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Traditional Knowledge and Geographical Indications: Foundations, Interests and Negotiating Positions

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1. A Brief Summary

The Doha Development Agenda (DDA) introduced the idea of protecting Traditional Knowledge (TK) into multilateral trade negotiations. In parallel, it discusses enhanced

protection of Geographical Indications (GIs) for agricultural products, beyond the current levels of protection based upon unfair competition. Both TK and GIs bear the potential to enhance diversification of products based upon sustainable agriculture. Both concepts are specifically addressed in the Doha Ministerial Declaration (DMD) of 14 November 2001 in paragraphs 18 and 19, respectively, relating to the TRIPs Agreement.¹ The DMD provides that WTO members extend protection of GIs to wines and spirits and address the inclusion of other products. It mandates the TRIPs Council to address Traditional Knowledge in reviewing the agreement under Article 71.1 of the TRIPs Agreement. Under the DDA, any reform must take into account the development dimension.²

The purpose of this paper³ is to describe i) the legal, economic, ecological and societal precepts shaping TK and GIs, ii) the legal framework for TK and GIs in the context of international trade regulation, iii) the work undertaken in international organisations, iv) positive norms of the WTO Agreements treating of TK and GIs, and v) the diverging negotiating positions of WTO Members towards complementing the system of legal protection for TK and GIs.⁴ It takes stock. It provides a survey of the state of play in different fora and the difficulties to bring about coherence in this new and complex field located at the intersections of agriculture, intellectual property and development.

Traditional Knowledge (TK) is a concept of cultural ecology, which, for matters of equity and sustainability, increasingly calls for legal protection as an emerging concept in international law. It expresses the exploitation by individuals or communities of genetic material, which the holders have discovered and identified as resourceful for the livelihood of contemporary and future generations.⁵ TK encompasses the processes of extracting relevant genetic resources from nature. The effort of identifying genetic resources is complemented by skill and practices of preserving such knowledge for future generations.⁶

¹ See Doha Ministerial Declaration, adopted 14 November 2001, WTO Document WT/MIN(01)/DEC/1 of 20 November 2001, [hereinafter Doha Declaration].

² See *id.*, paragraph 2.

³ The paper is part of a research project entitled “Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives” for the Swiss Agency for Development and Cooperation (SDC) of the Federal Department of Foreign Affairs.

⁴ See generally Cottier, T. & Panizzon, M., ‘Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection’, in: 7(2) *J.I.E.L.*, 2004, pp. 371-400; Cottier, T., ‘The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law’, in: 5 (4) *J.I.E.L.*, 1998, pp. 561, 569-573; see also Bellman, C., Dutfield, G., Melendez-Ortiz, R., (eds.) *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability*, London: Earthscan Publications, 2003; Dutfield, G., ‘Sharing the Benefits of Biodiversity – Is there a Role for the Patent System?’ in: 5 (6) *J.W.I.P.*, 2002, pp.899-931; Bragdon, S., ‘Major Legal Regimes Affecting Plant Genetic Resources’, in: *Intellectual Property: Trade, Competition, and Sustainable Development*, Cottier, T., Mavroidis, P.C., Panizzon, M. & Lacey, S. (eds.), World Trade Forum Vol. III, Ann Arbor, University of Michigan Press, 2003, pp.446-448; Llewelyn, M., ‘Which Rules in World Trade Law-Patents or Plant Variety Protection?’, in: *Intellectual Property: Trade, Competition, and Sustainable Development*, Cottier T., Mavroidis, P.C., Panizzon, M. & Lacey, S.(eds.) The World Trade Forum Vol. III, Ann Arbor, MI, University of Michigan Press, 2003, pp.305-308.

⁵ See e.g., Anaya, S.J., *Indigenous Peoples in International Law*, Oxford: Oxford University Press, 1996, p. 105, indigenous people share a “deeply felt spiritual and emotional nexus with the earth and its fruits,” and depend upon to “secure land and natural resource base to ensure the economic viability of their communities”.

⁶ See e.g., WIPO, *Traditional Knowledge – Operational Terms and Definitions*, Report of the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Document, WIPO/GRTKF/IC/3/9 of 20 March 2002.

Traditional Knowledge therefore often propels genetic engineering and drives biotechnological advances. Under the “product of nature doctrine” in patent law, courts reject patents “claiming products of newly discovered plants, artificially synthesized compounds that had been earlier derived from natural resources, or on DNA sequences, a cell containing it, or a natural or recombinantly produced protein.”⁷ Genetic resources, and, specifically, genetic sequences, thus remain in the public domain, as a common concern of humankind, free of access to all and in particular for research. No legal subject can claim any type of property rights to genetic resources. Yet, genetic resources and the related TK are being increasingly tapped on, and appropriated, by biotechnological and pharmaceutical companies in search of cures for globally important disease and ways and means to enhance food security.⁸ They serve as a basis for novel products that are fully subject to patent or plant variety protection.

International legal efforts, so far, have failed to efficiently and successfully protect TK which leads researchers to the genetic resource. The knowledge holder, who first discovered the promising propensities of a genetic resource for humankind, more often than not has remained without reward for his/her discovery which industry turned into a widely distributed, convincing cure against disease. The legal protection for TK relating to genetic resources has not remedied the imbalance created by industrial exploitation of traditional information yet.⁹ The United Nations Convention on Biological Diversity (CBD) is the pioneer treaty addressing the issue. It designed, some 12 years ago, the first legal instrument seeking to distribute fairly and equally the benefits of genetic resources.¹⁰ When Art. 8(j) CBD,¹¹ afforded the first-time legal protection for TK, its protection was to require a one-time financial or technological reimbursement from the firm interested in using the knowledge to the government in return for access to the resources.¹² A potential for the next stepping-stone in the development of legal protection for TK were the negotiations on the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of 2001.¹³ However, Art. 9.2(a) of the instrument leaves the aforementioned CBD regime

⁷ Burchfiel, Kenneth, J., *Biotechnology and the Federal Circuit*, Washington, DC: The Bureau of National Affairs, Inc., 1995, p. 61 referring to *American Wood Paper Co. v. Fiber Disintegrating Co.*, 90 U.S. (23 Wall.) 566 (1874) and *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U.S. 293, (1884) at 297; in the latter case the defendant argued that alizarine was a “a natural product” and that it has been “well known in the arts, from time immemorial, for the purpose of dyeing, and has generally been extracted from the ‘madder root’”. The court agreed with the defendant and invalidated the patent on similar grounds; see *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U.S. 293, (1884) at 311.

⁸ See e.g., Sutton, M.Q. & Anderson, E. N., *Introduction to Cultural Ecology*, Walnut Creek, CA: AltaMira Press, 2004, pp. 96-124.

⁹ See Cottier, T. & Panizzon, M., ‘Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection’, in: Maskus, K. & Reichman, J.H. (eds.), *International Public Goods and Transfer of Technology Under A Globalized Intellectual Property Regime*, Cambridge: Cambridge University Press, forthcoming May 2005.

¹⁰ See United Nations Convention on Biological Diversity (CBD) adopted at the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 (The Earth Summit) and entered into force 23 December 1993 [hereinafter CBD].

¹¹ See id., Art. 8(j): “Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices”.

¹² See id.

¹³ ITPGRFA adopted by the FAO Conference, at its Thirty-first Session (November 2001) on 3 November 2001, through Resolution 3/2001, entered into force on 29 June 2004, available at:

relating to TK unchanged. Some even maintain that the access and benefit sharing regime relating to TK has been weakened under the ITPGRFA, because Art. 9.2(a) treats TK no longer as an independent value to be protected, but considers TK a corollary to farmers' rights. In result, TK is left entirely to the national context and legislator.

Progress towards a comprehensive and system-wide protection for TK has not yet been made at the WTO. None of the WTO Agreements protect TK as intellectual property, nor do they empower the knowledge holder with the legal means of defending him/herself against misappropriation of the knowledge. Article 10^{bis} Paris Convention for the Protection of Industrial Property, as incorporated into the TRIPs Agreement, obliges Members to provide for protection against unfair competition, defined as competition "contrary to honest practices". The specific, indicative provisions do not address the problem of appropriation, but applies to it. Under GATT 1994, the only merit of the TK-related provisions so far, is to treat differently TK-based produced and production and process methods from non-TK based ones. 12.4 TBT Agreement allows South-South trade to apply lower standards than the minimum standards of international law, if such lower standards serve "preserving indigenous technology and production methods and processes". Paragraph 3(a) of the Annex to the Agreement on Textiles and Clothing (ATC) prohibits industrialized textile importing WTO members to invoke the textile safeguard of Art. 6 ATC against imports of traditional folklore handicraft textiles from developing countries. This amounts to the most specific legal protection of TK under current WTO law. Behind the proposals to add TK as an item on the Doha Development Agenda in the context of reviewing the TRIPs Agreement were the discussions at the WIPO. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the "IGC"),¹⁴ began in 2000 to elaborate a means of protecting TK with IPRs, in the context of the reform of the Patent Cooperation Treaty (PCT).¹⁵

Geographical Indications (GIs) are well established in intellectual property law, even though largely limited so far to protecting European values and assets. They protect specific qualities of a product, which draw their defining feature from a particular region and TK developed therein.¹⁶ GIs are expressly protected in Section 3 of the TRIPs Agreement in

<http://www.fao.org/Legal/TREATIES/033s-e.htm>, last visited 31 August, 2004 [hereinafter ITPGRFA], Art. 9.2 (a): "The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including: (a) protection of Traditional Knowledge relevant to plant genetic resources for food and agriculture;"

¹⁴ See WIPO, General Assembly, Twenty-Sixth (12th Extraordinary) Session, Geneva, September 25 to October 3, 2000, 'Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore', WIPO Document [WO/GA/26/6](#) of 25 August 2000, whereby the WIPO General Assembly in October 2000 established the ICG as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and [traditional knowledge](#), [genetic resources](#), and [traditional cultural expressions](#) (folklore).

¹⁵ See WIPO International Patent Cooperation Union (PCT Union), Working Group on Reform of the Patent Cooperation Treaty (PCT), Sixth Session, Geneva, May 3 to 7, 2004, Additional Comments by Switzerland on its Proposals Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications, WIPO Document, PCT/R/WG/6/11 of 21 April 2004.

¹⁶ See e.g., Nascimento, A., 'Potential Benefits of Geographical Indications: The Kava Case', in: *Traditional Knowledge on Plant Genetic Resources for Food and Agriculture, WTI/DEZA Biodiversity Project*, Wallingford, Oxfordshire: CABI Publishing, forthcoming 2005; see also Addor F. & Grazioli, A., 'Geographical Indications

Articles 22 through 24. The current GI regime grants a relatively low level of protection based upon standards of unfair competition for all products other than wines and spirits. It offers the prospects of an “enhanced” protection for wines and spirits in Art. 23.¹⁷ In 2002, the EC proposed to further expand the scope of this “enhanced” protection under Art. 23 to other agricultural products. Consensus is not expected shortly, as the EC, together with India, Thailand, Turkey and Switzerland, has been in disagreement with both the Cairns Group (USA, Brazil, Canada, Australia) and certain developing countries who fear another form of agricultural protectionism (China, Brazil, Colombia, Uruguay et al.).¹⁸

Under the “July 2004 Doha Development Package”,¹⁹ of 1 August 2004, GIs remain, an “outstanding implementation issue” of the Doha Round.²⁰ The “July 2004 Package”, which is officially called the “Doha Work Programme”,²¹ has put off the suggested changes to the TRIPs GI regime for the time being, and at least until May 2005.²² GI extension has been referred to an improvised process of “facilitators”, whereby such “Friends of the Chair” are entrusted with organizing discussions in identified areas, including GIs.²³ Under the auspices of the Director-General who may liaise with his “Friends”, that is the Chairpersons in the WTO bodies concerned, may hold “dedicated consultations” in order to speed up the search for solutions.²⁴ Not only are developing countries questioning the legality of the ad hoc proceeding, but also the procedures and criteria of selection of these key officials.²⁵ WTO Members are divided over the issue whether the DMD offers a sufficient negotiating mandate for GIs on products other than wines and spirits,²⁶ as well as for TK.²⁷

beyond Wines and Spirits—A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPs Agreement’, 5(6) *J.W.I.P.*, 2002, pp.865ff.

¹⁷ See generally Addor F. & Grazioli A., supra note 18, pp.865ff.

