commercial mark and can be referred to as subjective linkage. It exists in trademark laws, anti-unfair competition laws, and the law of passing off, and is manifested as trademarks or indications of source, represented by countries such as the United States, Germany, and the United Kingdom.[5] Objective linkage uses products as carriers, while subjective linkage is embodied in the cognition of commercial marks. Therefore, the article believes that the appellations of origin protected by the *sui generis* laws of Southern European countries in essence are product categories rather than commercial marks, and they are genuine GIs with the meaning of independent entities; the GIs protected by the trademark laws of the United States, the anti-unfair competition laws of Germany, and the law of passing off in the United Kingdom do not have an independent existence in the sense of positive law. They are not genuine GIs but trademarks or indications of source.

[5] Regarding the discussion on subjective and objective linkages, see WANG Xiaobing, 关联性要素与地理标志法的构造 (The Elements of Linkage and the Construction of Geographical Indication Law), 3 法学研究 (*Chinese Journal of Law*), 84 (2015).

A The Essence of Genuine GIs Lies in Product Categories Rather than Commercial Marks

As genuine GIs, the essence of appellations of origin is product categories rather than commercial marks. In France, the term *appellation d'origine* (hereinafter AO) is defined as the name of a country, region, or locality, which is used to denote products originating from that place. The quality or characteristics of the product are attributed to its geographical environment, including natural factors and human factors.[6] It can be seen that the appellation of origin refers to a specific product by using the name of a place. The name of the place is used as the name of the products that are produced in this place, and the products are known by the name of this place.[7] Therefore, "when we hear these names we think of products rather than the *sui generis* they designate."[8] This product as referred to by the name is the object protected by the special law. The name, as the signifier of the product, is used in attachment to the product and does not have an independent regulatory value. Just as a personal name has personal exclusivity, its protection is to safeguard the personality of the natural person referred to by the name rather than the name itself.[9]

From a semantic perspective, the choice of the term "appellation of origin" is not accidental; rather, it is an inevitable manifestation of the special law, which chooses products as protection objects. Whether in French or English, an "appellation" refers to the name of a person or thing, while an "indication" is defined as an action by which one indicates or makes known a thing.[10] That is to say, appellation is more objective than indication and focuses on the thing it refers to, while indication emphasizes the subjective cognition of the marking symbol. The former is defined by the object it refers to and is objectively external; the latter determines its direction based on the subjective cognition of the identifier and is subjectively dynamic. This determines that the appellation of origin follows the logic of naming by the thing. The core of its institutional norm is not to protect the symbolic direction of the appellation but to protect the compliance of the product, i.e., whether the product has the attribution of origin. Only compliant products are the things referred to by the appellation of origin. If the products are not compliant, there will be no use of the appellation. The use of the appellation merely reflects the effect of legal regulation on the products. Logically speaking, as long as the product remains unchanged, even if its name changes, the product protection still exists and has the effect of protecting its new name. It is the same as a natural person using a new name to identify his or her identity and enjoy the right to his or her name.

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[6] See Article L431-1 of Code de la consommation (the Consumer Code). This article uses AO specifically to refer to the appellation of origin in the French law. The "appellation of origin" is used as a general term to collectively refer to the appellation of origin stipulated in the legislation of Southern European countries, including France.

[7] See Stephen P. Ladas, *Patents, Trademarks, and Related Rights: National and International Protection*, Harvard University Press, at 1574 (1975).

[8] See WIPO, fn. 2 at 120.

[9] See ZHU Qingyu, 民法总论 (*The General Theory of Civil Law*), 北京大学出版社 (Peking University Press), at 407 (2016).

[10] See Ladas, fn. 7 at 1574.

Historically, the product attributes of appellations of origin have evolved and differentiated from indications of source. In the early French laws, false labeling of the origin of goods and false labeling of the producer both would result in the same criminal penalties.[11] Its purpose is merely to ensure the source function of the mark, to enable consumers to know where the products are made and by whom, without considering the nature and quality of the products. After the French Revolution in 1789, the boundaries of the old Champagne province were abolished, and it was divided into several smaller units known as départments. The département of I'Aube and département of la Marne were situated in both the old province of Champagne and the province formerly known as Bourgogne (Burgundy). Although the sparkling wine from Burgundy was superior to that from the ancient province of Champagne, the French government determined the right to use the term "Champagne" only based on geographical origin, which sparked protests and even unrest.[12] The Law of 6 May 1919 transferred the decision-making power of AO to the court. The court no longer simply determined the right to use AO based on the origin but also took into account the nature and composition of the product and the "substantial qualities" produced through "faithful and constant local methods."[13] AO no longer merely served as an indication of source; instead, it had acquired the attribute of product specifications. Although the Law of 6 May 1919 included product quality as a consideration in confirming AO, geographical origin remained the primary criterion. If any product is to use AO, all its ingredients must come from the region specified by the appellation.[14] Therefore, the dispute between the Aube and Marne départments over the use of the appellation "Champagne" had not been resolved. The Law of 22 July 1927 added new considerations to the Law of 6 May 1919, such as terrain, grape varieties, and fermentation methods.[15] Producers in the Aube département could label their products as "Champagne" as long as they followed the quality control requirements stipulated in this law. This enabled AO to break free from the geographical limitations it was previously subject to, taking a more decisive step toward the attribute of product category. The Decree-Law of 30 July 1935 established *appellation d'origine contrôlée* (Controlled Appellation of Origin, hereinafter AOC) and *Institut national des appellations d'origine* (National Institute

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[11] See *l'art. 1^er de la loi du 28 juillet 1824 relative aux altérations ou suppositions de noms sur les produits fabriqués* (Article 1 of the Law of 28 July 1824 relating to alterations or suppositions of names on manufactured products).

[12] See Louis C. Lenzen, Bacchus in the Hinterlands: A Study of Denominations of Origin in French and American Wine-Labeling Laws, 58 *Trademark Reporter*, 176–177 (1968).

[13] See Id. at 177.

[14] Paul Roubier, *Lè droit de la propriété industrielle* (Industrial Property Law), Vol. 2, Librarie du Recueil Sirey, at 761 (1954). Qtd. in Lenzen, fn. 12 at 178.

[15] See *arts. 3 et 5 de la loi du 22 juillet 1927 tendant à compléter la loi du 6 mai 1919 relative à la protection des appellations d'origine* (Articles 3 and 5 of the Law of 22 July 1927 supplementing the Law of 6 May 1919 on the protection of appellations of origin).

of Appellations of Origin, hereinafter INAO).[16] INAO formulated decrees to specify in detail the criteria of AOC, which cover aspects such as drainage, alcohol content, grape yield per unit area, and ripening period, and also delineated the regions that were eligible to use AOC. The provisions on the geographical origins of products and a series of production requirements guaranteed that the products possessed certain quality characteristics, i.e., belonging to a specific category and conforming to the tradition.[17] As a result, products became the core of institutional norms. Since products of the same quality cannot be produced elsewhere, the appellation of origin refers to a specific category of products that are exclusively produced in a specific region. That is, "AO designates product. The product's name is the same as the AO."[18] "At this stage the communicative logic supporting IS [indication of source] protection, that is shared with the trademark law, is layered over with *terroir* logic."[19] The term "appellation of origin" was hence distinguished from the indication of source, divorced from the realm of commercial marks, and became a completely different legal protection object.

B Characteristics and Functions of Genuine GIs

As an independent type of intellectual achievement, GIs have characteristics and functions that are distinct from those of other intellectual property objects. Firstly, the scarcity and irreplaceability of a product endow it with a premium function of dividing the market. Human creativity provides unlimited possibilities for the creation of commercial marks. GIs, as products with local features, are the result of the interaction between human creativity and specific natural factors of places and are in a very limited number. However, the small number does not diminish its importance. Compared with products using trademarks, the quality characteristics of GIs are always closely tied to the *terroir* of the origin, possess irreplaceability, naturally have the function of dividing the market, and can bring a more significant premium effect. In the context of economic globalization, the large-scale "daily" products produced by intensive agricultural production methods, such as those from the United States and Australia, have had a significant impact on the agricultural food

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[16] See *arts. 20 et 21 du décret-loi du 30 juillet 1935 relatif à la défense du marché des vins et régime économique de l'alcool* (Articles 20 and 21 of the Decree-Law of 30 July 1935 on the defence of the wine market and the economic regime of al-cool). The National Committee for the Appellations of Origin of Wine and Spirits established according to this law was renamed into INAO in 1947.

[17] See Louis Lorvellec, You've Got to Fight for Your Right to Party: A Response to Professor Jim Chen, 5 *Minnesota Journal Global Trade*, 67 (1996).

[18] Sergio Escudero, *International Protection of Geographical Indications and Developing Countries*, T. R. A. D. E. working papers 10, South Centre, July 2001, at 5.

[19] Dev Gangjee, *Relocating the Law of Geographical Indications*, Cambridge University Press, at 298 (2012). "Terroir" is a term with a specific meaning in French, referring to the combined interaction of natural and human factors in a particular place that results in the characteristics of the product. It is difficult to translate this term directly and accurately. To ensure precise expression, this article directly uses the original French term.

industries in various countries, leading to the disapperance of local gastronomic traditions, frequent occurrence of quality safety problems, and disengagement of food production from consumption. To counter the trend of product homogenization, Europe developed a niche specialty product production mode represented by the GI industries to meet the growing needs of consumers for products with local features.[20] Although the output of niche specialty products is small, their scarcity, irreplaceability, and traceability make them command higher premiums, thus becoming an important means for Europe to maintain its industries, product diversity, and market interests, attracting the interest and attention of more and more countries.

Secondly, the creativity of non-industrialized *terroir* enables GIs to have the function of cultural protection. The Second Industrial Revolution enabled organic chemistry to be applied in food production. Many traditional processes were replaced by modern technologies, triggering a debate in the field of agricultural products and foods regarding the terms "natural" and "manufactured" or "adulterated." In essence, it was a dispute over the application of industrial technology and the application of traditional processes. For instance, in the wine industry, processes such as watering, sweetening, plastering, or coloring, and using dried grapes to make wine, which aim to reduce costs, were criticized by traditional artisans as adulteration and fraudulence.[21] Under their influence, France passed legislation defining wine as a product produced using specific processes in an attempt to exclude products using the so-called "adulteration" process from the category of wine. The Law of 1 August 1905 aimed to offer a definition of all products and to ensure the evolution of norms in relation to adulteration procedures.[22] This law was progressively implemented through specific decrees, one for each product and then one for each component of a given product. The Decree-Law of 3 December 1907 is the application of this law to the wine sector. It stipulates the characteristics of wine and authorized technical solutions. Any product that uses unauthorized techniques to modify the natural state of the product or dissimulate the true quality of the product is not "genuine" wine.[23] This model of defining products through processes has become the fundamental institutional rule of AOC, that is, the geographical area, technical processes, and grape varieties of each AOC are all determined by decrees, and AOC is more of a technical control mark rather than a product quality mark. In other words, product quality, as the result of an obligation of means and an assessment process, was not defined *per se*; it

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[20] See Daniel W. Gade, Tradition, Territory, and Terroir in French Viniculture: Cassis, France, and Appellation Contrôlée, 94 *Annals of the Association of American Geographers*, 848–849 (2004).

[21] See Alessandro Stanziani, Information, Quality and Legal Rules: Wine Adulteration in Nineteenth Century France, 51 *Business History*, 274–277 (2009).

