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Chapter I

The importance of adopting IPRs as strategic measures fostering sustainable development

1. Introduction

IPRs associated to ICH are strategic safeguarding measures to protect at different levels community-held traditional knowledge, facilitating the sustainable development of the concerned communities. The IPR association to ICH, in particular, prevents it from being misappropriated or misrepresented, and helps control access to and use of documentation about it. Thus, IPRs on ICH protect and enhance the value of the ICH at stake to the benefit of communities. International cases on the adoption of IPRs as ICH safeguarding measures on elements inscribed in the UNESCO Lists of the intangible cultural heritage of humanities demonstrate that IPRs are relevant tools in line with the Convention on the safeguarding of intangible cultural heritage.

Several IPRs on Alpine Food Heritage already exist, as highlighted in the attached tables, that examine the nature of the IPR associated to the ICH, and the respective relevant regulations, specifications and social use. Although the tables are not meant to be exhaustive, they demonstrate that various ICH elements already adopt IPRs as safeguarded measures. Therefore, part of the traditional arts related to food and foodways in the Alpine Region is already protected by IPRs. These IPRs constitute relevant safeguarding and protective measures, preventing and reducing the risk of illegal exploitation and favouring sustainable commercialisation and development of the heritage at stake.

Yet, adoption of IPRs on ICH presents not only opportunities but also challenges. Thus, the development of a safeguarding plan with a comprehensive IP heritage strategy for the Alpine area is necessary. The comprehensive planning and strategy will enhance the value of this heritage, supporting modern techniques and contributing to the attractiveness and sustainable development of the area. The plan will encourage access to Alpine Food Heritage, and give examples of community governance models and interdisciplinary methodologies for the integrated management of IP and intangible heritage. In addition, this comprehensive IP framework will be focused to support heritage-sensitive marketing strategies. The IP protection strategy comprehensively framed will integrate intangible heritage management with the sustainable social and economic development of Alpine Food Heritage.

Thus, an IPR protection strategy highlights the strategical dimension of IPRs adoption on ICH and fully considers the needs and expectations of the target groups interested in making use of these IPRs. These target groups include communities intended as the ICH bearers and all subjects that participate to the multilevel governance system of Alpine Food Heritage. Namely at the local level municipalities and unions of municipalities of the Alpine areas, as well as urban and metropolitan public authorities, regional authorities (Regions, Cantons, Bundesländer) and subdivisions (Départements, Bezirke, etc.), higher education institutions, Chambers of Commerce and Business incubators, SME in the sectors of tourism (Hotels, Restaurants), food production, agriculture, marketing and communication, culture, creative business, researchers and civil society and citizenship, in particular NGOs such as Regional Tourist Marketing Organizations, as well as regional and foreign tourists and population of urban and metropolitan areas interested in Alpine lifestyle and culture and genuine, sustainable, traditional food. At the national level administration officers, politicians, Ministries and Departments (agriculture, culture, university and education, health and well being). At the international level intergovernmental organizations such as UNESCO and the Alpine Convention, as well as NGOs such as the Transnational association of Alpine Tourist Marketing Organizations.

For these target groups, therefore, IPRs adoption on ICH will become one of the number of developed strategic elements aiming at the implementation of sustainable valorisation of cultural and

natural heritage of the Alpine Space. A set of recommendations for a sustainable strategy of IPRs adoption for Alpine food heritage will therefore be developed. These recommendations will engage and empower target groups in their ICH sustainable safeguarding and valorisation. The recommendations will include a series of Guidelines defining collective IPRs suitable for Alpine food heritage chains. These Guidelines will help the relevant target groups to associate to their heritage IPRs on the basis of a careful strategy, benefitting communities and their sustainable development in line with the spirit of the UNESCO ICH Convention. The Guidelines are based on the analysis of the IPR strategy and are the following:

Guideline 1.

IPRs shall be adopted to protect ICH.

Guideline 2.

IPR shall be carefully selected among those capable of protecting ICH, including collective trademarks and geographical indications lato sensu intended.

Guideline 3.

IPRs adopted to protect ICH shall favour inclusive multilevel governance systems engaging and empowering communities.

Guideline 4.

IPRs adopted to protect ICH shall be capable of assuring environmental sustainable development, protecting biodiversity and preventing natural catastrophes.

Guideline 5.

IPRs adopted to protect ICH shall favour economic sustainable development, mitigating and reducing commercialisation risks, including:

- a) ICH ‘freezing’, standardisation and decontextualization
- b) ICH over-commercialisation
- c) ICH authenticity claims
- d) ICH misappropriations.

Guideline 6.

IPRs adopted to protect ICH shall be accompanied by heritage-sensitive marketing strategies.

Guideline 7.

IPRs adopted to protect ICH shall be accompanied by cultural and ethical protocols.

Guideline 8.

IPRs adopted to protect ICH shall be accompanied by cross-border enforcement strategies.

In addition, the recommendations will provide the aforementioned target groups with a set of selected measures to prevent and reduce the risk of illegal exploitation and favour the sustainable commercialisation of ICH, including IPRs specifications, regulations and related registration procedures, and relevant bibliography.

In this framework, the following pages are based on the document that I prepared, named “Legal study on Community rights and ICH intellectual property management and analysis of ICH international case studies on safeguarding measures to protect community-held traditional knowledge”. In particular, the following pages are grounded on its analysis of IPRs relevant to protect community-held traditional knowledge (chapter I) and of several related international case studies presented as best practices (chapter II). On these basis, the following pages will examine the importance of adopting IPRs as strategic measures fostering sustainable development of Alpine Food Heritage (chapter I), and provide communities and target groups with recommendations for a sustainable strategy of IPRs adoption on Alpine Food Heritage (chapter II).

2. IPRs as strategic protective safeguarding measures in the ICH Convention

The just mentioned elements inscribed in UNESCO adopt IPRs as safeguarded measures. Yet, the ICH Convention establishes that nothing within it “may be interpreted as [...] affecting the rights and

obligations of States Parties deriving from any international instrument relating to intellectual property rights". In addition, OD 145 states that to the extent that the emblem of the Convention "has been notified and accepted by the Paris Union Member States under Article 6ter of the Paris Convention for the Protection of Industrial Property, adopted in 1883 and revised at Stockholm in 1967, UNESCO has recourse to Paris Convention Member States' domestic systems to prevent the use of the emblem of the Convention where such use falsely suggests a connection with UNESCO, the Convention, or any other abusive use".

Save for the IPRs on the emblem of the Convention, then, intellectual property was one issue deliberately left aside by the ICH Convention, together with that of the rights of indigenous people. Thus, the inscription of ICH elements on the UNESCO Lists does not impose the recognition of any corresponding IPRs, nor a determination of ownership of those IPRs.

In this international framework, even in UNESCO States were not willing to enter into such complex and sensitive questions as IPRs, and agreed that the elaboration of the legal tools for a better protection of IPRs on ICH falls within the mandate of the WIPO.

Despite the Convention's official withdrawal from an IPR approach, IPRs started playing a relevant role from the very beginning of the implementation of the ICH Convention. During the Committee's session in 2010, relevant correspondence was sent by civil society to the Secretariat for the Committee, among which was a letter of the president of the copyright collective society of Azerbaijan. This letter related to the element "Armenian cross-stones art. Symbolism and craftsmanship of Khachkars" that was nominated by Armenia. The letter emphasized that the inscription on the UNESCO List of this ICH element could have infringed intellectual property rights belonging to the people of Azerbaijan. According to the letter, cross-stones of similar nature are also manufactured in Azerbaijan by local communities. Furthermore, the President of the State of Azerbaijan recognized these cross-stones as expression of local TK and adopted IPRs in favor of the communities that manufacture them. This letter was not taken into account in the evaluation of the nominated element, since a formal mechanism to treat correspondence from civil society did not yet exist. The element was subsequently inscribed on the Representative List.

This case originates in tense international relationships between the countries involved, that usually give rise to diplomatic strategies aimed at challenging reciprocal nominations with arguments grounded on political rather than substantive reasons. Yet, the case rendered clear that IPRs are used at the domestic level as important tools to protect ICH and that States were willing to bring this use to the attention of the Committee. However, the letter was grounded on a false understanding of IPRs. First, IPRs are territorial in nature and therefore only protect within the State that recognizes or grants them. As such, the recognition by the State of Azerbaijan of these cross-stones as expression of local TK and the adoption of IPRs in favor of the communities that manufacture them is valid just in Azerbaijan. Hence, the same recognition and adoption does not impede other countries, such as Armenia, to recognize and adopt IPRs in favor of other communities on similar cross-stones. Second, the inscription of an ICH element by one country to a UNESCO List does not grant any IPRs over this same element, as mentioned. Therefore, the same inscription by Armenia cannot infringe any intellectual property rights belonging to Azerbaijan.

In the following years, States started mentioning in their nomination files, the adoption of IPRs as measures to safeguard ICH. In this situation, in Nairobi in 2010, the Committee proposed to the General Assembly the adoption of new paragraphs of the Operational Directives (ODs), which referred to IPRs as relevant measures to safeguard ICH. In fact, the Committee emphasized that these measures would mitigate the risk of over-commercialization and misappropriation of ICH. Therefore, it encouraged States Parties to adopt IPRs in light of their obligations to recognize, promote and enhance

the importance of ICH as a strategic resource for sustainable development. According to the Committee, IPRs “promote creativity, innovation and utilization of intangible cultural heritage while ensuring that the bearers of such heritage, whether communities, groups or individuals, benefit from the protection of the moral and material interests resulting from the use or adaptation of that heritage”. Further, according to the Committee, IPRs would “ensure that the rights of the communities, groups or individuals that create, bear and transmit their intangible cultural heritage are duly protected from misappropriation or abuse of their knowledge and skills.”

This view was codified in 2010 by OD 104, according to which “States Parties shall endeavor to ensure, in particular through the application of intellectual property rights, privacy rights and any other appropriate form of legal protection, that the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage or engaging in commercial activities”. In addition, in the Chapter VI of the ODs on sustainable development, OD 173(b) reiterates that “States Parties shall endeavor to recognize, promote and enhance the importance of intangible cultural heritage as a strategic resource to enable sustainable development. To that end, State Parties are encouraged to: [...] (b) adopt appropriate legal, technical, administrative and financial measures, in particular through the application of intellectual property rights, privacy rights and any other appropriate forms of legal protection, to ensure that the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage or engaging in commercial activities”.

Recently, the adoption of intellectual property rights as safeguarding measures became a specific component of an indicator of the implementation of the 2003 Convention as contained in the draft overall results framework approved by the General Assembly at its seventh session in June 2018. The General Assembly approved the following “[f]orms of legal protection, such as intellectual property rights and privacy rights, are provided to ICH practitioners, bearers and their communities when their ICH is exploited by others for commercial or other purposes”. This framework was developed in response to recognition by the Internal Oversight of the difficulty of the Committee to monitor the implementation of the Convention without an overall results framework agreed upon by its State Parties. In this framework, core indicator number 14 is “the extent to which policies as well as legal and administrative measures respect customary rights, practices and expressions, particularly as regards the practice and transmission of ICH”. Importantly, one component of this indicator is the “forms of legal protection, such as intellectual property rights and privacy rights, are provided to ICH practitioners, bearers and their communities when their ICH is exploited by others for commercial or other purposes”.

In this framework, while the Committee in some cases seemed to encourage States to adopt IPRs, in other cases the recommendations of the evaluation body and the decisions accordingly adopted by the Committee seemed to remind States that IPRs, and GIs in particular, may be inconsistent with the spirit of the Convention.

In encouraging States to adopt IPR, the Committee inscribed in the UNESCO Lists several ICH elements that clearly indicate in their nomination file the adoption of IPRs at the domestic level. These inscriptions were accompanied by general statements of the Committee, such as that included in Decision 7.COM 6.9 of 2012, according to which the same Committee “welcomed the diverse initiatives of States Parties to implement intellectual property protections and other forms of legal protection for intangible cultural heritage, while also cautioning that certificates of origin put at risk the evolving character of intangible cultural heritage while other measures such as advice on packaging and design of products and market-driven mechanisms may not sufficiently ensure that the communities concerned are the primary beneficiaries”.

The same inscriptions were accompanied also by specific statements of the Committee acknowledging the relevant role of IPRs as proper safeguarding measures. Thus, for instance with decision 6.COM 8.21 of 2011, the Committee inscribes Al Sadu, traditional weaving skills in the United Arab Emirates nominated by the United Arab Emirates on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. The Committee recognizes that these “safeguarding measures correspond with the needs identified and can contribute to sustainable development and awareness of the element while improving the economic situation of the bearers; activities include regional and local training centres, governmental and NGO funds, awards and promotion activities, education and capacity building, and *intellectual property protection*” (emphasis added). Indeed, the nomination file of this element indicates that “the legal framework for the protection of the element should be made clear by disseminating to the public the rules and regulations for the protection and safeguarding of intangible cultural heritage adopted by the state. *Intellectual property rights should be enforced as part of heritage law to safeguard the element against factory production.* In this regard, the UAE will benefit from the experience of South Africa and Australia” (p.9).

With decision 7.COM 10.7 the Committee in evaluating the requested of Pakistan for International Assistance for Safeguarding of intangible heritage of Pakistan's Khyber Pukhtoonkhwa Province, highlighted that IPRs are ICH proper safeguarding measures. The Committee stated “recent years have witnessed a significant increase in threats to the intangible cultural heritage of Khyber Pukhtoonkhwa Province in the North-West of Pakistan, linked to the actions of fundamentalists who do not tolerate performing arts. This project, undertaken by the Pakistan National Council of the Arts, aims to safeguard and revive performing arts in the province, and to assist displaced artists to repatriate and resettle in the region. Key activities planned include the production and dissemination of audio-visual materials on the performing arts; the organization of large concerts in major cities; the creation of annual music and drama competitions among schools to raise awareness about the importance of this intangible cultural heritage and encourage talented performers; financial assistance to forty needy artists; and the organization of training for cultural officers. These cultural officers would be able to address the problems of local performing artists, including locating performance venues, and would function as a bridge between artists and cultural authorities. The PNCA would also work to establish a national union of performing artists in their chosen fields, *and would make efforts to promote their rights through the effective implementation of intellectual property rights protections*” (emphasis added).

With decision 13.COM 10.b.9 of 2018 the Committee inscribed Međimurska popevka, a folksong from Međimurje nominated by Croatia on the Representative List of the Intangible Cultural Heritage of Humanity. The nomination file of this element indicates that “raising awareness on the importance on ICH, which will be realized through elaboration of new, innovative media content and forms directed to print and digital social media, a greater scope of radio stations and, to a degree, to the Croatian Radio Television as the leading public media on the national level; and designed in close collaboration with the media entities in question. In addition, for the communities that identified themselves with popevka it is of vital importance to raise awareness on the *collective character of creativity, the corresponding intellectual rights in moral terms*, and the importance of the free flow of ideas in the public domain, which have not been recognized by the current Croatian legislative, while being of great importance for the viability of popevka” (p.8) (emphasis added). The Committee recognises that these “The safeguarding plan draws on measures developed in the past and concentrates on community-driven educational activities, continuous field research and the systematic archiving of the collected material. The element is also considered in the wider context of intangible cultural heritage in the region. The proposed media campaign would *raise awareness about collective creativity and intellectual rights.* An enhanced inclusion of intangible cultural heritage-related content

in the formal educational system and extra-curricular activities for children is expected » (emphasis added).

In discouraging States to adopt IPR, in 2014 the Committee dealt with the nomination of a food-related element, the “Traditional production of the Kranjska klobasa”, a semi-durable, lightly smoked, spiced pork and bacon stuffed sausage. The nomination file, submitted by Slovenia, refers in fact to the geographical indication of Kranjska klobasa, associating it with its uniqueness and originality. Those features are associated with the promotion of the Kranjska klobasa Business Interest Association, which is said to strictly adhere to the original recipe with geographical indication. The Committee condemned references to GI as a certifications system by emphasizing that “emphasis placed on a single certified method of production is contrary to the evolving nature of intangible cultural heritage, in constant recreation”.

More recently, in the evaluation of the element “Strawcraft in the Bahamas” the Committee stressed that “the Convention does not seek to establish a system of ownership such as through geographical indication and intellectual property” and invited the State Party “to avoid the use of inappropriate vocabulary and concepts when referring to intangible cultural heritage, such as ‘uniqueness’ and ‘authenticity’, which are contrary to the living and dynamic nature of intangible cultural heritage as defined under Article 2.1 of the Convention;” Indeed the file insists on the economic dimension of the craft and on its role in creative industry, stating, for example, that “the inscription will legitimize local ownership and increase pride in the element as a defining symbol of ‘being uniquely Bahamian’”.

In 2017, the Evaluation body in its report to the Committee raised to issue of “Ownership/Use of the Lists as a means to establish geographic origin”. It stated that “the concerns of ‘counterfeiting’ a given practice are not relevant to the Convention and may instead refer to issues of intellectual property rights”. It furthermore reminded States Parties that “the inscription of an element on one of the Lists of the 2003 Convention does not imply that exclusive rights are claimed over that element nor does it prevent other States Parties from doing the same” and that “the 2003 Convention does not seek to establish a system of protection based on geographic origin or geographic indication”. The Body expressed its concern that “some countries may be exploiting or misusing the Lists as a means to authenticate the practice of an element in that specific country” and recalled that “certain elements are shared across different countries and are not restricted to one specific country or specific groups.”

This general remark resonates with a specific comment included, in the same session, in the decisions on the inscription of a food-related element: the Art of Neapolitan ‘Pizzaiuolo’. In this decision the Committee reminds Italy “of the importance of using vocabulary and concepts that are appropriate to the Convention and to therefore avoid expressions such as ‘authenticity’, ‘counterfeit’, geographic ‘origin’, as well as any reference to exclusive ownership over intangible cultural heritage”. In the same decision the Committee further underlines that “safeguarding measures aiming at ‘preserving the authenticity’ of an element of intangible cultural heritage are not in line with the spirit of the Convention and would contradict the evolving nature of living heritage, which is by definition constantly recreated by the communities concerned”.

One may wonder, then, whether a conflict exists between the Committee decisions that seem to encourage states to adopt IPRs and those that seem to discourage them.

Yet, the Committee’s decisions are taken on a case by case basis. Thus, the favorable or negative outcome of a Committee’s decision on the IPR issue seems to depend on specific circumstances of each particular case, particularly, whether IPRs were concretely adopted in conformity to (what the Committee determines to be) the spirit of the Conventions. The spirit of the Convention, indeed, is a very important criterion of decision for the Committee and, accordingly, IPRs on ICH are to be used

within the Convention framework. For instance, since the ICH Convention does not require exclusivity or uniqueness or authenticity to safeguard ICH, the Committee considers that communities act against the spirit of this Convention when they emphasise the adoption of IPRs on ICH just to highlight the “exclusive”, “unique” and “authentic” nature of the heritage.