¹⁸ See WTO Trade Negotiations Committee - Geographical Indications the Significance of 'Extension' in the TRIPs Agreement and its Benefits for WTO Members – Communication from Thailand and Turkey – Addendum, WTO Document TN/C/W/14/Add.2 of 15 July 2003, certain WTO Members’ proposition in favour of extending the protection under Art. 23 TRIPs to all products.

¹⁹ WTO Doha Work Programme, Decision adopted by the General Council on 1 August 2004, WTO Document WT/L/579 of 2 August 2004 [hereinafter WTO, Doha Work Programme], the Doha Work Programme is also called the “General Council’s post-Cancún decision”.

²⁰ See WTO Ministerial Conference, Fifth Session, Cancún, 10-14 September 2003, Ministerial Statement [concluding Cancún] adopted 14 September 2003, WTO Document WT/MIN(03)/20 of 23 September 2003.

²¹ WTO, Doha Work Programme, supra note 21.

²² See id., p.2, a progress report on GIs is to be submitted to the Trade Negotiations Committee (TNC) and the General Council no later than May 2005.

²³ See Narlikar, A. & Wilkinson, R., ‘Collapse at the WTO: A Cancun post-mortem’, in: 25(3) *Third World Quarterly*, 2004, p. 450.

²⁴ WTO, Doha Work Programme, supra note 21, p.2.

²⁵ See Narlikar, A. & Wilkinson, R., supra note 25.

²⁶ Compare Office of the United States Trade Representative (USTR), ‘U.S. and Other Trade Partners Present Positions and Proposals to Prevent Unauthorized Use of Geographic Names’, USTR Press Release of 20 September 2002, available at: <http://usinfo.state.gov/ei/Archive/2004/Jan/06-428636.html>, last visited 18 November 2004; and Australian Government Department of Foreign Affairs and Trade, ‘Current State of WTO Doha Round Negotiations’, Press Release of September 2004, available at: http://www.dfat.gov.au/trade/negotiations/current_state_report.html, last visited 18 November 2004 [hereinafter Australian Government, Press Release 2004, Doha Round], “[t]he July 2004 Framework Package has retained GIs as an issue of interest in the agriculture negotiations, but as of early mid-September 2004 there had been no negotiations on those issues and Australia remains opposed to such negotiations;” with European Commission, External Trade, ‘The Doha Development Agenda’, available at: http://europa.eu.int/comm/trade/issues/newround/doha_da/index_en.htm, last visited 18 November 2004, “[t]he Ministerial Declaration launching the DDA reflects the ‘broad agenda’ and the focus on development

Considering the uncertainties revolving around the interpretation of the Doha mandate, it currently remains doubtful whether WTO Members are sufficiently committed to negotiate on reforming and rebalancing the TRIPs Agreement in favour of developing countries.²⁸ However, the problems underlying the topics addressed in this paper will not disappear. Apart from politics, a main reason for deferring at this stage is the fact that sufficiently clear concepts of scope and level of protection for TK and expanded GIs are still lacking. Enhanced efforts to coordinate the work of different organisations as well as combining negotiations on agriculture and intellectual property within the WTO need to be made under the Doha Development Agenda.

2. Defining Traditional Knowledge and Geographical Indications

1. Local Traditions of Knowledge, Geographical Origins of Products

Descriptions offered above indicate that Traditional Knowledge (TK) and Geographical Indications (GIs) share a common element insofar as they both protect accumulated knowledge typical to a specific locality. While TK expresses the local traditions of knowledge, GIs stand for specific geographical origin of a typical product or production method. GIs and TK relate a product (GIs), respectively a piece of information (TK), to a geographically confined people or a particular region or locality.²⁹

2. Traditional Knowledge as Information, Skill and Practice Handed Down from one Generation to the Next

Traditional Knowledge (TK) mainly expresses the exploitation by individuals or communities of plant genetic material resourceful for humans and the processes of extracting from nature the genetic resources, as well as the skill and practices of preserving this knowledge for future generations. In addition, the creation of clothing and tools, the construction and maintenance of shelter, the orientation and navigation on land and sea, the interpretation of climatic and meteorological phenomena, dies and weaving patterns, design, spiritual beliefs and expressions of culture also constitute TK.

The discoveries, transmitted from one generation to the next, document the skills and practices assembled over time, which are often upgraded by subsequent innovations in the

advocated by the EU: it mandates negotiations on agriculture, industrial products, services, intellectual property (geographical indications, TRIPs and Health), [...].”

²⁷ See Australian Government, Press Release 2004, Doha Round, supra note 28, “[t]he Doha Development Agenda requires a detailed review of the relationship between the TRIPs Agreement and the Convention on Biological Diversity. Australia has a major interest in ensuring a fair return from its biological resources and that the IP system, in Australia and internationally, supports innovation and investment in biotechnology.”

²⁸ See Cottier, T. & Panizzon, M., supra note 6.

²⁹ See TRIPs Art. 22.1 “Geographical Indications are, for the purpose of this Agreement, indications which identify a good as origination 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” (emphasis added).

course of history. TK is not static. Rather, it expresses a continuous process of devising strategies for the survival of humankind and insofar a viable complement to formal science. Local indigenous knowledge competes and complements the rational, expert-led scientific world view, the latter which, until the end of the 20th century was unquestionably considered the universal keeper of scientific knowledge and the only truth for development aid.³⁰ TK and efforts at expanding its scope will pay off, as TK becomes a valuable alternative to, or foundation of, formal science for managing ecological relations between society and nature, which includes “adaptation to environmental and social change”,³¹ not least because TK encompasses the entire spectrum of daily human life.³²

TK thus is “traditional” not because it is old, but because the knowledge is created, preserved and disseminated in the cultural traditions of particular communities. It is different from formalized, scientific and industrialised R&D efforts.³³ The following areas of main application and potentially relevant to international trade regulation may be distinguished.

2.1. Traditional Knowledge on Plant Genetic Resources (PGR)

Traditional knowledge on plant genetic resources embodies information, skills and practices about the healing and nutritional propensities of certain plants passed down from one generation to the next. This first category of TK is representative for all others introduced below, because it relies upon a sustainable use of genetic resources. It subscribes to an equitable but sustainable access of humankind to genetic resources and informs about the value and diversity of genetic resources, namely the need for preservation for future generations.³⁴ It thereby manifests a measure of respect for the diversity of nature and is committed to sustaining the life cycles of growth.

³⁰ See Briggs, J. & Sharp, J., ‘Indigenous Knowledges and Development: A Postcolonial Caution’, in: 25(4) *Third World Quarterly*, 2004, pp. 661-664; see generally Escobar, A., *Encountering Development: The Making and Unmaking of the Third World*, Princeton, NJ: Princeton University Press, 1995.

³¹ International Council for Science (ICSU) Study Group on Science and Traditional Knowledge, ‘Science and Traditional Knowledge’, *Report*, March 2002.

³² C.f. WIPO, Traditional Knowledge—Operational Terms and Definitions, Report of the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Document WIPP/GRTKF/IC/3/9, paras. 33, 59, informing that Panama’s sui generis system of protection, distinguishes TK that has a commercial utility from other TK; even if such a distinction may be criticized as having a disintegrating effect on the holistic nature of TK, the commercial use and spiritual components of it are intertwined, WIPO suggests that international treaties and domestic laws regulate the protection and use of commercially relevant TK, while leaving it to customary legal traditions to address issues of sacral and spiritual TK.

³³ See Agrawal, A., ‘Indigenous and Scientific Knowledge: Some Critical Comments’, in: 3(3) *Indigenous Knowledge and Development Monitor*, 1995, available at: <http://www.nuffic.nl/ciran/ikdm/3-3/articles/agrawal.html>, last visited 12 December 2004; see also Briggs, J. & Sharp, J., supra note 36, pp. 661-674.

³⁴ See Cottier, T., supra note 6, pp. 559-560; Burhenne-Guilmin, F., ‘L’Accès aux Ressources Génétiques-Les Suites de l’Article 15 de la Convention sur la Diversité Biologique’, in: *Les Hommes et L’Environnement, Quels droit pour le vingt-et-unième siècle, Études en hommage à Alexandre Kiss*, Prieur, M. & Lambrechts, C. (eds.), Paris, Éditions Frison-Roche, 1998, p.560; Dutfield, G., ‘Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation’, UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, Draft (October 2002), available at: http://www.ictsd.org/unctadictsd/docs_pp3-11; Biber-Klemm, S., ‘Incentives to Bring About Conservation and Sustainable Use of Genetic Resources in the Framework of the World Trade Order’, in: *Intellectual Property: Trade, Competition, and Sustainable Development*, Cottier, T., Mavroidis, P.C., Panizzon, M. & Lacey, S. (eds.), The World Trade Forum Vol. III, Ann Arbor, MI, University of Michigan Press, 2003, pp.482-504; see also Biber-Klemm, S. & Szymura-Berglas, D., ‘Problem and Goals’, in: *Traditional Knowledge on Plant Genetic Resources for Food and Agriculture, WTI/DEZA Biodiversity Project*, Wallingford, Oxfordshire, CABI Publishing, forthcoming 2005, for a summary on the basic principles and ethical reflections of the goals of instruments and

2.2. Agricultural and Ecological Know-how

TK plays an important role in resource management (pruning of plants and domestication of animals to increase production) and environmental manipulation (irrigation, encourage growth by burning tracts of land, etc.).³⁵ While the focus of what hitherto has largely been on indigenous peoples and their rights, broadening the scope to agriculture, renders TK an issue of interest to farming communities around the globe. Modern biotechnology in breeding of plant genetic resources may be complemented by deliberate policies to support the use and conservation of traditional plant genetic resources.³⁶ TK is associated with “niche” rather than with “mass” production. It therefore fosters diversity and contributes to the preservation of natural resources. Appropriate policies should serve the purposes of both supporting niche products, and by doing so, also of supporting biological diversity and thus food security. As scientific breeding tends to limit resources and crops available, the protection of TK in the field of agricultural plant genetic resources offers the potential of appropriate flanking policies.³⁷

2.3. Traditional Medicine (TM)

The World Health Organization (WHO) estimates that 25 % of “modern medicines are descended from plants first used traditionally”.³⁸ Such traditional medicine (TM) or ethno medicine as it is also called, not only involves ethno pharmacology, but also the knowledge of how to set broken bones or to spiritually heal psychological disorders.³⁹ The WHO programs seek to strengthen the role of traditional medicine (TM) in developing countries by integrating TM into national health care systems, increasing access to TM information

measures to protect Traditional Knowledge and plant genetic resources and the contribution of TK to the conservation and sustainable use of biological diversity.

³⁵ See e.g., Sutton, M.Q. & Anderson, E. N., supra note 10, p. 111.

³⁶ C.f. Sutton, M.Q. & Anderson, E. N., supra note 10.

³⁷ See Biber-Klemm, S., Cottier, T., Cullet, P. & Szymura-Berglas, D., ‘The Current Law of Plant Genetic Resources and Traditional Knowledge’, *Traditional Knowledge on Plant Genetic Resources for Food and Agriculture, WTI/DEZA Biodiversity Project*, Wallingford, Oxfordshire: CABI Publishing, forthcoming 2005, pp.57-81; c.f. Carneira da Cunha M. & Almeida M., ‘Indigenous People, Traditional People and Conservation in the Amazon in Brazil’, in: 129(2) *Daedalus* 2000, *Journal of the American Academy of Sciences*, on the potential tension between international law empowering indigenous TK holders and State sovereignty; it may be that the TK-holders form an indigenous minority in the State and that international law empowering such minorities, may be criticized for unduly influencing what is an internal issue of State sovereignty. Nonetheless it is a fact that often TK holders as minority indigenous cultures are discriminated against by the government to the effect that an IPR protection for TK will rarely become a reality in multiethnic states. One example in place are the ethnic minority of the Indios Guaraní in Brazil, Argentina, and Paraguay, who are discriminated against by their own government, but who also hold most of the TK in the PGRFA of the respective country’s flora.

³⁸ WHO, ‘Traditional Medicine—Growing Needs and Potential’, *WHO Policy Perspectives on Medicines*, No.2, May 2002, p. 1; see also Sutton, M.Q. & Anderson, E. N., supra note 10, p. 105, find data suggesting that 50% of the medicines used today originally were used by other cultures than our Western one.