[22] See *loi du 1er août 1905 sur la répression des fraudes dans la vente des marchandises et des falsifications des denrées alimen-taires et des produits agricoles* (The Law of 1 August 1905 on the suppression of fraud in the sale of goods and falsification of foodstuffs and agricultural products).

[23] See Stanziani, fn. 21 at 283.

was simply framed in ways of doing things.[24] Due to the varying soil and water conditions in different years, the product quality does not have the standardization of industrial production. Instead, it depends on how producers use traditional techniques to cope with the constantly changing natural conditions. Therefore, *terroir* does not mean strict adherence to the AOC rules, nor is it a passive discovery process. It requires producers to grasp the differences in the water and soil conditions of each piece of land in different years and, through creative production activities, to make the products exhibit the best *terroir* quality. The utilization and exploration of *terroir* by producers is similar to the collaboration between a composer and a musician. The composer creates the music, and the musician performs it. The performance should be faithful to the original score while also creatively expressing the musician's own understanding of the work.[25] The production process of AOC is the collective wisdom of local producers and is traditional. However, the production applications of individual producers are constantly innovative and keeping up with the times. Together, these two aspects have shaped the creativity of *terroir*. This creativity was highly valued by INAO and its founder, Joseph Capus. It endowed the AOC with regional diversity and historical variability and maintained French cultural techniques, traditional characteristics and even the shaping of national identity. AOC is no longer merely an intellectual achievement; it encompasses both the dimensions of cultural heritage and national characteristics, and represents the embodiment of history and ancestral *savoir-faire*. In comparison, the trademark system, as an emerging product identification system brought about by the Industrial Revolution, replaced the region-based product identification methods of the handicraft era. It met the demands of mass production under industrial conditions and constituted the cornerstone of modern industrial property law.[26]

Lastly, GIs are intellectual achievements but not private property. They have the functions of public products in supporting agriculture and alleviating poverty, promoting local industrial development, and facilitating social governance. In France, AOC is incompatible with the concept of property, because AOC does not belong to anyone and has no property owner. Anybody who produces compliant products in the AOC regions according to the specified requirements can use AOC to indicate that the products fall within the product category that AOC refers to. The product category cannot be privately owned, and "the AOC would thus be a type of 'property' that is non-transferable, non-transportable, and without designated title-holders. The AOC is not a brand name that a group of wine-makers own jointly."[27] The non-privacy determines that AOC is not intellectual property, and its system

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[24] See Geneviève Teil, The French Wine "Appellations d'Origine Contrôlée" and the Virtues of Suspicion, 2 *The Journal of World Intellecutual Property*, 256 (2010).

[25] See Geneviève Teil, Nature, the Coauthor of Its Products? An Analysis of the Recent Controversy Over Rejected AOC Wines in France, 3–4 *The Journal of World Intellecutual Property*, 102 (2014).

[26] See Luis de Javier, *Appellations of Origin in the Viticultural Sector: The Vision of the Wine Producers*, published on the official website of WIPO on November 7, 2001.

[27] See Lorvellec, fn. 17 at 69.

is not the intellectual property law.[28] The production and name use of AOC products cannot be separated from a specific region. They possess regional commonality and are conducive to shaping local political identity. In France, "the unity of political identity and production is apparent in all regions making wine that are eligible for appellations, where the name of the commune is often synonymous with the name of the wine."[29] GIs, this distinct attribute of regional public products, can effectively promote the common development of local industries, maintain the survival of small and medium-sized enterprises, boost farmers' income, and drive the development of remote and backward areas, thereby achieving positive social and political effects. In order to prevent this public product from being usurped by astute private enterprises familiar with trademark regulations, and also to maintain and enhance its economic utility and social-political functions, GIs must be managed by public authorities or public institutions, serving as a powerful tool for the government to implement public policies.

The scarcity, non-industrial nature, and public attribute of GIs are the characteristics of product categories rather than the characteristics of marks. Their functions of premium income, cultural protection and assistance for local development must also be achieved through products rather than marks. Therefore, the regulatory value of appellations of origin stems from products rather than appellations. This determines that the true objects protected by the *sui generis* law for appellations of origin are products rather than appellations or marks. Its essence is a product protection system rather than commercial mark protection rules. In France, INAO needs to formulate decrees for every AOC and set standards for product production methods and quality characteristics. Essentially, it is a legislative definition of product categories. The use of "appellations of origin" falls under the category of product identification and is a factual judgment. It is achieved through the state's supervision of product production and quality, and belongs to the public law rather than the industrial property law, which protects private rights.

C GIs Based on Subjective Linkage Are Not Genuine GIs

Unlike the objective linkage that uses products as carriers, subjective linkage is the understanding of the "indications" of geographical indications. That is, consumers identify the sources through indications and thereby distinguish the products. Consumers' understanding and evaluation of GIs stem from their product consumption experience, are determined by the independent management and control of the operators, and constitute the private reputation assets of the operators. These reputation assets are established on the basis of the arbitrariness of marking symbols. That is to say, the connection between the signified and the

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[28] See Delphine Marie-Vivien, The Role of the State in the Protection of Geographical Indications: From Disengagement in France/Europe to Significant Involvement in India, 2 *The Journal of World Intellecutual Property*, 128 (2010).

[29] Warren Moran, The Wine Appellation as Territory in France and California, 4 *Annals of the Association of American Geographers*, 698 (1993).

signifier is arbitrary,[30] and is shaped through the independent choices and marketing of the operators. Centered on the signifier, the signified will change with the alteration of symbolic cognition. This alteration enables a specific mark to acquire the source function and become a GI based on subjective linkage, or it may cause the GI to lose its source function, that is, to lose subjective linkage and thus lose legal protection. Therefore, the GIs based on subjective linkage fully comply with the commercial mark protection rules based on symbolic cognition. The aim is to center on symbolic signifiers, maintain the connection between them and the specific signified intact and free from interference and damage, and protect the reputation assets from being infringed upon. Unlike the product protection logic of appellations of origin, which determines a name based on a thing, GIs based on subjective linkage distinguish product sources based on cognition of marks and fall within the category of commercial marks. To maintain and fulfill its source function, a GI must be attached to products, but it cannot directly signify the products, that is, it cannot merge with the products and become the name of the products; otherwise, it will fall into the logic of product protection.

From a semiotic perspective, GIs based on subjective linkage essentially have no difference from trademarks and indications of source. They are all tools for conveying information to consumers and can be fully governed by the trademark law, anti-unfair competition law, or commercial mark protection rules in passing-off actions. The purpose of commercial mark protection is to distinguish the products of the mark user from other products. The use of a mark depends on whether the user has the right or qualification to use it. It is a value judgment based on the mark identification function rather than a factual judgment on product category attribute. Therefore, in countries like the United States and Australia, GIs are, in most cases, merely one aspect of the element of trademark distinctiveness, cannot be equated with specific products or be exclusively used, but are more like information such as the producer's name or address.[31] Accordingly, the United States Patent and Trademark Office holds that GIs have the same functions as trademarks, serve as indications of source, quality assurance and valuable commercial interests, and are a subset of trademarks.[32] In Germany, GIs are marks that describe the origins of goods or services and are under the general protection of the anti-unfair competition law.[33] In the United Kingdom, GIs are protected as

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[30] See Ferdinand de Saussure, 普通语言学教程 (*Course in General Linguistics*), translated by GAO Mingkai, 商务印书馆 (The Commercial Press), at 102 (1980).

[31] See Erik Thévenod-Mottet, The Protection of Geographical Indications in Multilateral Systems: A Cultural Clash, paper prepared for DOLPHINS Meeting, Florence, Italy, September 10–12, 2001, at 8.

[32] See USPTO, fn. 2 at 1.

[33] Before the *Gesetz über den Schutz von Marken und sonstigen Kennzeichen [MarkenG] vom 25. Oktober 1994* (German Law of Trademarks and Other Marks) took effect in 1994, Germany protected GIs mainly through Article 3 of the *Gesetz gegen den unlauteren Wettbewerb [UWG] vom 7. Juni 1909* (1909 Anti-Unfair Competition Law). The article stipulates that any person who, in a commercial transaction, makes misleading statements regarding a single commodity, commercial service or business conditions of all supplies, especially regarding its nature, origin ... source ... for competitive purposes, may be required to stop such statements. German scholars mainly use the concept of "geographical indication of source," which also includes indication of source.

brand names or product descriptions through passing-off actions to prevent the infringement by the defendant from causing confusion among consumers. In the positive laws of the above-mentioned countries, the legal attribute of GIs is trademarks or indications of source, not an independent type of right. Therefore, this article does not think that they are genuine GIs.[34]

III Legal Logic and Operational Mechanism of the Genuine GI System

The *sui generis* law centered on genuine GIs, as a product protection system, has a legal logic and operational mechanism that are completely different from those of commercial marks.

A Legal Logic of Product Protection in the Genuine GI System

The products as the objects protected by the special law must be products produced in a specific region and possessing unique quality. As products of the same quality cannot be produced elsewhere, the products fall within a category of products that are exclusively produced in a specific region. This product category is named after "appellation of origin," which essentially is the name of the product category. The name of this product category is product-specific, meaning that it can only signify a specific product category, and is region-specific, i.e., it can only signify products from a specific region. The product specificity determines the generic character of its name. That is, as long as the products meet the production requirements and quality standard, they will be given this name. It belongs to the public domain in that region. Just as French scholars Laurence Bérard and Philippe Marchenay have pointed out, "locally rooted products are so much a part of local living that they are known by generic names. They only acquire a geographical distinction when they are recognized and marketed outside the local area of production and consumption."[35] The regional specificity determines that the generic character of this name is not absolute; rather, it is restricted by region. Since the same products cannot be produced in the other regions, for the producers in another region, this product name does not belong to the public domain and cannot be used as a generic name. In this sense, the French code stipulates that the AOC can never be considered to reflect a generic character and thus can never fall into the public domain.[36] Based on this regional specificity, the appellations of origin can be referred to as "small generic names," while those that fall into the public domain and are not restricted by region can be called "large generic names."

However, it is not impossible for appellations of origin to become large generic names.

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[34] The difference between genuine and non-genuine GIs does not involve any conceptual correction or legal rectification. It merely represents an objective description of the independent nature of product protection and the non-independence of commercial mark protection in positive law.

[35] Laurence Bérard & Philippe Marchenay, *From Localized Products to Geographical Indications: Awareness and Action*, Centre National de la Recherche Scientifique, at 43 (2008).

[36] See *Art. L643-1 du Code rural et de la pêche maritime* (Article L643-1 of the Rural and Maritime Fishing Code).