It is true that important features of IPRs are precisely to protect the quality of products by rendering it exclusive and unique precisely because of its authentic attributes. Yet, on the one hand, with regard to exclusivity and uniqueness, collective IPRs have a “social” character and are inclusive of the relevant community by definition. There may be substantial differences between the communities as determined for the ICH inscription and those identified in the IPR registration form. Communities indicated as the IPR owner in the relevant GI or collective trademark may not correspond to those mentioned as the ICH bearers in the corresponding UNESCO nomination file. The former may be more restricted than the latter. Yet, this is a problem of identifying the communities concerned, that is inherent in the ICH system, rather than in IPRs as such.

With regard to authenticity, communities identified as the IPR owner are the ones who determine in their IPR regulation or specification the authenticity of their practice or related product and the “limits of acceptable change”. This empowers communities to define what are the authentic attributes of their heritage, but doesn’t mean that their heritage is determined as the authentic one by external evaluators. It is this external evaluation of authenticity that is neglected by the ICH Convention. Therefore, it seems necessary to distinguish between various kinds of authenticity in the Convention framework. In any case, again, this is a problem of defining authenticity that is inherent in the ICH system, rather than in IPRs as such.

The Committee, therefore, in line with (the hierarchy of the sources of law and the necessary respect of) Operational Directives 104 and 173(b), never decides against the adoption of IPRs on ICH as such. It never bases its decisions on allegedly existing technical reasons against the use of intellectual property on ICH. Its decisions reminding States that IPRs, and GIs in particular, may be inconsistent with the spirit of the Convention seem then based on the factual elements of the case at stake and in particular on the unsustainable use of the IPR in question. As ICH safeguarding measures, IPR shall favour sustainable development of the living heritage to which they are associated. Yet, there are cases where adopting and enforcing IPRs posed challenges and impeded to reach an effective sustainable development. These cases demonstrate that the adoption of IPRs on ICH is not an easy task and that strategy to effectively safeguard ICH in a sustainably way shall be devised. Ultimately, IPRs are regimes of governance that need to be carefully designed to fulfill an optimal range of social, environmental and economic sustainable development objectives.

3. Social sustainable development. Inclusive multilevel governance systems of collective IPRs engaging and empowering communities

In line with inclusive social development of ICH, IPRs shall lead to collective proprietarization of culture, contributing as such to inclusive social protection systems, inclusive multilevel governance systems and freedom of community and bearers to choose their own value system. It is therefore suggested the development of new IPRs governance systems, more favourable to engaging and empowering communities, and therefore more attentive to social equities and local capacity building. So, IPRs may become themselves a mean to foster greater racial and gender equities, by “pluralizing governance structures to meet local social justice needs grounded in human rights concerns”.

Yet, IP laws shall not unexpectedly reinforce gender disparity within the community. For instance, in Ghana, a new IP law was enacted to protect traditional weavers. Despite this law being formally neutral with respect to gender, since weaving is typically a male occupation, males started

suing for IP infringements small business newly established operators, who were primarily run by women.

Also, the adoption of IPRs on ICH shall not be based on allegedly existing cultural justification to favour indeed the granting of exclusive monopoly rights to few large local producers. This amounts to the disguise of economic protectionism with culture-related interests, thus oversimplifying the notion of culture. Also, this risks imposing Western notions and ideologies of property on traditional knowledge that can “proprietaryize” ICH. IPRs registration then may become part of what is called the construction of “commodity-heritage” artefacts.

First, to reach these aims, favouring all ICH bearers, IPRs to be adopted should be carefully selected. Collective IPRs shall be preferred, belonging to associations representing the interests of the entire community. If individual trademarks are to be registered, they should, however, belong to collective associations representing all ICH bearers. For copyright, it would be better to recognise it to authors, or better to co-authors, that not only created derivative works on TK, but also that belong to the ICH community.

Second, IPRs specifications (for GIs) and regulations (for trademarks) shall be drafted to emphasise cultural factors, such as the traditional methods of processing and production. These cultural factors shall be determined by the same traditional communities, including smaller producers, who shall be involved in the processes of drafting IPRs regulations and specification from the very beginning. This process shall then be based on a true collective investment, intergenerational knowledge transmission and involvement of historic associations representing ICH bearer in their entirety. The ultimate issue shall in fact be how and under what conditions IPRs management can empower all producers along the value chain. All of this implicates well defining the ICH bearers. Since ‘heritage’ and ‘community’ are socially and politically constructed ideas that are determined by negotiation and affected by the balance of power and interests among stakeholders, representations of the same ICH bearers may differ depending on the purpose of such representation. Thus, the relevant community identified in the drafting of the ICH nomination file may be different than that determined to create the IPR strategy to protect that element, including the drafting of GIs or trademarks specifications and regulations. Thus, IPRs, in particular collective trademarks and GIs governance and management is crucial to grant sustainable social development of the traditions at stake. In this respect, interestingly indigenous communities are deemed to be more harmonious, since “indigenous people have a political history of managing resources collectively and justifying those practices of resource management in accordance with norms drawn from human rights, environmentalist and sustainable development discourses, as they do in many parts of Latin America”. In those cases GIs may be attractive. Thus, indigenous collective IPRs are forged in human rights frameworks, are managed by collective institutions based upon participatory principles and avoid originating new inequalities.

Third, IPRs specifications and regulations shall be drafted taking into account the need to grant to all local producers the possibility to amend them. Otherwise, if this constant change over time is not foreseen and allowed to all community members, inappropriate standardization of production methods may arise. Yet, ICH to be kept viable needs to be flexible enough to allow for continuous creative experiments of new way of practicing it. In the case of Chevrotin cheese, standardization of production through the GIs specification drafted by large producers forced some producers in the French Alps to change their working methods or stop using the name. In the case of Serrano cheeses in Brazil, for example, local producers were not involved in drafting the GIs specification, resulting in inappropriate standardization of production methods and local producers being sidelined.

In contrast, when IPRs specifications and regulations are drafted relying too much on outside players such as the State or NGOs not representing the communities at stake, inequalities may be originated, once again impeding the traditional bearers' sustainable development. State-driven GI strategies typically don't treat equally all diverse stakeholders in supply chains. State-driven GI strategies focus primarily upon increased productivity and export earnings and tend to further deprive small producers, while on the contrary privilege industrial elites and powerful industry groups interested in maintaining their own positions of privilege.

In the cases of national coffee sectors in Kenya, for example, the state was both the holder of the mark and the central managing body for the certification process, which, made the process more susceptible to patronage and lobbying. Yet, in a parallel case of national coffee in Colombia, relatively egalitarian producer groups led the movement for branding Colombian coffee, registering the relevant trademarks and new regional denominations of origin not only in Colombia but also abroad. Although legally GIs were registered as collective state property, they were managed by way of delegation by private bodies. In fact, being a certification mark, the State as its holder was not entitled to use the trademark itself so as to maintain the integrity of the certifying process.

In India GIs are ideally held as a community or group right by associations of producers. Yet, state governments, departments, and central government agencies have dominated GI applications (registering fifty-six percent of the 227 GIs registered since 2004) while cooperative associations and societies (primarily representing the handicrafts sector) have filed only thirty-nine percent of the GIs granted. GI proprietors may live thousands of miles away from the producers of the goods that bear the mark, which limits the monetary benefits that producers are likely to see. In this system, producers and producer associations are mere beneficiaries, if and when they are even registered as such, which is seldom the case. Indeed, there are dozens of GIs registered for which there are few or no beneficiaries listed despite the known identities of hundreds of producers of the registered product. It is therefore suggested the development of new GIs governance systems more attentive to social equities and local capacity building.

States- intervention may also be decentralized. In fact, municipal governments may seem more sensitive to local social relations. Yet, municipal governments may also be more invested in the prejudices that uphold local forms of exclusion and more beholden to entrenched authority and respectful of elite privilege. In addition, local governments have often encouraged the substitution of traditional knowledge and methods with practices deemed more conducive to modernization. Yet, this often dire consequences for minorities and the equities of benefit sharing. In fact, communities have often found it difficult to control the social, ecological, or cultural consequences of producing traditional goods for modern markets.

With particular regard to NGOs intervention, the several community-based enterprises that market local products and celebrate the distinctiveness of their origins with success have involved supports at many scales, in particular in the Global South. Thus, for instance assistance in the constitution of cooperatives, building of transnational partnerships for the creation of marketing strategies, facilitation of communications between communities and national institutions. All of these assistance measures were typically carried out by transnational NGO networks. Yet, in these cases these transnational networks of actors didn't involve States. In contrast, States players need to be involved to deliver maximum economic and social benefits. In fact, the State shall be vested with obligations to encompass a broader field of social responsibilities in favour of communities.

In the case of the *mantecosa* cheese, for instance, in Peru, the State saw the potential benefit from its marketing as a typical local product. Thus, a collective trademark 'Poronguito' was registered in 2000 to better market the cheese, promote synergies between other regional foodstuffs and

develop tourism. Nonetheless, this trademark was not enough and in contrast extensive efforts by NGOs was needed to ensure that small cheese makers had their interests respected in the necessary dialogue and collective work between producers of *quesillo* (the curd used to make the cheese, which is generally provided by poor livestock producers in mountainous regions), small-scale cheese producers, speciality shops and national marketing institutions. Yet, despite these considerable efforts, ‘further work must be done to promote a greater sharing of benefits with small producers of *quesillo* (who are often women, often isolated, often exploited by middlemen, and physically and culturally distant from the end-product) as well as to reduce elite family-control of direct marketing to consumers’. In addition, “infrastructural support is necessary to enforce protection for [the collective mark abovementioned] indicating conditions of origin and to prevent their infringement in wider markets”. For these initiatives State-intervention is indeed necessary.

In addition, when IPRs specifications and regulations are drafted without the involvement of all local producers, inequalities may arise, favouring the interests of large producers. This goes against the needs and interests of local producers and may even exclude some of them who used to make the traditional product from continuing to use the associated traditional name. In the case related to the appellation of origin for cassis in Southern France, for instance, “an ever-smaller syndicate of producers came to dictate the conditions of its use in their own favor, limiting the number of eligible producers, preventing tenants who actually grew the grapes from receiving any benefits from its use, and deploying it so as to prohibit the creation of cooperatives that would benefit smaller producers, while entrenching poor working conditions for agricultural workers. The historical use of the GI exacerbates rather than mitigates local inequalities while reducing both biological and cultural diversity, and fails to meet criteria for participatory, democratic governance”.

In the case of Banasari Sari, for instance, the community was not sufficiently involved in devising a GI protection strategy. Banasari Sari is a centuries old artisanal form of embroidered, hand-woven silk fabrics originating in Banaras, India. The community of weavers is divided into several categories, including own-workers, loomless weavers, job-work weavers and master-weavers. The Banasari community has faced competition from weaving centres in India and China, as well as those who have been passing off machine fabrics as handmade. In order to compete, master weavers and traders resorted to unethical strategies such as reducing wages, lowering the quality of designs and passing off synthetic fibres as silk. A campaign for a GI started in 2006, and a GI was awarded in India in 2009.

The first problem is the lack of a broad-based community-wide support for the GI. The GI application was made by nine registered proprietors. These registered proprietors consisted of: two NGOs, two government agencies, two traders’ organisations and three producer cooperative societies. None of these groups represented the ‘ordinary weavers’, the NGOs worked with rural Hindu weavers, not the majority Muslim weavers, the government agencies were external to the artisan community, the traders’ organisations represented wholesale merchants not the job-work weavers, and the producer cooperative societies were under the control of large master weavers.

This first problem has two major consequences. One of these consequences is that because the GI applicants were not representative of the community of weavers, those controlling access to the GI were also not representatives of the community. Many artisans do not have the time or money to apply to have their work authorised and therefore could not access the GI. Those artisans would therefore legally infringe the GI if they call their work Banasari. Another consequence is that the applicants designed the GI to protect handloom weavers from powerloom weavers. The impulse to protect handlooms comes from the applicants, not the weavers. This protective paradigm has had a freezing effect on the culture and does not change any of the structures that keep weavers poor.

A second problem is that the GI application is written in English and Hindi, not the local dialect spoken within the communities. This had an isolating effect on the community. A third problem concerns the way the artisanal knowledge was described in the GI. Banasari is a dynamic tradition made from a collective heritage and fluid traditions. The GI catalogues the method of production in great detail and consequently hurts the evolution of the product because it does not capture the true fluidity of designs.

The key lesson from the Banasari Sari GI is that for GI to be effective, it must be designed through a participatory process with the close involvement of ordinary artisans and must be sensitive to the dynamic nature of artisanal knowledge. Even well designed GIs cannot address problems that arise out of the political economy of artisanal industries. Other lessons include the importance of wide consultations among the community of artisans. This is important not only for the future controlling of access to the GI but also for developing the criteria of authenticity. Further, there may be space for a flexible approach to protecting the crafts. For example, a dual system could be used to protect Banasari Sari: those using handloom technique could use a certification mark to distinguish their production method, while the GI could be expanded to include powerloom weaving from within Banaras. Finally, the GI needs to be coupled with a good trade policy to ensure that artisans can access raw materials affordably and are protected from those seeking to pass off their products.

Other Indian relevant GIs in this respect are those associated to Patachitra. This is an ancient form of painting done on paper and manifested by rich colourful application, creative motifs and portrayal of simple themes. It is practised in several regions of India, with specific Patachitra styles originating in West Bengal and Odisha. An Indian GI for Bengal Patachitra was awarded on 28 March 2018 and is valid until 16 August 2026. Another GI for Orissa Pattachitra was awarded on 7 July 2008 and is valid until 8 April 2027.

The Bengal Patachitra GI and Orissa Pattachitra GI are also quite specific in their description of the materials and methods of the tradition. It clearly states that the colours used in the paintings are natural colours and describes the dimensions of the paintings. The technical specifications have quite a high level of detail, for example the Bengal Patachitra GI states that there are no eyelashes, nails or open mouths. This could be seen as restricting the development of the craft. However, the lesson learned from Banasari is not that all technical criteria should be removed, but that the technical criteria should be based on broad community consultation and reflect the actual practices of the artists. Some degree of definition of the craft is needed, however it must be approached carefully so as to not risk freezing a dynamic tradition. Furthermore, there is some recognition of changing practices. For example, the section on production processes notes that traditionally, rat hairs were used for paint brushes but that in the present day, artists use brushes that are available in the market. Both the Bengal Patachitra GI and Orissa Pattachitra are written in English. Presumably, this has the same potential isolating effect on the communities as the Banasari Sari GI. A solution may be to ensure that the documentation is translated into the local dialect and distributed among the community.

Unlike Banasari Sari, however, there was just one applicant for the Bengal Patachitra GI. The applicant is Chitrataru, a group comprising 230 artisans. All Patachitra artists in Pingla are members of the collective Chitrataru. The main objective of Chitrataru is the preservation and promotion and capacity building of Patachitra artists. Chitrataru works closely with West Bengal Khadi and Village Industries Board to provide support for rural craft hubs. Similarly, the applicant for the Orissa Pattachitra GI is the Orissa State Cooperative Handicrafts Corporation Limited. This Corporation aims to effect co-ordination between handicrafts and other industries by suitable method such as enabling the artisans to manufacture articles required by other industries. This suggests that both GIs were the product of more widespread community consultation than the Banasari Sari.

The inspection body for controlling access to the Bengal Patachitra GI is made of government officials, a representative of West Bengal Khadi and Village Industries Board and a representative of Banglanatak.com. This may mean that the criteria for assessing access to the GI is more reflective of the practices of the Patachitra community of painters. The Orissa Pattachitra is even more flexible. The inspection body for the Orissa Pattachitra is comprised of customers and retailers as there are no standard parameters set for the artwork.

In the case of Formazza cheeses in Italy, individual IPRs were registered by collective entities. Yet, the process of drafting the rules for the use of the trademark didn't involve the entire communities, with the result of dividing it. Formazza (Pomatt) is a municipality in the Province of Verbano-Cusio-Ossola in the Italian region Piedmont, on the border with Switzerland. The municipality of Formazza consists of 14 small hamlets, with a total population of about 450 people, 230 families and 600 houses. The Formazza Valley is geographically an extension of the Antigorio Valley. The Casse spring marks the boundary between the communities of Antigorio who speak mainly Italian, and Formazza, an older settlement founded by Walser people, who came from a valley of the high Rhône (the Wallis (Valais)). Walser German is still spoken there: it is one of nine Walser communities in Italy where this is still the case. The community maintains some ties with Bosco Gurin (Switzerland), another Walser community, and the only German-speaking municipality of the canton of Ticino. This can be reached on foot via a mountain pass.

Considerable government and researcher attention has focused on the Walser communities in this area. An Italian national law protecting linguistic minorities was passed in 1999. This encouraged research and community activity on the linguistic and cultural heritage of Walser communities in the region over the last 20 years. Local cultural associations such as the Walserverein Pomatt, a NGO, have promoted the language and culture of these communities. However, much of the research that was done, focused on the history of the communities and what they did in the past. Between 2011 and 2013, community members in Formazza worked together with anthropologists to create a 'community map' of what they valued in the valley today. A Piedmontese research team (from the regional government and the University of Turin) focused on the Formazza community in drawing up the map because it is the only living Walser community in the valley (Salecchio, another Walser settlement, has long been abandoned). Other parish maps were created at this time too, under the auspices of the regional bureau of the Ecomuseums.

Maria Anna Bertolino, an anthropologist working as a consultant to the organization known as the 'Settore Cultural Heritage, Museums and Unesco Sites Valorization', undertook an inventorying exercise between October 2012 and March 2013, during the winter season. She is not from this area but had attended the workshop in Formazza during the summer of 2012 about the construction of the community map, where she met some of the people from the village. The map was useful in identifying ICH that was considered of value by the local community. It includes information about economic activities, intangible heritage, buildings, recipes. It was based on the views of the Walser community who had long lived in the valley as well as new residents and people working there temporarily. Bruna Piera Papa, the mayor of Formazza, who is not from the Walser community, actively supported the inventorying of ICH in the valley, as did the local teacher and Walser poet, Anna Bacher. Local people had already established a good working relationship with linguistic researchers in the past, and were willing to talk to Bertolino about their ICH. The mayor and her husband own a café in the main hamlet in front of the Municipality buildings, where many people were interviewed during the inventorying process.

In particular, the local community have indicated the importance of cheesemaking as part of their cultural heritage. They consider the local Bettelmatt cheese to be a distinctive cheese of the Walser community. Bettelmat is a pasture cheese, produced in the Antigorio and Formazza Valleys (on

the Swiss border of Piedmont). It is a fat cheese, with semi-cooked paste obtained from whole fat milk in a single milking. The yellow paste is soft and compact with a sweet and very intense flavor. The seasoning must be at least 60 days. This cheese has a very important tradition in the community. In fact, when someone used to be born in the community a round of alpine cheese (*formaggio d'alpe*), traditionally Bettelmatt, was kept in the cheese store from that date until they die. Called Death's cheese, it is served to the mourners who come to the house of the deceased person. So, the cheese is part of the community life cycle. Today, Bettelmatt commands high prices in Milan and is served in restaurants; only about 5,000 rounds are produced per year.

