Applications and Responses to RCEP Rules on Geographical Indications Protection in China

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Abstract. Regional Comprehensive Economic Partnership (RCEP) uses the World Trade Organization (WTO) rules as parent rules. Yet proble ms exist in the interpretation and application of intellectual property terms, which can easily cause controversy. The protection rules of the geographical indications (GI) are used as a magic weapon to promote Chinese high-quality agriculturalproducts to the world. But due to the left and right swaying of the legislators, they are chaotic and thus need to be improved urgently. In this case, China's GI protection should focus on disputed solutions, balancing legislators' initiatives and autonomy generated by geographical indication, and solving the historical problems of many departments overlapping management.

1 Introduction

The economic rationale for protecting GI derives mainly from the fact that the place of origin may be used as a quality signal, or alternatively, that the resources of the region may be captured as quality attributes.[1] However, China's GI of agricultural product brand competitiveness is still relatively weak, compared to its Asian neighbors and some European countries. Thus, its effect to increase agricultural exports, and improve the role of farmers' incomes is still very limited. China should seize this opportunity of RCEP, improve the existing protection system of geographical indications based on the Trademark Law, the Provisions on the Protection of GI, and the Measures for the Administration of GI of Agricultural Products, and improve the decentralized and fragmented features of China's legislation on geographical indications. [2]

2 Some problems of dispute rules on GI of RCEP

RCEP is based on Article 24 of the General Agreement on Tariffs and Trade(GATT) and Article 5 of General Agreement on Trade in Services(GATS), incorporates several WTO rules and, in some respects, develops as a modification of the rules by some WTO members. RCEP incorporates a number of WTO rules and develops some aspects of them and represents a modification of the rules by some WTO members. Chapter 6 lists a number of provisions that are incorporated into the TBT Agreement, but clearly states: 'In the event of inconsistency between the two, this Agreement shall prevail'. Confusingly, Chapter 11 of the RCEP (Intellectual Property Rights) states: 'In the event of inconsistency between the contents of this Chapter and TRIPS, TRIPS shall prevail'. Although RCEP members are free to establish 'conflicting norms', this provision is inconsistent with the principle of *lex posterior* and contrary to the TBT, which creates confusion. Moreover, the notion of 'TRIPS precedence' is puzzling: why should the old prevail over the new? 'TRIPS overrides' lead to two consequences: (1) it is contrary to the TBT provisions, resulting in the emergence of conflicting norms in the same treaty; (2) it is not in line with the intent of the FTA, as RCEP IPR protection should be more extensive than TRIPS.

While RCEP does not have a general conflict norm, it does have a treaty conflict arrangement in Article 20(2)(2), whereby if a Member considers that the provisions of this Agreement are inconsistent with the provisions of other agreements (including the WTO), it shall consult with the other Members with a view to arriving at a mutually satisfactory solution. RCEP does not have a general conflict norm, but it does provide for a conflict of treaties arrangement in its Article 20(2)(2). The use of case-by-case consultations rather than conflicting norms to resolve RCEP-WTO inconsistencies, while solving specific problems, can have institutional implications. For example, can two members disregard the principle of priority of subsequent law and arbitrarily adopt a solution similar to the priority of TRIPS, or even create a solution that is neither RCEP nor WTO? What would be the impact of two members' proposals on other members? Is it possible to reach a different formula with other members? Such a complex situation may not arise, but logically there are various possibilities. In short, there is a great deal more uncertainty in case-by-case consultations than in conflict regulation. [3]

Here, article 22 (1) of TRIPS defines GIs as 'indications which identify a good as originating in the territory of a WTO 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'. Articles 22, 23 and 24 of TRIPS can be enacted through specific laws

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such as China's Regulation on Protection of Products of Geographical Indications (2005), India's Geographical Indication of Goods (Registration and Protection) Act (1999) or Thailand's Act on Protection of Geographical Indications (2003). [4] Though China is privileged as a developing country, the huge blank on dispute rule leaves China with no roads but to prepare for future better interpretations or any other solutions.

3 Differences between RCEP and China's rules on GI protection

With the internationalization of GI worldwide, there is growing debate about the governance of GIs at a national level. How can this public good be reconciled with the logic of competition in a free market in which standard procedures and normalization of the contents are increasing? How should a state interact with private stakeholders in the regulation of such a public good? [5]

GI, in summary, refer to the relationship between products and their place of origin. According to different international legislative approaches, this correlation can currently be understood as 'subjective correlation' and 'objective correlation'. The essence of subjective correlation is to protect goodwill, which actually reflects the connection between products and specific places of origin in consumers' subjective cognition. Objective correlation, also known as the terroir element (translated by some scholars as 'soil'), refers to the objective nurturing relationship between a land and the people who have relied on it for generations to grow. This nurturing relationship is a de facto input-output relationship that is unrelated to the subjective perception of the public.

From the perspective of legal philosophy, regardless of the nature, type, and form of property, 'labor' is the basic way of obtaining property and one of the important sources of property rights. The intellectual property value of geographical indications first comes from the trademark use of relevant place names by relevant market entities on specific goods, which fully conforms to Locke's 'property labor theory', that is, 'labor should be rewarded'.