When the quality of a product is no longer restricted by a specific origin and like products can be produced in other regions, the use of the name will no longer be restricted by region, and the name will become a generic name shared by producers in different regions. This is the genericization of appellations of origin. This situation occurs because the product is no longer influenced by the natural and human factors of the origin, namely *terroir*. For instance, "Nougat de Montélimar," "Moutarde de Dijon," and "Linge Basque" no longer depend on specific regional conditions to define their characteristics, and products of the same quality can also be produced in other regions, so their names are regarded as generic names that can be freely used.[37] As long as the true origin is indicated, such names can be used for products from different regions. The decisive factor for the genericization of appellations of origin is that the product loses its sole objective causal connection with the origin, which can be referred to as objective genericization. It is the result of the de-localization of product quality and is completely different from the subjective genericization logic of trademarks or indications of source. Whether as a trademark or an indication of source, the essence of a non-genuine GI is an indication of source, indicating the origin of the product rather than directly signifying the product or indicating its quality. Consumers use this indication to identify the source and thereby form expectations on the product. When the indication loses its source function and directly signifies the product, it will be integrated with the product and become a generic name. The decisive factor for this genericization is a subjective process of change in consumer cognition. Its essence is the conversion of commercial marks into product names. In the United States, whether any GIs, including the appellations of origin from Europe, become generic is determined based on consumer cognition. For example, regarding whether the "Cognac" certification mark should be transformed into a generic name, the Trademark Trial and Appeal Board of the United States (hereinafter TTAB) focused on whether it had lost its meaning as a geographical indication of source.[38] In the United Kingdom, as names such as "British Sherry" and "South African Sherry" have been used for decades, the consumers' association of "Sherry" with Spain has been weakened, making it a semi-generic name.[39] The German court determines the generality through consumer cognition surveys, and the proportion should be over 80%.[40]

As a product name, the appellation of origin essentially represents the reputation of the product. Product reputation refers to the cognition of the product, rather than the cognition of its name or mark, and cannot be understood based on the theory of trademark distinctiveness. The foundation of product reputation is the quality characteristics of the product. The more distinct the product's characteristics, the clearer the category, and the higher the

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[37] See Friedrich-Karl Beier & Roland Knaak, The Protection of Direct and Indirect Geographical Indications of Source in Germany and the European Community, 1 *IIC*, 16 (1994).

[38] See Institut Nat. des Appellations d'Origine v. Brown-Forman Corp., 47 U. S. P. Q. 2d 1885 (T. T. A. B. 1998).

[39] See Vine Products Ltd. & Others v. Mackenzie & Co. Ltd. & Others, 86 R. P. C., 20 (1969).

[40] See Caroline Loschelder & Michael Loschelder, *Geographische Angaben und Ursprungsbezeichnungen* (Geographical Indications and Appellations of Origin), 2nd edition, Heymanns, at 5 (2002).

identifiability, and the more prominent the reputation will be. "Appellations with a narrow range of possible types are the best known and most respected.[41] Product characteristics form the basis of product reputation. There are no "quality-neutral" products with simple reputations. Product characteristics are formed by the *terroir* of origin, so its reputation is attributed to the origin, that is, "*terroir* was supposedly the basis for quality, which in turn, led to the product's reputation."[42] Therefore, this reputation is an "attributable" reputation, "[h]owever, the trademark and unfair competition approaches focus on *whether the reputation exists* at the relevant time and *not how it came about*, let alone why it *arose in a particular place*."[43] This reputation is consumer cognition to the mark rather than the cognition to the product, and is the reputation of the mark rather than the reputation of the product. In terms of trademarks, the foundation of reputation lies in their distinctiveness, and they function to identify the goods of the trademark owners or the persons authorized by them; in terms of indications of source, reputation conveys the information about the origin. As long as the source is genuine, the mark holder or user can independently determine the quality of the product without requiring any characteristics attributable to the origin. Therefore, the reputation is an "unattributable" reputation. This means that even the marks with simple reputations can be protected.

The protection of the appellations of origin in essence is to protect product reputation. In France, "Champagne" was once used in perfume. Although perfume and wine are different products, the defendant used characteristic elements, such as the shape of champagne wine bottle stoppers, with the intention of associating the product with champagne wine, which undermined champagne wine's reputation and was thus prohibited by the court.[44] If product reputation is not being exploited, it does not constitute a violation of law. Champagne is also a place name, so names like "Computer Company of Champagne" and "Champagne Transport Firm" do not constitute the exploitation of the reputation of champagne wine.[45] For another example, "Darjeeling" was once registered as a publication and distribution trademark. The French court of first instance held that different products would not cause confusion, and rejected the revocation request from the Indian Tea Board. However, the appellate court held that the disputed trademark contained the drawing of a teapot, indicating that it was attempting to profit from the reputation of Darjeeling tea. Therefore, the court ruled the trademark invalid.[46] In another case, the trademark owner offered insurance services

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[41] See Gade, fn. 20 at 854.

[42] See Gangjee, fn. 19 at 299.

[43] See Dev S. Gangjee, *From Geography to History: Geographical Indications and the Reputational Link*, in Irene Calboli & Ng-Loy Wee Loon (eds.), *Geographical Indications at the Crossroads of Trade, Development, and Culture,* Cambridge University Press, at 55 (2017).

[44] See *CA Paris, 15 déc. 1993, n°93/25039* (CA Paris, 15 Dec. 1993, No. 93/25039).

[45] See Lorvellec, fn. 17 at 68.

[46] See Justin Hughes & Diane Artal, *Translation of The Tea Board v. Mr. Jean-Luc Dusong, Court of Appeals of Paris, 05/20050, Decision of November 22, 2006*, 28 Cardozo Arts & Ent. L. J., 432 (2010).

under the name of "Darjeeling," without mentioning the tea product sector. The French court held that such use did not benefit from the reputation of Darjeeling tea.[47] Even if the appellation of origin is not used, but a similar name is used or the physical characteristics such as the appearance of the product are imitated, it can still constitute the exploitation of the product's reputation. For instance, "Cambozola" would evoke in consumers' minds the image of products with the appellation of origin "Gorgonzola," and an imitation of the distinctive horizontal black lines marking of "Morbier" cheese, even without using its name, would still trigger the association with this product. The European courts have prohibited such practices.[48] It can be seen that products are the objects protected by the genuine GI system; any use of their names, including using them in an implied, translated form, or accompanied by expressions such as "similar," "type," "style," or "imitation," as well as imitating their appearance or other physical characteristics, as long as it is associated with the products and exploits product reputation, will fall within the protection scope. It can be called product centralism. Just as the right to a personal name encompasses one's real name, nickname, pen name, anonym, courtesy name, and pseudonym, and the right to a portrait encompasses the reproduction of a natural person's physical appearance,[49] the cores of their protection are both the natural person's personality rather than the name or portrait *per se*. The principle is the same.

The protection based on product centralism is objective and absolute. As long as the product's essential characteristics remain unchanged, the protection will also remain unchanged, regardless of shifts in consumer cognition. Furthermore, this protection persists for as long as the product itself exists, unbound by any temporal limitations. The use of product names is a factual statement that distinguishes product categories. It can only signify a specific product, showing product-specificity. To use a name for something other than what it truly signifies is an act of misrepresentation—it is the commercial equivalent of the sophistry of "calling a deer a horse," deliberately distorting facts to mislead. Even if it does not cause confusion among consumers, it is still an unethical and abusive act. According to Article 1382 of the French Civil Code regarding the abuse of rights, French courts first ruled in 1984 that it is forbidden to use appellations of origin in non-similar products.[50] The prohibition of such behaviors does not need to take into account consumer cognition, and the theories of confusion and dilution do not apply to it.

The protection of non-genuine GIs is based on the function of indicating the source, and it is a protection of marks rather than products. As long as consumers do not have any confusion

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[47] See "Darjeeling," Decision of the Paris District Court (Tribunal de grande instance), 30 May 2013, Case No. RG 2010/01706, 46 IIC, 868 (2015).

[48] See *EuGH, Urteil vom 4. März 1999, Rs. C-87/97, Slg. 1999, I-1301, Rn. 25.–Gorgonzola/Cambozola* (ECJ, Judgment of 4 March 1999, Case C-87/97, ECR 1999, I-1301, Para. 25.–Gorgonzola/Cambozola); *Judgment of 17 December 2020, Syndicat interprofessionnel de défense du fromage Morbier, Case C-490/19, ECLI: EU: C: 2020: 1043, para. 41.*

[49] See ZHU, fn. 9 at 407–408.

[50] See TGI Paris, 5 March 1984, 1984 RIPIA 40. Qtd. in Heath & Marie-Vivien, fn. 2 at 829.

regarding the source, the reputation of the mark will not be damaged and thus there is no need for protection. In the United States, "Cognac," "Darjeeling," and other certification marks, are subjected to judgment on the likelihood of confusion, like ordinary trademarks.[51] The source function is based on consumer cognition. As long as they are known to the public, both quality-neutral GIs and appellations of origin with regional attribution are equally protected from passing off in the United Kingdom in order to prevent deception as to origin, reputation dilution, and unfair competition.[52] Consumer cognition is shaped through the use by the operator, and it may also disappear if it is used by others without restriction. Its protection is subjective, relative and dynamic.

As a product protection system, the genuine GI system follows the legal principle of products and is completely different from the operation logic of the commercial mark system. The relation between them is not a simple exclusive or coexistent relationship but a connective and coordinated relationship between different legal domains. On the one hand, "appellations of origin" signify product categories and are generic names, while trademarks or indications of source cannot be generic names. It means that no mark can be protected as both an appellation of origin and a commercial mark at the same time. The trademark laws in various countries generally stipulate that a mark only bearing the generic name of the product or only directly indicating the nature or quality of the product cannot be registered as a trademark. In France, AO cannot be registered as a trademark, including as a collective or certification mark.[53] If a term becomes an AO, it is considered a generic name and loses its distinctiveness as a trademark. Under French jurisprudence, such trademarks are subject to revocation, even if registered earlier.[54] On the other hand, trademarks containing generic names can acquire trademark rights if they are distinctive. For example, "Romanée-Conti" is AOC,[55] while DOMAINE DE LA ROMANÉE-CONTI was registered as an ordinary trademark,[56] which was used to identify Romanée-Conti wine of the trademark owner. Collective or certification marks can also acquire distinctiveness by attaching distinctive marks to the appellations of origin, in order to identify products with appellations of origin from specific groups or

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[51] See fn. 38 at 1891; *Tea Board of India v. The Republic of Tea, Inc., 80 U. S. P. Q. 2d 1899 (T. T. A. B. 2006).*

[52] See Norma Dawson, Locating Geographical Indications—Perspectives from English Law, 90 *Trademark Reporter*, 608–612 (2000).

[53] See *l'art. L711-2 du Code de la propriété intellectuelle* (Article L711-2 of the Intellectual Property Code).

[54] See SHEN Daming, 知识产权法 (*Intellectual Property Law*), 对外经济贸易大学出版社 (University of International Business and Economics Press), at 346 (1998).

[55] See *décret du 11 septembre 1936 concernant la définition des appellations contrôlées* «*Romanée-Saint-Vivant, Richebourg, Romanée-Conti, Romanée, La Tache*» (Decree of 11 September 1936 Concerning the Definition of the Controlled Appellations "Romanée-Saint-Vivant, Richebourg, Romanée-Conti, Romanée, La Tache").

[56] See "No National: 194564860," *BOPI Marques de fabrique, de commerce ou de service* (BOPI Trademarks), No. 20/01, Vol. II, p. 119.

guaranteed by the owner of the certification mark.[57] At this point, the appellation of origin in the trademark and the trademark containing the appellation of origin each perform their respective functions. The former indicates the product category, while the latter distinguishes the source of the product. They operate in parallel without contradicting each other, and are adjusted by the appellation of origin system and the trademark law, respectively.

B Product Supervision Mechanism for the Genuine GI System

Premium income, cultural protection and industrial development are both the product functions of genuine GIs, and the purposes of institutional legislation. Their realization is based on product authenticity and guaranteed by product supervision. Therefore, the rules of the genuine GI system in such aspects as the allocation of authority, the forms of expression, confirmation review, law enforcement and supervision, and even extraterritorial effect are all centered on product supervision and follow the legal principle of product protection.