There are 68 producers of Bettelmatt cheese today [Bonadonna, p. 4]. Yet, an individual trademark was registered, consisting in a sign, "bettelmatt 1821", owned by a collective entity representing the entire mountain community, namely the Comunita' Montana Antigorio Divedroformazza | Crodo | (Vb). It is registered for Class 29 (Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats). To use this trademark a license agreement has to be undersigned. The agreement is not disclosed, but the conditions on use of the name are known to be for example that the milk has to be from cows grazed in different places in winter and summer (part of the alpine transhumance system), and grazing has to occur in particular pastures in the area. In addition, even though in the past only the cheese made in the Bettelmatt pasture could use that name, now the area of production is located in a larger number of pastures. In particular, cheese made in the Antigorio Valley can use the name, even though this is not a Walser community. In contrast, there are no Bettelmatt cheesemakers in Formazza, since they cannot fulfil the new conditions for using the name, in particular that of the alpine transhumance system.

The farm Formazza Agricola Societa' Cooperativa Agricola, formerly a cooperative but now a private company with limited responsibility, for example, cannot make Bettelmatt because it has implemented technological measures that remove the need for transhumances. So, it and its licensee coming from Formazza make a similar cheese named Formazza (in winter) and Sümmer (in summer). In 2005 the Formazza Agricola Societa' Cooperativa Agricola registered the Italian trademark Formazza for Class 29 (Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats); Class 30 (coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; edible ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice); Class 31 (raw and unprocessed agricultural, aquacultural, horticultural and forestry products; raw and unprocessed grains and seeds; fresh fruits and vegetables, fresh herbs; natural plants and flowers; bulbs, seedlings and seeds for planting; live animals; foodstuffs and beverages for animals; malt); Class 32 (Beers; mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages) and Class 33 (alcoholic beverages (except beers)).

Formazza and Sümmer are sold at lower prices than Bettelmatt, since the requirements to produce them are less restrictive than for Bettelmatt. Thus, local people tend to eat these other cheeses now, and believe they have the same organoleptic properties as Bettelmatt, but simply use other names.

Fourth, IPRs shall contribute to increasing socio-economic conditions of the power imbalanced, often on the axis of gender, race, and ethnicity. Empowering these local stakeholders implies understanding the processes through which local inequalities were established and became entrenched. Thus, issues of race and labor shall be considered in IPRs governance and strategies, thus increasing social justice certification.

In South Africa, for instance, Rooibos tea is grown in a region where apartheid's racial legacy is a continuing reality for distinct peoples, including a precarious underclass of colored laborers. Rooibos was considered ideally suited for a GI because the link between the tea and its territory was due simultaneously to ecological characteristics, local production practices, and local culture, engaging both natural and human resources in "a collective process involving all local actors, thereby activating all the components of the rural economy." Proponents of the GI conveniently ignored the colonial histories of dispossession characteristic of the distinctive territories in which rooibos is cultivated and the racialized legacies and social discriminations its cultivation upholds. GIs was then adopted and even greeted by WIPO, which in 2013 pronounced that "for generations, [r]ooibos has provided a healthy, aromatic tea for people all around the world and an important economic resource for farmers and producers in South Africa. With its importance reverberating throughout the tea and IP world, it is poised to bring about change that will positively benefit a people, a legal system, and a nation". GI's originated significant export earnings and a great pride. However, "rather than help to heal apartheid's wounds, the governance of the GI reinscribes its scars". The GIs drafters in fact "conveniently ignored the colonial histories of dispossession characteristic of the distinctive territories in which rooibos is cultivated and the racialized legacies and social discriminations its cultivation upholds".

In India, the Tea Board of India, the sole representative of tea producers in India, registered the sign "Darjeeling Tea" as a GI and a certification trademark in India and in various other countries including the U.S., Canada, Japan, Egypt and the United Kingdom. The "Darjeeling Tea" sign has offered distinctive characteristics of quality, flavours and a global reputation for more than a century, due to it being cultivated, grown and produced in the West Bengal district of Darjeeling over 2000 meters above sea level. Indian tea producers export extremely significant quantities of their Darjeeling tea worldwide. The Darjeeling Tea GI has been much celebrated since it was the first of India's now over 150 registered GIs and a huge success in terms of raising export earnings. The Tea Board of India controls this GI as national patrimony, making eighty-seven plantations a natural garden home for a unique tea, based in a naturalized terroir. Yet, the community that produces Darjeeling and most other tea exported from India, is constituted by hierarchically organized plantations on which descendants of indentured laborers, most of whom are women and ethnic minorities, toil under harsh conditions with little job security and few benefits. Such Indian Darjeeling tea is picked nearly entirely by the female descendants of indentured women from Nepal, who brought this rare tea and their knowledge of its cultivation into this region (later incorporated into the state of West Bengal) where they have been trapped ever since. The region covered by the GI (eighty-seven colonial plantations put back into production) is not co-extensive with the Darjeeling district of West Bengal. In fact most of the same tea in this state is cultivated by Adivasis (tribal or indigenous peoples) who are entirely excluded from the GI's benefits. And of course, the GI excludes the country of Nepal's own smallholder cooperatives (indeed, they are seen as imitators from whom "the real" Darjeeling needs to be protected). The GI marketing campaign represents exploitative industrial plantation labor. Darjeeling is also understood as national cultural patrimony and the basis for a new industry—tea tourism—in which women are disciplined to perform the smiling docility marked by the GI's social imaginary. Yet, these women make one dollar a day, working sixty-hour weeks, an amount far too low to support themselves and their families. Theirs is bonded labor; women inherit their jobs and are utterly reliant upon plantation owners for housing, health care, their children's education, and access to subsistence plots (degraded by monocultural production) for sustenance. Working under huge billboards that feature their angelic doppelgangers, which are plastered across the countryside, how can tea pluckers transform their prospects? To the extent that such branding supports a new tourist industry whose profitability is dependent upon satisfying visitor's expectations, women's capacities to protest their working conditions are only undermined. Ironically, many tourists dress up as smiling tea-pickers, mimicking the GI advertisements, while the workers have new jobs to add to their toil—posing for pictures and

singing for visitors. They complain that the GI has “turned the plantation into a zoo”—in which they are the captive animals.

Indian neglect of plantation workers is closely related to the fact that most of them are from tribal communities and are still considered foreign aliens in the regions where they work. As we have seen, workers in Darjeeling are descendants of migrants from Nepal, whereas workers in Assam originate in Jharkand, Chhattisgarh, Odisha, and West Bengal. Whereas many of the tea workers in West Bengal are recognized as Scheduled Tribes (constitutionally recognized historically marginalized groups), people with similar origins are denied this status in Assam and designated as Other Backward Classes. Under Indian law, Scheduled Tribe status enables the exercise of protective discrimination and avails access to free education and reservation in formal employment alongside other state facilities. The Assamese government, dominated by caste Hindu Indian National Congress leaders, has refused to recognize plantation workers as having the same tribal origins as those of their kin who remained in West Bengal. Many tea workers now identify as Adivasi, or indigenous peoples, both as an umbrella identity under which members of different tribes can mobilize and as a basis to assert collective political rights. Despite passage of a state resolution to recognize “tea tribes” in 2004, the Registrar General of India denied these plantation workers tribal status on the basis that they did not display primitive traits, hold a distinctive culture, or the requisite backwardness. Such characteristics are arguably no longer descriptive of any tribes in contemporary India. Nonetheless, the workers’ tribal identity is contested by other recognized tribal groups who see plantation lands as illegally seized from indigenous peoples and who sometimes violently assault plantation laborers who claim Adivasi identity.

4. Environmental sustainable development. IPRs on ICH protecting biodiversity and preventing natural catastrophes

In line with environmental sustainability of ICH, IPRs shall help protecting biodiversity and the role of communities’ knowledge and adaptation strategies, which often form the basis of their resilience in the face of natural catastrophes and climate change. As already mentioned, traditional communities typically manage local resources and the environment in a highly sustainable manner. They do so through the application of sophisticated resource management systems developed through knowledge of the natural environment. Such knowledge is to be intended as ‘a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.’ For example, the Turkana of northwestern Kenya have a highly sophisticated natural resource management system that has enabled them to survive in an environment that many would consider as being extremely hostile. Indigenous and traditional groups empowered with rights to control access to their lands and communities have a better chance of preventing misappropriation of their knowledge related to the sustainable use of the environment, and of negotiating favourable bioprospecting arrangements.’ Among these rights stand IPRs, which can therefore provide significant environmental benefits.

Among the primary justifications for using IPRs, on traditionally produced goods is that GI specifications and trademarks regulations can be environmentally friendly and compatible with the maintenance of biodiversity and landscape. These GIs are therefore called “Green GIs”, and are considered capable of providing prospects for new forms of rural development, community autonomy, preservation of cultural traditions, and even conservation of biological diversity when the production of goods encourages the stewardship rather than the depletion of the natural resources from which they are made. Thus, ‘GIs present long term benefits as they create value, enhance the marketability of goods and give an edge to developing countries to promote exports and rural development, thus

generating sustainability and inter-generational equity'. In addition, green GIs enable producers to secure the premium prices, which may be grounded on the fact that the relevant specification requires that the traditionally produced goods at stake are free from contaminants, such as herbicides and pesticides.

For instance, the EU GI specifications of Jersey Royal Potatoes indicates that 'Growers stand their seed growing on the second shoot and by far the majority of the crop is planted by hand. While artificial fertilisers are used, locally collected seaweed is used extensively, not only does it provide an excellent source of organic fertiliser, the salt content of the seaweed it is believed does much to enhance the flavour'. Similarly, the EU GI specification of Arroz De Valencia indicates that 'El uso de pesticidas en el arrozal valenciano está severamente controlado por las normas y leyes que protegen el Parque Natural de PAIbufera. A causa de la presencia de arroz salvaje o "rebordonit" es común la escarda manual para el control de hierbas adventicias'. Also, the EU GI specification of Diepholz Moor Lamb indicates that 'The Diepholzbr moorland sheep eat heather, bent, cotton grass, sedge and various herbs and grasses; also pine, birch, frángula and other woody plants. By means of selective herding the sheep are pastured mainly on land on which no mineral fertiliser or plant protection product has been applied. Intensive fattening is not worthwhile and is not done, although in winter their feed is supplemented with feed produced on the farm.'

From an environmental protection perspective, GIs provide consumer confidence in these traditional products purity, as well as in their traceability. Thus, while securing higher returns for producers, GIs play an important role in achieving rural development and the maintenance of rural landscapes. Even though environmental sustainability was not the primary aim of GIs development, since GIs 'derive from local, including natural resources [...] environmental benefits are increasingly seen as a positive potential GI externality.'

For instance, empirical studies of the European olive oil industry, which is characterized by an extensive use of GIs, identify this industry as 'a good example of agriculture with many associated positive environmental impacts such as lower rates of soil erosion, improved fire--risk control, water efficiency, lower pollution and higher levels of biodiversity and genetic diversity in olive--tree varieties.'

For instance, the EU GIs specification of Cafe De Colombia indicates that 'There are two methods for removing the mucilage: fermentation and mechanical removal, which uses the "Becolsub" machine, or environmentally-friendly wet-method processing of coffee". 'The process [...] known as the environmentally-friendly or Becolsub process, created by Cenicafé and approved by the Federation following analyses of its impact on the quality of the coffee [...] consists of a similar wet process but considerably reduces the use of water, which is a scarce resource in some regions. Unlike the earlier method of removing mucilage by fermentation, here it is removed by the mucilage removal equipment designed by Cenicafé. Despite the fact that the environmentally-friendly method reduces water consumption it does not affect the characteristic quality of Café de Colombia'.

In addition, IPRs shall establish limits to over-exploitation of the natural resources that are necessary to produce certain traditional goods or services. The success of an origin product may lead to an increase in demand and therefore to increased pressure on local resources. Sustainable production guidelines need to be agreed upon by means of a participatory process. These guidelines shall be codified in GIs specifications or trademark regulations. This will prevent pressure being placed on fragile environments and ensure in particular that IPRs itself does not lead to "genetic erosion." Thus, IPR, such as GIs and collective trademarks, can also serve as a tool for encouraging sustainable agricultural practice by 'legally limiting the scale of production and production methods.' Thus, the need to maintain terroir attributes of goods to qualify for GI protection over the long term inevitably requires the adoption of environmentally sustainable land-use practices.

For instance, an IP strategy was examined in relation to Coorg orange, a crop frequently associated with coffee agroforestry systems in the mountain region of Kodagu (Western Ghats, India). This to successfully use IP by local producers, having a positive impact on the landscape and its associated biodiversity'. The region at stake produces nearly one-third of Indian coffee, mostly in agroforestry systems under native tree cover. The landscape mosaic in Kodagu is completed by the existence of forest fragments embedded in the human-dominated landscape of the coffee belt, and improving landscape connectivity, serving as corridors for numerous species. Together with the coffee plantations, they provide a series of environmental services in terms of pollination, carbon sequestration, and water recharge that the scientific community is only now starting to assess.' To valorise origin-based products, a possible strategy was considered to be the registration of trademarks, GIs and environmental certification, via eco-labels'. With particular regard to the registered GI, the specifications for its application was devised as environmentally friendly and compatible with the maintenance of the landscape mosaic.

In particular, the Indian GI specification of Coorg Arabica Coffee indicates that 'modern method of cultivation in coorg Coffee cultivation is an integral part of the lives of the people of kodagu district and forms the backbone of the economy of the district till today. Increase in productivity levels is performed by judicious management of resources and taking the advantage of favourable climatic conditions. The native method of cultivation is still followed but with the advent of new technology and improvement in agricultural science, few methods have been modernised. [...] Different soil management practices are also followed such as i) soil conservation measures, ii) soil moisture conservation measures and iii) drainage measures. Native methods like pruning, weeding and manuring is also followed for sustainable productivity of coffee.' In addition, the specification highlights that 'the coffee farmers growing Arabica and Robusta under shade trees provide ecosystem services through their farms and protect biodiversity. The shade also means that there is natural mulching from the leaves that fall onto the ground, which in turn helps avoid the use of strong fertilizers and pesticides.'

In addition to IPRs, to ensure sustainable collection another way is to use environmental certification labels, such as the Good Field Collection Practices or the Forest Stewardship Council.' These product certifications, which seek to achieve environmental protection through market-based mechanisms, such as price premiums or improved market recognition, provide financial incentives to landowners to manage their land such that environmental benefits are maintained. Yet, with particular regard to the coffee agroforestry systems in the mountain region of Kodagu (Western Ghats, India), it was considered that 'none of the ecolabels are adapted to preserve the rich tree diversity of the coffee agroforestry systems of Coorg, since this would require specifying in the eco-standards that a threshold of 30% of *Grevillea robusta* should be included to stop the rapid trend of this exotic species replacing native trees.' Thus, as it will be explained in the following pages, a more effective and enforceable strategy would consist of adopting environmental certification labels in association with IPR tools.

For instance, the EU GI specification for Clare Island Salmon indicates that '*Method of production*: Each spring young salmon smolts are carefully transferred into very large flexible cages moored off Clare Island and cared for every day by local islanders from their own boats for up to two years. The salmon are fed a specially formulated diet, using natural ingredients compounded locally and they are protected from storm damage and predation'. In particular, "the Clare Island salmon is certified as organic by an accredited auditing body based in Germany'. Similarly, the EU GI specification for ORIEL SEA SALT indicates that 'Oriol Sea Salt is made from pure sea-water. It is harvested through a proprietary system in an environmental and sustainable approved manner. The process is Organic Certified which allows Oriol Sea Salt to be used in organic products and recipes.'

5. Economic sustainable development. IPRs on ICH protecting against its commercialisation risks

In line with sustainable development of an economic nature of ICH, IPRs shall lead to supporting certain commercial activities that favour the livelihoods of groups and communities. In particular, those activities that generate income opportunities for community members, including the poorest and most vulnerable. In particular, the adoption of IPRs on ICH shall not favour commercial activities that may raise certain risks threatening ICH viability. Otherwise, IPRs on ICH risk themselves increasing the level of commercial threats, endangering ICH. Thus, the adoption and enforcement of IPRs related to ICH shall be carefully designed, to use these rights as safeguarding measures that effectively protect ICH against its commercialization threats, ensuring that communities involved are its primary beneficiaries (OD 116).

The risks associated to commercial activities that threaten ICH viability are the following:

- (i) ICH ‘freezing’ and standardisation, namely lack of variation, creation of standardized canonical versions, subsequent loss of opportunities for creativity and change.
- (ii) ICH decontextualization, namely distorting the meaning of ICH, or removing it from its usual cultural environment.
- (iii) ICH over-commercialisation, namely over-exploitation of natural resources with the aim of producing goods and services for unsustainable sale, bartering or tourism.
- (iv) ICH authenticity claims, namely invoking the exclusive nature of an ICH element or its outstanding value with respect to other practices, creating hierarchies among the elements.
- (v) ICH misappropriations, namely unjust rewarding inappropriately obtained in the eyes of the communities concerned by individual members of the community, the State, tour operators, researchers or other outside persons through exploitation of the ICH held in common.

6. Cont. ICH freezing, standardization and decontextualisation

With regard to freezing and standardisation, IPRs specifications or regulations sometimes may crystallize and standardize traditional practices, restrict normal variation and change, and thereby exclude some producers, who used to make the product, from continuing to use the name. This happened for instance in the abovementioned cases of Serrano cheeses in Brazile, Chevrotin cheeses in the French Alps, and Formazza cheeses in the Italian Alps. Yet, the risks of freezing, standardisation and loss of secrets knowledge are particularly acute in the case of TSGs. In fact, registering a PDO or PGI does not require producers to reveal the production method in details. In contrast, with regard to TSG it is the recipe that shall be disclosed, rather than the origin of ingredients or the locus of production. Describing the receipt creates standards against which compliance can be assessed, and can discourage innovation and diversification, hampering creativity among producers. In the case of the ‘Birmingham Balti’ TSG application from the UK, producers argued that specifying a single recipe for the Balti sauce did not reflect diversity among producers, would reveal their knowledge, and prevent innovation. Thus, producers didn’t provide a recipe and the application was then refused by the European Commission.

With regard to decontextualization, in addition, while PDOs and GIs require a local connection and have therefore a geographical scope, TSG is problematic. In fact, once producers reveal the way in which a product has been ‘traditionally’ made, the use of the sign is then available to anyone who follows the specification, wherever located. Thus, by registering a TSG, producers face the prospect of attracting an unlimited number of competitors from any region and making the production method available to be used by them anywhere in the world. The geographical scope of GIs and PDOs necessarily limits competitors. Thus, registration of a TSG may encourage ‘delocalisation of the production of TSG products’, as producers of any kind based in any location can use the ‘traditional’ registered name as long as they use a specific recipe given in the specification.