³⁹ See Sutton, M.Q. & Anderson, E. N., supra note 10 pp. 101, 105..

and ensuring an appropriate, safe and effective use of TM.⁴⁰ The WHO, in particular, calls for balancing the price of a drug that is affordable to a developing country and the adequate compensation for the R&D efforts of the pharmaceutical industry.⁴¹

2.4. Traditional Cultural Expressions (TCEs)

Traditional Cultural Expressions (TCEs) demonstrate that information includes cultural expressions and is not limited to plant genetic resources. Such TCEs are: Dance, music, weaving and pottery patterns, other traditions of healing, cooking, cleaning and dressing.⁴² The WIPO Intergovernmental Conference identifies TCEs as: “(i) the preservation and safeguarding of tangible and intangible cultural heritage; (ii) the promotion of cultural diversity; (iii) the respect for cultural rights; and (iv) the promotion of creativity and innovation – including that which is tradition-based – as ingredients of sustainable economic development.”⁴³

3. Geographical Indications as Definition and Protection of Origin

Geographical Indications (GIs) are closely related to functions assigned to trademarks and are well-established in unfair competition law.⁴⁴ Even if GIs have no property holder *per se*, they nevertheless count towards an intellectual property right, because their benefit stream is the geographical area in relation to the producer of a product.⁴⁵ In addition to IPRs and competition law, GIs are subject to consumer laws, as they embody the preference a consumer may express for locally produced goods. The benefit stream (value) of TK is encapsulated in the intellect of the human mind, while the benefit stream of a GI is a particular product originating in a particular geographical region.⁴⁶

⁴⁰ See WHO Information Office, ‘WHO Launches The First Global Strategy on Traditional and Alternative Medicine’, *Press Release WHO/38* of 16 May 2002, available at: <http://www.who.int/inf/en/pr-2002-38.html>, last visited 12 November, 2004.

⁴¹ See *id.*

⁴² Cottier, T., & Panizzon, M., *supra* note 6, pp.371-373.

⁴³ See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 7-15, 2003, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Document Prepared by the Secretariat, WIPO Document WIPO/GTRKF/IC/5/3, 2 May 2003 [hereinafter WIPO, Consolidated Analysis].

⁴⁴ See Cottier, T., *supra* note 6.

⁴⁵ See Addor, F., Thumm, N. & Grazioli, A., ‘Geographical Indications, Important Issues for Industrialized and Developing Countries’, in: *Institute of Prospective Technological Studies (IPTS) Report*, May 2003, p. 25, “Geographical Indications and their protection is a suitable means to protect ‘informal innovation’, particularly because the right is related to the product itself and it does not depend to a specific right holder”; see also Rangnekar, D., ‘Geographical Indications: A Review of Proposals at the TRIPs Council’, in: *UNCTAD-ICTSD Project on IPRs and Sustainable Development*, Issue Paper No. 4, 2003; Rangnekar, D., ‘Demanding Stronger Protection for Geographical Indications: The Relationship between Local Knowledge, Information and Reputation’, in: *United Nations University, Institute for New Technologies*, Discussion Paper 2004/11 of April 2004, available at: <http://www.intech.unu.edu>, last visited, 15 December 2004.

⁴⁶ *C.f.*, Drahos, P., ‘The Regulation of Public Goods, in: 7(2) *Journal of International Economic Law*, 2004, p.328, on the expression benefit stream.

3. Towards Protection of Traditional Knowledge

1. Objectives and Scope of TK Protection

Linking the origin of product with the quality of the product is a well-established objective of intellectual property protection, namely of GIs.⁴⁷ The protection of the traditional values as opposed to the novelty of an invention has been a yet unseen objective for an IPR. It is not inconceivable. Like other forms of intellectual property rights, such as trademarks or trade secrets, neither GIs nor TK require novelty.⁴⁸ Also, TK protection is not limited to intellectual property. The varying scope of TK and its different functions touch upon many fields of law, ranging from unfair competition, unjust enrichment to contractual liability.⁴⁹ None of them is clearly prevailing at this stage. At this stage, most international legal sources of TK protection are non-binding *soft law*, except for the few treaty instruments described below.⁵⁰

2. Current Legal Framework

The overarching international legal framework is Agenda 21 that came out of the 1992 Earth Summit in Rio de Janeiro. Among Agenda 21's objectives of preserving biodiversity for future generations, Principle 22 emerges as recognition that indigenous peoples have a vital role to play in environmental management and development because they dispose of alternative answers and solutions to formal science in the form of TK.⁵¹

⁴⁷ See generally Addor, F. & Grazioli, A., supra note 18, pp. 865-879; see also Cottier, T., 'The Case for Protecting Traditional Knowledge and Geographical Indications in Agricultural Trade', World Trade Institute, University of Bern, Working Paper, 2003, on file with the authors.

⁴⁸ See American Associations for the Advancement of Science (AAAS) 'Project on Traditional Ecological Knowledge, Making the Connection: Traditional Knowledge, Science and Human Rights', in: AAAS *Science and Human Rights Program*, available at <http://shr.aaas.org/tek/connection.htm>, last visited 1 September 2004.

⁴⁹ See, e.g., Cottier, T. & Panizzon, M., supra note 6, pp.389-394; see Reichman, J.H. & Lewis, T., 'Using Liability Rules to Stimulate Local Innovation in Developing Countries', in: Maskus, K. & Reichman, J.H. (eds.), *International Public Goods and Transfer of Technology Under A Globalized Intellectual Property Regime*, Cambridge: Cambridge University Press, forthcoming May 2005; Reichman, J.H. & Hasenzahl, C., 'Non-Voluntary Licensing of Patented Inventions : Historical Perspective, Legal Framework under TRIPs, and an Overview of the Practice in Canada and the United States of America', in: UNCTAD-ICTSD *Capacity Building Project on IPRs*, Issue Paper No.5, 2003; Reichman, J.H., 'A Compensatory Liability Regime for Applications of Traditional Knowledge', Draft Paper presented to the Cardozo Symposium on the Legal Protection of Traditional Knowledge, New York (23-24 February 2000), pp.4, 8.

⁵⁰ WTO, Secretariat, The Protection of Traditional Knowledge and Folklore, Summary of the Issues Raised and Points Made, WTO Document IP/C/W/370, 8 August 2002, [hereinafter WTO Secretariat, The Protection of Traditional Knowledge, Summary of the Issues], p.3.

⁵¹ See Agenda 21, United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 3-14 June 1992 ("The Earth Summit"), available at: <http://www.un.org/geninfo/bp/enviro.html>, last visited 4 September 2004; see also Schäfer, C., & Reinhardt, S., 'Traditional Knowledge Relating to the Conservation and Use of Biodiversity', Issue Papers, 2004, Implementing the Biodiversity Convention Project, Federal Ministry for Economic Cooperation and Development, Germany, for the link between the Rio Declaration, the CBD and traditional knowledge.

2.1. Traditional Knowledge on Plant Genetic Resources (PGR)

Since TK encapsulates information about plant genetic resources, scholars associated the idea with international intellectual property protection (IPRs).⁵² Eventually, this approach has made its way into discussions relating to the World Trade Organization's (WTO) Agreement on Trade-related Intellectual Property Rights (TRIPs) and the World Intellectual Property Organization (WIPO). The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) values TK for its contribution to new cures for globally important disease or for ensuring the food security of a region during a drought. WIPO also acknowledges that TK on plant genetic resources raises questions of distributive justice between the TK holder and the multinational company reaping the benefits from patenting the use of the information about the genetic resource.⁵³ Yet, under contemporary international law, the state has full jurisdiction over the genetic resource. It can sell the resource to a user by a contractual arrangement, unless the genetic resource qualifies for a public good by being listed in a databank.⁵⁴ No international legal protection is yet in place to effectively empower TK holders with the legal means to defend his/her know-how against misappropriation and unfair competition.

2.2. Agricultural and Ecological Know-How

Traditional knowledge plays an important role in cultural ecology, including resource management, such as in agricultural techniques of enhancing production of plants and animals and controlling their lives by domestication and fertilization.⁵⁵ International environmental law namely protects the natural resources from extinction but does not relate

⁵² See Cottier, T., *supra* note 6, pp. 559-560; *similarly*, Downes, R., 'How Intellectual Property Could be a Tool to Protect Traditional Knowledge', in: 25 *Colum. J. Envtl. L.*, 2000, p.255; Hansen S.A., & van Fleet J.W., *A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, Washington, D.C., American Association for the Advancement of Science (AAAS), 2003, available at: <http://shr.aaas.org/tek/handbook/.p.4>; *c.f.* Roht-Arriaza, N., 'Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities', in: 17(4) *Mich.J.Int'l L.*, 1996, pp.921-2; Ramani, R., 'Note and Comment: Market Realities v. Indigenous Equities', in: 26 *Brooklyn J. Int'l L.*, 2001, pp.1147-1176, p.1148, fn.4.; *see also* WTO Secretariat, *The Protection of Traditional Knowledge, Summary of the Issues*, *supra* note 57, para. 8; *similarly*, UNCTAD Trade and Development Board Commission on Trade in Goods and Services, and Commodities Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, 30 October – 1 November 2000, UNCTAD Document, TD/B/Com.1/EM.13/2, 22 August 2000, pp. 3-4, 9-10.

⁵³ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 7 to 15, 2003, Participation of Indigenous and Local Communities, WIPO Document WIPO/GRTKF/IC/5/11 of 28 March 2003, the "IGC" is open to Member States of WIPO and relevant IGOs and NGOs accredited as observers; participation of indigenous and local communities is currently being discussed.

⁵⁴ See Birnie, P. & Boyle, A., *International Law and the Environment*, 2nd ed., New York: Oxford University Press, 2002, pp. 137-144, 604-608; *see generally*, Nanda, V.P. & Pring, G., *International Environmental Law and Policy for the 21st Century*, New York: Transnational Publishers, 2003; *see also* Espiell, H.G., 'The Common Heritage of Mankind and the Human Genome', in: *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Wellens, K. (ed.), 1998, pp. 519-532; Arsanjani, M.H. & Reisman, W.M., 'The Quest for an International Liability Regime for the Protection of the Global Commons', in: *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Wellens, K. (ed.), 1998, pp.485ff, while TK is not considered common heritage of humankind, the genetic resources, which TK identifies, preserves and disseminates, are discussed as regards their eligibility under common heritage of humankind. The advocates of subjecting genetic sequences under common heritage concepts argue that genetic sequences fulfill the criteria of "existing for the benefit of all" and "existence and use affect humans around the world."

⁵⁵ See Sutton, M.Q. & Anderson, E. N., *supra* note 10, pp. 110-117.

to the informative value of such practices, processes and techniques. TK is expressed in Art. 8(j) of the aforementioned 1992 Convention on Biological Diversity (CBD),⁵⁶ which was adopted in the context of the Earth Summit in Rio de Janeiro on 29 December 1993.⁵⁷ It was further developed in the CBD Conference of the Parties (COPs)⁵⁸, specifically by COP-6 in the “Bonn Guidelines”,⁵⁹ and the International Treaty for Plant Genetic Resources, ITPGRFA of 3 November 2001⁶⁰. Protection and valuation is sought on the basis of contractual relations and compensation.⁶¹ Legally, the resources have remained in the public domain, available to all, under the territorial jurisdiction of nation states.

2.3. Traditional Medicines (TM)

The World Health Organization (WHO) has acknowledged that TK, which provides for healing substances and practices and touches upon health policy, is to be recognized as traditional medicine (TM), forming one of the pillars of modern scientific medicine. So far, the WHO neither has advocated an international legal regime protecting TM as a part of TK, nor sought to enhance the perception of the global role of TK in industrialised countries. Rather the WHO has confined TM to a role for development country medical policy only.⁶²

⁵⁶ See CBD, supra note 15.

⁵⁷ See id., together with Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, and the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity were also adopted at the “Earth Summit”, whereby the Agenda 21 is the only other document containing a reference to TK; see also Dutfield, G., ‘The Convention on Biological Diversity and Intellectual Property Rights’, in: *Cultural and Spiritual Values of Biodiversity*, Posey, D. (ed.), UNEP, forthcoming, currently available at: <http://www.ubcic.bc.ca>, last visited 1 September 2004.

⁵⁸ See COP-2 Decision II/12, COP-3 Decision III/14, COP-4 Decision IV/9, COP-5 Decision V/16 and COP-6 Decision VI/25, as well as the meetings of the Working Group on Article 8(j) established by COP-4 Decision IV/9.