From the perspective of the allocation of authority, products serve as the objects regulated by the *sui generis* law, and the confirmation and supervision of their quality should be under the responsibility of the relevant product authorities. Since products with appellations of origin are agricultural products and foods, countries such as France, Italy, Spain, and Greece all define the agricultural, forestry, fishery, and food departments as the authorities.[58] INAO is also a professional institution administered by the French Ministry of Agriculture. Non-genuine GIs as commercial marks have no relation to the products. They are either administered by the industrial property department; for example, GI trademarks are administered by the Patent and Trademark Office in the United States; or, like in Germany and the United Kingdom, they are adjusted and protected by courts through anti-unfair competition law or passing-off actions.

From the perspective of the forms of expression, appellations of origin, as product names, must be pronounceable rather than unpronounceable symbols, graphics, colors, three-dimensional shapes, sounds, or scents. The appellations of origin usually name products after place names, and the place names are the same as the product names, such as "Champagne" and "Bordeaux." Consumers identify products from their names and may not know their origins. However, as long as the products are authentic, their origins can naturally be guaranteed. Therefore, the product name is not necessarily the name of origin. For instance, "Stilton" cheese is produced in Derbyshire, Leicestershire and Nottinghamshire, but it got

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[57] See Xinzhe Song, *The Role Played by the Regime of Collective and Certification Marks in the Protection of Geographical Indications—Comparative Study of Law and Practice in France, the EU and China*, 5–6 *The Journal of World Intellectual Property*, 449, 451 (2018).

[58] It is the Ministry of Agriculture and Food in France, the Ministry of Agriculture, Food and Forestry Policies in Italy, the Ministry of Agriculture, Fisheries and Food in Spain, and the Ministry of Rural Development and Food in Greece.

its name because it is sold in Stilton.[59] For instance, the birthplace and main producing area of "Longkou Bean Vermicelli" is Zhaoyuan. It got its name because it was distributed and transported out from Longkou.[60] Even non-geographic names can be used as product names. For example, "Rooibos," originally meaning "red shrub", is the name of South African rooibos tea. It has received protection as an designation of origin in Europe.[61] The product name does not need to have a specific style, such as a specific font, color, or decorative or identifying pattern. Any form of name, whether it is an alias, a translation, or a similar name, as long as it signifies the product, is within the protection scope. If a product has multiple names, for example, "Jiali Yak" is also known as "Nyangya Yak," or "Fangcheng Danshen" is also named "Yu Danshen," all of these names should be protected.[62] In other words, appellations of origin are more about the meaning rather than the form. They depend on the products and reflect product centralism.

Different from product centralism, non-genuine GIs, whether as ordinary trademarks or collective or certification marks, must be identifiable, manifested as the identification of a specific form of mark. Therefore, a trademark must have a graphic representation or example. It centers on the form of the mark and values the form rather than the meaning, and can be referred to as mark centralism. As long as the form is identifiable, the GIs that the US trademark system can accommodate are not limited to place names, and also include words, slogans, designs, three-dimensional marks, colors, and even sounds and scents.[63] In Germany, the so-called geographical indications of source include any marks that can indicate the origin, and the scope is broader. Names like "Sekt" and "Weinbrand," which are the generic German names for sparkling wine and brandy, are understood by the public as products of German-speaking countries. The German government believes that they should be classified as "indirect indications of source" protected by the competition law.[64] The anti-unfair competition law focuses on the public's perception of the origin rather than the identification of the form of the mark, which can be called source centralism.

Confirmation review serves as the prerequisite for supervision enforcement. Its task is to determine whether there are products with characteristics attributable to origin and to

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[59] See Matthew J. Rippon, What Is the Geography of Geographical Indications? Place, Production Methods and Protected Food Names, 2 *Area*, 158 (2014).

[60] See 招远县志 (*Local Records of Zhaoyuan County*), 华龄出版社 (Hualing Press), at 238 (1991); 龙口市志 (*Local Records of Longkou City*), 齐鲁书社 (Shandong Qilu Press), at 176 (1995).

[61] See Commission Implementing Regulation (EU) 2021/865 of 28 May 2021 Entering a Name in the Register of Protected Designations of Origin and Protected Geographical Indications ("Rooibos"/"Red Bush" [PDO]), OJ L 190/88 (2021).

[62] See LIU Hongchun (au. & trans.), 地理标志与实现可持续发展目标——地理标志保护实务探讨与案例分析（汉英对照版）(*Geographical Indications and Achievement of the Goal for Sustainable Development: Practical Discussion and Case Study on Geographical Indication Protection [Chinese-English Version]*), 知识产权出版社 (Intellectual Property Publishing House), at 26 (2023).

[63] See USPTO, fn. 2 at 2.

[64] See *EuGH, Urteil vom 20. Februar 1975, Rs. 12/74, Slg. 1975, 181, S. 186 ff. – Sekt/Weinbrand* (ECJ, Judgment of 20 February 1975, Case 12/74, ECR 1975, 181, p. 186 *et seq.* –Sparkling Wine/Brandy).

establish product standards or technical specifications. Essentially, it is product examination. This examination decides three fundamental elements: The first is whether the product has unique characteristics; the second is the natural and cultural factors of the origin and their geographic distribution; the third is the objective causal relationship between the product's characteristics and its origin. Among these, establishing objective attribution is the key and core aspect, and its verification must and can only be completed by experts. Therefore, INAO has set up a national committee that, based on expert opinions, decides whether to accept AOC applications, determines production conditions, and forms technical specifications for products. These specifications are then formally issued as decrees by the Ministry of Agriculture.

The confirmation review of the collective or certification marks of GIs only examines the marks and does not involve products. The core is the determination of distinctiveness. The distinctiveness of this trademark is not the information about the group membership of the trademark user it conveys or the origin, but the control and management of the trademark by the trademark owner as reflected by it. TTAB pointed out that if a geographical name is to become a certification mark, its use must be controlled and limited in such a manner that it reliably indicates that the goods come exclusively from a particular region, just as an ordinary trademark can reliably indicate that the goods come from a particular producer.[65] It can be seen that regardless of a collective mark, a certification mark or an ordinary trademark, its reputation or distinctiveness is shaped by the trademark owner through its governance of the use of the trademark. The rules that govern the use of collective and certification marks, as the basis for shaping distinctiveness, are mark rules rather than product specifications. Their content is determined by the trademark owner independently and is under its responsibility. The state neither intervenes nor examines it. Whether it is the product characteristics or the range of the origin or the production conditions, they can all be demonstrated and guaranteed through trademarks. However, the objective attributability of these aspects is something that the trademark owner cannot freely choose or display. In the United States, the certification rules for certification marks are descriptive and mechanical. For instance, the "Roquefort" certification mark is described to "indicate that the same [products] has been manufactured from sheep's milk only, and has been cured in the natural caves of the community of Roquefort, Department of Aveyron, France,"[66] not involving any objective attribution at all. Of course, the trademark owner may incorporate the statutory technical specifications that reflect objective attribution into the trademark governance rules. However, this guarantee of attribution stems from the implementation of the specifications rather than the use of the trademark, and is subject to the supervision under the public law rather than the self-discipline of private rights. It represents a different legal relationship.

The use of an appellation of origin as a legal product category shall comply with technical

[65] See fn. 38.

[66] USPTO, *Trademark Principal Register: ROQUEFORT*, Reg. No. 571, 798, Registered March 10, 1953.

specifications or standards, and this cannot be achieved without the direct supervision of the competent authorities. In France, since AOC was approved, it has been under the supervision of the local INAO agencies. These agencies are well-versed in the products and their origins. They ensure that production specifications are adhered to by assisting producers and conducting undercover inspections of farms.[67] As long as it meets the requirements of the specifications, any product can use AOC. Producers do not need to be dependent on the association.[68] If a product is found non-compliant and using AOC, it constitutes an administrative violation. The INAO will file a lawsuit or take legal protection measures. If it constitutes a crime, a fine or imprisonment will be imposed.[69] In conclusion, the AOC supervision applies to products rather than names, and does not have the effect of excluding certain individuals from using the names. If some products do not meet the standards, but others do, the name can still be used. Product supervision is a core function and fundamental effectiveness mechanism of the product system, providing strong protection by public power to realize the product value function of GIs.

Under the trademark system, trademark owners do not have the power to supervise products. They can only limit the trademarks to specific products by governing the use of the trademarks. This trademark governance is a private act and shall not be subject to the intervention from public power. Both ordinary trademarks and collective or certification marks can be used only under the authorization of trademark owners. The rules for the use governance of collective and certification marks stipulate the authorization conditions promised by trademark owners. Unauthorized use of a trademark constitutes a trademark infringement even if the product meets the authorization conditions. It can be seen that the core of the use of GI trademarks lies in whether the user has the right to use the trademark rather than whether the product complies with the regulations. It is a judgment of legal right, not a judgment of factual product quality. Therefore, the governance by trademark owners applies only to the use of the trademark and does not govern the product directly. In the United States, the Patent and Trademark Office does not supervise the applicable standards for products, nor does it involve itself in a trademark owner's authorization rules. Its jurisdiction is concerned solely with whether the established rules for trademark use have been followed and whether consumers have been deceived or misled. If trademark owners break the commitment of self-discipline, such as failing to implement control over the use of the trademark in accordance with the rules, or refusing in a discriminatory way those eligible to use the trademark, the certification mark will be cancelled.[70]

Lastly, in terms of extraterritorial effect, the differentiation and supervision of products must be based on product specifications. Therefore, the overseas protection of these products

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[67] See Elizabeth Barham, Translating Terroir: The Global Challenge of French AOC Labeling, 19 *Journal of Rural Studies*, 134 (2003).

[68] See Gade, fn. 20 at 863; see Heath & Marie-Vivien, fn. 28 at 126, 140.

[69] See fn. 16 at Article 23 of the Decree-Law of 30 July 30 1935; see SHEN, fn. 54 at 345.

[70] See 15 U. S. C. Sec. 1064 (2006).

must be premised on the recognition and enforcement of the product specifications by the protecting country. The mutual recognition and protection of products occur between countries that both have the special systems for appellations of origin. They jointly formulated the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration under the leadership of France. Its essence is a system for mutual recognition and protection of products. The effectiveness of overseas product protection stems from the protection provided by the country of origin or the validity of product specifications, without considering the awareness of the consumers in the protecting country. For countries like Germany that are not parties of the Agreement, France signed bilateral treaties with them, stipulating that the names listed in the treaty annex must be used for products from the country of origin, and can only be used under the conditions stipulated by the laws of the country of origin.[71] This means that in both Germany and France, French appellations are used in accordance with French laws, and German appellations are used in accordance with German laws. Germany and France both provide objective and absolute protection for appellations. Even when used in a translated form or with the indication of the true source, or accompanied by expressions such as "type," "style," or "imitation," such use is prohibited. Germany even provides private prosecution for the French appellations, enabling them to be protected by criminal law as they are in France.[72] This product protection logic does not conform to German positivist jurisprudence. It is the result of the realpolitik contest between France and Germany. The treaty signed between France and Switzerland also has similar arrangements.[73] Britain was also under pressure from France, but it insisted on basing its protection on the cognition of British consumers to marks. In the "Spanish Champagne" criminal prosecution case, the British jury held that Champagne is a type of sparkling wine, and "Spanish Champagne" does not constitute a false description. For this reason, France threatened to recognize "Scottish whisky" as a similar generic name.[74] In subsequent civil litigation, the British court held that "Spanish Champagne" might mislead consumers and should be banned.[75] As a result, the protection request from France was satisfied, and

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[71] See *Arts. 2 und 3 des Abkommens zwischen der Bundesrepublik Deutschland und der Französischen Republik über den Schutz von Herkunftsangaben, Ursprungsbezeichnungen und anderen geographischen Bezeichnungen vom 8. März 1960, BGBl. II 1961* (Articles 2 and 3 of the Agreement between the Federal Republic of Germany and the French Republic on the Protection of Indications of Origin, Designations of Origin and Other Geographical Designations of March 8, 1960, Federal Law Gazette II 1961), p. 22.