To avoid these risks, the IPRs to be associated to ICH shall be carefully selected, bearing in mind that they shall protect a form of living heritage. IPR shall then constitute a major source of innovation for development. In addition, their specifications and regulations shall be drafted considering how they may impact producers and community bearers and the viability of their ICH. IPRs shall facilitate the protection of their related product or services in a dynamic context, where natural changes may prompt

product and service variations reflected in periodical variations to the GI specification. They shall then respect the dynamic nature of ICH, which is “constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”

Thus, IPR shall be adopted provided that periodical variations to their specification and regulation are possible. In addition, the procedure to periodical vary IPRs circulation rules shall be carefully envisaged, which shall be inclusively drafted and accessible by the entire community. In their absence, these rules are to be found in those related to the trademark owner governance, namely the association or foundation statutes and constitutive acts.

In relation to GIs, PDOs, and TSG, according to Art. 53, para. 2, of the EU Regulation No 1151/2012 on Quality Schemes for Agricultural Products and Foodstuffs, a change to their specification can occur. Yet, if this prompts a major change, then a new assessment of the GI, PDO or TSG at stake shall be carried out by the European Commission according to the same registration processes, under the above-mentioned Arts. 49 to 52. A major change is one that: (a) relates to the essential characteristics of the product; (b) alters the link between the quality or characteristics of the product and the geographical environment (referred to in Art. 5, para. 1, which concerns the requirements for designation of origins), or the link between a given quality, the reputation or other characteristic of the product and the geographical origin of the product (referred to in Art. 5, para. 2, which concerns the requirements for geographical indications); (c) involves a change in the name, or any part of the name of the product; (d) affects the defined geographical area; or (e) represents an increase in restrictions on trade in the product or its raw materials. Similarly, a major change to a TSG product specification is one that: (a) relates to the essential characteristics of the product; (b) introduces essential changes to the production method; or (c) includes a change to the name, or to any part of the name of the product.

In relation to trademarks, the flexibility in amending the relevant regulations of use, is greater. In fact, individual trademarks, eventually owned by collective entities, circulates under private licence agreements, which may be changed anytime by the licensor, provided that the licensee accepts the changes. Also, the owner of a collective trademark is able to amend its related regulation, provided that the amended version is submitted to the relevant trademark office. In relation to EU collective trademarks, for instance, the regulations governing the use of such trademarks must “specify the persons authorised to use the mark, the conditions of membership of the association [of manufacturers, producers, suppliers of services, or traders] and, where they exist, the conditions of use of the mark, including sanctions.” These regulations must be submitted to the European Union Intellectual Property Office within two months of the date of filing of the trademark. Accordingly, “the proprietor of an EU collective mark shall submit to the [European Union Intellectual Property] Office any amended regulations governing use”, which “shall take effect only from the date of entry of the mention of the amendment in the Register.” Parallel provisions exist in relation to EU certification marks.

7. Cont. Over-commercialisation

With regard to over-commercialisation, as already recalled, is an over-exploitation of natural resources with the aim of producing goods and services for unsustainable sale, bartering or tourism. Concerns of over-commercialisation were raised with regard to “the Traditional production of the Kranjska klobasa” (Carniolan sausage). This element was named by Slovenia to be inscribed in 2015 on the Representative List. Yet, it was not inscribed for its over-commercial aims, as “the nomination focuses more on the product than on the skills related to its production or the social function of its consumption” by “what appears to be an economically motivated interest group”. This element has an IPR associated, namely a GI, which was registered by the non-profit association Kranjska klobasa Business Interest Association firstly in Slovenia in 2008, and then in the European Union in 2015. The GI at stake didn’t protect enough the element from these over-commercialisation concerns.

Over-commercialisation concerns were also raised with regard to the element “the Mediterranean Diet”, nominated firstly by Spain, Greece, Italy and Morocco, by a letter sent to the UNESCO Secretariat in 2010. Since a formal procedure to dealing with correspondence from civil society was introduced only in 2012, the letter was disregarded and the element was inscribed on the Representative List in 2010. Nonetheless, the Committee invited States Parties to avoid over-commercialisation of ICH. In addition, the Committee invited States Parties to use the Convention’s emblem in commercial activities only in line with the relevant Convention’s rules, which require an express authorisation to any sale of goods or services bearing this emblem, the conclusion of contractual arrangements with the private

subjects interested in commercializing the element, and the establishment of specific benefit sharing mechanisms in favour of the ICH Fund. As already mentioned, this element has an IPR associated, namely an individual trademark, which is registered as an EU trademark by a series of collective entities belonging to different countries. The trademark at stake didn't protect enough the element from these over-commercialisation concerns.

Over-commercialisation risks can be avoided by carefully selecting the IPRs associated to ICH at stake, so to ensure that the communities involved are the primary beneficiaries and to avoid over-exploitation of natural resources with the aim of producing goods and services for unsustainable sale, bartering or tourism. Thus, for instance the relevant specification or regulation on the use of the sign protected by the IPR at stake, shall establish specific benefit sharing mechanisms of the income-generating activities in favour of all ICH bearers. Therefore, not only of those that belong to the association owning the IPR, but also those members of the community that may eventually belong to other associations or simply figure as private individuals.

In addition, the same relevant specification or regulation shall establish limits to over-exploitation of the natural resources that are necessary to produce certain goods or services, as just mentioned with regard to sustainable environmental development. Other limits may consist in posing percentages of goods or services that shall be sold or offered to the public in the relevant markets under the traditional techniques. Similar percentages are for instance established by the regulation of the use of the trademark associated to the "Traditional violin craftsmanship in Cremona". Yet, in this case this flexibility doesn't aim at avoiding over-commercialisation of the violins, but rather pursues the goal of rendering the practice of the ICH at stake economically sustainable for community members. In fact, with regard to the violin-makers, for instance, the violins manufactured according to the traditional techniques requirements are very expensive and are sold in reduced numbers. Allowing other violins to be manufactured according to softer requirements, for instance not entirely by hands, renders them cheaper and better sold. Yet, the same flexibility may originate a lack of trust by specialised consumers, who may be confused on the quality of the goods or services at stake. In fact, for instance in the case of the "Traditional violin craftsmanship in Cremona" since violins complying with the traditional requirements and violins that don't are manufactured by the same violin-makers, specialised violin players are starting wondering which is the exact quality of the violins manufactured in Cremona.

8. Cont. Authenticity Claims

With regard to authenticity, as already recalled, under the Convention, no element is "authentic" with respect to others, and the same use of the term 'authenticity' has been discouraged, to avoid external experts imposing their own views of ICH practice on communities who practice it, as already mentioned. Thus, while the significance of World Heritage sites is primarily defined by expert analysis, using criteria such as authenticity and integrity and outstanding universal value, since ICH is living heritage to safeguard this heritage is not to validate one authentic or historically accurate way of its enactment or transmission. ICH elements change over time, responding to new situations, and are often also practised in a wide variety of ways so that typically two consecutive enactments of the same ICH element will not be exactly the same, even when practiced by the same community. Also, ICH is justified primarily by the value that communities, groups and individuals who practise and transmit that heritage attribute to it. Thus, no outstanding universal value is required and no hierarchies between ICH elements based on authenticity shall be introduced.

Thus, the UNESCO Lists are not to be interpreted or used as a means to authenticate the practice of an element in a specific country. On the contrary, "certain elements are shared across different countries and are not restricted to one specific country or specific groups." Further, "the identification of a specific community in [a nomination] form does not necessarily exclude others from practising the element" in other countries. In addition, the Convention and ODs encourage multinational nominations, because much ICH is practised across national borders. This is also the reason why many of the names used for ICH elements (such as *lavash*, for a tradition related to a flatbread) inscribed on the Lists of the Convention from different communities in various locations or countries are very similar.

Yet, for instance, "Art of Neapolitan 'Pizzaiuolo'" nomination form, for example, states that "neapolitans are very proud of this common tradition, nowadays threatened by globalization, distorted and often counterfeited all over the world". The nomination form continues saying that therefore conferences and seminars "will be organized with the purpose of disseminating deep knowledge of the characteristics of genuineness and authenticity of this art." This ICH nomination acknowledge *pizzaiuoli*

elsewhere in the world, while retaining the idea that the ‘authentic’ home of the foodway is in Naples. While Naples is considered the centre of the community of ICH practitioners, the role and expertise of *pizzaiuoli* ‘outside Naples’ is also acknowledged.

The TSG specification associated to this element, then, does not refer to a diaspora of the community out of Naples, as the ICH nomination does, but to that of “pizzerias”. It suggests, in fact, that signs like ‘pizzeria napoletana’ and ‘Pizza Napoletana’ evoke the “link with Naples, where for more than 300 years this product has retained its authenticity”.

In its inscription decision of this element, then, the Committee “remind[ed] the State Party of the importance of using vocabulary and concepts that are appropriate to the Convention and to therefore avoid expressions such as ‘authenticity’, ‘counterfeit’, geographic ‘origin’, as well as any reference to exclusive ownership over intangible cultural heritage.” It also “underline[d] that safeguarding measures aiming at ‘preserving the authenticity’ of an element of intangible cultural heritage are not in line with the spirit of the Convention and would contradict the evolving nature of living heritage, which is by definition constantly recreated by the communities concerned.”

IPRs on ICH, then, shall respect the “principles and spirit of the Convention”, in particular avoid any authenticity claim. Yet, this is perfectly in line with the nature of said conventional IPRs, which don’t adopt any authenticity requirement. In fact, despite certain IPRs, such as TSG, don’t emphasise any territorial connection between the element and its geographical location, this cannot prompt communities to invoke worldwide territorial exclusivity and highlight the authentic character of the elements protected by said IPRs. In fact, given the territorial nature of IPRs, including TSG, which grants rights to be enforced just in the countries where it is registered, it is against this nature to invoke worldwide exclusive rights from IPRs. In addition, both TSG and other IPRs, that emphasise a territorial connection between the element and its geographical location, such as GIs and PDOs, don’t pose any authenticity requirement in relation to the element to be protected since no expert is required to verify at the moment of their registration if the traditional product at stake is “authentic”. Other notions are used, namely that of originality, which, however, doesn’t correspond to that of authenticity of the product, since it relates to the sign rather than to this same product. Thus, those IPRs cannot impede others from producing similar products as long as they use distinctive signs. In addition, as already mentioned protection of elements under TSG consisting of generic names, such as “Pizza Napoletana” is weak, since it doesn’t preclude competitors to say that they are making and selling Pizza Napoletana, even though they don’t comply with the specification requirements, as long as they don’t use the sign “TSG”.

In sum, it is true that the TSG suggests most prominently also through the name ‘*Pizza Napoletana*’ itself “that those Neapolitan pizza “chefs and their methods are the ‘authentic’ source and heart of the recipe”. Yet, this TSG just “narratively localizes the name ‘*Pizza Napoletana*’ in Naples, but at the same time makes the use of the designation legally available to all who follow the recipe anywhere in the world. Thus, the TSG gives no monopoly rights over the designation to producers from Naples. This, confirms that authenticity claims are against, not only the spirit of the Convention, but also the nature and scope of IPRs, such as collective trademarks, GIs, PDOs and TSGs.

9. Cont. Misappropriations

Misappropriations of intangible cultural heritage consist in wide scale copying of traditional designs, motifs, symbols and artworks for commercial gain without the knowledge or permission of communities. Alteration of traditional practices and products may result from commercialization that can lead to the adaptation of such practices and products to fit the taste of potential consumers, whether that be tourists or the general public. Therefore, a major concern for indigenous artists and communities is the integrity of their creations. As such, the obstacles in the preservation of intangible cultural heritage today are not only the result of disuse or abandonment by members of the communities concerned, but also the result of abuse or misappropriation by third parties. The Mexican National Commission on human rights recently enacted a general recommendation on the protection of the cultural heritage of indigenous people and communities of the Mexican Republic. This recommendation recognised the

aforementioned human rights to cultural heritage, described in great details all cases of misappropriations of Mexican ICH by multinational companies, and concluded characterising these misappropriations as human rights violations, enforceable before courts.

Misappropriations of community language and imagery occurred for instance in Lego toys (2001), in cigarettes marketed by Philip Morris in Israel (2005-2006), in the koru (unfurling fern frond) design on Canterbury rugby boots (2002), in Jean Paul Gaultier's use of moko (traditional Māori facial tattoo) on fashion models (2007), in a television advertisement by car maker Fiat which consisted of a crowd of Italian women dressed in black and performing the Maori haka, a war dance traditionally performed only by men (2006), in the "disrespectful" misappropriation of a Māori cultural icon, Hei-tiki, for the commercial sale of *HEITIKI infant formula* (2011) and in the appearance of an "instantly recognisable" Māori tattoo design in the 2011 film *The Hangover Part II* (2011). Both Lego and Philip Morris withdrew their toys and cigarettes, respectively, following protests over the misappropriation of Māori ICH. These products were deemed to have misappropriated Māori ICH and both companies chose not to incorporate images and names from Māori ICH in future launches of their products. Furthermore, the CEO of Philip Morris issued an apology to the Māori people during a shareholders meeting in New York, which was televised nationally in New Zealand, where a spokesperson stated that "we sincerely regret any discomfort that was caused to Māori people by our mistake and we won't be repeating it." However, the company did not grant any monetary compensation to the Māori. By contrast, despite the New Zealand Ministry of Foreign Affairs and Trade advising Fiat that use of the haka in their advertisement "was culturally insensitive and inappropriate," the company indicated that it would proceed with the campaign.

In another case, the fashion designer Giovanni Guzmán used the traditional Guatemalan *Mayan* textile, in particular ceremonial designs, to dress Miss Guatemala in the Miss Universe competition without before asking for permission from the community. In the Guatemalan company "Maria's Bags" producing bags embodying Mayan designs and selling them all around the world without neither consent or benefits-sharing and even using the name "Maria" in a disrespectful way to designate indigenous women; in the *Instituto Guatemalteco de Turismo* (INGUAT) misusing the indigenous designs in the staff clothes and in souvenirs sold to tourists. Finally, in May 2016 the Mayan weavers represented by the AFEDES Association presented to the Guatemala State a legal action, alleging that those acts of exploitation violate the Constitution of the Republic of Guatemala, since the traditional textiles "commodification and cultural appropriation [...] are a threat to the culture, because it makes use and sells these weavings in a decontextualized way, without economically benefitting the creators of this art". In addition, these weavers presented a legislative initiative to reform five articles of the Guatemalan Copyright Law (Decree N. 33/98 and its reforms) and the Industrial Property Law (Decree N. 57/2000) to better protect all the Mayan textiles. The Mayan weavers based this initiative on the Constitution, Article 31 of the United Nations Declaration about the right to property, and Article 23 of the Convention 169 of the International Labor Organization about the right to self-determination. This legislative initiative aims at the recognition of the indigenous communities as the authors and owners of their designs. Also, that any third-party use and exploitation of these designs shall be prohibited, unless perpetrated with the prior and informed consent of the community. Furthermore, that a percentage of the monetary incomes has to be transferred to the community creators as a mean of benefit sharing. However, this reform, in the words of the community, is only the first step, because the main purpose is to even obtain, in the future, a stronger *sui generis* protection for Mayan textiles. In a recent case of cultural appropriation, Papercut Patterns, a New Zealand company of pattern creators, labeled a new pattern of jackets as 'Kochi Kimono'. The pattern of the jacket labeled as 'Kochi Kimono' 'was a square-cut short jacket, with optional side ties'. Influenced by the creation and advertisement of 'Kochi Kimono' jackets on social media, the Instagram followers of Papercut Patterns, specifically, inexperienced seamstresses started creating their own patterns for jackets and shared their results on the social media, Instagram, 'tagged with #Kochikimono' comprising the name of a

traditional Japanese dress, 'Kimono'. Kimono is considered the national dress of Japan with loose long-sleeves and typically tied with a sash. This popularity of tagging a particular design of jackets as '#kochikimono' continued for eighteen months until Helen Kim, an Asian-American woman, pointed out that labeling any design of jacket as 'Kimono', a name of a Japanese traditional dress, 'without any connection beyond a certain boxiness about the sleeves to the traditional Japanese dress, was cultural appropriation.' There was much debate on the topic of cultural appropriation on social media regarding 'Kimono' as well as an interview of Helen Kim, who initiated the awareness of cultural significance of the design of traditional Japanese dress, 'Kimono' by a leading newspaper company, the Guardian. Following this awareness campaign on social media as well as print media, Papercut Patterns, the New Zealand company of pattern creators promised to rename the pattern of the jacket in question to 'kochi' and also publicly thanked everyone 'who let [them] know the mistake [they] made in giving one of [their] patterns a culturally sensitive name'.

In another case of cultural appropriation of 'Kimono', U.S. television celebrity, Kim Kardashian West launched 'a new, solution-focused approach to shape enhancing underwear' trademarked as 'Kimono Solutionwear'. Following which Japanese people shared their concern on social media that the trademark 'Kimono Solutionwear' for lingerie 'disrespects traditional clothing.' Specifically, Yuka Ohishi, a Japanese woman informed BBC that '[they] wear kimonos to celebrate health, growth of children, engagements, marriages, graduations, at funerals. It's celebratory wear and passed on in families through the generations.'. As a sign of protest, Kardashian West's social media accounts received hundreds of comments, 'many using the hashtag #KimOhNo, expressing distaste for her word choice'. Even the mayor of Kyoto, Japan, Daisaku Kadokawa, sent Kardashian West 'an open letter asking her to reconsider her attempt to trademark a name that includes the word "kimono."'. In addition, he informed Kim Kardashian West that Kyoto, Japan, is working towards registration of the term 'kimono' on UNESCO's Intangible Cultural Heritage list and as such the term "should not be monopolized.". Although consequent to this interference by the mayor of Japan, Kim Kardashian West removed the term 'kimono' from the trademark for 'a new, solution-focused approach to shape enhancing underwear', in Tokyo, industry minister Hiroshige Seko informed that Japan "will continue to watch the situation.". As explained above, only one of several instances of cultural appropriation by Kim Kardashian West was stopped. For instance, '[a]ccording to public records available from the U.S. Patent and Trademark Office, trademark applications for names such as "Kimono Intimates," "Kimono Body" and "Kimono Solutionwear" have been filed and examined since April 2018. Kardashian West's Los Angeles-based lingerie line company is Kimono Intimates Inc.'