⁵⁹ [Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization](#), adopted by COP6 decision VI/24 in April 2002. These guidelines were established pursuant to the mandate in Art. 15 CBD where CBD parties agree to “take legislative, administrative or policy measures, as appropriate [...] with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources”. The Bonn Guidelines encourage the development of national regimes and contractual arrangements for access and benefit-sharing and to the implementation of the objectives of the Convention. They regulate on a voluntary basis the access to genetic resources and the sharing of the benefits arising from their use. Because they underscore national legislative efforts for TK protection, they stand somewhat in contrast to the TRIPs, which prefers a top-down approach of international binding legislation for TK protection.

⁶⁰ See ITPGRFA, supra note 18.

⁶¹ Burhenne-Guilmin, F., supra note 40, pp.552-554, 560-562, one of the earliest authors to clearly distinguish the issue of protecting genetic resources from the one of protection the Traditional Knowledge identifying the genetic resource as a useful resource for humankind. Based on the distinction, the author finds the current CBD regime insufficiently equipped to conserve TK and to protect the knowledge holder.

⁶² See WHO, ‘Traditional Medicine – Growing Needs and Potential’, *WHO Policy Perspectives on Medicines*, No.2, May 2002, p. 1; see more generally, ‘WHO Essential Drugs and Medicines Policy’, ‘WHO Traditional Medicine

2.4. Traditional Cultural Expressions (TCEs)

The concept of Traditional Cultural Expressions (TCEs) was recognised by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). WIPO protects traditional cultural expressions (TCEs) insofar as these are recognized internationally or domestically as cultural rights, but WIPO does not itself establish an international legal protection regime.⁶³ Neither copyright nor design protection under current international law, apply to TCEs.⁶⁴ No consensus at the WIPO today yet exists as to the attribution of an IP Right to TCEs which would empower traditional artists and practitioners, the indigenous, local and other cultural communities against appropriation of their work by mass cultural industries.⁶⁵

3. Emerging Intellectual Property Protection for TK in the WTO

The TRIPs Agreement in its present form and scope is perceived to respond to the needs of industrialised countries.⁶⁶ It does not offer much to farming communities, the main holders of traditional knowledge around the globe. It was acceptable to developing countries mainly because it formed part of an overall package and single undertaking, which included a pledge to liberalise market access in agriculture and textiles. These goals are only materialising slowly. They have not remedied a basic imbalance.⁶⁷

3.1. TK and Developing Countries

The Doha Ministerial Declaration acknowledges that the majority of WTO members are developing countries.⁶⁸ If the Doha Ministerial Declaration seeks to “place their [developing countries’] needs and interests at the heart of the Work Programme adopted in this Declaration,”⁶⁹ TK is considered one of the interests that the negotiations under the Doha Agenda should pursue because TK “plays an important role in vital areas such as food security, the development of agriculture and medical treatment for up to 80 percent of Africa’s rural economy.”⁷⁰

Yet, many developing countries were for a long time indifferent towards the value of TK. In the low-income sectors of agriculture it often has led to stagnation and, invariably, to the loss of TK as structures changed.⁷¹ Today, there is an increasing awareness that

Strategy 2002-2005”, *WHO Document WHO/EDM/TRM/2002.1*, pp. 29-32, available at: <http://www.who.int/medicines/library/trm/trmmaterial.shtml>, last visited 12 November 2004.

⁶³ See WIPO, Consolidated Analysis, *supra* note 50.

⁶⁴ *Cf. id.*, paras. 12-14.

⁶⁵ See *id.*

⁶⁶ See among others, Downes, R., *supra* note 59, p.255.

⁶⁷ See Cottier, T., & Panizzon, M., *supra* note 6, pp.381-384.

⁶⁸ See Doha Declaration, *supra* note 3, paragraph 2.

⁶⁹ See *id.*

⁷⁰ Nwokeabia, H., ‘Why Industrial Revolution Missed Africa: A “Traditional Knowledge Perspective”’, Economic Commission for Africa (UNECA), Document ECA/ESPD/WPS/01/02, 2001, on file with the authors, p.4.

⁷¹ *Id.*, ‘The Economics of African Indigenous Knowledge’, World Bank Indigenous Knowledge Programme, *IK Notes on Indigenous Knowledge and Practices*, No. 53, 2003, pp.1, 4, available at:

rendering the knowledge bearer attentive to the value of his/her knowledge will encourage the holders to appreciate TK as the “continuous and additive innovation”.⁷²

In the context of the Doha Development Agenda, many, but not all developing countries propose, to seek an agreement on improved market access for agricultural products.⁷³ If agricultural exports from a developing country reflect traditional natural resources of that region, such as specific grains or products which are processed and produced through traditional skills and techniques, it is argued that a step toward validation of TK at the WTO would be achieved if market access barriers for TK-based products were to be lowered by tariff cuts, either through Special and Differential Treatment (S&D), a “development box”, or through overall tariff cuts applicable to all WTO Members.⁷⁴ But there are also those developing countries, namely India and Nigeria, which consider the protection of TK as an issue within the broader debate on food security. They also maintain that if TK-based agriculture is shielded off from global trading rules, developing countries retain their “food production capacity”, (either through the special safeguard mechanism or via countervailing duties) and food security of developing countries would be enhanced.⁷⁵

3.2. Doha Declaration on Traditional Knowledge (2001)

While the TRIPs Agreement of 1994 is silent on TK⁷⁶, the Doha Declaration of 2001 introduces TK as an item for work on intellectual property. The declaration notes that while the TRIPs Council “must examine the relationship between the TRIPs Agreement, and Traditional Knowledge and folklore, and other relevant new developments”, it must do so by “fully tak[ing] into account the development dimension.”⁷⁷ Implicitly perhaps, the WTO

<http://www.worldbank.org/afr/ik/iknt53.pdf>, last visited 16 November 2004, TK is characterized as “continuous, but non-additive innovation.”

⁷² Id.; see also Cottier, T. & Panizzon, M., supra note 6, pp. 383-386.

⁷³ WTO, Agriculture Negotiations, Backgrounder, Developing Countries, http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd14_devopcount_e.htm, last visited 18 November 2004, “[m]any developing countries complain that their exports still face high tariffs and other barriers in developed countries’ markets and that their attempts to develop processing industries are hampered by tariff escalation (higher import duties on processed products compared to raw materials). They want to see substantial cuts in these barriers.”

⁷⁴ See WTO, Committee on Agriculture, Special Session, Agreement on Agriculture: Special and Differential Treatment and a Development Box, Proposal to the June 2000 Special Session of the Committee on Agriculture by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador, WTO Document G/AG/NG/W/13 of 23 June 2000.

⁷⁵ See WTO, Committee on Agriculture, Special Session, Agreement on Agriculture: WTO Negotiation on Agriculture, Proposal by Nigeria, WTO Document G/AG/NG/W/130 of 14 February 2001; see also, WTO, Agriculture Negotiations, Backgrounder, Developing Countries, “Some countries say WTO arrangements should be more flexible so that developing countries can support and protect their agricultural and rural development and ensure the livelihoods of their large agrarian populations whose farming is quite different from the scale and methods in developing countries. They argue, for example, that that subsidies and protection are needed to ensure food security, to support small scale farming, to make up for a lack of capital, or to prevent the rural poor from migrating into already over-congested cities.”

⁷⁶ See Dutfield, G., supra note 36, p.6.

⁷⁷ Doha Declaration, supra note 3, paragraph 19.

developing country Members intend to ensure that developed countries will, by being called upon to recognise TK, give more consideration for developing countries' needs in installing an effective IPR protection consistent with the TRIPs.⁷⁸ Also, they seek to increase the demand in both developing and industrialized countries for traditional crops.⁷⁹ But also certain industrialised countries, feeling pressure from the Cairns Group and certain developing countries to liberalise their agricultural trade, advocate that the special form of protection through GIs should be expanded to all agricultural products.

3.3. The "July 2004 Package"

The "July 2004 Doha Development Agenda Package" of 1 August 2004 is a decision adopted by the General Council to reformulate the Doha Round objectives (in the format of a "Work Programme") in order to keep the Doha Development Round on track and to successfully round up the negotiations with an agreement by the end of 2005.⁸⁰ Traditional knowledge protection was left out in the July 2004 Package, even if it had been a specific item on the DDA. Also, at the last minute, the EU demands for extending GI protection to products other than wines and spirits were discarded too. In the light of existing problems and substantive proposals made and discussed shortly, it is evident that this will not be the last word on the matter. The decision, however, reflects that the matter is not conceptually mature for negotiations.

4. Specific Proposals on Traditional Knowledge

1. Discussions within the TRIPs Council

In the TRIPs Council, a number of arguments were made in support of TK protection, namely that "it is only equitable that TK should be given legal recognition."⁸¹ Given that the *raison d'être* of the TRIPs Agreement, which is to provide as broad a scope of IP protection for as broad a range of subject matters possible, including new ones such as plant varieties, biological materials, lay-out designs and computer software, it is only logical that TK, as a discovery of circumstance, should also be included in the IPR framework of the TRIPs Agreement. As the report of the TRIPs Council puts it: "nothing in the TRIPs Agreement prevents the WTO from adopting a specific protection regime for TK."⁸² Moreover, this report considers the socio-economic argument in favour of protecting TK with intellectual property rights that "an egalitarian system of IPRs is one which does not exclude a priori any section of society."⁸³

⁷⁸ See Cottier, T. and Panizzon, M., supra note 6, pp.372-373.

⁷⁹ See Brush, R.S., 'The Demise of Common Heritage and Protection for Traditional Agricultural Knowledge', paper prepared for Conference on Biodiversity, Biotechnology and the Protection of Traditional Knowledge, St. Louis MO, April 4-5, 2003, available at: <http://law.wustl.edu/centeris/Confpapers/>, on file with the authors, p.49.

⁸⁰ See WTO, Doha Work Programme, supra note 21; see also Williams, F., 2004, WTO Races to Hit Outline Deal Target', in: *Financial Times*, 1 July 2004, p. 6; Genfer Zwischenspur für die Dauha-Runde, *Neue Zürcher Zeitung*, 21 July 2004; *Neue Zürcher Zeitung*, Formale Geplänkel um die Dauha-Runde, 28 July 2004.

⁸¹ WTO Secretariat, The Protection of Traditional Knowledge, Summary of the Issues, supra note 57, p.3.

⁸² Id., p.11.

⁸³ Id.

2. Three Negotiating Positions on Traditional Knowledge Protection

2.1. CBD-consistent TRIPs Interpretation of the “Checklist Countries”

In 2002, one of the first proposals relating to TK was logged by a group of developing countries i.e. Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe. They suggested a solution based upon a mix of IP protection and the access and benefit-sharing regime of the CBD. TK should be validated under the WTO rules by interpreting the TRIPs Agreement as mutually consistent with the CBD rules. They propose to introduce the principles of informed consent and disclosure of origin prior to the grant of patent rights.⁸⁴ In a related submission, Ecuador, India, Peru, Thailand, Venezuela, Pakistan and Bolivia find that should protection be granted to TK it should be in compliance with the CBD provisions, pursuant to the TRIPs Council Doha mandate paragraphs 12 and 19 in combination with paragraph 47 of the Doha Ministerial Declaration (DMD).⁸⁵

2.2. Disclosure of Origin Requirement: The EU and Switzerland

The EU and Switzerland proposed that the sources of origin of TK as well as the genetic resources be laid open by the patent applicant.⁸⁶

Switzerland, which had argued that a disclosure requirement constitutive to patent application would protect the TK holders, accommodated the potential financial burden on the pharmaceutical industry, by referring TK protection to the non-mandatory instruments of WIPO. This position leaves the WTO to “benefit” from WIPO’s work.⁸⁷ The Swiss

⁸⁴ See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, The Relationship between the TRIPs Agreement, the Convention on Biological Diversity and the Protection of Traditional Knowledge, WTO Document IP/C/W/356 of 24 June 2002, which is a proposal submitted by Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe for circulation to TRIPs Council Members with the proposal that: “[T]he TRIPs Agreement should be amended in order to provide that Members shall require that an applicant for a patent relating to biological materials or to Traditional Knowledge shall provide, as a condition to acquiring patent rights: (i) disclosure of the source and country of origin of the biological resource and of the Traditional Knowledge used in the invention; (ii) evidence of prior informed consent through approval of authorities under the relevant national regimes; and (iii) evidence of fair and equitable benefit sharing under the national regime of the country of origin.”