In fact, the lack of geographical indication concepts among ordinary people is not unique to China, which is a common situation. Even in Europe, where geographical indication protection is at the forefront of the international community, research on 600 Irish consumers shows that only 7% of respondents are aware of Ireland's geographical indication situation[6]. Another issue is that with the internationalization of global geographical indications, there is an increasing debate on national level governance of geographical indications. How does this public interest align with the competitive logic of the free market? In the free market, the standardization of standard procedures and content is increasing. How should the state interact with private stakeholders when regulating such a public product[7]?

In some aspects, China chose its own way while RCEP choose the other way. In terms of the standard of review for objections, the RCEP emphasizes 'the customary term in the common language as the common name for the goods in question in the territory of the Contracting Party' and 'the understanding of the term by consumers in the *territory* of the Contracting Party, whereas China's *Measures for the Protection of Foreign GI* (MPFGI) emphasize the technical quality requirements, quality requirements, popularity, and relevance of the product. RCEP is based on public perception and focuses on the reputation of the product in the general perception of consumers in the Contracting Parties from the perspective of consumers, which effectively avoids the lag of the legislation and ensures the accuracy of the perception. On the other hand, China's legislation tends to rely on the identification model of the previous trademark law, which is based on professional knowledge and emphasizes whether the product itself is within the scope of public power or authoritative third parties' constraints.

MPFGI does not show any convergence with the provisions of the RCEP on the composite terminology on GI protection. While the RCEP provides for the date of protection of geographical indications, MPFGI only provides for an annual reporting system for protected geographical indications, but not this system. However, it is worth mentioning that the latter provides for the period for accepting objections to announcements, the implementation of a self-declaration system for special indications, and the information disclosure obligation of the State Intellectual Property Office. This is not only consistent with the information disclosure obligations of the parties in RCEP but also goes further in information disclosure.

4 Analysis of RCEP GI protection rules adaption in China

In the giant international trade agreement represented by RCEP, the concept of rules for the protection of GI is inherited from the concept of the European system for the protection of geographical indications, with the concept of *terroir* as the core, and geographical indications are essentially the natural DNA that nurtures Mother Earth, which cannot be cloned and is difficult to be scientifically interpreted. In other words, GI are the sum of the culture, geography, traditions, heritage, and traditional practices of peoples and nations. [8] As a cultural heritage, the geographical indication is a valuable national treasure and enjoys a high status, which is protected by the state and has the attribute of public power.[9]

Bilateral and regional agreements often lead to the migration of intellectual property standards from developed countries to underdeveloped countries. These transplants are harmful, for example, they tend to overlook the local needs, national interests, technological capabilities, institutional capabilities, and public health conditions of underdeveloped countries; They may also stifle local development, especially when the development paths of the two are inconsistent.Although China's position in the current world intellectual property system is constantly improving[10], from the perspective of per capita income and the overall level of global social development, China is still a developing country. If the standards for intellectual property protection exceed the scope of socio-economic development, it not only cannot have a positive impact on innovation, but may also have adverse effects on public interests and social welfare. Before the implementation of new policies, it is necessary to carefully evaluate the balance between intellectual property

protection and social public interests, consider whether these policies are beneficial to the country and meet the development requirements of the country from all aspects, and also consider the relationship between the costs of materials and manpower required and profits. We cannot simply emphasize the interests of one aspect while neglecting the interests of others. It is particularly important not to blindly increase the interests of intellectual property rights holders, but also to take into account public interests and safeguard the overall interests of society.

To some point, China might protect them as intangible cultural heritage at first. The reasons for this are twofold: Legally, China's current intellectual property rights system began with the accession to the Paris Convention for the Protection of Industrial Property in 1985 and has been established through legal transplantation for only more than 30 years now. Due to the lack of modern intellectual property rights awareness, coupled with the long-standing tradition of emphasizing agriculture and suppressing commerce, it is impossible to generate the right to claim the protection of GI. On the other hand, China is a vast country with complex geography, climate, and culture, and the distribution of famous local specialties is extremely dispersed and diverse, involving various industrial fields, without forming a representative geographical indication industry with common interests and a high degree of self-recognition, and lacking the industrial foundation for the establishment of the geographical indication system.

Worse, China is an example of the difficulties faced by countries in the choice of their macro-rule model. Conflicting influences from the US and the EU, but also China's own culture and history, led to the coexistence of trademarks managed by the State Administration for Industries and Commerce (SAIC) and two sui generis models.[11]The historical traditions mentioned above have a direct impact on China's legislation on the protection of geographical indications. However, the domestic geographical indication protection system has obvious redundancy of legal provisions and insufficient protection.

Anyway, the uncertainty of such disputes may shake the confidence of foreign countries in the consistency of China's GI protection, and thus affect the image of China's import and export trade and business environment.