In a landmark case, German rock group Enigma misappropriated a song that belongs to the tradition of Taiwan's Amis tribe and is customarily performed by a host to welcome guests. This traditional song was sung by an elderly Amis aboriginal couple named Difang and Igay Duana and performed in Europe during their 1988 tour. Subsequently, the song was illicitly recorded during a performance in France by the Maison des Cultures du Monde and the EMI record company. The Enigma group remixed the song using a two minute sample of the Duanas' voices. The German rock group then renamed the song *Return to Innocence*. In 1996, the song was used for the Olympic Committee's promotional advertisement, which was seen by people in Taiwan and by the Amis as part of the Olympic promotion on CNN and other US networks that were broadcast worldwide. *Return to Innocence* entered Billboard Magazine's International Top 100 and stayed there for 32 straight weeks but the Kuos and the Amis tribe were never informed about the use of their voices by Enigma or by EMI records. The Duanas asked for recognition as the original artists and requested to perform the song at the opening ceremony of the Olympic Games in Atlanta. When this didn't materialise, the Duanas began an out-of-court legal battle not only to obtain financial compensation and recognition, but also to protect the cultural heritage of the whole tribe. However, as of today, the Duanas and the Amis "have received neither credit nor payment for being the star singers." The Maison des Cultures du Monde did eventually agree to pay a symbolic fee of FRF15,000 (less than US\$3,000), after the Enigma CD was released to the Chinese Folk Arts Foundation which brought the Amis group to Europe for the first time. But due to the current dispute over who (if anyone) really owns the copyrights and related rights over the music of the Amis people, the money has remained in the Foundation, and has not been given to the indigenous people who performed in Europe.

10. Cont. Combining IPRs with heritage-sensitive marketing protection strategies.

Labelling schemes

Marketing strategies shall be adopted together with IPRs measures to effectively safeguard ICH. Among the marketing measures those related to labelling schemes are relevant. These schemes, in fact, pursue the same goals as IPRs, namely helping producers to achieve higher prices for 'traditional' products and consumers trusting producers, thus integrating into traditional marketing, which usually adopted the perspective of the modern corporation, consumption approaches, namely 'consumer culture theory' (CCT). These, in fact, provide an anthropologically and sociologically understanding of marketplace dynamics, entrepreneurship and collective approaches to branding, namely alternative market economies built on ethical and sustainable principles that benefit vulnerable individuals and communities. Thus, association of products with networks characterised by labelling systems reduces the costs to consumers of determining credence attributes. Labelling and quality schemes administered by trusted agencies for instance can thus be used to establish the nature of specific credence attributes. All these labelling systems, then, help to raise the value of 'traditional' products in the eyes of consumers by providing trusted signposts about what credence attributes matter.

Among these marketing strategies stand for instance food security labelling systems, such as Codex Alimentarius, which is an international standard-setting organization whose members are states. The Codex Alimentarius Commission was created in 1962 as a joint undertaking of the UN Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO). Membership is open to all FAO and WHO member states and now numbers 188 (including the EU). It has a dual function: "protecting the health of the consumers and ensuring fair practices in the food trade (Codex Alimentarius, 2015)." To this end, it has a Commission which is specifically charged with adopting advisory multilateral "good practice" standards on such matters as the composition of food products, food additives, labelling, food processing techniques, and inspection of foodstuffs and processing facilities.

Other labelling schemes were created by the International Organization for Standardization (ISO). This non-governmental organization was constituted immediately after World War II with headquarters in Geneva for coordinating standardizing efforts by private business. For instance, the U.S. member of ISO is the American National Standards Institute (ANSI), a private entity. Thus, for the United States, the primary, although not sole, participants in ISO processes are representatives of private industry. ISO standards are both adopted by and addressed to private parties.

Other labelling schemes are purely private voluntary standards, ranging in coverage from potentially global consortia to individual firms such as importers and retailers. All these systems related to foodstuffs are now voluntarily labeled for any number of attributes, including organically produced; sustainably produced; natural or all-natural; GMO-free; antibiotic-free; hormone-free or no hormones added; free-range or cage-free; grass-fed or pasture-raised; and humane raised and/or handled. Other labelling systems raise awareness on locally- produced food, lending greater importance to the locality of origin. Such claims or labels are specific to foodstuffs, but there are many others for non-food articles in commerce, including those awarded by private voluntary certifying organizations. Examples include fair trade coffee and sustainably harvested timber.

These heritage-sensitive marketing protection strategies help raising awareness on the protection system not only in the country of origin of the product at stake but also abroad. In fact, all these labelling systems help to raise the value of 'traditional' products in the eyes of consumers and of potential competitor. In addition, these labelling and quality schemes administered by international agencies, are recognized and trusted at an international level. This, may discourage infringements of traditional products protected by them, and favour a better protection of the ICH cross-border.

Yet, in contrast to intellectual property rights, including GIs, these labelling systems to assure for instance food safety are generally non-binding and hortatory in nature. They are voluntary standards

adopted by consensus. In contrast to some of the output of intergovernmental organizations, the standards are strictly hortatory and are not binding under international law. Thus, their enforcement is much weaker than that related to IPRs, such as GI. In fact, unlike IPRs, the labelling schemes at stake don't have a harmonized legal framework to prevent infringements and favour enforcement, like that instituted by the TRIPs agreement for IPRs.

It is true that these labelling schemes may be protected applying rules on unfair competition. Yet, these rules imply for instance that the plaintiff demonstrates that he started and invested on a commercial activity, that the competitor unfairly copied. Yet, if a certificate typically demonstrates the existence of an IPR in favour of its owner, no administrative acts certify the existence and investments on a commercial activity. In addition, IPRs are typically presumed to be valid, unless the defendant demonstrates the opposite. So, the burden of the proof lies with the plaintiff in case of unfair competition, whereas with the defendant in case of IPRs. Furthermore, domestic procedural contexts are typically more favourable to enforcing IPRs, than competition activities even if under labelling schemes.

Thus, there is a highly disparate treatment of indications of quality and safety included in labelling schemes or in GIs. Yet, GIs are treated for trade purposes as having a proprietary component, they are in fact intellectual property rights. Thus, it could be advisable to extend such an approach to include in the GIs specifications regulation designed to address other attributes of food safety and quality, so that those regulations could even be incorporated into the existing regime of GIs and treated as intellectual property.

For these reasons, it is advisable to associate to the aforementioned labelling schemes IPRs protection. A labelling scheme with associated intellectual property protection is for instance the UNESCO emblem, which as already mentioned is registered as an IPR. Another labelling scheme with associated IPRs protection is the organic production logo of the European Union (hereinafter "Organic logo of the EU"). This logo is regulated by the Commission Regulation (EU) No 271/2010 of 24 March 2010, amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007, as regards the organic production logo of the European Union. The logo aims at better identification by the consumer of organic products falling under the EU regulations concerning the organic production. Recital 7 of the Regulation at stake indicates that "in order to enable the use of the logo as soon as it is compulsory in accordance with the EU legislation and to ensure the effective functioning of the internal market, to guarantee fair competition and to protect consumer interests, the new organic production logo of the European Union was registered as an Organic Farming Collective Mark in the Benelux Office for Intellectual Property and is consequently in force, usable and protected. The logo will also be registered in the Community and International Registers".

Another labelling scheme with associated IPR protection is Slow Food. Slow Food is a global, grassroots organization that aims to prevent the disappearance of local food cultures and traditions. Founded in 1989, it builds on the previous experience of Arci Gola, an association created in Bra (Piedmont, Italy) in 1986. As indicated by its name, Slow Food exists to counteract the rise of fast food culture, the prevalence of processed food, industrialised agrobusiness and the rules of the global market by promoting food that is good (that is, healthy and tasting good), clean (produced with low environmental impact and with animal welfare in mind), and fair (respecting the work of those who produce, process and distribute it). To achieve this mission, Slow Food promotes biodiversity (in cultivated and wild varieties) as well as diverse methods of cultivation and production; promotes a sustainable and environmentally friendly food production and consumption system; spreads taste education and responsible consumption; and connects producers of quality foods with conscious consumers (called 'co-producers') through various events and initiatives.

Since its beginnings in Italy, Slow Food has grown into a global movement involving millions of people in over 160 countries. As an umbrella organization, Slow Food guides and empowers over 1,500 local chapters and 2,400 food communities. Slow Food oversees projects such as the Ark of Taste, Presidia, and Slow Food 10,000 Gardens in Africa, and the Terra Madre network. With particular regard to the Presidia project, it aims to support quality food production at risk of extinction; protect unique regions and ecosystems; recover traditional processing methods; and safeguard native breeds and local plant varieties. The Presidia are now one of the most effective instruments for implementing the Slow Food's strategy on agriculture and biodiversity. The project started in 1999 when, after cataloging the first few hundred products at risk of extinction through the Ark of Taste, Slow Food decided to take an extra step and work directly with communities of small-scale producers, providing them assistance to improve production quality and identify new market outlets, and organizing exchanges with producers internationally through Slow Food events. At the end of 2016, there were over 514 Presidia in more than 67 countries around the world (405 in Europe; 49 in the Americas; 41 in Africa; 19 in Asia and Oceania). Today, the number has grown to 522, involving more than 13,000 producers.

"Presidio Slow Food" is now a registered trademark (word mark) in the EU and Switzerland. It is owned by Slow Food Italia, a collective entity whose membership is open to everyone. In 2008, Presidio Slow Food was registered as an individual trademark (trademark no. 580366) in Switzerland by Slow Food Italia for Nice classes 16 (Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites ((except furniture)); instructional and teaching material ((except apparatus)); plastic materials for packaging ((not included in other classes)); printers' type; printing blocks), 25 (Clothing, footwear, headgear), 29 (Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible fats and oils), 30 (Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces ((condiments)); spices; ice), 31 (Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals; malt), 32 (Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages), 33 (Alcoholic beverages ((except beers)), 35 (Advertising; business management; business administration; office functions; organisation of trade fairs), 39 (Transport; packaging and storage of goods; travel arrangement), 40 (Treatment of materials), 41 (Education; providing of training; entertainment; sporting and cultural activities), 43 (Providing of food and drink; temporary accommodation). The same individual trademark has also been registered for the same classes by Slow Food Italia in 2008 as an EU trademark with the European Union Intellectual Property Office.

To obtain a license for using the Presidium trademark, producers must be united in an association (either a cooperative or a consortium) and accept the production protocol for their product. Each Presidium establishes a production protocol with producers to ensure traceability, artisanal methods and high quality, which is stricter than most PDO specifications. The protocols require producers to eliminate or reduce chemical treatments; use methods that respect animal welfare; defend native breeds and local vegetable varieties; use ecological packaging where possible; and favour the use of renewable energy. Each Presidium has two reference figures: the presidium coordinator, who is the leader or a member of the Convivium where the Presidium is found, with the role of coordinating and liaising between the producers and the regional and national Slow Food associations; and the producers' coordinator, nominated by producers, who is the guarantor of respect of the rules and protocol of the Presidium, and who liaises between the producers and Slow Food.

Each Presidium pays the Slow Food national office an annual license fee, which takes into account the economic value of the Presidium production the year before; the year the Presidium was launched; the geographical area; the number of producers involved; the production technique and the type of products. If the Presidium is very recent or is working in particularly difficult or marginal conditions, Slow Food does not ask for affiliation fees.

11. Cont. Arts Festivals and IP related Ethical and Cultural Protocols

Among the marketing measures that can be adopted together with IPRs tools to effectively safeguard ICH, those related to arts festivals are relevant. Art festivals aim at celebrating the world's rich and diverse cultures, bringing together time-honored traditions and modern creativity in the form of dance, music, theater, film, photography, visual arts, crafts, and much else. Arts festivals offer a unique cultural experience of a community's identity, providing an opportunity to revitalize and preserve cultural practices, and serving as a creative laboratory for contemporary performers. Also, arts festivals strengthen social inclusion, promoting intercultural dialogue and deeper understanding through shared experience, thus fostering social sustainable development of the intangible heritage of communities. In addition, arts festivals can generate sizeable longterm financial benefits and significant business and employment opportunities, thus fostering economic sustainable development of the ICH at stake.

Yet, organizing an arts festival is a complex undertaking encompassing many marketing and legal managerial strategies. From a legal perspective, an effective strategy designed to uphold the IP and cultural interests of all ICH stakeholders is central to the management of arts festivals. Conventional IPRs, as already mentioned, offer protection of the ICH concerned. Yet, complementary measures are needed, including cultural protocols, guidelines and notices. This effective IP management strategy, integrated to marketing strategies, fosters cultural respect and sustainable development of the ICH at stake.

WIPO is working to foster the protection of traditional knowledge and traditional cultural expressions, when represented and shared at arts festivals around the globe. This WIPO works include effective IPRs management and marketing strategies to address the challenges faced by organizers of arts festivals. WIPO, for instance, is assisting the Secretariat of the Pacific Community, the Council of Pacific Arts and Culture, and Solomon Islands on IP management strategies that arise when organizing the Festival of Pacific Arts. This event, held every four years in a different country, highlights the region's rich diversity of arts, culture and knowledge. WIPO's support includes advice on the use and application of conventional IPRs, as well as other measures to safeguard ICH interests in line with the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) and the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

In general terms, measures to safeguard festival's brand and identity, including both marketing and IP tools, are the registration of a trademark of the festival, the securing of a domain name, the development of a merchandizing program that defines the festival's product portfolio, the establishment of a sponsorship program and define levels of sponsorship and associated rights, of official retail outlets onsite and online and the monitoring of the online market for infringing products. These measures protect the festival's various artistic manifestations, including their culturally sensitive material, from unauthorized or inappropriate exploitation by others, and opportunistic businesses that free-ride on the festival's reputation and popularity. Examples of misappropriations of arts festivals related ICH are the sale of postcards reproducing images of a sacred dance, use of a video clip of a traditional performance in a tourism promotion campaign; a CD of illegally recorded original songs

inspired by traditional music; replicas of traditional dance costumes made using ancestral weaving methods; ritual face painting used out of context and in an offensive way.

To avoid these misappropriations of arts festival related ICH and to foster its sustainable development, marketing strategies shall be combined to an effective IP strategy, including copyright and trademark rights used in association with IP tools including contracts, cautionary notices, protocols and guidelines, notices, accreditation and access conditions.

In particular, cautionary notices shall be similar to the following: “no filming, photography or recording devices allowed.” These notices are typically placed onsite, or published on festival tickets, websites and official programs. They restrict unauthorized uses, protecting performers’ ICH. Oral warnings shall also be given prior to a performance. A media accreditation system outlining the terms and conditions of festival recordings and ensuring that representatives of the media provide details of the proposed use of festival recordings. Measures to monitor use of official broadcasts and detect infringements shall be developed.

Guidelines and protocols shall be developed, advising visitors and members of the media about the need to respect the ICH of festival participants. Protocols can ensure proper attribution to ICH bearers and achieve respect for the eventual sacred character of a performance. Such protocols might request the audience to “please exercise courtesy and sensitivity when taking photographs: seek the permission of the subjects” or may state “no use, adaptation or commercialization of ICH without the prior informed consent of traditional custodians.” WIPO for instance has an Indigenous Protocol site which publishes “Cultural Protocols for Indigenous Reporting in the Media”. These were created to reply to the need of ABC Indigenous Programs Unit, Radio and Online in conjunction with Indigenous staff and journalist in the ABC. Being aware that protocols for Indigenous communities have been ignored by many media outlets and journalists weren't aware that protocols existed or hard to find, this Indigenous Protocol site aims at assisting journalists, filmmakers, producers and documentary makers to understand the importance of abiding by Indigenous Protocols. The Protocol has been written as a guide to help bridge the gap between the needs of Television and Film makers and the Indigenous people and their customs.

Ethical codes of conduct and guidelines have also been developed in other contexts. For instance, with regard to academic researches on indigenous people different associations have developed their own sets of guidelines with different shapes and content depending on the perceived need of the specific research discipline. For instance, guidelines for Ethical Research in Australian Indigenous Studies were developed in 2012 by Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The Guidelines are currently under revision. The Guidelines comprise 14 principles grouped under the broad categories of rights, respect and recognition; negotiation, consultation, agreement and mutual understanding; participation, collaboration and partnership; benefits, outcomes and giving back; managing research: use, storage and access; and reporting and compliance. Comparative analyses of different ethical guidelines and codices related to indigenous peoples and local communities, especially with focus on traditional knowledge and cultural practices, have been carried out with focus on ethical concepts and principles within the codes and with the aim of discussing some of the challenges and opportunities in relation to their respective language and use.

12. Cont. Cease and desist letters and consumers’ boycotts

Among the marketing measures that can be adopted together with IPRs tools to effectively safeguard ICH, those related to out-of-court legal and marketing battles are relevant. Namely communities may adopt strategies consisting in sending cease and desist letters to the misappropriator. Communities may even adopt organized consumer protests on social media, calling

for a boycott of the product and parent company/brand. In particular, naming and shaming strategies to facilitate outcries on social media regarding the cultural appropriation. These letters and naming and shaming strategies may highlight the human rights violations perpetrated by the cultural misappropriation.

In a recent case, a misappropriation of the “Ceremonial Ritual de los Voladores” occurred. A letter was sent by the community to the misappropriator, namely a beer company Cerveceria Moctezuma based in Mexico and represented in the letter as being the daughter company of the Dutch company Heineken. The letter was sent to both companies the Mexican and Dutch ones, and emphasised that this ceremony is considered to be intangible cultural heritage by UNESCO since 2019. Such ceremony constitutes a dance associated with fertility performed by ethnic groups of Mexico and central America, in particular the Totonac people of the Mexican state of Veracruz. The ceremony objective is to express profound respect for nature and the spiritual universe, as well as the living harmony between both. Contrary to the cultural and spiritual value that the Ceremonial Ritual de los Voladores represents, the beer companies at stake included the images alluding to the ceremony in their labels of the beer *cervezaIndio*. Such misuse of the traditions was understood by the community, as indicated in their letter, as trivializing their cultural expressions and violating the protection given by UNESCO and its status of intangible cultural heritage. Thus, the community in the letter required the beer companies to immediately cease their misappropriations and indemnify community representatives. The letter based their petition on the Mexican relevant law on sui generis copyright, as well as on other international human right instruments. Despite this letter and the strong reaction of support for the community against the beer companies that the misappropriation originated, these companies did not behave in the expected manner and perpetrated their infringement. Therefore, the community started a legal proceeding in Mexico. This legal proceeding couldn't stop Heineken in perpetrating the infringement too, but originated the Mexican aforementioned general recommendation on the protection of the cultural heritage of indigenous people and communities of the Mexican Republic, that characterised the Ceremonial Ritual de los Voladores misappropriation as a human right violation.