⁸⁵ See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, The Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) Checklist of Issues, Submission from Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela, WTO Document IP/C/W/420 of 26 February 2004 and WTO, The Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) Checklist of Issues, Submission from Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela, Addendum, WTO Document IP/C/W/420, Add. 1 of 5 March 2004, the latter communicating that Bolivia has been added to the list of sponsors of the above mentioned submission.

⁸⁶ See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Additional Comments by Switzerland on its Proposals Submitted to WIPO Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications, Communication from Switzerland, WTO Document IP/C/W/324 of 14 June 2004, pp. 1-2.

⁸⁷ WTO Council for Trade-Related Aspects of Intellectual Property Rights - Article 27.3(b), the Relationship between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge, Communication from Switzerland, WTO Document IP/C/W/400 of 28 May 2003, paras.25-27.

government's way of proceeding reveals the sensitive task of balancing high-profile research interests while committing to equity in the distribution of the worlds' resources. The submission to the TRIPs Council refers in an Annex to a copy of the Swiss submission to the WIPO.⁸⁸

The Swiss submission to the WTO considers intellectual property protection for TK on the agenda for reform of the WIPO Patent Cooperation Treaty (PCT). Arts. 51bis 1g(ii) and (iii) would have to be amended to include an obligation to disclose the origin of TK and of genetic resources as an essential requirement to every patent application. The submission further states that the Council for TRIPs should "benefit" and "draw upon" the "relevant work being carried out in WIPO". In consequence, under the Swiss proposed disclosure of origin requirement for TK and genetic resources, disclosure is not scheduled to acquire the universally binding force it would otherwise have had if jurisdiction for TK were concentrated in the WTO and its binding dispute resolution mechanism.⁸⁹

The EC agrees to a disclosure of origin criteria in WTO law, under the condition that it be only declaratory. The EC argues in favour of disclosure of origin of the genetic resource and of related TK, being held apart from patent application criteria. Under the EC proposal, a failure to disclose the origin would trigger criminal sanctions and/or civil liability, but not affect the validity of the patent.⁹⁰ Apart from the declaratory versus constitutive effect of the disclosure requirement, another difference to the Swiss proposal is that the EC would subject a TRIPs disclosure of the source requirement *ab initio* to the WTO dispute settlement panels.⁹¹ The EU argues that a "self-standing disclosure requirement" should be introduced into the TRIPs, which would function in the following way: "When TK is used as a basis for further innovations, disclosure of the original TK from which inventions are derived would be an important way of ensuring that holders of Traditional Knowledge share in the benefits."⁹² The EU proposal contrasts with the Swiss approach, which requires a disclosure of the source of the genetic resource and of the prior art relating to TK as a constitutive requirement for the grant of a patent, because according to the EU, the "legal consequences to the non-respect of the requirement should lie outside the ambit of patent law".⁹³

While the EC proposal limits the legal consequences to those outside patent law, the Swiss and the African Group propose that a failure to disclose would delay a patent being granted or affect its validity.⁹⁴ Two South American WTO members have, established a

⁸⁸ See Sixth Session of the Working Group on Reform of the Patent Cooperation Treaty held on 3-7 May 2004, Submission by Switzerland to the International Bureau of WIPO, WIPO document PCT/R/WG/6/11.

⁸⁹ Compare, *id.*, p. 2 with WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Communication from the European Communities and their Member States, Review of Article 27.3(b) of the TRIPs Agreement, and the Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore, "A Concept Paper", WTO Document IP/C/W/383 of 17 October 2002, [hereinafter WTO, "A Concept Paper" from the European Communities] pp. 1-2.

⁹⁰ See WTO, Committee on Trade and Environment, Report of the Meeting held on 8 October 2002, Note by the Secretariat, WTO Document WT/CTE/M/31 of 2 December 2002, para.74.

⁹¹ See *id.*, pp. 3-13.

⁹² See WTO, "A Concept Paper" from the European Communities, *supra* note 91, p. 2.

⁹³ See *id.*, p. 2.

⁹⁴ See WTO, Council for Trade Related Aspects of Intellectual Property Rights, Communication from the European Communities and their Member States, WTO Document IP/C/W/383 of 17 October 2002, under the EU proposal, a firm, which fails to comply with the declaration of origin of the genetic resource or with the documentation of prior art as regards TK, will not be refused a patent because disclosure under the EC regime, is not a "substantive requirement of patentability", instead the firm would only encounter civil or penal law consequences. While the WTO could deal with preventing the misappropriation of TK, the EC nevertheless finds that "TRIPs Council is not the right place to negotiate a protection regime for a complex new subject

regional protection for TK under the Andean Pact, by requiring prior disclosure in patent applications. These are the Andean decision No. 391 of August 16, 1996 and the Biodiversity Law of Costa Rica. Brazil welcomed the EC's proposal that it would be important to disclose the source of the country of origin of the biological resource and of TK used in an invention.⁹⁵

Other suggestions propose bilateral contracts between the TK holder and the person or company wishing to exploit the patent. These suggestions point out at the difficulty of "negotiations between unequal parties and the problem of prior informed consent". Others propose a *sui generis* system of protection (protection of proprietary rights that serve to ensure fairness and equity).⁹⁶

2.3. The Proposal of *sui generis* Rights: the "African Group"

The 41 countries constituting the African Group propose that TK is a "category of IPR" for which a *sui generis*-type protection should be accorded. The "misappropriation" of TK shall lead to a cancellation of the IPR. Such misappropriation occurs where industry might have appropriated certain genetic resources to which it was lead towards by TK.⁹⁷ The African proposal prefers top-down protection of TK, whereby a multilaterally agreed standard would serve to unify the different national laws, as the African proposal says: "Any protection of genetic resources and traditional knowledge will not be effective unless and until international mechanisms are found and established within the framework of the TRIPs Agreement."⁹⁸ The African proposal suggests that the international coordination of such protection should be vested in the TRIPs Agreement and that an IPR-type protection is the only effective means for protecting TK, even if, the African Group suggests that the TRIPs be mutually supportive with the CBD and the ITPGRFA: "Other means, such as access contracts and data bases for patent examinations, can only be supplementary to such international mechanisms, which must contain an obligation on Members collectively and

matter like TK or folklore"; see WTO, Council for Trade Related Aspects of Intellectual Property Rights— Article 27.3(b), 'The Relationship between the TRIPs Agreement and the Convention on Biological Diversity, and the Protection of Traditional Knowledge', Communication from Switzerland – Revision, WTO Document IP/C/W/400/Rev.1 of 18 June 2003, for Switzerland; see WTO, Council for Trade-Related Aspects of Intellectual Property Rights— Article 27.3(b), The Relationship between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge, Submission by Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand, Venezuela, WTO Document IP/C/W/403 of 24 June 2003, for the countries listed; see WTO Council for Trade Related Aspects of Intellectual Property Rights— Article 27.3(b), 'Taking Forward the Review of Article 27.3(b) of the TRIPs Agreement', Joint Communication from the African Group, WTO Document IP/C/W/404, of 26 June 2003, [hereinafter WTO, Taking Forward the Review of Article 27.3(b)], for the 41 countries of the African Group: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Congo (Democratic Republic), Côte d'Ivoire, Djibouti, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, , Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

⁹⁵ See WTO, Taking Forward the Review of Article 27.3(b), supra note 96, para.75.

⁹⁶ Id.

⁹⁷ See id., pp.1-9.

⁹⁸ Id., pp. 2, 4-5.

individually to prohibit, and to take measures to prevent, the misappropriation of genetic resources and traditional knowledge.”⁹⁹

3. Attitudes of Academia and Non-Governmental Organizations

Scholarly proposals to introduce new IP rights to TK (Traditional Intellectual Property Rights, TIP Rights)¹⁰⁰ have generally been met with reluctance in practice and industry, so far. Many fear that protecting TK with private rights introduces the concept of proprietary possession, which contrasts with the communitarian lifestyle in many developing countries, and which it is feared, will destroy the traditional ways of life. The younger generation in developing countries, it is argued, does not believe that TK can result in economic returns.¹⁰¹ Their career choices follow the model of globalisation and they believe that modernising is the only way to render their economies marketable. Most NGO's find that obliging the developing countries to establish an IPR system of protection, regardless of whether or not it might be beneficial to the valuation of TK, only deepens the divide between developed and developing countries.¹⁰²

Some scholars are discussing how to fine-tune the disclosure of genetic origin and TK requirements. De Carvalho finds that a disclosure requirement constitutive to a patent application should only then apply when the genetic resource concerned is preserved *in situ*. Where the active components are isolated from those resources or even synthesized, i.e. the genetic resource is preserved *ex situ*, the link between the invention, the know-how, including the TK and the resources may become too weak to be of any significance for patent protection.¹⁰³

4. Discussions in Other Organisations

4.1. Food and Agricultural Organization (FAO)

The 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of the UN Food and Agricultural Organization is the successor treaty to the FAO International Undertaking (IU), Its so-called “multilateral system”, realises free access to listed crops, but under Art. 12.3 ITPGRFA requires the users of such crops listed under the Annex I, to reward the government under whose sovereignty the natural resource is located. The multilateral system of the ITPGRFA is based on a public domain approach. It depends upon public funding and prohibits IPRs on genetic resources, unless the genetic

⁹⁹ Id., pp. 2, 3

¹⁰⁰ See Cottier, T. & Panizzon, M., supra note 6, pp.371-399; see also Cottier, T., supra note 6, pp.555-584.

¹⁰¹ See Balick, M.J., ‘Traditional Knowledge: Lessons from the Past, Lessons for the Future’, Discussion Draft, Conference on Biodiversity, Biotechnology and the Protection of Traditional Knowledge, St. Louis MO, April 4-5, 2003, available at: <http://law.wustl.edu/centeris/Confpapers/>, on file with the authors, pp.19, 26.

¹⁰² See generally, Downes, R., ‘Using Intellectual Property as a Tool to Protect Traditional Knowledge: Recommendations for Next Steps’, *The Center for Environmental Law (CIEL) Discussion Paper*, 1997, available at: <http://www.ciel.org/Publications/>, on file with the authors; see also NGOs specialized in the field of agricultural diversity: GRAIN (www.grain.org) and RAFI (www.rafi.org), GAIA Foundation, Actionaid (mail@actionaid.org.uk).

¹⁰³ See de Carvalho, N.P., ‘Patent Law and Policy Symposium: Re-Engineering Patent Law: The Challenge of New Technologies’, in: 2 *Wash.U.J.L. & Pol’y.*, 2000, p.371.

resource has been taken out of the “common concern of humankind” and is under private property.¹⁰⁴

The ITPGRFA attributes only a minor role to TK as a tool in the efforts to explore and conserve plant genetic resources. The ITPGRFA addresses TK as one facet of the preservation of genetic resources and as a corollary to farmers’ rights in Art. 9.2(a).¹⁰⁵ Art. 9.2(a) ITPGRFA is unlike the CBD’s Art. 8(j), the latter which acknowledges the conservation efforts and sustainable use of genetic resources by traditional communities as a subject matter in its own right. Legal protection under the ITPGRFA follows the CBD model of “conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security”.¹⁰⁶

The ITPGRFA has a rather dismissive attitude towards IPR protection for TK. Traditional knowledge is not referred to in the ITPGRFA. It does little to spur inventions based upon TK, and the treaty “refuses to establish a hierarchy between itself and other related treaties”, such as intellectual property rights treaties” with the result is that “the door is open for conflicting interpretation at the time of implementation”.¹⁰⁷ The ITPGRFA expressly subscribes to “balanc[ing]” the research interest towards free access with the “equitable sharing of the benefits arising out of their use”. The legal instruments, however, are shaped in favour of the research community with little to offer on legal protection and adequate compensation for traditional communities that have been the pioneers in exploring and identifying genetic resources.¹⁰⁸ Instead, putting plant genetic resources to work, and thus through conservation through use without legal restrictions indirectly seek protection of TK.

4.2. WIPO and WHO; UNESCO and UNCTAD

4.2.1. *Traditional Knowledge on Plant Genetic Resources*

WIPO has mainly proposed a bottom-up approach. Developing countries would first be called upon to establish national IPR systems with the possibility to patent TK. Only after assessing the national experience would TK protection be introduced at the international level.¹⁰⁹ The United Nations Conference on Trade and Development (UNCTAD) formulates

¹⁰⁴ See ITPGRFA, supra note 15, Art. 12.3; see also Birnie, P., & Boyle, A., supra note 61, pp. 573, 559, 579 on the concept of “common concern” in international environmental law, particularly, the CBD.