[72] Id. at Article 4 and Clause 2 of Article 7.

[73] See *Art. 2 bis 4 und Art. 6 des Vertrags zwischen der Schweizerischen Eidgenossenschaft und der Französischen Republik über den Schutz von Herkunftsangaben, Ursprungsbezeichnungen und anderen geographischen Bezeichnungen vom 14. Mai 1974, SR 0. 232. 111. 193. 49* (Articles 2 to 4 and 6 of the Treaty between the Swiss Confederation and the French Republic on the Protection of Indications of Origin, Designations of Origin and Other Geographical Names of 14 May 1974, SR 0. 232, 111, 193. 49).

[74] See Dev S. Gangjee, Genericide: The Death of a Geographical Indication?, in Dev S. Gangjee (ed.), *Research Handbook on Intellectual Property and Geographical Indications, Cheltenham*, Edward Elgar, at 514 (2016).

[75] See *J. Bollinger and Others v. The Costa Brava Wine Co. Ltd., 78 R. P. C., 127 (1961).*

cognition to marks as the legal foundation for British passing off litigation was also upheld. In the United States, TTAB rejected INAO's objection to the trademark registration of "CHABLIS WITH A TWIST," holding that although "Chablis" is protected by AOC in France, it is understood as a generic name of goods in the United States. The US court upheld the decision of TTAB, holding that INAO had neither demonstrated that American consumers believed that "Chablis" indicated that the product originated from the Chablis region of France, nor proved that this alleged geographic misrepresentation constituted a material factor in consumers' purchasing decisions.[76] Of course, it is not impossible that AOC is protected in the United States, but it must follow the legal principle of centering on consumer cognition, that is, it must be regarded by consumers as a category name of specific products exclusively produced in a specific region. For instance, among the non-generic names identified by the Alcohol and Tobacco Tax and Trade Bureau of the United States, there is a category of names that are identifying names for specific wines. Wines from the designated origin can be used as the class and type designations based on their own strengths, including "Bordeaux," "Medoc," and other AOC and European names. To be classified under this category, the applicant must prove that its name is known to the American consumers and to the trade as the designation of a specific wine from a particular region, distinguishable from all other wines.[77]

IV The Interpretation of GI in Positive Law: Legal Principle vs. Political Compromise

From the perspective of the current positive law for GIs, whether it is the *sui generis* protection under the Old World Roman system represented by the European Union, the protection of trademarks or indications of source in countries like the United States, or the emerging legislative protection in Eastern Europe, Asia, Africa and Latin America, these systems no longer strictly follow the pure logic of product protection or commercial mark protection. Instead, they have shown a trend of compromise and reconciliation. It is the result of the competition between the product protection mode and the commercial mark protection mode. In essence, it is the outcome of realpolitik–a contest of national interests and subsequent compromise on the international stage. However, the legal logics of product protection and commercial mark protection are neither compatible nor interchangeable. The forced reconciliation between them based on political compromise has weakened the link between a product and its *terroir*. Although it allows for diverse legislative expressions that meet the different needs of various countries, it also leads to internal legal and structural contradictions in the legislation of different countries, thereby undermining the product function of GIs that promote local development. China must therefore approach such compromises in its own legislation with caution and vigilance.

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[76] See *Institut Nat. des Appellations d'Origine v. Vintners Intern. Co., Inc., 958 F. 2d 1581 (Fed. Cir. 1992).*

[77] See 27 C. F. R. Sec. 4. 24 (c) (2000).

A From the *Sui Generis* System of the European Union to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS): Compromise and Inclusiveness of the Rules for Protection of GIs

The GI system of the European Union (EU) was promoted and established by France. It adopts the rules of *sui generis* laws of Southern European countries in terms of product scope, registration procedures and supervision protection, and belongs to a product protection system. However, in order to enhance the inclusiveness of the system to coordinate the positions of the member states, especially to take into account the legislative traditions and industrial interests of the countries in northern Europe such as Germany, this system inevitably deviates from the legal principle of product protection. This not only led to conflicts in legal principles but also caused distortions in the protection practices. The specific manifestations are as follows.

Firstly, the EU's attempt to balance product protection with intellectual property protection creates a conflict between public and private laws. Alcoholic products are part of the EU's common organization of the markets in agricultural products. Their GI system is based on the product classification rules in the technical specifications for products,[78] and reflects French tradition. The GIs of agricultural products and foods are regulated as industrial property objects in the form of a special system,[79] echoing the industrial property theory of Germany based on its tradition of competition law. In France, GIs are the only type of quality marks that are both regulated by its consumer code and covered by its intellectual property code.[80] However, product quality supervision runs counter to intellectual property protection. Administrative supervision over whether a product complies with the statutory technical specifications is the confirmation and declaration of product characteristics or categories in essence. It is a factual judgment that cannot be distorted or tampered with. It belongs to the realm of public order and cannot be manipulated and traded for privately. It does not possess the private right attributes of intellectual property rights. In 2012, the EU included the GIs of agricultural products and foodstuffs into the Regulation (EU) No 1151/2021 on quality schemes for agricultural products and foodstuffs, putting them back to the product protection

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[78] See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 Establishing a Common Organisation of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347/671 (2013) ; Regulation (EU) 2019 /787 of the European Parliament and of the Council of 17 April 2019 on the Definition, Description, Presentation and Labelling of Spirit Drinks, the Use of the Names of Spirit Drinks in the Presentation and Labelling of Other Foodstuffs, the Protection of Geographical Indications for Spirit Drinks, the Use of Ethyl Alcohol and Distillates of Agricultural Origin in Alcoholic Beverages, and Repealing Regulation (EC) No 110/2008, OJ L 130/1 (2019).

[79] See Council Regulation (EEC) No 2081/92 of 14 July 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, OJ L 208/1 (1992).

[80] See fn. 6 at *Article L431–1 to Article L431–7 du Code de la consommation* (Article L431–1 to Article L431-7 of the Consumer Code); see fn. 53, at *Article L721–1 to Article L722–17 du Code de la propriété intellectuelle* (Article L721-1 to Article L722–17 of the Intellectual Property Code).

system.[81] GIs are a tool for the EU to enhance product quality control and implement a quality-oriented approach. Its institutional basis is the common agricultural policy rather than the common intellectual property policy.[82]

Secondly, the weakening of origin attribution has undermined the foundation of objective and absolute protection. In the EU system, two parallel concepts: "Designation of Origin" (DO) and "Geographical Indication" (GI) appeared. The former represents the embodiment of the French AO, while the latter, as a variant of the German geographical indication of source, allows the use of the reputation attributed to origin as the basis for protection, without requiring the *terroir* elements that involve the interaction of natural and human factors. The absence of natural factors undermines the guarantee of the regional specificity of objective attribution, making it unable to resist the de-localization of product quality. Therefore, GI cannot distinguish product categories but mainly indicates product sources. This source identification mark and the DO used for classifying products enjoy the same objective strong protection, which not is unreasonable but also raises concerns of interfering with competition and hindering the free movement of goods. To distinguish them from ordinary indications of source, France ever regarded "Label Rouge" and other quality certifications as a prerequisite for applying for GI protection. However, this does not make it a product category name with regional specificity. Moreover, as a certification mark, the use and certification of Label Rouge are controlled by private third-party institutions. Using it as the precondition for obtaining objective and absolute protection for GIs further erodes the legal basis of the protection by public power. The source indication attribute of GI has also disrupted the proper coordination between product protection and the trademark system. The recognition of trademarks as GIs implies genericization, and therefore should be abolished.[83] However, the source indication attribute of GIs does not have the effect of making the prior trademarks generic. Therefore, the EU allows the coexistence of the prior trademarks without hindering the use of geographical names.[84]

Thirdly, at the EU level, unified product examination is absent and it tends to resolve conflicts of interest through the objection procedure rather than having experts make factual determinations on objective attribution. Except for the applications for the registration of spirits, which can be directly submitted to the European Commission for examination, all other applications must first undergo substantive examination by the member states, and

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[81] See Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on Quality Schemes for Agricultural Products and Foodstuffs, OJ L 343/1 (2012).

[82] See Vadim Mantrov, *EU Law on Indications of Geographical Origin: Theory and Practice*, Springer, at 143, 160 (2014).

[83] See Article 40 (3) of Council Regulation (EEC) No 2392/89 of 24 July 1989 Laying down General Rules for the Description and Presentation of Wines and Grape Musts, OJ L 232/13 (1989).

[84] See Article 1 (7) (b) of Council Regulation (EEC) No 3897/91 of 16 December 1991 Amending for the third time Regulation (EEC) No 2392/89 Laying down General Rules for the Description and Presentation of Wines and Grape Musts, OJ L 368/5 (1991).

the European Commission will only conduct subsequent formal examinations.[85] Indeed, the examination of applications "requires, to a great extent, detailed knowledge of matters particular to the Member State concerned, matters which the competent authorities of that State are best placed to check,"[86] but the authorities in different countries are different. Most of them are in the agricultural and food sectors, though there are also intellectual property agencies. The differences in the examination methods and results pose a systematic risk for the unified implementation of the EU system. This risk cannot be resolved through the examination of the European Commission because the Commission eliminates conflicts of rights or interests mainly through the objection procedure and does not conduct a substantive examination of the products.

Fourthly, the privatization of supervision has resulted in a system characterized by relative effect, standardized means, and market-oriented functions. In 2006, the EU allowed product supervision to be open to private certification bodies.[87] France decided to extend the certification supervision by private third-party institutions for GI to DO. The INAO no longer directly supervised products, but would approve and administer the certification bodies and authorize their control plans for DO or GI.[88] As private institutions did not have the power to supervise products, they could only constrain producers through private rights. Therefore, since 2006, France has required all producers to join the organizations for the defense and management of the DO or GI.[89] The supervision of these organizations over their members no longer had the absolute effect applicable to all products. Compared with the supervision by public powers, private institutions find it difficult to gain public trust when it comes to product compliance, especially the certification of sensory characteristics and objective attribution. They make decisions to grant or revoke certifications mainly based on standardized tests. Their inspection lists do not include indicators that are difficult to detect, such as the sensory characteristics of products, nor do they consider the causal relationships between these indicators. This brings it closer to the certification model of collective and certification marks. The introduction of third-party certification led to the withdrawal of public oversight. Although it responded to the doubts about the impartiality of INAO and was in line with France's policy orientation of reducing public expenditure, its practical outcome undermined the dominant position based on the quality of the origin. When producers lose the freedom to not join the defense and management organizations

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[85] See EuGH, Urteil vom 6. Dezember 2001, Rs. C-269/99, Slg. 2001, I-9517, Rn. 52. – Spreewälder Gurken (ECJ, Judgment of 6 December 2001, Case C-269/99, ECR 2001, I-9517, Para. 52. – Spreewald Cucumbers).