In another case, a misappropriation of the Mevlevi Sema ceremony occurred. This ceremony is one of the oldest rituals of the Mevlevi Order, founded in 1273 in Konya (Turkey) by Mevlâna Celâleddin-i Rûmi. Since 2008, this ceremony has been inscribed in the United Nations Educational, Scientific and Cultural Organization (UNESCO) Representative List of the Intangible Cultural Heritage of Humanity. Prior to this, in 2005, UNESCO proclaimed the ceremony to be a Masterpiece of the Oral and Intangible Heritage of Humanity. The Mevlevi Sema ceremony is of great cultural, spiritual and religious significance to the Mevleviye community. Dancers use to receive 1001 days of reclusive training within the Mevlevi-houses where they learn about ethics, codes of behaviour and beliefs by practicing prayer, religious music, poetry and dance. After this training, they remain members of the order, but return to their work and families. This religious practice is universally recognisable by the image of the so-called Whirling Dervish. It is with great surprise that the world saw this image, together with the name of “Rumi”, reproduced on the bottles of a liquor that has no connection at all with the religious ceremony and is intended for commercialization to the public. The company Wijnhandel De filosoof advertised and distributed “Rumi Vodka with Persian spices” in several countries of the world, without having asked nor received any permission to use the image and the name related to the Mevlevi Sema ceremony. A letter was sent by 22nd Descendant of the Mevlâna Celâleddin-i Rûmi, the community, which notified Wijnhandel De filosoof that the commercial behavior infringes a number of legal provisions, inter alia, ‘use of the image of the Mevlevi Sema ceremony infringes the copyright and image rights of the Mevleviye community’, ‘Wijnhandel De filosoof’s use of our sign and name is a culturally insensitive misappropriation of the Mevleviye community’s intangible cultural heritage and has caused distress, discomfort and offence to the community’ and ‘Wijnhandel De filosoof’s use of the sign constitutes a violation of the Mevleviye community’s fundamental human right to intangible cultural heritage that is recognised and guaranteed under international and European Union law’. Contrary to the cultural and spiritual value that the Mevlevi Sema ceremony represents, the liquor company at stake included the images, namely, Whirling Dervish alluding to the Mevlevi Sema ceremony in their labels of the liquor “Rumi Vodka with Persian spices”. Such misuse of the traditions was understood by the community, as indicated in their letter, as trivializing their cultural expressions and violating the protection given by UNESCO and its status of intangible cultural heritage. Thus, the community, 22nd Descendant of the Mevlâna Celâleddin-i Rûmi, in the letter required the liquor

companies to immediately cease and desist their misappropriation. Further, the letter from the community reserved the right to take appropriate legal action against Wijnhandel De filosoof. The community also notified of their intention of bringing this matter to the attention of the Turkish Government, which is greatly concerned about the preservation of the national intangible heritage, to gain the support of Government for the community action. However, the company, Wijnhandel De filosoof, did not reply, instead they posted the letter at stake on the social media in a very disrespectful manner.

In this case, the cease and desist letter didn't produce any positive results for the concerned community. Thus, a boycott strategy could also serve the purpose. Yet, despite Rumi being a well-known figure, most Muslim devotees might not be alcohol drinkers. So, a boycott might not threaten commercially the company and might have limited effect on sales. On the other hand, issues of disrespect towards a religion might be handled by the corporate social responsibility, rather than the sales or marketing department. Thus, this marketing strategy might eventually work, particularly if adopted in tandem with a legal strategy.

In case where out-of-court battles are not achieving the expected results, because the misappropriator reply to these letters in a non-respectful way, court enforcement seems to be necessary. Yet, since typically misappropriations occur abroad a domestic proceeding in the country of origin of the traditional knowledge at stake would not be necessary either, and a cross-border legal enforcement strategy in-court shall be adopted. As will be explained, cross-border enforcement, however, is expensive and difficult.

13. Cont. Consolidation of litigation to cross-border enforce IPRs on ICH

As already mentioned misappropriations typically occur outside the State of origin of the ICH. The UNESCO Convention aims at safeguarding ICH both at the domestic and at the international level, but lacks rules on transnational misappropriation cases. No international treaty on sui generis protection of TK and therefore ICH across borders is currently in force. Thus, to safeguard ICH across borders, States Parties have adopted IPRs, in particular GIs. Yet, since IPRs are territorial and provide protection only in the country for which they are registered, adopting IPRs to safeguard ICH from transnational misappropriation raises two interrelated problems.

Firstly, IPRs on ICH must be registered not only in the country of origin, but also in each and every other State for which protection is required. So, for instance States Parties to the Convention have registered collective and certification trademarks or GIs, not only for their respective territory where the ICH originates, but also for several other jurisdictions. This is in order to protect their ICH not only in its country of origin, but also in other relevant territories, such as the EU. For example, the registration of EU GIs in the Database of Origin and Registration (DOOR) kept by the European Commission and the publication of said registration in the EU Official Journal gives rise to unitary IPRs, the effects of which cover the entire EU territory under Article 118(2) of the Treaty on the Functioning of the European Union (TFEU). Italy has acquired unitary EU IPRs through the registration of the "Pantelleria", "Moscato di Pantelleria" and "Passito de Pantelleria" PDO, and the 'Pizza Napoletana' TSG. Italy has also registered the "Cremona Liuteria" collective trademark not only in Italy, but also in another 33 countries. In addition, the trademark "We Are What We Eat MedDiet Mediterranean Diet" is registered in the EU.

Secondly, IPRs must be enforced not only in the country of origin, but also in each and every other States for which protection is required. So, for instance States Parties to the Convention that are non-EU member States, which have registered domestic IPRs and EU IPRs, must enforce these rights not only in their country of origin but also in every State of the entire EU territory to effectively protect their ICH from transnational misappropriations. So, the domestic GIs registered for the ICH element of the Republic of Korea ("weaving of Mosi"), can only safeguard its respective ICH in the Republic of Korea, not abroad. Similarly, the parallel GIs, certification and collective trademarks registered on the ICH elements of Italy ("Violin craftsmanship") and Morocco ("Argan") provide protection for the countries of registration only. Therefore, these collective trademarks provide protection for each of

the 34 countries for the Italian element and 29 countries for the Moroccan element. They do not, however, extend to other States.

Yet, with regards to GIs, certification and collective trademarks registered on the ICH elements of their respective States in more than one country, their enforcement in each country of registration is extremely costly and wholly ineffective.

This is well represented by the following transnational cases concerning misappropriated elements that despite not being inscribed or nominated to be inscribed on the UNESCO ICH Lists, are nevertheless related to intangible traditions and culture, and therefore are understood as being included in the category of TK *lato sensu* intended. Examples of cases relating to the alleged misappropriation of intangible cultural expressions concern Indian “Darjeeling Tea” in Germany, Israel, Norway, Sri Lanka, Japan, France, Russia and the U.S. and German “Genuine Bavarian Beer” and “Bayerisches Bier” in Italy, Spain, France and Australia.

In the first example, the Tea Board of India, the sole representative of tea producers in India, registered the sign “Darjeeling Tea” as a GI and a certification trademark in India and in various other countries including the U.S., Canada, Japan, Egypt and the United Kingdom. The “Darjeeling Tea” sign has offered distinctive characteristics of quality, flavours and a global reputation for more than a century, due to it being cultivated, grown and produced in the West Bengal district of Darjeeling over 2000 meters above sea level. Indian tea producers export extremely significant quantities of their Darjeeling tea worldwide.

In the second example, Bayerischer Brauerbund e.V. (Bavarian Brewery Association) registered “Bavarian” and “Bavaria” and their German language equivalents, as GIs in the EU and in several other jurisdictions, including Australia. The Bavarian Brewery Association in Munich represents the interests of over 240 breweries located in Bavaria, Germany. The relevant GIs indicate that the beer originates in Bavaria and therefore possesses a quality, reputation or other characteristic attributable to said origin. Bavarian breweries export significant quantities of beer worldwide, in particular to Australia and throughout Europe, especially Italy.

Country-by-country enforcement of the GI and certification trademark “Darjeeling Tea” was carried out by the Tea Board of India in Germany, Israel, Norway, Sri Lanka, Japan, France, Russia and the U.S. (i) In Japan, the Tea Board of India first filed an action of invalidation against a Japanese company “over the registration of the Darjeeling logo, namely Darjeeling women “serving tea/coffee/coca/soft drinks/fruit juice” in the Japanese Patent Office. This action was successful: the JPO Appeal found the registration invalid for being contrary to public order and morality. Second, the Tea Board of India opposed the application for “Divine Darjeeling” filed by another Japanese company. This action was partially successful: the action of invalidation was dismissed by the JPO Opposition Board on the ground that the trademark “Divine Darjeeling” was not misleading or descriptive of the quality of the goods; however the revocation of the trademark on the grounds of non-use succeeded, because the Japanese company did not prove use of the trademark in Japan. Third, the Tea Board of India brought an action of invalidation against a Japanese trademark registration of “Darjeeling tea” with a map of India by a third Japanese company, claiming that the registration was contrary to public order and morality. This action was partially successful: it was rejected because “the written English character ‘Darjeeling tea’ and the map of India for the goods of Darjeeling tea are used as an indication of the origin and quality of Darjeeling tea and will not harm the feelings of the Indian people”. Yet, the revocation of the trademark on the grounds of non-use succeeded because the Japanese company in this case did not prove use of the trademark in Japan. (ii) In France, despite Indian law protecting French GIs, there is no reciprocity for Indian GIs in France. Under French law, opposition to a trademark application, where the trademark is similar or identical to a GI, is prohibited if the goods in the class for which the trademark is registered are different to those of the GI. Therefore, despite the Tea Board of India protesting, “Darjeeling” has been registered as a trademark in respect of goods in several classes, amounting to misappropriation of the “Darjeeling” GI. (iii) In Russia, the Tea Board of India filed an application against use of “Darjeeling” by a Russian company. This application was objected on the grounds of conflict with the same trademark that had been registered earlier. However, the objection was overruled by the Russian Patent Office, who accepted the Tea Board of India's application. (iv) In

the U.S., the Tea Board of India filed an application for an unauthorised use by its licensee in the U.S. of “Darjeeling nouveau” relating to certain goods and services. This application was successful as it was found that confusion of the trademarks was likely.

Country-by-country enforcement of the GIs “Genuine Bavarian Beer” and “Bayerisches Bier” was carried out by Bayerischer Brauerbund e.V. (Bavarian Brewery Association or BBA) against the Dutch brewer Bavaria N.V. (“Bavaria co”) in Germany, Italy, Spain and Australia. “BAVARIA HOLLAND BEER” was registered by Bavaria with German priority from April 1995 and Italian priority from October 1995. BBA challenged the validity of Bavaria co’s trademark in several EU member States, such as Germany, Italy and Spain, and non-EU countries, such as Australia. (i) In Germany, BBA successfully challenged Bavaria co’s trademark. After referring some legal questions to the European Court of Justice (EUCJ), the German Federal Court referred the case back to Oberlandesgericht München (OLG Munich). In 2012, OLG Munich determined that national German trademark law protected the term “Bayerisches Bier” in the period before it was registered for protection internationally. OLG Munich’s ruling held that no further appeals were available to Bavaria co, but they have since filed an appeal against this denial of leave to appeal. (ii) In Italy, Bavaria co registered their figurative trademark in 1971, whereas the GI “Bayerisches Bier” was not registered by BBA until 2001. In 2011, the question of the interaction between this GI and the “BAVARIA” trademark was referred to the EUCJ by the Court of Appeal of Torino. It was concluded that a bona fide, prior registration of a trademark, that did not mislead as to the origin of the goods, could not take advantage of the reputation of a later GI. Applying this to the current case, the Court of Appeal held that the Bavaria co trademark was valid and legitimately used, a decision which was later upheld by the Court of Cassation in September 2012. (iii) In Spain in 2009, the Spanish Supreme Court upheld the Provincial Court of Madrid’s 2004 judgment against Verband Bayerischer Ausfuhrbrave Reien, EV. It was concluded that 1) in Spanish, “Bavaria” is not meaningful enough to evoke a sufficiently intense and precise connection with Bavaria the territory, thus generating the belief that “Bavaria” beer originates from there; and, 2) the two parties’ trademarks are visually, aurally and conceptually different enough to prevent confusion between them. (iv) In Australia, the BBA filed an opposition against Bavaria co registering a trademark for beer that includes the word “Bavaria”, three references to Holland and a number of non-word elements. This opposition was rejected and the trademark was registered since it was not substantially the same or deceptively similar to the BBA GIs, and therefore did not deceive or cause confusion. Indeed, the Federal Court of Australia concluded that the trademark “Bavaria” was inherently adapted to distinguish Bavaria co’s beer from that of the Bavarian Brewery Association.

As these examples clearly show, IPRs registered in various countries are currently enforced in each and every one of those countries, which, as already mentioned, is not effective. In particular, such a country-by-country enforcement of the relevant parallel IPRs obliges the interested parties, intellectual property right owners or alleged infringers, to defend as many proceedings as there are registered IPRs according to a mosaic approach. This approach leads to a multiplication of parallel proceedings, raising the risk of conflicting judgments, the costs of litigation, and generating inequalities between big multinational companies and medium-small sized enterprises. ICH bearers then may not be prepared to adopt such an approach: namely to register and enforce IPRs -such as GIs - not only in their domestic country but also in all other States for the territories of which they require their ICH to be protected.

To effectively safeguard ICH, not just in the country of origin but also in other countries, IPRs should be enforced cross-borderly. This could be achieved by consolidating proceedings before a single court, ideally applying a single law. Private international law (“PIL”) in transnational cases determine which court is competent to adjudicate and according to which law. Regarding cross-border GI cases, for instance, PIL norms may grant jurisdiction to a single court, allowing for a consolidation of the relevant multi-State legal proceedings. Also, PIL norms may designate the law of the country of origin as the applicable law, allowing the competent court to apply one law to solve the multi-State litigation proceedings.

Among the PIL norms that grant international jurisdiction to the court of just one of the various States involved, are the relevant EU PIL norms. As already mentioned, even though the QS Regulation is exhaustive, it does not prevent the application of national laws because it must still be integrated. In fact, with particular regard to GI infringement, the QS Regulation establishes that EU member States

shall take all appropriate administrative and judicial measures to prevent or stop the unlawful use of GIs that are produced or marketed in that member State, designating the responsible authorities. Thus, the QS Regulation takes into account domestic enforcement of GIs in purely national infringement cases. However, the QS Regulation does not establish any provision related to the cross-border enforcement of GIs in transnational infringement situations. In particular, unlike all other Regulations on unitary IPRs, the QS Regulation does not include any rules on international jurisdiction and applicable law and therefore needs to be integrated.

With regards to applicable law, the QS Regulation is integrated by the aforementioned international treaties on GIs that determine the application of the law of the State of origin (*lex originis*) to issues such as the GI's existence, ownership, infringement and remedies. In contrast, for disputes related to IPRs other than GIs, the law of the State for which the protection is requested (*lex loci protectionis*) applies under the EU Rome II Regulation.

With regard to international jurisdiction, the QS Regulation is integrated by the EU Brussels system, as well as by the Lugano Convention. The Brussels system internationalises cross-border intellectual property rights litigation, concentrating adjudication of disputes before a single judicial authority even in cases of multi-State infringement and reducing the risks of conflicting judgments and the inequalities between different players. In fact, it is true that this system establishes an exclusive jurisdiction rule, according to which international jurisdiction, in cases of registration or validity of patents, trademarks, designs and other registered IPRs, lies exclusively with the courts of the member State of deposit or registration. This exclusive jurisdiction rule requires proceedings related to registration or validity of IPRs to be brought before each and every country of registration. However, the Brussels system limits the scope of the (exclusive) jurisdiction of the courts of the State granting the IPRs to disputes that imply changes in the administrative acts of registration (i.e. validity of registered IPR claims). In contrast, the same system allows other courts, such as those at the defendant's domicile or at the place of the illegal action, to adjudicate other multi-State parallel IPR disputes which therefore could be consolidated before a single competent court. In addition, the Brussels system's exclusive jurisdiction rule may be applicable to an invalidation of a trademark registered in breach of a GI under Art. 14.1 of the QS Regulation, but it does not apply to claims concerning GIs. In fact, exclusive jurisdiction requires that the registration took place at the national level, whereas the GIs registration under the QS Regulation takes place at the EU level. Also, as already mentioned, GIs cannot become generic or declared invalid and therefore disputes related to GIs cannot concern their validity and do not fall into the exclusive jurisdiction rules, which address validity only. Thus, as long as the relevant cross-border IPRs disputes, in particular those concerning GIs, are not those falling into the exclusive jurisdiction rule, the Brussels system allows for their consolidation before a single competent court.

In sum, transnational disputes concerning IPRs which cannot be submitted to a (international) court competent to adjudicate the case in its entirety may fall into the exclusive jurisdiction rule of the Brussels system. This rule leads to country by country enforcement of the IPRs at stake, and therefore to multiple parallel proceedings, with risk of conflicting judgments and high litigation costs. In contrast, transnational disputes concerning GIs do not fall into the exclusive jurisdiction rule of the Brussels system. Thus, country by country enforcement of the GI at stake is not imposed by any (international or) EU norm and therefore consolidation of the relevant litigation can occur, with the advantage of avoiding conflicting judgments and high litigation costs.

This is in line with recent international academic proposals, that to promote consolidation of cross-border IPR litigation even further are limiting the scope of exclusive jurisdiction rules. These proposals serve as a model for future negotiations of an international agreement on intellectual property and private international law, as well as for amendments to the Brussels system. First, these discussions resulted in the adoption of four sets of principles, namely the ALI Principles; the CLIP Principles; the Transparency Proposal; and the Joint Japanese-Korean Proposal (hereinafter: the four sets of principles). Only the CLIP Principles explicitly cover GIs, by being applied *mutatis mutandis* to GIs.¹ It is, however, submitted, that these Principles are applicable without reservation to the protection of GIs under the condition that this protection can be qualified as an exclusive right. This condition is certainly met under the QS Regulation since Article 4(b) expressly characterises GIs as (EU unitary) IPRs.

Second, in November 2010 the ILA instituted a Committee on 'Intellectual Property and Private International Law'. Building upon the four sets of principles, this Committee works towards adopting

guidelines on intellectual property and private international law, which could serve as a model for future international agreements promoting a more efficient adjudication of transnational intellectual property disputes. The proposed scope of the ILA Guidelines includes GIs.

All sets of principles and the ILA Guidelines allow for the consolidation of multinational GI related claims, limiting the scope of exclusive jurisdiction rules. This is based on general jurisdiction norms; on overcoming exclusive jurisdiction in cases related to validity issues incidentally raised; on establishing that those issues can be brought before a court of a State other than that of registration, provided that the judgment on validity would have *inter partes* effect; and on allowing for the adjudication of a GIs multi-State infringement in its entirety by a single court.

In synthesis, to safeguard ICH, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage was adopted in 2003. This Convention aims at safeguarding ICH both at the domestic and at the international level, but lacks rules on transnational misappropriation cases. To safeguard ICH across borders, States Parties have adopted IPRs, in particular GIs. Yet, domestic registrations of GIs cannot safeguard ICH globally. In fact, save in cases where these GIs registered in the country of origin are recognised and enforced abroad based on specific bilateral or multilateral treaties, GIs must not only be registered in their country of origin, but also in other jurisdictions.