¹⁰⁵ ITPGRFA, supra note 15.

¹⁰⁶ ITPGRFA, supra note 15, Art. 1

¹⁰⁷ Cullet, P., ‘The International Treaty on Plant Genetic Resources for Food and Agriculture’, in: *International Environmental Law Research Center (IELRC), Briefing Paper*, 2003, No. 2, available at: <http://www.ielrc.org/content/f0302.htm>, last visited 16 November 2004.

¹⁰⁸ See ITPGRFA, supra note 18, Art. 1.1.

¹⁰⁹ See WIPO, *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, Report of the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Document WIPO/GRTKF/IC/3/8 of 29 March 2002, paras.4, 5, 8, 17-57; but see paras.8, 42-43.

minimum standards to support an internationally recognized *sui generis* system.¹¹⁰ WIPO and UNESCO have put together model provisions for national laws on the protection of folklore.¹¹¹ WIPO is also building databases for sustaining national legislative efforts to protect TK.¹¹² The WHO has confined TM to a role for development country medical policy only.¹¹³

4.2.2. *Traditional Cultural Expressions*

WIPO identifies Traditional Cultural Expressions (TCEs) in addition to TK on plant genetic resources. WIPO proposes to establish an IPR to protect the “expressions of folklore” as distinct as Indian cinema (“Kannada”, which is regional Indian cinema and “Bollywood” musicals and movies), Indian software programs, and Brazilian music, African weaving patterns, folkloric dances, languages etc.

Copyright protection, also called moral rights has so far been the domestic legal format for protecting cultural heritage. Such rights of attribution of authorship – the right of the author to be named in connection with their work, the right of integrity of authorship, and to object to, and stop derogatory treatment of a work that demeans the author’s reputation, are codified, internationally, under the Berne Convention for the Protection of Literary and Artistic Works. Indigenous knowledge-holders would like to see the Copyright Amendment (Moral Rights Bill) of 1999 of the Berne Convention extended to encompass recognition of the communal rights of indigenous custodians.¹¹⁴ Another approach would be to introduce GIs when exporting and marketing of TK relating to cultural goods and services originates in a specific region, and may be localized as such, namely cultural manifestations, movies, and dances. Yet another approach is to consider TCEs as in the public domain, the use of which international treaty law will, similarly to TK relating to PGR, subject to limitations, such as access and benefit sharing, prior informed consent and transfer of technology. The public domain approach has the advantage that it gives a legal framework to what anthropologists and social scientists identify as the significance of folklore for the formation of “public space”.¹¹⁵ Possibly, a mix between a public domain and IPR protection would consist the most effective way to preserve folklore: Where a knowledge bearer may be identified, protection may be designed as an IPR, whereas where

¹¹⁰ See UNCTAD, *The Sustainable Use of Biological Resources: Systems and National Experience for the Protection of Traditional Knowledge, Innovations and Practices, Agreed Recommendations*, UNCTAD Document TD/B/COM.1/L.16 of 27 March 2001, stating that “The Commission makes the following recommendations at the international level: ... (d) Exchange information on national systems to protect TK and to explore minimum standards for an internationally recognized *sui generis* system for TK protection.”

¹¹¹ See Dutfield, G., *supra* note 36, pp.32-34.

¹¹² See Gopalakrishnan, N.S., ‘Protection of Traditional Knowledge, The Need for a *Sui Generis* Law in India’, in: 5(5) *J.W.I.P.*, 2002, pp.726-727.

¹¹³ See WHO, ‘Traditional Medicine—Growing Needs and Potential’, *WHO Policy Perspectives on Medicines*, No.2, May 2002, p. 1; *see more generally*, ‘WHO Essential Drugs and Medicines Policy, “WHO Traditional Medicine Strategy 2002-2005”’, *WHO Document WHO/EDM/TRM/2002.1*, pp. 29-32, available at: <http://www.who.int/medicines/library/trm/trmmaterial.shtml>, last visited 12 November 2004.

¹¹⁴ See Cultural Heritage Working Group of the Centre for Studies in Intellectual Property and Technology Law, Arts and Humanities Research Board, ‘IP, Cultural Heritage and the Public Domain’, Meeting 2 September 2002, available at: <http://www.law.ed.ac.uk/ahrb/events/archive.asp>, last visited 29 August 2002; *see also* Aboriginal and Torres State Islander Commission (ATSIC), ‘Indigenous Rights’, available at: http://www.atsic.gov.au/issues/indigenous_rights/intellectual_property/Default.asp, last visited 29 August 2004.

¹¹⁵ Public Space and Civil Society, Indira Gandhi National Centre for the Arts, New Delhi (IGNAC), Report, International Seminar on Folklore, available at: <http://www.ignca.nic.in/nl002301.htm>, last visited 30 August, 2004.

a dialectical relationship exists between the private and the public, a public domain approach may be warranted. In addition to the protection of the folklore as a product, the heritage holder should be protected in the exercise of his/her heritage under the fundamental freedom of indigenous people pursuant to the UNESCO Draft Declaration on the Rights of Indigenous Peoples and the ILO Convention 169, as well as relevant provisions of human rights law.¹¹⁶

5. Towards Enhanced Protection of Geographical Indications

1. Legal Protection of “Marks” of Origin

Insofar as GIs are “place names”, which stand for the quality and locality of a product and so generate a responsibility for a place and region, they contrast with anonymous, global, mass production.¹¹⁷ GIs reflect the current trend away from “high volume ‘day-to-day’ foods engineered by multinational enterprises or mass producing agriculture towards “lower volume niche or specialty products.”¹¹⁸ GI protection is close to, but different from trademark protection. The priority principle “First in Time, First in Right” resolves the conflict between trademarks and GIs. It says that a validly registered prior mark should prevail against a later geographical indication and *vice versa*.¹¹⁹

2. Status Quo of GIs under Section 3 TRIPs

An absolute level of GI protection applies to wines and spirit pursuant to Art. 23 TRIPs whereas a relative level of protection exists for all other goods under Art. 22 TRIPs. The relative level of protection establishes a protection of GIs limited to the principles of unfair competition. The relative level of protection prohibits using a geographical name if such a name and use would mislead the public as to the true geographical origin of the product. As long as there is no delusion of the consumer, a geographical name may be used under the condition that where a product is not produced at its geographical origin, the foreign location of production is mentioned in combination with the name of the speciality, e.g. “Roquefort cheese produced in Norway”, “Feta cheese made in the USA”. Under the absolute and enhanced level of protection, products made elsewhere than in the protected geographical area are barred from using the geographical name even where the true origin

¹¹⁶ See United Nations High Commissioner for Human Rights (UNHCR) Cultural and intellectual property of indigenous peoples, Sub-Commission on Human Rights resolution 1993/44; see also Daes, E.-I., United Nations Study on the Protection of the Heritage of Indigenous People.

¹¹⁷ C.f. WTO, TRIPs: Geographical Indications—Background and the current situation, Geographical Indications in general of 26 February 2004 (last update), available at: http://www.wto.org/english/tratop_e/trip_e/gi_background_e.htm, last visited 17 November 2004, for the definition of GIs as “place names”.

¹¹⁸ Barham, E., ‘Translating Terroir: The Global Challenge of French AOC Labeling’, 19 *Journal of Rural Studies*, 2003, pp.127, 129.

¹¹⁹ See Hellwig, F., Z., ‘Why the Principles of Priority and Exclusivity cannot be Compromised — The Trademark Owner’s Perspective on Geographical Indications and First in Time, First in Right’, Working Paper, 2004, International Trademark Association, available at: http://www.inta.org/articles/firstintime_firstinright.html, last visited 11 November 2004.

of the product is indicated, or even where it is accompanied by qualifications such as “kind”, “type” or “style”. The literally correct name or a similar name must not be used under the enhanced protection of Art. 23. The absolute level of protection today only exists for wines and spirits, e.g. the local name of Champagne may not be used for a local Swiss dry white wine.¹²⁰

2.1. Built-in Agenda of Article 23:4 TRIPs Agreement

Art. 23:4 TRIPs contains a built-in agenda, which calls for negotiating a multilateral registration system of GIs for wines and spirits. The built-in agenda of Art. 23:4 TRIPs does not call for negotiating to extend the higher level of protection applicable to wines and spirits under the current law, to other products.¹²¹ Nevertheless, the EC, as mentioned above, refers to this built-in agenda when it argues in favour of expanding the coverage of the higher-level GI protection regime, which currently exists for wines and spirits, to other products. The EC not only maintains that the TRIPs provides for the mandate to negotiate the multilateral register for high-quality products in order to guarantee their geographical origin, but that the Doha Ministerial Declaration sets the deadline of the Fifth Ministerial Conference to be held on September 2003 in Cancun to establish such a register (absolute level of protection).¹²² Should the EC be successful, the result would be that cheeses such as “American Gouda”, but also “Gouda-style” or “Gouda-type” would be eliminated and producers outside the original geographical scope of protection would be forced to rename and remarket their products.¹²³

Those WTO members opposing the extension of the registration (i.e. the absolute level) protection system to products other than wines and spirits, are foremost the agricultural mass-producing countries, such as the US and Australia. These WTO Members argue that the built-in agenda of Art. 23:4 TRIPs does not provide for the mandate to negotiate an expansion of the scope of the GI protection regime.

2.2. Specific Item on the Doha Development Agenda

The only reference to GIs was that the General Council *discuss*, in the context of implementation, “[w]ithout prejudice to the positions of Members, all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration (DMD), including on issues related to the extension of the protection of Geographical Indications provided for in Article 23 of the TRIPs Agreement to products other than wines and spirits, if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by

¹²⁰ See Origin (an NGO), ‘The WTO’s presentation of the Doha agenda: Rendez-vous in Cancun’, GI-Info/On going negotiations, available at: <http://www.origin-gi.com>, last visited 2 September 2004.

¹²¹ See Art. 23:4 TRIPs: “In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPs concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.”

¹²² See European Commission, External Trade, Intellectual Property, TRIPs and Geographical Indications: ‘EU submits Three Communications on Geographical Indications’, Brussels, 24 June 2002, available at: http://europa.eu.int/comm/trade/issues/sectoral/intell_property/wto_nego/intel4.htm, last visited 17 November 2004.

¹²³ See Cabot, T., ‘Naming Rights, is America the Home of the Free but Not of the Brie?’, in: *The Washington Post*, 21 May 2003, p. F01.

holding dedicated consultations.”¹²⁴ GI protection might be expanded in scope only if the General Council agrees upon the issue in July 2005.¹²⁵

3. Increasing Interest at the WTO

In the light of increasing pressure to do away with costly and trade distorting agricultural domestic support measures, the GI debate has gained momentum in the WTO. It has become a divisive issue between WTO Members in the agricultural negotiations, even if GIs, institutionally, are an instrument of the TRIPs and not of the Agreement on Agriculture (AoA).

3.1. European Interests

The protection of GIs is at the core of the EC’s and Switzerland’s positions in reforming their highly subsidized agriculture.¹²⁶ The promotion of GIs forms part of the two countries review proposals to the TRIPs and part of their interest in agricultural negotiations. Rules of unfair competition protect local and regional speciality products and even if not an instrument of market access liberalization itself, the EC and Switzerland seem to vest GIs with a *quid pro quo* function considering GIs a trade-off for dismantling existing barriers to agricultural imports from developing countries. In other quarters, such as the Cairns Group countries, GIs risk to be perceived as new forms of protectionism.

Geographical Indications, so the EU, are “the lifeline for 138’000 farms in France”.¹²⁷ For example, Neapolitan pizza makers convinced Italian lawmakers (the Ministry of Agriculture) in the summer of 2004, to issue a law protecting the “true” Pizza from imposters: the label their pizzas would carry under the new law is “STG” Guaranteed Traditional Specialty.¹²⁸ A closer examination reveals that such specifications to the pizza-making process are all but protective of the regional produce of Southern Italy, such as Vesuvian-grown tomatoes and buffalo-milk mozzarella from the Campagna, fearing cheaper competition from Polish-grown tomatoes and Slovenian mozzarella, of the enlarged EU.