[86] Id. at Paragraph 53.

[87] See Article 11 of Council Regulation (EC) No 510/2006 of 20 March 2006 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, OJ L 93/12 (2006).

[88] See Delphine Marie-Vivien et al., Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France, 98 *World Development*, 28 (2017).

[89] See fn. 36 at *Article L642-18 du Code rural et de la pêche maritime* (Article L642-18 of the Rural and Maritime Fishing Code).

and have to bear the costs of private certification, those unable to bear the costs are forced to give up the use of the names and even cease production due to the loss of government support. Under the pressure of market competition, private certification bodies run the risk of being overly lenient in their evaluations of clients. They focus only on compliance inspection rather than providing support and assistance as the government does.[90]

In conclusion, to safeguard the interests of industries such as alcohol and cheese, the EU insists on providing objective and absolute product protection for GIs (including DOs and GIs), but weakens the legal logic of products in the aspects such as concept definition, attribution review, and usage supervision to enhance inclusiveness. The system as a whole presents a state of being "tight on the outside, loose on the inside," a structure of interior deficiency and exterior excess riddled with structural contradictions.

During the TRIPS negotiations of the GATT Uruguay Round, the EU's push for stronger GI protection clashed with the industrial interests of "New World" countries, drawing opposition from countries such as the United States and Australia. The inclusiveness of the EU system shaped by the compromise between France and Germany provided a guideline for the EU and the US to reach a compromise in the TRIPS negotiations. The TRIPS adopted the GI concept of the EU and used a single "GI" definition. It treats the reputation of the goods as an independent element in parallel with quality and characteristics, and only requires that it be associated with the origin rather than with the natural and human factors of the origin.[91] This significantly dilutes the element of objective attribution, making it compatible with the legal principle of commercial marks based on source cognition. The TRIPS mandates objective and absolute protection only for wines and spirits, reflecting the interests of the alcohol industry as the core interests of Europe. Other GIs only enjoy relative and subjective protection, which is an embodiment of American commercial interests and legal principles. The TRIPS does not provide specific provisions for the confirmation and supervision of GIs. The WTO members can freely choose different institutional designs to implement the above-mentioned protection standards. This has emptied and eroded the internal public law mechanism for products that only covers the objective strong protection of GIs for alcoholic products. Other GIs enjoy only relative and subjective protection based on the legal principle of source cognition, further clothing GIs with the veil of private rights. It can be seen that the reconciliation and compromise reached between Europe and the United States have made the TRIPS more inclusive but also exacerbated its structural contradictions and legal flaws.

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[90] See Marie-Vivien et al., fn. 88 at 28, 31, 32.

[91] Article 22 of the TRIPS stipulates: "Geographical indications are, for the purpose of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

B Causes, Advantages and Disadvantages of Diverse Attributes of GI Systems in Various Countries

Under the strong inclusiveness of the TRIPS, the legislative designs for GI protection in the WTO members exhibit great diversity. Some countries have followed the example of the United States and adopted trademark laws for protection, such as South Africa, Japan, and Republic of Korea; most countries have formulated special laws, such as India and Iran; and some countries have incorporated GIs into the protection of the comprehensive intellectual property laws or even civil codes, such as Brazil, Mexico, and Russia. However, special legislation is not equivalent to product protection, trademark law protection does not necessarily fully adhere to the legal rules of the commercial mark law, and comprehensive legislation also varies in orientation and cannot be generalized. Therefore, the division of legislative forms is merely an external aspect; what matters more important is to analyze the reasons and pros and cons for the system choice based on the attribute orientation of legislation. From the perspective of attribute orientation, there are three legislative modes in the countries: product protection mode, commercial mark mode, and hybrid mode.

The product protection mode based on objective attribution is universally applicable to the agricultural and food industries. The AOC product protection mechanism in France originated in the wine and food industries. Through the development and expansion by the EU, it has become a powerful tool for promoting the common agricultural policy and the quality system for agricultural products and foods, achieving remarkable results. It has been borrowed and emulated by the special laws of countries such as Switzerland and China. The product protection mode realizes the effective protection of GIs abroad by outputting product quality standards. This protection is based on the compliance with quality standards, aims to ensure that consumers correctly identify the products, and is independent of consumer cognition to commercial marks. The export competitiveness of French AOC and EU DO and GI stems from this. In the past, Shaoxing Rice Wine from China was frequently disturbed by counterfeiting abroad. Even after registration as a certification mark, the situation was still not improved. After the former State Bureau of Quality and Technical Supervision issued the Provisions on the Protection of Products of Geographical of Origin (invalid now) in 1999 and Shaoxing Rice Wine was hence protected, the market share of Shaoxing Rice Wine produced in the Taiwan region of China dropped from 80% to 25% in Japan,[92] because the protection of product of geographical origin means that these products are under the supervision of the Chinese government, and their quality has been officially certified by the exporting country, and naturally gains the trust of overseas consumers, who do not need to pay attention to distinguishing the authenticity and ownership disputes of the trademark.

Some countries adopt the commercial mark mode and hold a negative or even resistant attitude towards the product protection mode for various reasons. The Indian law for GIs

[92] See LIU Zhaobin, 强化原产地域产品保护 促进民族精品走向世界 (Strengthening the Protection of Geographical Indication Products and Promoting National Quality Products to Go Global), 经济日报 (*Economics Daily*), Oct. 28, 2001.

of goods is entirely centered on marks, which is very similar to the trademark system. For instance, it requires that a GI must have a specific design, the registration application must designate the class of product, the competent authority is the industrial property agency, and only the marks are examined while the products are not, the registration has a validity period, which is renewable, and attention is paid to the authorization of mark use rather than product supervision.[93] Behind this mark protection lies the fact that most Indian geographical indications signify handicrafts,[94] to which it is difficult for product protection based on objective attribution to apply. The commercial mark mode has led to insufficient protection of local specialty products, and also made it difficult to deal with counterfeiting or trademark infringement abroad. In Sri Lanka, the Tea Board registered the name "Ceylon Tea" accompanied by a lion logo as a trademark. However, in foreign countries, the name "Ceylon Tea" cannot be registered due to its descriptive nature, while only the lion logo can be registered, or although the lion logo can be registered along with the name "Ceylon Tea," the name itself is not entitled to exclusive rights. As a result, the Tea Board has no right to prevent others from using the name "Ceylon Tea" outside the territory of Sri Lanka, nor can it require them to comply with the relevant quality requirements.[95] Chinese enterprises once applied for trademark registration of the names "Napa Valley" and "Screw Kappa," but the American Napa Valley Vintners Association raised an objection to this.[96] Since trademark protection is based on mark cognition and is regional in nature, it cannot prevent the use of the mark outside the region and thereby prevent the formation of different mark cognitions. Moreover, international trademark protection does not have the effect of exporting quality standards to other regions. Therefore, as long as consumers are not confused, the trademark protection advocated and promoted by the United States cannot support this objection. For this reason, the American agricultural and food industries, especially the wine industry, have

[93] See Sections 3, 11 (b) and (d), 18, 21, 22 of the Geographical Indications of Goods (Registration and Protection) Act, 1999, (No. 48 of 1999).

[94] Handicrafts are the main sources of income for rural areas in India and also important export products of India. As of March 2022, India has registered a total of 420 geographical indications, among which 232 are for handicrafts, accounting for 55.2% of the total. See Vrunda Kulkarni & Viren Konde, Pre- and Post-Geographical Indications Registration Measures for Handicrafts in India, 16 *Journal of Intellectual Property Rights,* 463 (2011); *Annual Report 2021–2022*, Office of the Controller General of Patents, Designs, Trademarks and Geographical Indications, available at the official website of Intellectual Property India, at 75.

[95] See Ravindra A. Yatawara & Amrit Rajapakse, *Gaining Competitive Advantage through the Protection of Geographical Indications: An Analysis of the Tea*, *Sapphires and Cinnamon Industries of Sri Lanka*, Institute of Policy Studies of Sri Lanka, at 23 (2009).

[96] See Mark Silva, Sour Grapes: The Compromising Effect of the United States' Failure to Protect Foreign Geographic Indications of Wines, 1 *Boston College International and Comparative Law Review*, 208 (2005); Case for Administrative Dispute in Trademark Opposition and Review between Napa Valley Vintners and the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce, Administrative Judgment of High People's Court of Beijing Municipality (2016) J. X. Z. No. 2295.

always been advocating for strengthened quality supervision and GI protection.[97] Considering the interests of its agricultural and fishery industries, Japan enacted a law for the protection of specific agricultural, forestry, and fishery product names in 2014,[98] shifting to the product protection mode. This law stipulates that the Ministry of Agriculture, Forestry and Fisheries shall, based on the expert's advice, determine the objective attribution of products and implement it in product supervision.

Countries such as Cambodia, Chile and Russia protect GIs by incorporating them into the special laws, industrial property laws or even civil codes as mark types of intellectual property rights, but they have also absorbed the institutional elements of the product mode, thus falling under the hybrid mode. For instance, the Russian Civil Code requires verifying the product attributes of the appellations of origin, and the attribution of origin conditions, reflecting the focus on products, and also stipulates that the registration of appellations of origin has a validity period, which is renewable, showing obvious characteristics of commercial mark protection.[99] However, the verification of products and the registration protection of marks fall under different systems and are not interlinked. The hybrid mode verifies the objective attribution of products in the mark confirmation process, but it cannot implement it in mark protection. GIs eventually degenerate into marketing marks, which have no essential difference from trademarks and other marks.

Regardless of the protection mode adopted, the WTO members must ensure that objective and absolute protection is extended, at a minimum, to alcoholic products. This provision represents the true core of the GI rules in the TRIPS. However, the commercial mark mode in most countries does not have a legal basis for providing objective and absolute protection. In a few countries, even if the product protection mode is adopted, the introduction of independent reputation elements and the emptiness of the public law mechanism for products in the TRIPS have disrupted and weakened the legal logic of objective and absolute protection. In conclusion, although the TRIPS has unprecedentedly promoted objective and absolute protection in the world, its structural contradictions and legal flaws compromised based on realpolitik have also become the internal problems of the systems in the countries. It is the result of the continuous dilution and weakening of the legal principle of products based on objective attribution. It not only causes the objective and absolute protection to lose

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[97] See Robert W. Benson, American Appellations of Origin, 62 A. B. A. J. 792 (1976); Bruce A. Babcock & Roxanne Clemens, Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products, MATRIC Briefing Paper 04-MBP 7, Iowa State University, May 2004, at 2, 15, 17; Renée Johnson, Geographical Indications (GIs) in U. S. Food and Agricultural Trade, CRS Report R44556, March 21, 2017, at 18.

[98] 特定農林水産物等の名称の保護に関する法律 (Act on the Protection of Names of Specific Agricultural, Forestry and Fishery Products).

[99] *Ст. 1523, 1525 и 1531 Гражданского кодекса Российской Федерации, Часть Четвертая, Федеральный закон № 230-ФЗ от 18 декабря 2006 года (с последними изменениями и дополнениями от 25 февраля 2022 года)* (Articles 1523, 1525, and 1531 of the Civil Code of the Russian Federation, Part Four, Federal Law No 230-FZ of December 18, 2006 [as last amended on February 25, 2022]).

its legal support and become a means for national interest protectionism, but also makes its product function for promoting local development lose its guarantee. This is something that China should prevent and overcome during GI legislation.