And so, certain States Parties have registered GIs, not only for their respective territories, but also for other countries. In particular, EU GIs were also registered by non-EU member States. However, multi-State registrations of GIs still cannot safeguard ICH transnationally. In fact, the parallel GIs registered in many jurisdictions must currently be enforced in each and every country of registration. This mosaic approach should be followed apparently in the case of EU GIs also, since the QS Regulation does not establish a system of cross-border enforcement of GIs, but shall be integrated by the EU Brussels system, and particularly by its exclusive jurisdiction rule that implies a multiplication of parallel proceedings, with risk of conflicting judgments, high costs of litigation, and inequalities between parties. This could be particularly true where IPRs owners are ICH bearers, and therefore communities, groups or individuals that may not be truly prepared to register and enforce IPRs not only in their domestic country but also in all other States for the territories of which they require their ICH to be protected.

Yet, the Brussels system's exclusive jurisdiction rule does not apply to claims concerning GIs. In fact, exclusive jurisdiction requires that the registration took place at the national level, whereas the GIs registration under the QS Regulation takes place at the EU level. Also, GIs cannot become generic or declared invalid and therefore disputes related to GIs cannot concern their validity and do not fall into the exclusive jurisdiction rules, which address validity only. Thus, as long as the relevant cross-border IPRs disputes, in particular those concerning GIs, are not those falling into the exclusive jurisdiction rule, the Brussels system allows for their consolidation.

In sum, unlike transnational disputes concerning IPRs, those on GIs do not fall into the exclusive jurisdiction rule of the Brussels system. Thus, country by country enforcement of the GI at stake is not imposed by any (international or) EU norm and therefore consolidation of the relevant litigation before a single competent court can occur, with the advantage of avoiding conflicting judgments and high litigation costs. This would be in line with recent international academic discussions, that to promote consolidation of cross-border IPR litigation even further are limiting the scope of exclusive jurisdiction rules. In particular, that of the International Law Association Committee on Intellectual Property and Private International Law.

Chapter II

Recommendations for a sustainable strategy of IPRs on Alpine food heritage

14. Sustainable strategy of IPRs adoption for Alpine food heritage

IPRs are already associated to ICH concerning the food supply chains of the Alpine area as indicated by the tables presented as Attachment I, which indicate the nature of the IPRs associated to ICH, relevant regulations, specifications and social use. Clearly this indicates that various ICH elements already adopt IPRs as safeguarded measures. Therefore, part of the traditional arts related to food and foodways in the Alpine Region is already protected by IPRs.

Since IP protection constitutes a relevant safeguarding measure to prevent/reduce the risk of illegal exploitation and favour the sustainable commercialisation of this ICH, the adoption of IPRs by various ICH elements related to Alpine Food Heritage is in line with the UNESCO Convention and the inscription of Alfoodways in the Representative List of the Intangible Cultural Heritage of Humanity. This inscription will imply the development of a safeguarding plan that includes a comprehensive IP heritage planning framework in the Alpine area, which is still missing. This comprehensive IP plan is needed to enhance the value of Alfoodways heritage, supporting modern techniques and contributing to the attractiveness and sustainable development of the area. This comprehensive framework will encourage access to Alfoodways heritage, and give examples of community governance models and interdisciplinary methodologies for the integrated management of IP and intangible heritage. In addition, this comprehensive IP framework will be focused to support heritage-sensitive marketing strategies. As such, the IP protection comprehensively framed will integrate intangible heritage management with the sustainable social and economic development of Alfoodways.

In this framework, Guidelines defining collective IPRs suitable for Alpine food heritage chains and selected measures to prevent/reduce the risk of illegal exploitation and favour the sustainable commercialisation of ICH will be developed by the following pages.

15. Guidelines defining collective IPRs strategies suitable for Alpine food heritage chains

The following recommendations are developed for the various target groups involved in the integrated governance frameworks related to the Alpine food heritage, including local, regional, national authorities, EUSALP, communities. These recommendations will help communities and their governance systems to develop a sustainable strategy of IPRs adoption for Alpine food heritage. This will enhance the value and sustainability of such heritage. The recommendations will be called Guidelines.

Guideline 1.

IPRs shall be adopted to protect ICH.

Guideline 2.

IPR shall be carefully selected among those capable of protecting ICH, including collective trademarks and geographical indications lato sensu intended.

Guideline 3.

IPRs adopted to protect ICH shall favour inclusive multilevel governance systems engaging and empowering communities.

Guideline 4.

IPRs adopted to protect ICH shall be capable of assuring environmental sustainable development, protecting biodiversity and preventing natural catastrophes.

Guideline 5.

IPRs adopted to protect ICH shall favour economic sustainable development, mitigating and reducing commercialisation risks, including:

- e) ICH ‘freezing’, standardisation and decontextualization
- f) ICH over-commercialisation
- g) ICH authenticity claims
- h) ICH misappropriations.

Guideline 6.

IPRs adopted to protect ICH shall be accompanied by heritage-sensitive marketing strategies.

Guideline 7.

IPRs adopted to protect ICH shall be accompanied by cultural and ethical protocols.

Guideline 8.

IPRs adopted to protect ICH shall be accompanied by cross-border enforcement strategies.

16. Selected measures to prevent/reduce the risk of illegal exploitation and favour the sustainable commercialisation of Alpine food heritage.

The following measures are developed for the various target groups involved in the integrated governance frameworks related to the Alpine food heritage, including local, regional, national authorities, EUSALP, communities mentioned in section 1. These measures will help communities and their governance systems to prevent/reduce the risk of illegal exploitation and favour the sustainable commercialisation of Alpine food heritage. This will enhance the value and sustainability of such heritage. These measures consist in a set of IPRs material on Alpine food heritage and other ICH elements inscribed in the UNESCO lists and constituting the aforementioned best practices. The set of IPRs material consists in guided presentations of a comparison of the selected specifications of PGI, PDO and TSG, and regulations of collective trademarks. In addition, the set of IPRs material includes a guided explanation on selected procedures relevant to register PGI, PDO, TSG and collective trademarks.

(i) Selected PGI specifications

Typically, traditional products are strictly linked to a territory and a production receipt. IPRs whose functions include certifying the link between a product and its territory as well as a production method, include PGI. PGI certify that a product originates from a specific geographical area, its characteristics are attributed to that particular geographical area and that at least one of its production steps takes place in this defined geographical area.

Specifically, a EU PDO serves to identify a product: a) originating in a specific place, region or, in exceptional cases, a country, b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and c) whose production entirely takes place in the defined geographical area (Art. 5(1) Regulation (EU) 1151/2012). In contrast, a protected geographical indication (PGI) identifies a product: a) originating in a specific place, region or country,

b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin, and c) whose production contains at least one step which takes place in the defined geographical area (Art. 5.2 Regulation (EU) 1151/2012). Thus, the difference between PDO and PGI is the level of connection of the product with the specific territory of origin. In order to obtain a PDO, 100% of the product must be produced in a specific geographical area. In contrast, to obtain a PGI, it is sufficient that at least one step of production takes place in the specific territory.

Applications for the registration of names as PDO and PGI can only be made by groups who work with products with the name to be registered (Art. 49(1) Regulation (EU) 1151/2012). Furthermore, a group means any association, mainly composed of producers or processors working with the same product, irrespective of its legal form (Art. 3(2) Regulation (EU) 1151/2012). In the event that the relevant geographical area is trans-border, several groups from different member States or third countries may jointly lodge an application for registration. An individual natural or legal person may be treated as a group for the purpose of registration if it can be shown that: (a) the person concerned is the only producer willing to submit an application, and (b) with regard to PDOs and PGIs, the defined geographical area possesses characteristics which differ considerably from those of neighbouring areas or the characteristics of the product are different from those produced in neighbouring areas (Art. 49(1) Regulation (EU) 1151/2012).

Where an application for a PDO and PGI relates to a geographical area in a member State, or is prepared by a group established in a member State, the application must be addressed to the authorities of the member State where the relevant geographical area is located or where the applicant is established. In Italy the designated authority is the Ufficio PQA IV, Direzione Generale per la Promozione della Qualità Agroalimentare, Ministero delle Politiche Agricole, Alimentari e Forestali. Applications can be sent to this authority by PEC or mail. Applications must be lodged directly with the European Commission where the application relates to a geographical area that is not in a member State, such as Switzerland (Art. 49(5) of the Regulation (EU) No 1151/2012). Applications can be sent to this authority by email at agri-b3@ec.europa.eu. The content required in an application is set out in Art. 8 of Regulation (EU) 1151/2012. An application for registration must include the name and address of the applicant group, the authorities or bodies (if available) verifying compliance with the provisions of the product specification, the product specification, and the Single Document, which is a summary of the specification that is written in a more precise and concise way.

There are no fees for the registration procedure but there are control costs. In the EU, control costs are regulated by Art. 37(1)(b) of Regulation 1151/2012. It specifies the costs related to the control of the production process, in particular the verification of compliance with the product specification, which is carried out by competent authorities designated by each member State or, if existing, specific control bodies operating as a specific product certification body and nominated by the competent authorities of each State. Outside the EU, third Countries have the authority to determine and regulate control costs that are applicable within their respective territories. Moreover, potential additional costs associated with the registration procedure are listed in Art. 47(1)(b) of Regulation 1151/2012 and includes fees to cover the management of the product's quality scheme, such as those for processing the application (for example, discussion and exchange of information with the relevant authorities linked to the definition of the

specification), costs for managing oppositions to the registration request, applications for amendments and requests for cancellations.

The QS Regulation also introduced a TSG sign. The function of TSG is to safeguard traditional methods of production and recipes (Art. 17 Regulation 1151/2012). A name can be registered as a TSG “where it describes a specific product or foodstuff that: (a) results from a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff, or (b) is produced from raw materials or ingredients that are those traditionally used” (Art. 18(1) Regulation 1151/2012). In addition, the name must: (a) have been traditionally used to refer to the specific product, or (b) identify the traditional character or specific character of the product (Art. 18(2) Regulation 1151/2012). Furthermore, the European Commission describes the system of TSGs as “identif[ying] products of a traditional character, either in the composition or means of production, without a specific link to a particular geographical area”. Art. 3 of the Regulation defines ‘traditional’ as “proven usage on the domestic market for a period that allows transmission between generations; this period is to be at least 30 years”.

There are a few key differences between TSGs and PDOs/PGIs. First, in the TSG specification, producers must reveal in great detail the traditional character of the product (Art. 19 Regulation 1151/2012). On the contrary, for PDOs and GIs, it is sufficient to simply highlight the link to a specific geographical area. Secondly, TSGs are characterised by the absence of a link to a specific geographical area, which finds its origin in the Certificate of Special Character (CSC) scheme which was established by Art. 4 of the Stresa Convention on the Protection of Appellations of Origin and Names of Cheese (Stresa Convention) of 1951 to protect semi-generic designations that were not closely linked to a specific place. Perhaps it is the detailed disclosure of the traditional character of TSG products along with the absence of a link to any specific location which has invited competitors to reproduce the traditional goods all around the world. Thirdly, because it doesn't cover indirect commercial uses of registered names, the protection offered by TSG registration is overall weaker than that offered by PDOs and PGIs (Art. 24 Regulation 1151/2012). Whilst Art. 13 and Art. 24 of the Regulation protect registered PDO and PGI, and TSG designations against “any misuse, imitation or evocation, or against any other practice liable to mislead the consumer” respectively, PDO and PGI designations enjoy additional protection under Article 13, that is, protection against “any direct or indirect commercial use of a registered name in respect of products not covered by the registration”. The lack of protection against “indirect” uses of TSGs means that protection of a TSG name is limited to its use in relation to identical traditional products but doesn't extend to cover traditional goods that may be fairly similar yet not exactly. Furthermore, rights established under the TSG scheme are also considered subordinate to other IPRs, including those established under the PDO and PGI schemes. For all those reasons, only 58 registrations have been made under the TSG scheme to date. Instead, most producers choose to register GIs (737 registrations) or PDO (634 registrations).

The TSG registration procedure is the same as that described in relation to PDO and PGI and is set out in Art. 49(1) Regulation (EU) 1151/2012. Yet, owing to the absence of a geographical link, Art. 49(1) specifies that, for TSG names, several groups from different member States or third Countries may jointly lodge an application for registration.

The QS Regulation also introduced a new set of tools for the protection and enhancement of food products in rural areas, known as optional quality terms (OQT). In 2014, the Commission thus enacted the Delegated EU Regulation No. 665/2014, precisely to regulate the conditions for the use of the optional quality term “mountain product” (MP). This tool aimed to enhance agricultural production in harsh environments, such as mountain areas, and at the same time promote the territory and local development, maintain the economic activities in mountain areas and redistribute wealth. Article 1 stipulates that the term “mountain product” may be applied to “products made from animals that are reared for at least the last two thirds of their life in those mountain areas, if the products are processed in such areas” or, alternatively, “products made from transhumant animals that have been reared for at least one quarter of their life in transhumance grazing on pastures in mountain areas”. Article 2 specifies that “feedstuffs for farm animals shall be deemed to come essentially from mountain areas if the proportion of the annual animal diet that cannot be produced in mountain areas, expressed as a percentage of dry matter, does not exceed 50% and, in the case of ruminants, 40%”. Moreover, Article 6 provides derogations, by stating that “following processing operations may take place outside mountain areas, provided that the distance from the mountain area in question does not exceed 30 km: (a) processing operations for the production of milk and milk products in processing facilities in place on 3 January 2013”.

Unlike the EU system which favours GIs, registration of a geographical name is prohibited, or regularly rejected, in other States such as the US and Australia. In fact, since European immigrants have brought the names of GIs to the US and Australia, and used them to promote their own products in their new homes, these names have become so widely used that they have become generic to consumers and now represent different categories of goods and services of the same type. Although, GI names in those countries may still be protected by the respective trade mark systems, namely through certification or collective trade marks.

The use of trade marks, however, does not provide protection that is as comprehensive as that offered by the sui generis GI systems. EU GI registrations last in perpetuity (unless cancelled) without any need for re-registration, cover translations (e.g. Parmesan in place of Parmigiano Reggiano), prevent the use of the name with de-localisers (e.g. German Parmigiano Reggiano) or expressions such as “like” or “style” (e.g. like Parmigiano Reggiano), do not require proof that the name is neither generic nor descriptive, cannot be cancelled for becoming generic and descriptive or for non-use, and do not need an effective use of the name on the markets of registration or a monitoring of these markets.

In contrast, trade mark registrations need to be renewed, do not cover translation, do not prevent the use of the name with de-localisers or expressions such as “like” or “style”, require proof that the name is neither generic nor descriptive, which is difficult to ascertain, expensive and largely uncertain, it can be cancelled for becoming generic and descriptive or for non-use, and thus requires GI producers to effectively use the name in the various markets of registration and to monitor these markets despite having registered the GIs as trade marks for preventive purposes, and involves launching legal actions against all infringement cases.

Furthermore, the quality standards of collective trade marks are fixed by regulations which are essentially acts of private autonomy. By contrast, the quality standards of EU GIs are attributable to the place of origin of the product and to the long-standing traditional knowledge developed by the local people, which are fixed in the relevant specifications. Secondly, the right holder of collective trade marks is the consortium. In contrast, EU GIs

are owned and exercised collectively and the consortium is not regarded as the owner but rather the manager of the protected name. Thirdly, the collective trade mark owner is responsible for ensuring compliance with certain standards by its members. In contrast, EU GIs specifications are subject to a monitoring system with official controls carried out either by public authorities or by private objective and impartial control bodies. Finally, collective trade marks may only be used by certain associations and legal persons governed by public law. By contrast, EU GIs can be used by all producers who make their products in the place designated in EU GI and whose products share the specification qualities.

EU GIs are similar to certification trade marks, which are granted only upon compliance with the defined standards, but unlike collective marks are not limited as to membership. Certification trade marks may be used by anyone who can certify that their products meet established standards and are controlled by the registered entity who is considered “competent to certify” the products concerned. GIs are usually managed and enforced by an official body, although in some legal systems, companies and individuals can also take legal action against infringement of GIs. The registration of a GI can therefore, in many cases, be a more powerful tool than a trade mark for protecting use of a name, and it may be used alongside existing trade marks. Although, the downside of such extensive protection is that producers have less control over the use and enforcement of GIs than trade marks.

In addition, registering a GI is not like registering a patent. It only prevents others from using the same name or symbol to describe products but does not prevent use of the same method of production or the same ingredients which is disclosed in the GI specification. Thus, if secret methods of production are revealed as part of a GI specification, they are exposed to use and exploitation by anyone.

See attachments II for examples of PGI specifications.

Specifications of PDO typically have the following content:

Name

Member State or Third Country

Description of the agricultural product or foodstuff

Type of product

Description of product to which the name in point (1) applies

Raw materials (for processed products only)

Feed (for products of animal origin only)

Specific steps in production that must take place in the identified geographical area

Specific rules concerning slicing, grating, packaging, etc.

Specific rules concerning labelling

Concise definition of the geographical area

Link to the geographical area

Specificity of the geographical area

Specificity of the product

Causal link between the geographical area and the quality or characteristics of the product (for PDO) or a specific quality, the reputation or other characteristic of the product (for PGI)

(ii) Selected PDO specifications

PDO certify that a product originates from a specific geographical area, that its characteristics are attributed to that particular geographical area and that all of its production steps take place in this defined geographical area.

On further information on PDO, see this section 16 (i).

See attachments II for examples of PDO specifications.

Specifications of PDO typically have the following content:

1. Name
2. Member State or Third Country
3. Description of the agricultural product or foodstuff
 - 3.1. Product type
 - 3.2. Description of the product to which the name in point 1 applies
 - 3.3. Raw materials (for processed products only)
 - 3.4. Feed (for products of animal origin only)
 - 3.5. Specific steps in production that must take place in the defined geographical area
 - 3.6. Specific rules concerning slicing, grating, packaging, etc.
 - 3.7. Specific rules concerning labelling
4. Concise definition of the geographical area
5. Link with the geographical area
 - 5.1. Specificity of the geographical area
 - 5.2. Specificity of the product
 - 5.3. Causal link between the geographical area and the quality or characteristics of the product (for PDO) or a specific quality, the reputation or another characteristic of the product (for PGI)

(iii) Selected TSG specifications

IPRs whose functions include certifying the adoption of a traditional production method, rather than any link with a certain territory, include TSG. TSG certify that a product is manufactured using traditional methods of production and recipes. However, it does not certify the existence of any link with a particular geographical area.

On further information on TSG, see this section 16 (i).

See attachments II for examples of TSG specifications.

Specifications of TSG typically have the following content:

Product Specification of a Traditional Speciality Guaranteed

[Insert name, as in 1 below:] '...'

EC No: [for EU use only]

Member State or Third Country '...'

Name(s) To Be Registered

Type of Product

Grounds for Registration

1. Whether the product:

results from a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff

is produced from raw materials or ingredients that are those traditionally used.