The production of a specialty cheese from the Jura region between France and Switzerland, Mont d’Or Vacherin, is an example of “savoir-faire”. The main characteristic of

¹²⁴ See WTO, Doha Work Programme, supra note 21, Section 1 (d).

¹²⁵ See id., June 2005 is the date, which the July 2004 Package sets for the General Council to review the proposals submitted to it and to take appropriate action.

¹²⁶ Council Regulation (EC) 692/2003 8 April 2003 amending Regulation (EEC) Nr. 2081/92 on the protection of Geographical Indications and designation of origin for agricultural products and foodstuffs, O.J. L 99 (April 17, 2003), domestic EC law was recently revised.

¹²⁷ See European Union, European Commission, External Trade, Sectoral Issues, Intellectual Property, ‘Why do Geographical Indications matter to us?’, Brussels, 30 July 2003, available at: http://europa.eu.int/comm/trade/issues/sectoral/intell_property/argu_en.htm, last visited 12 November 2004 [hereinafter EU, Why do Geographical Indications matter to us?].

¹²⁸ Baker, A., ‘For the Pizza Makers of Naples, A Tempest in a Pie Dish’, in: *The New York Times*, 9 June 2004, citing Rosa Russo Iervolino, mayor of Naples, “[i]t is a guarantee for Naples pizza, just as there are guarantees for other Italian brands, like Parmesan cheese. It is important to recognize where certain foods come from and protect them from impostors”; see also Cabot, T., supra note 138.

the cheese is its production process involving the cheese-maker fermenting the milk into the cheese and the “affineur”, who is someone improving the quality of the cheese. The cheese-maker, on the one hand, does not necessarily have TK, because the making of the raw cheese loaves does not involve a skill specific only to Mont d’Or cheese. The affineur, on the other hand, is the one who produces the typical quality of this creamy cheese, which is eaten by the spoon.¹²⁹ It is the affineur, and not the cheese-maker who only ferments the milk, who disposes of a specific skill, unique only to his practice, which enables him/her to give the raw cheese loaves the particular Mont d’Or flavour and consistency, which involves packing the cheese for storage in pine wood baskets and other skills. GIs may protect the Mont d’Or cheese loaves themselves, because only soft cheese from the French and Swiss Jura mountains produced in the typical conifer wood basket may be commercialized under that name.

“Savoir-faire”, the French expression related to TK and GIs, demonstrates how linguistic expressions, which stand for a specific lifestyle, cannot be properly translated into the language of a region or culture foreign to that lifestyle. It illustrates well the “European” affinity for the culture, lifestyle and consumer choice that GIs stand for.

These examples may be dismissed as an exaggerated application of the concept. Nevertheless, they demonstrate how developed country agriculture, with the exception of the Cairns Group Members, today is faced with competition from developing countries having successfully switched from subsistence farming to cash crops,¹³⁰ and is seeking legal protection to keep up farming practices, such as intellectual property rights.¹³¹

3.2. Developing Countries

37 Members, composed of developed and developing countries alike, have signed proposals advocating GI protection at the WTO to be expanded to agricultural products.¹³² Developing countries increasingly value GIs as an instrument contributing to a remunerative marketing of an agricultural production based upon traditional cultivation methods. Persistent resistance to this extension may therefore communicate an unfortunate message to those countries about the *realpolitik* of the international intellectual property regime.¹³³

¹²⁹ See Vesper, T., ‘In der Vallée de Joux fließt der Vacherin wieder, Der König unter den Weichkäsen wandelt sich mit den Zeitläufen’, in: *Neue Zürcher Zeitung*, 2 September 2004.

¹³⁰ Rangnekar, D., ‘The Socio-Economics of Geographical Indications, A Review of Empirical Evidence from Europe’, in: *UNCTAD-ICTSD Capacity Building Project on IPRs*, Issue Paper No. 8, 2004.

¹³¹ See Wallis, W., ‘African farmers dig deep to comply with EU food rules’, in: *Financial Times*, 7 April 2004.

¹³² WTO Council on Trade-related Intellectual Property Rights, Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, Estonia, the European Communities and their fifteen Member States, Georgia, Hungary, Iceland, India, Jamaica, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey WTO Document IP/C/W/353 of June 24, 2002, [hereinafter WTO Communication from Bulgaria, Cuba, the Czech Republic, Estonia, the European Communities [...]]; see also Rangnekar, D., ‘Geographical Indications: A Review of Proposals at the TRIPs Council, Extending Article 23 to Products other than Wines and Spirits’, *UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development*, May 2003, available at: www.ictsd.org/ipronline/unctadictsd, last visited November 16, 2004.

¹³³ Blakeney, M., ‘Proposals for the International Regulation of Geographical Indications’, in: *4 J.W.I.P.*, 2001, pp.629, 652; see also Addor, F. & Grazioli, A., supra note 18, p.886.

3.3. Cairns Group

Cairns Group countries (such as Argentina, Brazil, United States, Australia) whose economies are built upon immigration from Europe, consider GIs nothing but a protectionist tool to prevent immigrants from using the “original” recipes and methods of production of their forefathers, thereby denying them comparative advantages in producing and marketing highly competitive like products. Examples besides French viniculture in the Americas, Australia and South Africa, are the production of originally Greek feta cheese in the US (Wisconsin), the and the manufacture of Italian parmesan cheese in Argentina and Australia.¹³⁴ Tensions between old world “niche products” sold at a high price and new world mass agriculture of the same, but cheaper product lead to a reluctance to accept intellectual property rights in agriculture, which may also have influenced the relative inexistence of TK for a long time.

6. Specific Proposals on Geographical Indications

With a view to completing the work started on the implementation of Article 23.4, the TRIPs Council notes that issues related to the extension of the protection of GIs provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPs pursuant to paragraph 18 in combination with paragraph 12 of the Doha Declaration.¹³⁵ The negotiating mandate for GIs is contained in paragraph 12 DMD. It must be read in connection with paragraph 18 DMD.¹³⁶ However, paragraph 12 DMD offers no clear statement as to what the scope of the negotiations should be. It provides for a two-track approach, 1) if there is a specific negotiations mandate in the DMD; “the relevant implementation issues shall be addressed under that mandate”. If there is no specific negotiations mandate, paragraph 12 says that 2) “the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies” by the end of 2002”, which, in the case of GIs, would mean the Council for TRIPs.¹³⁷ Because WTO Members have expressed different viewpoints on whether the first or second paragraph 12 DMD applies to the negotiations on GIs, the scope of the absolute level of protection has not been extended yet.¹³⁸ It is unclear whether the extension of enhanced protection pursuant to Art. 23 TRIPs to agricultural products has a specific mandate or whether an express one has to be created. The discussion pertains to the linkage of the Agreement on Agriculture negotiations with the TRIPs reforms. Under the narrow view, GIs may not form part of the

¹³⁴ See <http://atalanta1.com/products/cheese-arg-parm.htm>; last visited November 18, 2004, for Parmesan in Argentina, usually called “Reggianito” in analogy to “Parmigiano Reggiano”, the official name for Parmesan in Italy; the Parmesan Council is currently pursuing a court case at the International Court of Justice in The Hague to stop this happening, arguing that the ‘parmesan’ label should apply only to cheese produced under its scrutiny in the area around Parma and Reggio Emilia in Italy.

¹³⁵ See Doha Declaration, supra note 3.

¹³⁶ See id., paragraph 18.

¹³⁷ Id., paragraph 12.

¹³⁸ See “Origin” (an NGO), supra note 122.

current Doha Round negotiations, as the mandate is limited to agriculture and there is under the Doha mandate no explicit mention of GIs for agricultural products.¹³⁹

1. Conflicting Objectives in Negotiations

1.1. Extending Enhanced Level of GI Protection: EU Proposal

The EU proposal for a multilateral register for GIs and the extension of the additional GI protection both under the TRIPs, ensures that not only wines and spirits but also cheeses, rice and teas will not be copied by producers from other countries by simply indicating 'made in USA' or 'style of Roquefort'.¹⁴⁰ Its most far-reaching proposal is to ensure "market access for EU GI products, by asking WTO members, to remove prior trademarks and, if necessary, grant protection for EU GIs that were previously used or have become generic so that our GI products can gain market access."¹⁴¹

The EU wishes to use GIs as a bargaining chip conditioning its own opening of agricultural markets to cheaper imports (i.e. the removal of direct support measures) to a wider recognition for GIs. However, a procedural problem poses itself because GI protection figures only on the agenda of the TRIPs review and is not up for negotiation in the context of the agricultural liberalization. Since agriculture negotiations on GIs are so-called "second phase" negotiations where meetings are largely "informal", papers presented so far have not been official WTO documents.¹⁴²

However, the Doha Declaration seems to prohibit discussing GIs as a negotiation chip for market access of agricultural products in the context of

¹³⁹ See WTO website, Trade Topics, TRIPs, Geographical Indications, Background and the Current Situation, 'Extending the "higher level of protection" beyond wines and spirits', online text, available at: http://www.wto.org/english/tratop_e/trip_s_e/gi_background_e.htm#protection, last visited 5 September 2004.

¹⁴⁰ See WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Implementation of Article 23.4 of the TRIPs Agreement Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications, Communication from the European Communities and its member States-Revision, WTO Document IP/C/W/107/Rev. 1 of 22 June 2000.

¹⁴¹ EU, Why do Geographical Indications matter to us?, supra note 143; see also WTO Communication from Bulgaria, Cuba, the Czech Republic, Estonia, the European Communities [...] supra note 149.

¹⁴² The availability of such WTO "documents" thus depends on the respective Members' disclosure policy.

the Agreement on Agriculture. Whether or not expanding the scope of GIs to agricultural products should be exclusively dealt in the TRIPs Council, it is uncontested that GIs will be informally used as a bargaining tool in agriculture negotiations, at least as long as the Doha Round negotiations are still aiming at concluding the round with a single package undertaking.

1.2. Registration System of the EU, India, Nigeria, Kenya, Thailand, Bulgaria, Switzerland and others

The registration system, which the EU together with India, Pakistan, Sri Lanka, Mauritius, Nigeria, Kenya, Cuba, Thailand, Bulgaria, Romania, Switzerland, Slovakia, Slovenia, and Moldova suggests that all registered products will benefit from a legal presumption of validity of GI protection.¹⁴³ In support of its proposal, the EC also points to India is an example for a country in favour of GI protection, because unlike others, its economy is based upon its distinct culture, which it also exports in the form of saris, specialty teas (Darjeeling, Assam), similarly to Thailand (Jasmin rice), which also supports GIs.¹⁴⁴

1.3. “Joint Paper” Counterproposal of the Cairns Group

The counterproposals by the US, Brazil, Canada, Chile and Japan (Members of the Cairns Group) agree to a registry, but not to the legal effect the EU proposes.¹⁴⁵ This “joint

¹⁴³ WTO, Council for Trade-Related Intellectual Property Rights, Special Session, Communication from Bulgaria, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, Malta, Mauritius, Moldova, Nigeria, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland and Turkey, Negotiations Relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications, WTO Document TN/IP/W/3 of 14 June 2002.

¹⁴⁴ See European Commission, External Trade, Intellectual Property, TRIPs and Geographical Indications: EU submits Three Communications on Geographical Indications, Brussels, 24 June 2002, available at: http://europa.eu.int/comm/trade/issues/sectoral/intell_property/wto_nego/intel4.htm, last visited 17 November 2004.