V Product Protection Mode and Basic Design under the Unified Legislation of GIs in China

Given that most of China's GIs pertain to agricultural products and foods, and considering the legislative tradition of GI protection, China should adopt the product protection mode for its unified GI legislation. Under the quality governance system, the existing special systems should be integrated and improved, and product protection should be separated from the private law, so that the trademark law can return to the legal principle of marks in the private law.

A The Unified Legislation of GIs in China Should Adopt the Product Protection Mode

The vast majority of GIs in China signify agricultural products and foods. This constitutes the industrial foundation for the adoption of the product protection mode in the unified legislation of GIs.[100] Given that the Agreement between the Government of the People's Republic of China and the European Union on Cooperation on, and Protection of, GIs and some of the free trade agreements concluded by China have stipulated objective and absolute protection for GIs, product protection can provide an institutional channel and environment for the implementation of protection for GIs of the contracting countries and, meanwhile, provide necessary conditions for the export and enforcement of Chinese product quality standards abroad.

From the perspective of legislative tradition, both the special protection under the Provisions and the Measures, and the protection of GIs under the trademark law are product protection or have an obvious product-oriented tendency, constituting the institutional foundation for the selection of product protection mode in China's GI legislation.

The Provisions on the Protection of the Products of Geographical Origin serve as the first special system for GIs in China and belong to a product protection system. The Provisions promulgated in 2005 abolished this system, but retained its institutional design for product protection. The title of the Provisions explicitly indicates that its protection objects are "GI products," and its legislative basis is product-related laws such as the product quality law and the standardization law. Its protection application, approval, standard formulation and regulatory system are all centered on products. Its implementation relies on the formulation of product standards and the exercise of public power for quality supervision. Although the title

[100] As of 2018, after excluding overlapping protection, there were a total of 6,684 GI products, GIs of agricultural products and GI trademarks in China, with over 90% for agricultural and food products. See WANG Hongru & QIN Wenjin, 中国地理标志产品的空间分布与集聚特征研究 (Research on the Spatial Distribution and Agglomeration Characteristics of Geographical Indication Products in China), 6 世界地理研究 (*World Regional Studies*), 158 (2023).

of the Measures designates "GIs of agricultural products" as management objects, it is not the ultimate goal of institutional design, because "the protection of GIs of agricultural products … unlike ordinary trademark registration … is to identify a product that is marked with 'appellation of origin'; the technical quality control of geographical indications of agricultural products ... is to standardize the traditional and inherent characteristics of certain existing agricultural products, as well as their correlations with the natural and human factors of the origin."[101] Products and technical quality control as the regulatory content of the Measures determine the attribute of its product system.

The Chinese trademark law has a distinct product-oriented tendency when examining the applications for registration of collective or certification marks of GIs. For such trademark registration applications, in addition to the examination of the marks in accordance with the basic provisions of the trademark law, special matters also need to be examined, including the relationship between the specific quality, reputation or other characteristics of the product and the natural and human factors of the origin. The examination of the rules governing the use of marks also involves the sensory characteristics, physical and chemical indicators or production methods of the goods, as well as their causal relationships with the natural factors of the origin.[102] The examination of specific matters must be determined based on the facts of the products. Trademark examination is no longer merely a mark examination. It also involves product examination.

It is evident that both the special system and trademark protection in China embody the concept of product centralism. It is the spontaneous recognition of the "nature of things," the product attribute of genuine GIs. It is also the natural choice and inevitable path for leveraging product functions, promoting local industrial development and facilitating cultural protection. After more than a decade of exploration, China has developed a robust body of experiences and operational rules in product examination, supervision, protection and international promotion. The overall results have been positive and favorable. To fully capitalize on the abundant GI resources of China, assist the poverty alleviation efforts, expand foreign trade and achieve rural revitalization, China should adhere to the product protection mode, consolidate past experiences, address existing deficiencies, and establish a GI system that is in line with legal principles and needs.

In order to implement the product protection mode, it is necessary to clearly distinguish between product systems and mark protection and follow different legal principles. On the one hand, we should incorporate product protection into the special laws, overcome the problem of label-centric approach to product protection in the existing special system, and transform the in personam management of special symbols into direct *in rem* product

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[101] JIN Fazhong (ed.), 农产品地理标志概述 (*Introduction of Geographical Indications of Agricultural Products*), 知识产权出版社 (Intellectual Property Publishing House), at 176 (2011).

[102] See 商标审查审理指南 2021 (The 2021 Trademark Examination and Adjudication Guidelines), formulated by China National Intellectual Property Administration, at 328, 331, 332.

supervision. On the other hand, we should correct the product-oriented trend in trademark protection and restore it to the legal principle of marks for trademark distinctiveness.

B Integrate and Improve the Existing Special System for GIs within the Quality Governance System

Genuine GIs fall within a specific category in the field of product quality and should be legislatively designed within the quality governance system. The Outline to Improve Quality of Development issued by the CPC Central Committee and the State Council in February 2023 proposes to strengthen the protection of intellectual property rights such as GIs, implement the project for intensive protection of agricultural products with GIs, improve quality-related laws and regulations, and crack down on the production and sales of counterfeit and substandard goods as well as infringement of intellectual property rights. Under the framework of this outline, China should leverage the product quality system consisting of the standardization law, the product quality law and the agricultural product quality and safety law, integrate the Provisions and the Measures as a special law for the formulation and implementation of the quality technical standards for products with local features, incorporating the following designs and improvements.

Firstly, the special law may adopt a title such as the Law on the Protection of Geographical Indication Products. The definition of "geographical indication products" should focus on the attribution of product quality or features to the natural and cultural factors of the origin, and exclude the independent element of "reputation."

Secondly, the competent authority should be reasonably determined. Unlike the practices in countries such as France and Italy, where the supervision of agricultural products and foods is under the jurisdiction of the same department, agricultural products and foods are supervised by the agricultural and rural affairs department and the administration for market regulation, respectively in China. The adminstration market regulation supervises products that have been processed, manufactured, and are for sale, while the agriculture and rural affairs department supervises agricultural products.[103] For edible agricultural products, the agricultural department is responsible for supervision from the planting and breeding stage up to their entry into the market or production and processing enterprises. The subsequent supervision is handled by the adminstration market regulation.[104] Given that the TRIPS classifies GIs as

[103] See Article 2 of the Product Quality Law of the People's Republic of China (hereinafter the Product Quality Law) and Article 2 of Law of the People's Republic of China on Quality and Safety of Agricultural Products Order. Agricultural products refer to primary products derived from agriculture.

[104] See 农业部　食品药品监管总局关于加强食用农产品质量安全监督管理工作的意见 (Opinions of the Ministry of Agriculture and the Food and Drug Administration on Strengthening the Supervision and Administration of the Quality and Safety of Edible Agricultural Products) (N. Z. F. [2014] No. 14) and Article 2 of 食用农产品市场销售质量安全监督管理办法 (Measures for the Supervision and Administration of Quality and Safety of Edible Agricultural Products in Market Sales) ([2023] Order 81 of the State Administration for Market Regulation).

intellectual property rights, the China National Intellectual Property Administration took over the function of protection of GI products from the former General Administration of Quality Supervision, Inspection and Quarantine in 2018. Such a distribution of departmental authorities has two problems. The first, the boundary between the authorities of the administration for market regulation and those of the agricultural and rural affairs department is not clear. The two departments divide their authorities based on whether the products have been processed, manufactured, and sold. This approach cannot completely eliminate the overlapping of functions. Like agricultural products, those that have undergone processing such as sorting, peeling, and crushing, and of which basic natural properties and chemical properties remain unchanged are classified as primary products.[105] The agricultural and rural affairs department has the authority to supervise them. However, the GIs of agricultural products also cover the products that have been dehydrated, cooked, pickled, or fermented,[106] involving the scope of authority of the administration for market regulation. The second, the China National Intellectual Property Administration, is the authority for GIs but lacks the capacity. Due to the lack of product quality supervision function, the China National Intellectual Property Administration lacks the capacity to examine products, formulate product standards, and implement them in law enforcement of product supervision. Therefore, the ideal solution for the allocation of authority is to merge the supervision of agricultural products and foods into one department, which assumes the function of GI protection.

Thirdly, in the aspect of product examination, the existing special system, especially the protection of GIs of agricultural products, is centered on objective attribution. It has developed scientific and meticulous examination rules in aspects such as the delineation of production areas, the refinement of technical specifications for production, and quality assessment.[107] The special legislation should absorb and integrate it. The examination of factual elements of objective attribution is the core of product examination and constitutes substantive examination. It should be undertaken by product experts. The results of expert examination are factual judgments and are final. No application for review or filing of a lawsuit is allowed.

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[105] Id. the Options.

[106] See 农产品地理标志登记保护产品目录 (Product Catalogue for Registration and Protection of Geographical Indications of Agricultural Products) (Z. L. D. [2021] No. 37, abolished in November 2022).

[107] See 农产品地理标志登记生产地域范围确定规范 (Specification for Determining the Production Area Range in the Registration of Geographical Indications of Agricultural Products), 农产品地理标志登记产品外在感官特征鉴评规范 (Specification for Evaluating the External Sensory Characteristics of Products in the Registration of Geographical Indications of Agricultural Products), 农产品地理标志登记产品抽样检测技术规范 (Technical Specification for Sampling Inspection of Products in the Registration of Geographical Indications of Agricultural Products), 农产品地理标志登记现场核查规范 (Specification for On-Site Verification in the Registration of Geographical Indications of Agricultural Products), and 农产品地理标志登记审查准则 (Criteria for Review of the Registration of Geographical Indications of Agricultural Products). Except the Technical Specification for Sampling Inspection of Products in the Registration of Geographical Indications of Agricultural Products, other regulations were all abolished in November 2022.

Product examination is factual judgment, but it forms the foundation of local group interests. The coordination and realization of these interests should be achieved through social co-governance of quality. Just as proposed by the Outline to Improve Quality of Development, we should "make innovation in the quality governance model, and improve the diversified governance mechanism based on law, with the government as the leading force, and participants from all sectors of the society ... give play to the bridging and connecting role of industry associations, chambers of commerce, academic societies, and consumer organizations, and carry out technical services such as standard formulation, brand building, and quality management … " When conducting product verification and demarcation, the authority should involve producers, associations and consumers in the process. On the basis of jointly exploring the attribution of the origin, the authority should coordinate the interests and refer to traditions and customs to determine the technical rules and quality standards of production, prevent the use of rules and standards to exclude or restrict market competition, and ensure that GIs play the role of regional public products.