In China, after the new round of institutional reform of the State Council in 2018, although the protection functions of trademarks and GI products were incorporated into the reorganized State Intellectual Property Office, they are managed by the Trademark Office and the Protection of Geographical Indications and Official Signs Division of the Department of Intellectual Property Protection, while the protection functions of GI of agricultural products are still exercised by the Ministry of Agriculture and Rural Affairs alone, and the three management authorities still have problems such as inconsistent administrative status and unsound communication mechanisms. There are still problems such as different administrative statuses and unsound communication mechanisms among the three administrative organs. The fragmented legislation and multiple management have seriously affected the long-term development of GI protection in China and greatly hindered the integrated construction of the protection system.

5 How to improve rules on GI protection in China under RCEP

RCEP is mainly based on TRIPS. The meta-rules established in the TRIPS constitute the overarching level of governance that addresses the outcomes to be achieved by national regulatory frameworks in implementing GI protection. As the TRIPS had to accommodate widely divergent doctrinal views and existing national systems, it provides no more than a broad definition of GI and a minimum scope for protection.[12]

Now, China's legislation still favors technical quality requirements, quality requirements, visibility, and relevance, which is not only contrary to the international legislative trend but also not in line with China's judicial practice regarding the 'relevance' and 'whether confusion can be achieved' determination of preference.

At present, China implements parallel protection for the protection of geographical indications, in addition to a part of geographical indications which are protected with reference to the Trademark Law and are subject to a ten-year protection period, there are also many geographical indications that are protected by other administrative regulations. The latter does not specify the term of protection but only stipulates that the right holder will lose the right of geographical indication if he does not organize the production in accordance with the corresponding standards and management norms, or if he does not use the special sign on the protected geographical indication product within two years. Such a provision will easily lead to disputes in international trade.

Further, it is better to combine both GI protection rules and intangible cultural heritage related rules. According to the definition of UNESCO, intangible cultural heritage refers to various social practices, conceptual expressions, forms of expression, knowledge, skills, and related tools, objects, handicrafts, and cultural venues that are considered as part of their cultural heritage by various communities, groups, and sometimes individuals. Article 2 of the 2011 Intangible Cultural Heritage Law of the People's Republic of China (hereinafter referred to as the 'Intangible Cultural Heritage Law') stipulates that 'Intangible cultural heritage referred to in this law refers to various traditional cultural expressions that have been passed down from generation to generation and are considered as part of their cultural heritage, as well as physical objects and places related to traditional cultural expressions.' Through these provisions, intangible cultural heritage is more of a concept belonging to the cultural system, Its objects mainly include two aspects - intangible forms of traditional culture and the physical objects and places that embody these traditional cultures, with the most crucial being 'culture'. Therefore, the essential connotation of intangible cultural heritage is the experiential knowledge and information created and expressed by humans through the use of wisdom in long-term production and life.

Various symbols reflect human creativity and imagination, and are constantly being created. On this basis, the characteristics of intangible cultural heritage can be summarized as follows: firstly, from the perspective of manifestation, it is reflected as the attribute of immateriality, or 'creative intellectual achievements'. Secondly, from the

perspective of its form of existence, it has traditional attributes, has been passed down from generation to generation, has a long history, and is in a dynamic state of change. From the perspective of attribution, although there are a small number of individuals who own such skills, it often contains group and regional characteristics, shared by groups within a certain geographical range, and the owner is uncertain. Finally, from the perspective of value attributes, in addition to possessing the primary cultural value of 'protecting world cultural diversity', its economic and legal 'interest attributes' are also prominent in modern social conditions, which is precisely the reason for the frequent commercial development disputes in the field of intangible cultural heritage. However, although these objects have various names, they can all be covered in two categories: 'intellectual creation achievements' and 'commercial symbols'. The most essential feature of intellectual property is its 'immateriality of the object'. In theory, the two have similarities and can be similarly protected. This is not to prove the intellectual property rights of intangible cultural heritage, but to illustrate the possibility of theoretical connection. After all, the universal and public nature of the term 'culture' in intangible cultural heritage determines that it cannot be used as private property, and it contains too much content and its wording is too grand.

GI and intangible cultural heritage evaluate the same object from different dimensions. Both (intangible cultural heritage and landmarks) focus on ancient creativity and community ownership, rather than new knowledge and private ownership. Due to their inherent similarities, it can be considered to connect the two through procedural and physical similar protection.

Chinese provinces should consider the local conditions and do a good job of legislating in their own provinces, considering the rules on GI protection in China as well as the RCEP, to build free brands and protect their own GI while actively promoting their GI overseas, to let more people feel the colorful charms of China's vast land.

China should expedite the entire protection of GI dispersed in various sectoral laws, establish a library of specific standards for the application of a certain geographical indication, and learn from the legislation of the European Union to adopt a high-standard approach to GI protection in China.

6 Conclusion

RCEP rules on GI protection are trying to take care of the vast number of developing countries among the contracting parties, and the overall legal framework is relatively loose. Regrettably, China's existing relevant rules are still unable to adapt to and converge with this loose legal mechanism. From the acquisition of rights to the maintenance of rights, China's current legal system is a bit confusing and insufficiently enforced. Now that the Law on the Protection of Geographical Indications is about to be promulgated, it is hopeful that China can adapt to RCEP rules on GI protection, improve its legal system, and promote the development of Chinese agricultural products to the world better.

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