¹⁴⁵ WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Special Session - Proposal for a Multilateral System for Notification and Registration of Geographical Indications for wines and spirits based on article 23.4 of the TRIPs agreement, Communication from Argentina, Australia, Canada, Chile, Colombia,

paper” of the Cairns Group Members and others, represents the mass agriculture (agro-business, and large-scale farming) as opposed to niche production and subsistence farming. In order to keep the market for mass products free of product-specific protection, the Cairns Group would like to see the registration of GIs as a notification process without legal effect.¹⁴⁶

The Cairns Group is also opposed to granting the higher level of GI protection which today exists for wines and spirits to products other than these. As the US Trade Representative Zoellick says, the Doha Ministerial Declaration does not provide for the mandate to extend the absolute level of protection beyond wines and spirits: “For GIs other than wines and spirits, the Doha mandate does not call for negotiations. We believe the current system works well, and we share the concerns of many in the developing world that we don't need to burden everyone with a large and costly new framework, as some have suggested.”¹⁴⁷

In contrast to its official negotiating position at the WTO, the US' internal policy has resolved to introduce a country-of-origin labelling (COOL) for fresh produce, red meats, and peanuts and seafood on the domestic market. It h started in 2004 for seafood and will apply to all other products starting 2006, under the umbrella of the 2002 US farm bill. However, it is still disputed whether or not the disclosure of origin (COOL) should be voluntary or mandatory.¹⁴⁸

The Cairns Group argues that the built-in agenda of 23:4 TRIPs has not been an issue on the DDA. Therefore, the Cairns Group members believe that there is no negotiating mandate in the DDA for extending the scope of the absolute level of protection to other products than wines and spirits. A fortiori they find it even less likely that the Doha Ministerial Declaration would allow negotiating such an enhanced level of protection under the framework of the Agreement on Agriculture, namely the provisions on multifunctionality. As the Australian Government Department of Foreign Affairs and Trade says, “[t]he July 2004 Framework Package has retained GIs as an issue of interest in the agriculture negotiations, but as of early mid-September 2004 there had been no negotiations on those issues and Australia remains opposed to such negotiations.”¹⁴⁹

The Europeans, joined by India and some other countries, want a mandatory registry of GIs that would prevent other countries from using the names. The US and other countries refuse to negotiate a mandatory list, but will accept a voluntary list with no enforcement power. The EU says it will not accept an agriculture agreement without a geographical registry.¹⁵⁰

Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, Philippines, Chinese Taipei, and the United States, WTO Document TN/IP/W/5 of 23 October 2002 [hereinafter WTO, “Joint Paper”].

¹⁴⁶ See “Joint Paper”, supra note 147.

¹⁴⁷ Office of the United States Trade Representative (USTR), ‘U.S. and Other Trade Partners Present Positions and Proposals to Prevent Unauthorized Use of Geographic Names’, USTR Press Release of 20 September 2002, available at: <http://usinfo.state.gov/ei/Archive/2004/Jan/06-428636.html>, last visited 18 November 2004.

¹⁴⁸ See Becker, G.S., ‘Country-of-Origin Labelling for Foods’, in: *Congressional Research Service (CRS) Report for Congress, 97-508 ENR*, last updated 3 August 2004, p.1.

¹⁴⁹ Australian Government, Press Release 2004, Doha Round, supra note 28.

¹⁵⁰ See Sek, L., ‘World Trade Organization Negotiations: The Doha Development Agenda’, in: *Congressional Research Service (CRS) Report for Congress*, updated 6 August 2004, p. 6.

2. Diverging Interests of Developing Countries

It is important to note that GI protection is not a North-South issue. Interests in the developing world vary, according to the economic structures and objectives. Many developing countries aspire to become the world's major exporters of cash crops, as the way to growing out of poverty, namely food aid dependency. To them, GI's are considered hostile in achieving these goals. They are traditionally perceived as non-tariff barriers to agricultural imports. According to them, GIs function similarly to import quotas imposed by industrialized countries as a substitute for abolishing agricultural subsidies. Another developing country critic is that GIs lead to over-head costs incompatible with the development perspective of small-scale production of export crops, and insofar similar to food safety regulation. As labelling and food safety regulation are found to be detrimental to poverty reduction, so GIs are found to fail the test of cost effectiveness.

At the same time, GIs form an important bargaining tool for these developing countries to pressure developed countries to open their agriculture market. A possible negotiation package could look like this: If the EC is granted the extension of the GI coverage it has been asking for, it should in return quit subsidising its ineffective cash crop market and open instead its common agricultural market to cheaper cash crops from developing countries, retaining an agricultural market of its own for niche and specialty products only.

Developing countries might have, as indicated above, a genuine interest in protecting endogenous products akin to their climate, region and culture. Since the terms Basmati rice, Darjeeling tea and Blue Mountain coffee are not protected under GIs, they do not require the product to stem from a specific region. Hence, developing countries without a GI protection, risk that multinationals sell "their" rice, or tea coffee under the traditional names, but without the product stemming from that region or having been cultivated according to local tradition.¹⁵¹ The large coffee, tea and rice producers, namely Jamaica, Kenya, Mauritius, Morocco, Nigeria, Pakistan, Sri Lanka, Thailand, as well as Bulgaria, China, the Czech Republic, the EU, Hungary, Liechtenstein, Slovak Republic, Slovenia Switzerland, Turkey, want to extend the absolute level of protection under Art. 23 TRIPs.¹⁵² Only via such an IPR protection, which is able to exclude third parties from appropriation, will developing country farming communities be empowered against multinationals. But again, the stumbling block will be the registration of such GIs in databases and, for the farming communities involved, getting acquainted to proprietary rights and using the empowerment in practice. Other developing countries, foremost certain New World WTO Members argue against the registration of GI products, because they have fewer products of their own traditional culture and agriculture that would qualify; because they have been using Europeanised names for similar products.

¹⁵¹ WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Communication from Bulgaria, Cuba, the Czech Republic, Georgia, Hungary, Iceland, India, Sri Lanka, Kenya, the Kyrgyz Republic, Liechtenstein, Moldova, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey, Work on Issues Relevant to the Protection of Geographical Indications, Extension of the Protection of Geographical Indications for other Products, WTO Document, IP/C/W/308 of 17 September 2001; *see also* WTO Council for Trade-related Intellectual Property Rights, Geographical Indications the Significance of 'Extension' in the TRIPs Agreement and its Benefits for WTO Members, Communication from Bulgaria, Cyprus, Czech Republic, Estonia, European Commission, Georgia, Hungary, India, Kenya, Kyrgyz Republic, Latvia, Liechtenstein, Malta, Macedonia, Poland, Romania, Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand, Turkey, WTO Document TN/C/W/14 of 9 July 2003 [hereinafter WTO, Communication from Bulgaria, Cyprus [...]].

¹⁵² See WTO, Communication from Bulgaria, Cuba Cyprus [...], *supra* note 134.

3. Complementary Protection for Traditional Knowledge

GIs may ensure protection for TK, which for some reason does not fulfil the criteria for patent protection, usually because no TK holder can be identified. How do GIs relate to TK? ¹⁵³ Traditional Knowledge establishes, as mentioned above, a social relationship between the product and a person, while GIs are “traditional” insofar as they represent food systems, endogenous to a specific region.¹⁵⁴ Geographical Indications may substitute for IP protection of TK. Even a *sui generis* right may not provide sufficient protection, especially when the TK has been public knowledge and can no longer be assigned to a specific right holder, such as in the Kava case.¹⁵⁵ For example, the US Patent Office granted Natrol, Inc., a US-based Company a US patent for “kavatrol”, a dietary supplement that serves as a general relaxant, composed of Kava, chamomile, hops and schizandra.¹⁵⁶ Two German companies, William Schwabe and Krewel-Werke, obtained a patent for Kava as a prescription drug for treating strokes, insomnia and Alzheimer’s disease. In France, L’Oreal has patented the use of Kava against hair loss. The Kava patent firstly raises the issue of pharmaceutical companies misappropriating the knowledge of traditional communities about the healing propensities of Kava, in addition to engaging in the biopiracy of the Kava plant’s genetic resources. Secondly, the existence of patents based on Kava raises concerns about the conservation and protection of TK related to Kava. The commercialization of Kava-based products has had a negative impact on its conservation. The increasing exploitation of the plant has provoked the harvesting of immature Kava, thus not only jeopardizing the quality of the medicinal product but also reducing its resource base.¹⁵⁷ An intellectual property right may not protect Kava because it is in the public domain and there is no specific TK holder for it, who could apply for TK protection.¹⁵⁸ GIs it is agreed prove to be the second best option for protecting Kava by acting as a substitute to patent protection of the TK related to the plant itself.¹⁵⁹

7. Conclusions

The advent of the TRIPs Agreement created a new discussion on the relationship of public and appropriated information. The advances of biotechnology, protected by intellectual property, call for new instruments for the protection of Traditional Knowledge. Genetic engineering, which developing countries might rely on for food security, in the light of droughts and floods exacerbated by global warming, bears the risk of further devaluating knowledge relating to the conservation and use of traditional crops and thus deplete the heritage of traditional biodiversity and conservation through use. Similarly, the

¹⁵³ See Cottier, T. & Panizzon, M., supra note 6.

¹⁵⁴ See id., p.127.

¹⁵⁵ See Nascimento, A., supra note 18

¹⁵⁶ Downes, D. & Laird, S.A., ‘Innovative Mechanisms for Sharing Benefits of Biodiversity and Related Knowledge: Case Studies on Geographical Indications and Trademarks’, in: *UNCTAD Biotrade Initiative*, Geneva, 1999, p.5.

¹⁵⁷ See Puri, K., ‘Is Traditional or Cultural Knowledge a Form of Intellectual Property?’ In: *Oxford Electronic Journal of Intellectual Property Rights*, WP 01/00, available at: <http://www.oiprc.ox.ac.uk/EIWP0100.pdf>, pdf file version of the OHP slides and the accompanying Notes which were first presented at the Oxford University Intellectual Property Research Centre Research Seminar, on 18th January 2000 by Prof. Kamal Puri, on hold with the authors, pp.7, 27.

¹⁵⁸ See id.

¹⁵⁹ See generally, Nwokeabia, H., supra note 72.

protection of Geographical Indications no longer is exclusively seen as an instrument to protect European values. It equally bears the potential to enhance and diversify products from developing countries. Both, TK and GI protection are inherently linked to liberalization of market access in agriculture. They offer the potential to support niche products and to make a contribution, at the same time, to sustainable agriculture.

Negotiations on TK and GIs are difficult for a number of reasons. As TK is a novel concept, lacking long traditions in national law, it is difficult to define suitable answers on the level of international law. For GIs, the problem is different: here, long-standing experience of extensive protection in European law calls for a new deal and balance in international law. An appropriate level and scope of protection needs to be found. The answers in both areas can and should be based upon the precepts of intellectual property protection. The account of the negotiations, however, also confirms that the subject matter cannot and should be considered as an issue limited to intellectual property protection.

Separating the TRIPs review from agricultural negotiations does not allow capturing the full breadth and potential of the problems involved in relation to negotiations on agriculture. TK and GIs form part of an effort to support diversification in an increasingly competitive agriculture. They cannot be dissociated and isolated from market access negotiations. Moreover, intellectual property is able to capture merely a fraction of the problem, as information and knowledge often is not assignable and not suitable for appropriation in the first place. It is not an accident that the matter was postponed in July 2004. Broader policies are needed. Indeed, protection of TK should be approached comprehensively across all WTO Agreements in a coherent manner. A two-track approach built upon IPR protection for TK itself and improved market access for TK- and GIs based products and, perhaps, production methods could be one envisaged outcome of the single undertaking of multilateral negotiations under the Doha Development Agenda.

The WTO offers the unique opportunity to trade off TK as in the information protected by an IPR under the TRIPs with a concession for increased market access for TK embodied in a product or production methods under the GATT, or what Peter Drahos has termed the “skill-embodiment” and the “artifact-embodiment” respectively.¹⁶⁰ The WTO should thus be the ideal forum for seeking ways to regulate within one single negotiation in one single forum both the protection of TK and the market access for TK products.

Claus-Dieter Ehlermann’s argument that “[a]n agreement on solutions for these problems might also require a larger menu of subjects under negotiation than are offered by the ongoing talks on improvements and clarifications”, is applicable by analogy to the twin issues of TK and GIs.¹⁶¹ Empowering a local community or individual holder of TK with the possibility to exclude third parties would not only better balance the benefits, which certain plant genetic resources are proven to have for humankind, between the developing and the industrialized WTO Members. It also has the potential of being the first convincing argument and foundation for many developing countries of why to implement the TRIPs Agreement. TK protection in the TRIPs could be traded off by developing countries against the interest of industrial countries to enhance patent protection in the field of genetic engineering and to expand the absolute level of protection for GIs beyond wines and spirits.

¹⁶⁰ Drahos, P., ‘The Regulation of Public Goods’, in: 7(2) *J.I.E.L.*, 2004, p.328.

¹⁶¹ Ehlermann, C.-D., ‘Policy Conclusions’, in: *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding*, Conference Report, E.-U. Petersmann (ed.), Fiesole: European University Institute, 2002, p. 144.

Even if considered as non-trade concerns of validating traditional lifestyles and preserving biological and cultural diversity, both GIs and TK could make contributions to an equilibrated world trading system.