[Provide explanation]

2. Whether the name:

has been traditionally used to refer to the specific product

identifies the traditional character or specific character of the product

[Provide explanation]

Description

1. Description of the product to which the name under point 1 applies, including its main physical, chemical, microbiological or organoleptic characteristics showing the product's specific character (Article 7(2) of this Regulation)

2. Description of the production method of the product to which the name under point 1 applies that the producers must follow including, where appropriate, the nature and characteristics of the raw materials or ingredients used, and the method by which the product is prepared (Article 7(2) of this Regulation)

3. Description of the key elements establishing the product's traditional character (Article 7(2) of this Regulation)

(iv) Selected Registration Procedures for PDO, PGI and TSG

A. General Remarks

I. An EU “Protected Designation of Origin” (PDO) is available for agricultural products and foodstuffs. The function of the PDO is to certify the close connection between the product and a defined geographical area, Art. 5 Regulation (EU) 1151/2012: a) the product must be originating in that area, b) its qualities or characteristics must be essentially or exclusively due to a particular geographical environment with its inherent natural and human factors and c) the productions steps must all take place in that defined geographical area.²

II. An EU “Protected Geographical Indications” (PGI) is available for agricultural products and foodstuffs. The function of the PGI is to certify the close connection between the product and its reputation, and a defined geographical area. Art. 5 Regulation (EU) 1151/2012: a) the product must be originating in a specific place, region or country; (b) its given quality, reputation or other characteristic is essentially attributable to its geographical origin; and (c) at least one of the production steps of which take place in the defined geographical area.³

III. An EU “Traditional Specialities Guaranteed” (TSG) is available for agricultural products and foodstuffs. The function of the TSG is to safeguard traditional methods of production and recipes.⁴ A name shall be eligible for registration as a traditional speciality guaranteed where it describes a specific product or foodstuff that: (a) results from a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff; or (b) is produced from raw materials or ingredients that are those traditionally used.⁵ For a name to be registered as a traditional speciality guaranteed, it shall: (a) have been traditionally used to refer to the specific product; or (b) identify the traditional character or specific character of the product.⁶

B. Procedural Guidelines

I. The documents in the application, which are sent to the Commission, shall be in one of the official languages of the Union.⁷

II. Costs: ‘Without prejudice to Regulation (EC) No 882/2004 and in particular the provisions of Chapter VI of Title II thereof, Member States may charge a fee to cover their costs of managing the quality schemes, including those incurred in processing applications, statements of opposition, applications for amendments and requests for cancellations provided for in this Regulation.’⁸

III. Content of Application

1. A PDO or PGI application must include at least the following:

a. the name and address of the applicant group and of the authorities or, if available, bodies verifying compliance with the provisions of the product specification;

b. the product specification provided for in Article 7;

c. a single document setting out the following: (i) the main points of the product specification: the name, a description of the product, including, where appropriate, specific rules concerning packaging and labelling, and a concise definition of the geographical area; (ii) a description of the link between the product and the geographical environment or geographical origin referred to in Article 5(1) or (2) of

² Art. 5(1) Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L343/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1151&from=EN>>, available in Italian at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32012R1151&from=EN>>

³ Art. 5(2) Regulation (EU) No 1151/2012

⁴ Art. 17 Regulation (EU) No 1151/2012

⁵ Art. 18(1) Regulation (EU) No 1151/2012

⁶ Art. 18(2) Regulation (EU) No 1151/2012

⁷ Art. 47(6) Regulation (EU) No 1151/2012

⁸ Art. 47 Regulation (EU) No 1151/2012

Regulation (EU) No 1151/2012, as the case may be, including, where appropriate, the specific elements of the product description or production method justifying the link.⁹

2. A TSG application must include at least the following:

- a. the name and address of the applicant group;
- b. the product specification as provided for in Article 19 of Regulation (EU) No 1151/2012.¹⁰

IV. Procedure

1. Applications for registration of names may only be submitted by groups who work with the products with the name to be registered.¹¹ A group means any association, irrespective of its legal form, mainly composed of producers or processors working with the same product.¹² A single natural or legal person may be treated as a group where it is shown that both of the following conditions are fulfilled: (a) the person concerned is the only producer willing to submit an application; and (b) with regard to protected designations of origin and protected geographical indications, the defined geographical area possesses characteristics which differ appreciably from those neighbouring areas or the characteristics of the product are different from those produced in neighbouring areas.¹³

2. The application shall be addressed to the authorities of the applicable Member State.¹⁴

a. National Authorities

i. Austria: Österreichisches Patentamt

ii. Germany: Deutsches Patent- und Markenamt

iii. France: L'Institut National de L'Origine et de la Qualité

iv. Italy: Ministero delle Politiche Agricole e Forestali

v. Slovenia: Ministrstvo za Kmetijstvo, Gozdarstvo in Prehrano

vi. Switzerland: Bundesamt für Landwirtschaft

3. If the Member State considers that the requirements of Regulation (EU) 1151/2012 are met, it may take a favourable decision and lodge an application dossier with the Commission.¹⁵

(v) **Selected Collective trademarks regulations**

Collective trademarks distinguish a product as being produced by members of a certain association of producers through the use of verbal and/or graphic signs, and may serve to designate the geographical origin of a product. Individual trademarks may also serve the purpose of indicating the place of origin of the traditional product. In those cases, indeed, individual IPRs are owned by collective entities. Yet, the signs registered as individual trademarks must be distinctive and therefore words describing the geographic origin of the relevant product cannot be used. However, geographical names may be used as individual trademarks if they are not merely descriptive of the origin of the product.

Certification trademarks are used to distinguish products which are certified by the proprietor (a physical or legal person) of the trademark in relation to the material utilised, the mode of manufacture employed, the mode of performing a service employed, the product's quality, accuracy or other characteristics, excluding however its geographical origin.

⁹ Art. 8(1) Regulation (EU) No 1151/2012

¹⁰ Art. 20(1) Regulation (EU) No 1151/2012

¹¹ Art. 49(1) Regulation (EU) No 1151/2012

¹² Art. 3(2) Regulation (EU) 1151/2012.

¹³ Art. 49(1) Regulation (EU) 1151/2012

¹⁴ Art. 49(2) Regulation (EU) 1151/2012

¹⁵ Art. 49(4) Regulation (EU) 1151/2012

Collective marks are used to denote the goods or services of a group of people, and include groups where membership rules and limitations on admission may apply. A collective trade mark therefore distinguishes the goods or services of the members of an association (which is the proprietor of the collective mark) from those of other undertakings (Art. 74(1) Regulation (EU) 2017/1001). The main function of a collective mark is to guarantee and certify the origin, nature or quality of products or services which are under the constant control of the association who registers the trade mark. The geographical origin of the goods or services may also be designated, in trade, through collective marks (Art. 74(2) Regulation (EU) 2017/1001). Collective trade marks protect proprietors from deceptive marks used by third parties which attempt to exploit the attributes associated with specific collective marks. Deceptive marks may be refused registration on the basis that they wrongly imply that goods or services originate from a particular group or area, or are made in a specific way. With the exception of the foregoing characteristics, the principles and rules related to individual trade marks are generally also applicable to collective trade marks. Although, in terms of the distinctiveness requirement, whilst still a necessary element for collective trade mark registration, it is held to a less strict standard than that which is applicable to individual trade marks. In particular, for collective trade marks, specification of the geographic origin of relevant products or services is explicitly permitted by the law. In addition, verbal elements that describe the nature and other characteristics of the products or services may also be utilised if the necessary precautions are taken, such as incorporating distinctive figurative elements in the trade mark.

Registration of a collective mark can only be filed by an association of manufacturers, producers, suppliers of services or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue or be sued, as well as legal persons governed by public law (Art. 74(1) Regulation (EU) 2017/1001). The association must also have statutes that specify matters such as who can become a member. Moreover, a collective trade mark may be registered by an association to designate the origin of a product in a third country. In the case of the EU, this means that an association could also protect products made in Switzerland.

A collective trade mark does not, however, entitle the proprietor to prohibit a third party from using such sign or indication in the course of trade, provided such use is in accordance with honest practice in industrial or commercial matters. In particular, a collective mark is not to be invoked against a third party who is entitled to use a geographical name (Art. 74(2) Regulation (EU) 2017/1001). This protection of third party rights extends only to the name itself. If the collective trade mark also includes, for example, a graphic element and is a collective mark beyond merely a geographical name, use of the collective mark will be reserved to members of the association only.

Certification marks are used to denote goods and services that meet specific criteria, such as being made in specific areas using specific methods. Any group can use the mark as long as the goods or services comply with specific criteria, the compliance of which is determined through an assessment process. Whilst a collective mark can be administered by an association itself, a certification mark must be administered by the owner of the mark who is to be an independent actor. The owner cannot sell goods or services bearing the certification mark but rather, is responsible for assessing compliance with the criteria for goods and services which seek to use the certification mark. Where certification marks use a geographical designation of

origin as a criteria, these marks are in effect very similar to a geographical indications (see below) but can be administered by different agencies.

In the EU, in order to approximate the laws of the member States relating to trade marks, the EU Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 introduced certification trade marks. An EU trade mark is an EU certification mark if it is applied for as such and is capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods and services which are not certified (Art. 83 Regulation (EU) 2017/1001). Any natural or legal person, including institutions, authorities and bodies governed by public law, may apply for EU certification marks provided that such proprietor does not carry on a business involving the supply of goods or services of the kind certified. With the exception of the aforementioned characteristics, the principles and rules described above in relation to individual and collective trade marks are also applicable to certification trade marks.

The use of collective and certification trade marks must be governed by regulations (Art. 75 Regulation (EU) 2017/1001). These regulations need to specify the persons authorised to use the mark, the conditions of membership of the association and, where they exist, the conditions of use of the mark including sanctions where the conditions are breached. These regulations are normally published and easily accessible by the general public. As such, collective marks are transparent and therefore help to build consumer confidence in the relevant trade mark and related products or services.

On further details on the differences between collective trademarks and GIs see section 16(i).

See attachments II for examples of collective trademarks regulations.

Regulations on the use of collective and certification trade marks typically have the following content.

RULES FOR THE USE OF COLLECTIVE TRADEMARKS

Article 1 - Trademark Owner

(Include the name of the owner of the Trademark/where they are based/the name of the trademark/the type of trademark e.g. 'collective'/where the trademark is registered/the international class of the trademark e.g. Nice class/mention of the attached Rules for Production document)

Article 2 - Purpose of the Collective Trademark

(the intended use of the trademark/how it will benefit the Association/Consortium that owns it)

Article 3 – Conditions and Requirements for the Granting of Use

(requirements for becoming a licensee of the Trademark/who is able to apply/who approves applicants) (whether the Trademark is exclusive or not/granted without or with payment of a fee/who determines the cost of the fee)

Article 4 – How to Apply

Include rules on how the operator interested in obtaining the license to use the Trademark may apply to be granted the license to use the trademark

Article 5 – Terms of Use

(what product the Trademark may be used for/how the document needs to be made e.g. refer to the Rules for Production/what the Trademark cannot be used for) (restriction on conferring the license/Licensee may not license/convey sub-licenses/dispose of the Trademark to third parties)

Article 6 – Labelling and presentation methods

(how to use the Trademark /should the Trademark be used in its entirety/may it be used in part or with modifications/may it be used with his own brands or trademarks/restrictions to prevent confusion for customers e.g. 'Licensee shall not register and not use trademarks, companies, brands, company names and other distinctive signs that might lead to confusion with the Trademark or its individual elements'/Licensee shall not damage or harm the reputation of the Trademark or the owner of the Trademark/limit on number of Trademark brandings) (make use of the Trademark in activities involving the products production, advertising, promotion, sales and marketing) If the Trademark is not included in the Regulation, it should be included in an attachment.

Article 7 - Monitoring Body

(give a description of the body/committee/group that will be in control of monitoring compliance e.g. the makeup of the body/their responsibilities/the procedures they must follow)

Article 8 – Monitoring Compliance

(who will monitor the proper use of the Trademark/what their responsibilities are) (access to work areas for inspection/Licensee will allow for access to areas where the product is made in order to monitor compliance with these Rules and the Rules for Production/if a product does not meet requirements, then they must not sell that product with the Trademark and they must withdraw products on the market at their own expense)

Article 9 – Non-Compliance and Sanctions

(insert disciplinary sanctions/describe the levels of sanctioning/report of any irregularities to an authority) (when will the owner decide to take legal action against violations of obligations by the Licensee/what type of legal action e.g. in court or out of court or arbitration/ what is the appropriate legal method)

Article 10 – Liability

(exemption of the Trademark owner from liability to the Licensee in the event of invalidity or ineffectiveness of the Trademark, and when the Trademark infringes of third party rights/licensee indemnifies and holds harmless the owner from damages or other claims of third parties relating to the products produced by the Licensee)

Article 11 - Confidentiality

(Licensee will not reveal to third parties in any way even after termination or expiration the confidential information gained from the owner of the Trademark/Licensee may not use this information for purposes other than those provided for in these Rules or the license)

Article 12 - Term and Termination

(when the Trademark License goes into effect/how long it stays in effect/rules regarding termination/describe when termination may occur outside of the normal procedure given above)

Article 13 - Effects of Termination

(use of Trademark after termination/return of materials relating to or having the image of the Trademark/Licensee does not acquire rights, entitlements to any compensation, indemnities, damages, or other payments due to the use of the Trademark)

Article 14 – Other Responsibilities of the Licensee

(the responsibilities of the Licensee should they become aware of violations e.g. give notice and assist in search for evidence)

Article 15 – Jurisdiction and Representation

(who has the exclusive jurisdiction over disputes arising from or related to the license)

Article 16 – Final Provisions

(language of origin prevailing over translations/when the present Rules go into effect)

Additional Guidelines

- Attached to this document should be a product making regulation, which outlines in detail the procedure that must be used in order to produce a product (bread, cheese, meat) that may use the Trademark.

(vi) **Selected Registration Procedures for collective trademarks**
Where to Register?

National Level

- Appropriate Office to Register¹⁶
- Austria- <https://www.patentamt.at/en/trademarks/>
- France- <https://www.inpi.fr/fr>
- Germany- <https://www.dpma.de>
- Italy- <http://www.uibm.gov.it/index.php/marchi>
- Slovenia- <http://www.uil-sipo.si/sipo/activities/trademarks/>
- Switzerland- <https://www.ige.ch/en/protecting-your-ip/trade-marks.html>

EU level

- Where to Apply- <https://euipo.europa.eu/ohimportal/en/apply-now>
- Although EU registration provides wider coverage, is more convenient, and costs less, it is important to be aware of the possible issues that may arise when taking this route instead of a national one.
 - There is a greater threat of opposition.
 - You must demonstrate that the Trademark is in use in at least some EU countries.
 - A judge in any EU country can invalidate the Trademark if they find it to be incorrect.

Procedure: EUIPO Trademark Application

A. General Remarks

1. ‘The EU collective mark indicates that the goods or services protected by that mark originate from members of an association, and may only be used by them.’¹⁷

2. Who may Apply

i. ‘A collective mark can be any type of mark (e.g. word, figurative, 3D, etc.), provided that it belongs to a legal person under public law or to an association and it is used to distinguish the goods and services of the members of that association from those of other undertakings. Only associations of manufacturers, producers, suppliers of services or traders, as well as legal persons governed by public law, may apply for European Union collective marks.’¹⁸

3. Ways to Apply

i. E-filing: online applications at <https://euipo.europa.eu/ohimportal/en/apply-now>.

ii. Regular post or by courier.¹⁹

4. Language of Application

i. The application can be filed in any of the EU languages.

ii. Applicants must also choose a second language that is different from the first language from the five official Office languages: English, French German, Italian or Spanish.²⁰

5. Basic Fee

i. ‘The basic fee is due within one month from the date the application is received by EUIPO.’

ii. Applications will only be reviewed once payment has been received.

iii. Fees

¹⁶ Find a list of all the IPR offices for EU countries at <<https://www.epo.org/service-support/useful-links/national-offices.html>>

¹⁷ <https://euipo.europa.eu/ohimportal/en/eu-trade-mark-regulation-faqs-2017#wtom>, under ‘EU Certification Marks’

¹⁸ <https://euipo.europa.eu/ohimportal/en/application-procedure#2.A.4>, 2.C.9

¹⁹ <https://euipo.europa.eu/ohimportal/en/application-procedure#2.A.4>, 2.A.2

²⁰ <https://euipo.europa.eu/ohimportal/en/application-procedure#2.A.4>, 2.A.4

- a. ‘EUR 1500 (if applied for online) for the first class; EUR 50 for the second class and EUR 150 for each subsequent class’²¹
 - b. ‘The basic fee for an EU collective mark filed using the paper form (by post) is EUR 1 800.’²²
- iv. In order to have an application reviewed immediately, the applicant must pay at the payment step of the application process.²³
- B. Type of Application
- 1. Fast Track- 5 Step Form
- i. Not applicable to Collective Mark applications.
 - 2. Advanced Form
 - i. This form will need to be completed in order to apply for a Collective Mark.
- C. What is Needed
- 1. Distinctiveness
 - i. Trademarks are denied registration only if ‘they are devoid of any distinctive character, Art. 7 (1) (b) Regulation (EU) 2017/1001. Non-distinctive marks refused registration include those that simply describe the goods (e.g. ‘apple’ for apples); distinctive marks that can be registered will better indicate the origin of the goods (e.g. ‘apple’ for computers).
 - 2. The Figurative Element
 - 3. Regulations
 - i. Collective marks must have regulations governing their use, Art. 75 Regulation (EU) 2017/1001. These regulations shall specify the persons authorized to use the mark, the conditions of membership of the association and, where they exist, the conditions of use of the mark, including sanctions, Art. 75 (2) Regulation (EU) 2017/1001.
 - ii. These regulations are normally published and easily accessible by the general public. Collective marks are therefore very transparent and help to build consumer confidence in the relevant trademark and the related products.
 - iii. These regulations governing the use cannot simply refer to a tradition but must also be distinctive.²⁴
 - 4. Registration by an association
 - i. An application for registration will also need to be filed by an association of manufacturers, producers, suppliers of services, or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued, as well as legal persons governed by public law, Art. 74 (1) Regulation (EU) 2017/1001.
 - ii. Such an association will need to have statutes, specifying who can become a member.

(vii) Selected Bibliography

See attachment II.

Attachment I: selected tables on already existing IPRs on Alpine Food Heritage

Attachment II: selected IPRs specifications, regulations and bibliography on Alpine Food Heritage

²¹ <https://euipo.europa.eu/ohimportal/en/eu-trade-mark-regulation-faqs-2017#wtom>, in the chart under ‘Fees’

²² <https://euipo.europa.eu/ohimportal/en/application-procedure#2.A.4>, 2.C.10

²³ <https://euipo.europa.eu/ohimportal/en/application-procedure#2.A.4>, 2.A.8

²⁴ For example, the regulations for the use of the “Cremona Liuteria” collective mark require that anyone who wants to become a licensee of the trademark must have worked as a professional violin maker in the province of Cremona for at least five years or must have been employed for at least five years by a luthier who practices his trade in the province of Cremona. Available in English and Italian at < <http://www.cremonaviolins.com/en/the-consortium/the-trademark-cremona-liuteria-and-the-regulations/>>