The final and most crucial and challenging task is to overcome the limitations of the protection scope and transform the *in personam* management of special marks into direct *in ren* product supervision. Article 2 of the Regulations defines GI products as "products named using geographical names after being approved," excluding the products that have consistently and traditionally used geographical names without approval. This will result in the existence of products using the same GI that are either approved according to the Provisions or not approved at all. The former must comply with the statutory standards and specifications, while the latter uses GIs based on traditions and customs, without the obligation to comply with the standards and specifications, and are not protected by the Provisions. The basis for the distinction between the two is not the difference in quality but whether they are subject to the supervision of the authority to ensure compliance with the standards and specifications. The specific manifestation is the use of special symbol for GIs. The use of a special symbol indicates that the product complies with the standards and specifications and has been guaranteed by the authority. Even if the special symbol is not used, the GI can still be used according to traditions and customs. The authority has no right to stop it and does not assume the responsibility for supervision and guarantee. Therefore, the Provisions only protect the approved GI products, rather than the entire product category. The specifications do not focus on the use of GIs, but the approval and supervision of the use of special symbol.[108] This not only deviates from the regulatory meaning of GIs as a product category but also causes confusion among consumers. Article 2 of the Measures defines GI of agricultural products without any approval requirements. It is a definition of the natural facts of the regional agricultural product category. Article 3 stipulates that the GIs of agricultural products shall be protected upon registration. Logically speaking, this registration should transform the natural product category

[108] See Articles 20, 21, and 23 of the Provisions.

into a statutory category, and the products in this category would all be protected by the Measures. However, "the GI of agricultural products adopts a labeling system that combines public symbol with the names of regional products."[109] It means that those who do not use public symbol but only use regional product names (i.e., GIs) do not fall under the use of "GIs of agricultural products," and are not subject to the adjustment of the Measures. This would also result in the emergence of two types of products using the same GI, namely the products using a public symbol and those not using a public symbol. Only the former are protected by the Measures. Therefore, similar to the Provisions, the true regulatory meaning of the Measures is to identify certified products through the management of public symbol, rather than using GIs to differentiate product categories. To use a special symbol or public symbol, the producer must submit an application and obtain approval or authorization. If the producer fails to organize production in accordance with the standards and specifications, or does not use the special symbol within two years, its use will be suspended.[110] It can be seen that the regulatory effects of both the Provisions and the Measures are *in personam* rather than *in rem*. The eligibility for using special symbol and public symbol is a value judgment on subject rights rather than a factual judgment on product category.

In comparison, the AO in France and the DO and GI in the EU all define natural product categories.[111] After they are registered according to law, they are transformed from natural product categories to statutory categories. That is, AO becomes AOC, DO becomes "Protected Designation of Origin" (PDO), and GI becomes "Protected GI" (PGI). The product categories are protected as a whole, and their names can be used by all products that have origin-related characteristics. The EU specifies that as long as the products are compliant, all operators can use PDO and PGI.[112]

Chinese special law should adopt the concept of supervision entire product categories, and regard the categories signified by the registered GIs as regulatory objects. Where a GI signifies products, a special symbol must be indicated, and the technical requirements of the standard for the GI products must be made public and implemented. Otherwise, it shall be handled by the standardization department or the product supervision department. If any harm has been caused to others, the offender shall bear civil liability.[113]

In conclusion, from the perspective of quality governance, the registration examination and supervision of GIs fall within a specific category of the standardization and quality

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[109] See Article 14 of the Measures.

[110] See Articles 15 and 16 of the Measures; Articles 20 and 23 of the Provisions.

[111] See fn. 6 at Article L431-1 du Code de la consommation; see fn. 81 at Article 5 of the Regulation (EU) No 1151/2012 of the European Parliament; see fn. 78 at Clause 1, Article 93 of the Regulation (EU) No 1308/2013 of the European Parliament and Paragraph 4, Article 3 of the Regulation (EU) 2019/787 of the European Parliament.

[112] See fn. 81 at Clause 1, Article 12 of the Regulation (EU) No 1151/2012 of the European Parliament.

[113] See the provisions of Articles 27 and 38 of the Standardization Law of the People's Republic of China, Articles 26 and 40 of the Product Quality Law.

supervision system, and shall comply with the general rules of that system. The special law for GIs is a specific system adaptive to the product characteristics of GIs. Its regulatory means, operational mechanisms and legal effects all originate from laws such as the standardization law, the product quality law, and the agricultural product quality and safety law. Such product identification and quality supervision based on standardization are quite different from the principles of intellectual property. While both are intellectual achievements, the former operates within the domain of public law, whereas the latter constitutes property rights protected under private law.

C Revision and Application of the Trademark Law Based on the Legal Principle of Marks as Private Rights

As the TRIPS Agreement declares GIs as private rights, Article 123 of the Civil Code of the People's Republic of China classifies GIs as intellectual property, and the protection of their private rights is achieved mainly through the trademark system. However, the private rights rules of trademark protection are hardly compatible with the public attribute of GIs. When the validity period of trademark registration expires and is not renewed, or when the trademark rights holder ceases to exist with no successor, the private right mechanism loses its ability to regulate GIs. For example, after the trademark owner of the GI certification mark "Xingtang Jujube" (No. 4736563) was revoked, the trademark could not be transferred or licensed during the period of its registration, causing difficulties to the producers. To avoid conflicts between the protection of private rights and the public attribute of GIs, GIs should be separated from the private law.

Secondly, since the special law has defined GI products, Clause 2, Article 16 of the Trademark Law of the People's Republic of China (hereinafter the Trademark Law) loses its necessity of existence and should be deleted and no longer serve as the basis and benchmark for the trademark examination of GIs to correct the product-oriented tendency of such trademarks. The examination of the collective or certification marks of GIs is not merely a mark examination; it also involves a product examination. This is because the Trademark Office uses Clause 2, Article 16 of the Trademark Law as the examination basis.[114] However, the examination based on this clause has transcended the system framework of the trademark law that merely examines the authenticity of the source, and has gone beyond the authority and responsibility scopes of the Trademark Office.[115] This examination cannot be achieved through the trademark examination procedure, nor can it be implemented in trademark enforcement because the trademark examiners lack the ability to identify objective attribution, and trademark enforcement does not have the function of product supervision. From the perspective of procedural jurisprudence, product

[114] See fn. 102 at 322.

[115] See ZHANG, fn. 2 at 179.

examination, as a static and objective factual judgment, is final, while the trademark distinctiveness examination based on the dynamic cognition of consumers may have different conclusions. The two are incompatible. For example, after the trademark owner of "Xingtang Jujube" was revoked, the government established the Xingtang County Association of Special Agricultural Products and submitted a trademark registration application twice (No. 34127515 and No. 47274260). It means that product examination needs to be repeated. However, can the same product be subject to repeated examination? How to handle inconsistent examination results? From the perspective of substantive legal principles, product examination and trademark distinctiveness examination are mutually conflicting and cannot be balanced. If a trademark has distinctiveness, it cannot be a generic name; while a GI is a generic name that directly indicates the quality or attribute of the products. The product-based trademark examination will lead to trademark registration of such generic names, giving trademarks the function of directly indicating the quality or attribute of the products. This departs from the functional logic of distinguishing goods by identifying the source, making the collective or certification marks of GIs incomparable with other trademarks,[116] and becoming a special type of trademark. This not only undermines the overall unity and inherent organic nature of the trademark law but also extends its protection into the product domain, causing chaos and conflicts. For example, a simple product name like "Wuchang Rice" was registered as a certification mark because it met the requirements for a GI and "Yangzhou Fried Rice," which incorporates distinctive patterns, cannot be registered as a collective mark because its name is not a GI,[117] while the registrant of the collective mark of the "Tongguan Roujiamo" GI has asserted its rights regarding the name "Tongguan Roujiamo," sparking controversy.[118]

Thirdly, GIs, as small generic names, are the same as large generic names. They are all the generic names referred to in Article 11 of the Trademark Law and cannot be registered as trademarks. The generic name that achieves distinctiveness through use, or demonstrates distinctiveness by adding distinctive marks can be registered as a trademark. This legal cognition has appeared in the judicial practice of China. For example, "Qinzhouhuang Millet" is a protected GI product. The court held that "Qinzhouhuang" is the name of a grain variety, which can reflect the fundamental differences between this type of grain and other grains, and meets the requirements of a generic name.[119] "However, this identification

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[116] See the case for administrative dispute in trademark opposition and review between Changsha Yulu Enterprise Marketing and Planning Co., Ltd. and the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce, Administrative Judgment of High People's Court of Beijing Municipality (2013) G. X. Z. Z. No. 1201.

[117] See fn. 102 at 321.

[118] See DAI Youqing et al., "潼关肉夹馍" 官司不断图的是什么 (What Are the Persistent Lawsuits over "Tongguan Roujiamo" for?), 北京青年报 (*Beijing Youth Daily*), Nov. 25, 2021.

[119] See the case for dispute among Shanxi Qinzhouhuang Millet (Group) Co., Ltd., Shanxi Qinxian Tanshanhuang Millet Development Co., Ltd., etc. over confirmation of infringement of trademark rights, Civil Judgment of the Supreme People's Court (2013) M. S. Z. No. 1642.

does not negate the possibility that 'Qinzhouhuang' and the logo are distinctive as registered trademarks … the marks listed in Paragraph 1, Clause 1, Article 11 of the Trademark Law have acquired distinctiveness through use and can therefore be registered as trademarks in accordance with the law."[120] The "Qinzhouhuang" trademark consists of a pattern similar to a Ruyi lock formed by decorative laces on the periphery, calligraphic characters "Qin Zhou Huang" inside the lock and an image of an ancient emperor. The public identifies it as a combined trademark as a whole. This trademark has acquired certain distinctive characteristics through use, so its registration is maintained.[121]

Lastly, the registered trademarks contain a GI (a generic name) are subject to Article 59 of the Trademark Law. The trademark owner has no right to prohibit others from using this name in a proper manner. Just based on this legal principle, the Supreme People's Court held that although the registered trademark "Qinzhou" enjoys high popularity, it has no right to prohibit other enterprises from using the characters "Qin Zhou Huang" on millet products made from "Qinzhouhuang" grains to indicate the origin of the millet variety.[122]

Through the above-mentioned legal amendments and the application of relevant clauses, the protection of GI trademarks can completely withdraw from the product domain and return to the commercial mark system. The legal attribute of GI trademarks is trademark rather than GI. The distinctiveness of any trademark is shaped by the trademark owner's control over its use. It demonstrates the trademark owner's certification endorsement of the product. In the functional logic, this is identical to a GI's special mark that indicates the authority's certification of the product. Only, the former indicates the private control and certification by the trademark owner, constitutes private reputation property and is protected by private law, while the latter is controlled and guaranteed by the authority and belongs to the realm of public power. Unlike the singular, non-competitive nature of official certification, private certification allows for competition and the coexistence of multiple parties, and enables the establishment of different certifications for state-certified products. This distinction between public power and private rights means that GI trademarks should not share special symbol with GI products. In the practice of China, there are numerous instances where multiple trademarks are used to distinguish the same GI product. For instance, collective marks "Suzhou Yangcheng Lake Crab Industry Association," "Bacheng Yangcheng Lake of Kunshan Bacheng Town Yangcheng Lake Crab Industry Association" and "Bacheng Yangcheng Lake" and individual trademarks "Yangcheng Lake" and "Yangcheng Lake Brand" have all been registered. Their roles should be to distinguish Yangcheng Lake crabs certified by different trademark owners. They have no

[120] The case for dispute between Qinxian Wugelao Local Specialties Co., Ltd. and Shanxi Qinzhouhuang Millet (Group) Co., Ltd. over infringement of trademark rights, Civil Judgment of the Supreme People's Court (2020) Z. G. F. M. S. No. 997.

[121] See the case for administrative dispute between Shanxi Qinxian Tanshanhuang Millet Development Co., Ltd., etc. and China National Intellectual Property Administration over trademark invalidation request, Administrative Judgment of High People's Court of Beijing Municipality (2020) J. X. Z. No. 6548.

[122] Id.

difference from the functional logics of other trademarks. All trademarks containing GIs should be subject to the general norms of the trademark law. No special rules that break through the principles of the trademark law should be established for them. The protection offered by the trademark law and the product protection provided by the special law fall under different legal systems and cannot be substituted for each other. Instead, they should perform their respective duties and function in an interconnected and coordinated manner.